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No. 79615-7


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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

Plaintiffs/Appellants

v.

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

Defendants/Respondents

RESPONSE TO THE AMICUS CURIAE BRIEF
OF PACIFIC LEGAL FOUNDATION, WASHINGTON
EMPLOYMENT LAWYERS ASSOCIATION, AND WASHINGTON
STATE TRIAL LAWYERS ASSOCIATION

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I. ARGUMENT

A. Petitioners Do Not Seek Expansion of the Public Policy Exception to the Doctrine of At-Will Employment. Rather they seek to vindicate the longstanding public policy protecting collective action to improve working conditions.

1. Washington public policy has long protected employees' right to collectively seek to negotiate about their working conditions and to take collective action for their mutual aid and protection,

Amicus Pacific Legal Foundation ("PLF") asserts the Petitioners seek to have this Court extend the public policy exception to at-will employment to purely private matters involving personality disputes and disagreements over management style. PLF Brief at 1, 8. PLF cites *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989) as stating that the public policy exception to the employment at will doctrine is not intended to guarantee employees' freedom to act for their private interests or in the pursuit of what they believe to be a business firm's interest.

However, RCW 49.32.020 declares that as a matter of public policy the individual workers have a right to act in concert to improve their working conditions. In the introductory portion of the statute, the legislature specifically stated that this public policy was intended to provide legal protection for workers to act together in order to be better

able to obtain improved working conditions. Thus the public policy implicated is the right to collective action.

Dicomes did not involve a public policy claim based on exercising the rights to act in concert, and it did not hold that the content of employees' complaints must address a large public policy, rather than "personal preferences" and "professional differences," as the Court of Appeals characterized the employees' concerns, in order to support a claim for wrongful discharge. The holding in *Dicomes* stands for nothing more than that the actions of the plaintiff must be in furtherance of public policy to state a claim for wrongful termination in violation of public policy. Here, that public policy is the right to act concertedly without restraint or coercion by their employer.

2. Plaintiffs Actions Were Protected by Public Policy.

Here, the plaintiffs have shown that their actions were in furtherance of their right to act concertedly to advance interests related to their working conditions. Some of the concerns employees expressed in doing so may be personal preferences or professional differences of individuals, but their collective efforts are protected by RCW 49.32.020, regardless of whether some of the concerns expressed may be personal preferences professional differences concerning the workplace.

In the instant case, the employees collectively sought to improve their working conditions by petitioning their employer to request changes in their working conditions. Petitioners' disagreements over management decisions and management style—professional differences—were integrally related to Petitioners' grievances about their working conditions.

Some of the Petitioners wrote the April 6, 2004 letter to the Board of Directors("Board")of Respondent, despite the policy of Linda Brennan ("Brennan"), the Executive Director, prohibiting employees from doing so, because Brennan refused to respond to their complaints. CP 73, 159: 12-13, 183: 1-2. Petitioners, along with other of Respondent's employees not party to this action expressed complaints, particularly about under staffing, to an investigator hired by the Board of Directors. CP 99. Finally, after Brennan not only refused to address the employees' complaints, but fired two of them for insubordination, disloyalty, and organizing against her, Petitioners again wrote the Board that work conditions had worsened, and walked out after demanding the Board resolve their grievances. CP 79.

Specifically, the employees complained about potential and actual violations of federal and state wage and hour laws, inconsistent

application among employees of sick and vacation leave, and inadequate reimbursement to employees of travel expenses. CP 73, 74, 109, 110. The Executive Director's inattention to day-to-day activities, along with hostile and dismissive remarks to both employees and disabled clients further demoralized employees. CP 109, 110. The employees complained that despite the high staff-to-disabled client ratio described in the letter and by virtually every employee to the investigator, Brennan consistently refused to consider hiring more production staff, which meant even employees with administrative roles were expected to pitch in on the production floor, and at the same time were expected to meet client load expectations. CP 73, 99. The employees asserted Brennan had so mismanaged the budget, fundraising, and partnership relations that she had put the entire organization, including the jobs of every employee, at risk. CP 73-77.

The employees complained that Brennan used her mother, who worked on the production floor, to surveil them and report back to her, which discouraged them from speaking with each other further demoralizing them. CP 75.

In the April 6, 2004 letter the six employees requested the Board meet with them to hear details of their grievances as stated in the letter, as

well as information too lengthy to be included in the letter about other issues. The Board finally met with the employees on June 29, 2004 after many requests for them to do so. In addition to the concerns raised in the letter,¹ employees complained to the Board that Brennan failed to conform to the Problem Report policy as stated in the employment manual; that she had removed documents, including a grievance, from an employment file; that she had threatened employees that she would get rid of them by "making them want to leave;" that she denied requests for raises by blanket statements that there was never any money for raises; that Brennan's harassing, hypercritical and dismissive treatment of and violent verbal outbursts to staff were demoralizing and humiliating; and that there was high turnover among production staff because of Brennan's harassing treatment of them. CP 183: 5-8; CP 188 – 189.

B. The Implied Cause of Action Under RCW 49.32.020 Prohibits Restraint and Coercion, Not Just Wrongful Discharge.

In *Krystad v. Lau*, 65 Wash.2d 827, 400 P.2d 72 (1976), the Court held there was no implied cause of action under RCW 49.32.020 to remedy unlawful interference with employee's rights to join and designate a labor union as their collective bargaining agreement. In *Bravo v. Dolsen*

¹ The concerns raised in the letter were about working conditions. See Brief of Amicus Curiae WELA, at pgs. 10-12

Cos., 125 Wn.2d 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 Wn.2d 629, 649-52 9 P.3d 787 (2000) (same).

It held that the Legislature intended to prohibit a wide range of actions that could operate to deprive workers of protections under the statute; if the Legislature intended to prohibit only discriminatory discharge, it could have easily have chosen to use that term. *Id.* The Court specifically recognized that interference, restraint, or coercion may include threatening workers with dismissal and coercive question of workers. *Id.* at 756. Although *Krystad* and *Bravo* only addressed 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; *Pulcino* (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).

In the April 6, 2004 letter the employees requested the Board not share the letter with Brennan because they feared retaliation. After the letter was sent, several employees noted Brennan was screening and withholding critical mail from them, impeding their ability to perform, and then and then criticizing them for failing to do their jobs. CP 165, 170 She refused to authorize attendance at meetings the employees had customarily attended prior to the letter. CP 165, 170. Brennan was having the employees followed to find out if they were meeting together on their own time. CP 184. The employees hoped to learn through pre-trial discovery whether the whether the Board authorized or condoned Brennan's retaliatory actions. CP 187, RP at 31-32.

Amicus Pacific Legal Foundation asserts that RCW 49.32.020 should be construed as protecting only the concerted activity of workers in organizing a labor union. Brief of PLF at 12.

However, RCW 49.32.020 by its language does not state that or imply that the ability of unorganized workers to protect themselves by concerted activity is limited to organizing a union. That interpretation contradicts the words of RCW 49.32.020 "wherefore, though he should be free to decline to associate with his fellows." If concerted activity means only organizing a union, then an employee who chooses not be organize or

join a union is completely without protection. If the legislature intended for the statutory protections of RCW 49.32.020 to extend only to organizing a union, it would have said so, and would not have used the words "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 and protections;..." [Emphasis added]. Amicus PLF's position is not the policy of the legislature as enunciated in RCW 49.32.020.

The Nova employees did precisely what RCW 49.32.020 protects: they organized themselves, they together wrote letters to their employer about their working conditions, and attempted to speak collectively with the employer about these conditions, and they together took the action of work stoppage and strike for their mutual aid and protection.

The forgoing 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.

C. Issues of Material Fact Preclude Summary Judgment on Employees' Claim of Wrongful Discharge in Violation of Public Policy.

As discussed by Amici Washington Employment Lawyers Association ("WELA") and Washington State Trial Lawyers Association

("WSTLA"), the tort of wrongful discharge in violation of public policy is available to workers who are discharged for exercising their rights under RCW 49.32.020.

The trial court failed to consider this public policy, nor did it acknowledge the factual issues that were material in analyzing the record to determine whether material facts were disputed. Material fact issues exist precluding summary judgment.

D. The Court of Appeals Erred in Holding that Workers Having a Title as Manager are Not Excluded from Protection of RCW 49.32.020.

As discussed by Amicus WELA, there is no exclusion of supervisors from the protections of RCW 49.32.020. Nor was there factual evidence on the record as to the status of the employees as supervisors or managers.

II. CONCLUSION

Petitioners respectfully request this Court to reverse the opinion of the Court of Appeals Division III and remand for trial.

RESPECTFULLY SUBMITTED this 5th day of February 2008.

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2008 FEB -5 P 4: 35 CERTIFICATE OF SERVICE

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DATED this 5th day of February 2008, at Spokane, Washington.



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**FILED AS ATTACHMENT
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