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DIVISION II

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STATE OF WASHINGTON
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SUPREME COURT OF THE STATE OF WASHINGTON

MATTHEW CUDNEY,

Petitioner,

v.

ALSCO, INC.,

Respondent.

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SUPREME COURT
STATE OF WASHINGTON
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**BRIEF OF AMICUS CURIAE, DEPARTMENT OF LABOR AND
INDUSTRIES, STATE OF WASHINGTON**

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I. IDENTITY AND INTEREST OF AMICUS

The Department of Labor and Industries of the State of Washington (Department) is the state agency charged by the Legislature with the administration and enforcement of laws relating to the WISHA discrimination statute. RCW 49.17.160. The Legislature delegated to the Department the authority to promulgate rules relating to WISHA, including the enforcement of RCW 49.17.160. RCW 49.17.040; RCW 49.17.050; RCW 49.17.240. Consistent with this delegation, the Department promulgated WAC 296-360, the regulations that guide the assistant director in enforcing RCW 49.17.160.

The United States District Court for the Eastern District of Washington has certified two questions to this Court. The Department is concerned only with the first question—whether the WISHA discrimination statute precludes common law causes of action by individuals for wrongful discharge in violation of public policy based on safety and health whistleblower activities. Because this question implicates the Department's interpretation of the Act and its rules and policies, the Department appears in this case as *amicus curiae*.

The Department agrees with worker Matthew Cudney that Mr. Cudney has a common law cause of action for wrongful discharge in

violation of public policy under the WISHA discrimination statute, RCW 49.17.160.

II. OVERVIEW OF THE STATUTORY AND REGULATORY SCHEME

The Occupational Safety and Health Act (OSHA) was created to promote workplace safety. 29 U.S.C. § 651(b). OSHA allows individual states to enact safety and health standards if such standards meet or exceed their federal counterparts. 29 U.S.C. § 667(c). The Washington Legislature enacted the Washington Industrial Safety and Health Act (WISHA) in 1973, adopting OSHA's anti-discrimination statute, 29 U.S.C. § 660(c), almost verbatim. WISHA's anti-discrimination provision provides that:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

RCW 49.17.160(1).

When the Department receives a complaint, it refers the complaint for investigation to one of its investigators. Investigators conduct an investigation during the 90-day period after a complaint is filed, including voluntary interviews of the relevant witnesses and a review of any

documents provided by the employer and other parties.¹ Based on the investigative report and the investigator's recommendation, the WISHA Discrimination Program of the Division of Occupational Safety and Health (DOSH) makes an initial determination whether it believes the chapter has been violated. WAC 296-360-040. If the program finds sufficient evidence to support a violation, it issues a *merit* determination letter; if it determines that there is insufficient evidence, it issues a *non-merit* determination letter. WAC 296-360-040. If a non-merit determination letter is issued, the complainant may request that the Director review the division's determination and issue a further determination. WAC 296-360-040(2). If the Department issues a merit determination letter, the letter does not result in an issuance of a citation, infraction, civil penalty, damages, or any equitable relief by the Department. WAC 296-360-020. If there is a merit finding, the Department generally refers the matter to the Attorney General's Office for the filing of an original action in superior court to seek remedies, including back-pay and possible reinstatement. An employer has no right to appeal a merit determination. WAC 296-360-040(2).

¹ RCW 49.17.160 and WAC 296-360 do not provide specific authority for demanding documents from the Employer or subpoenaing the affected parties or 3rd parties.

RCW 49.17.160 provides: “If upon such investigation, the director determines that the provisions of this section have been violated, he shall bring an action in the superior court of the county wherein the violation is alleged to have occurred against the person or persons who is alleged to have violated the provisions of this section.” However, WAC 296-360-020 clarifies the Department’s role in RCW 49.17.160 actions:

Any employee who believes that he/she has been discriminated against in violation of section 16 of WISHA may, within thirty days after the violation occurs, file a complaint with the assistant director alleging the violation. The division shall investigate the complaint and, if the assistant director determines that section 16 of WISHA has been violated, *the division may bring a civil action against the violator in superior court. The suit may ask the court to restrain violations of RCW 49.17.160 and to grant other appropriate relief, including rehiring or reinstating the employee to his or her former position with back pay* (emphasis added).

The Department interprets the provisions of RCW 49.17.160 to mean that Department must ensure enforcement of RCW 49.17.160, but not necessarily file a superior court action.² WAC 296-360-020. The Department routinely advises workers who may be aggrieved under RCW 49.17.160 to consult with private counsel. Under circumstances where a complainant seeks private counsel and chooses to pursue his own private

² In fact, the Department rarely files an original action in superior court because of early resolution or because it defers to the resolution of a Complainant’s own private right of action.

right of action, the Department provides litigation support, but the Department usually does not file on an original action as a party itself.

III. ARGUMENT

A. Because This Court Has Previously Recognized a Tort for Wrongful Discharge in Violation of Public Policy For the WISHA Discrimination Statute, It Should Not Revisit the Issue Absent a Change in the Statute

In *Wilmot v. Kaiser Aluminum*, 118 Wn. 2d 46, 63, 821 P.2d 18 (1991), this Court held that there are two separate causes of action under the industrial insurance discrimination statute: (1) a private right of action for wrongful discharge in violation of public policy, and (2) the Department's state action under RCW 51.48.025. One action can proceed without the other, and remedies may be different under the two causes of action. In *Wilmot*, this Court also implied that both industrial insurance discrimination and WISHA discrimination complainants do have a private right of action for wrongful discharge in violation of public policy, when it expressly disavowed *Jones v. Industrial Electric-Seattle, Inc.*, 53 Wn. App. 536, 768 P.2d 520 (1989).

The Court of Appeals in *Jones* had concluded that RCW 49.17.160 was complete, and therefore an exclusive remedy. *Id.* at 538-539. In that case, the complainant sought to bring a wrongful discharge in violation of public policy claim after the Department declined to bring action because

his complaint was untimely to the Department. *Id.* at 537-538. The *Jones* Court concluded that he was time-barred by RCW 49.17.160 from bringing any of his claims based on safety and health complaints, and that he did not have a private right of action for wrongful discharge in violation of public policy on the basis of RCW 49.17.160. *Id.* The *Jones* Court specifically addressed whether RCW 49.17.160 authorized an individual tort action for wrongful discharge in violation of public policy:

So far as it applies here, *Thompson* created as a narrow exception to the employment at will doctrine, a tort of wrongful discharge where the discharge contravenes a clear mandate of public policy. The opinion was cautiously worded, however, and the court did not purport to deal with a policy arising from a statute that also supplied a remedy for violation of the policy. In *Grimwood v. University of Puget Sound, Inc.*, the court, finding it unnecessary to do so, expressly declined to decide the question. Because it is squarely presented here, we deal with it now.

Id. at 538 (citations omitted, emphasis added).

In the instant case, the employer, AlSCO, Inc. (AlSCO), essentially asks this Court to overrule *Wilmot* and reinstate the rule from *Jones*. AlSCO argues that *Wilmot* should not control this case and that its analysis is not useful because the *Gardner* case did not exist at the time of *Wilmot*.³ Instead, AlSCO urges this Court to apply its reasoning in *Korslund v.*

³ In *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996), this Court concluded that for a cause of action for wrongful termination in violation of public policy, the Plaintiff must prove: (1) the existence of a clear public policy; (2) that discouraging the conduct in which he engaged would jeopardize public policy; and (3) that the public-policy-linked-conduct caused the dismissal.

Dyncorp, 156 Wn.2d 168, 125 P.3d 119 (2005), to conclude that an individual does not have a tort action for wrongful termination in violation of public policy. In *Korlund*, this Court held that the comprehensive remedies under the federal Energy Reorganization Act (ERA) were adequate to protect the ERA's public policy mandate prohibiting the termination of nuclear industry employees for reporting safety and fraud complaints. *Id.* at 182. The Court held that because the ERA provided an adequate means of promoting the public policy mandate that it creates that the plaintiffs could not satisfy the Jeopardy element under the *Gardner* Analysis. *Id.* at 183. Accordingly, the *Korlund* Court declined to find a new tort action for wrongful termination in violation of public policy under the ERA. *Id.* at 181.

The issue in *Korlund* was whether to expand the tort of wrongful termination in violation of public policy to ERA matters, where no such tort had previously been recognized. The Court appropriately applied the test from *Gardner*. However, RCW 49.17.160 allows an employee to bring a private action for WISHA discrimination and this authorization remains unchanged since the *Wilmot* holding.⁴ Despite the fact that the statute remains unchanged, Alscow now seeks a ruling from this Court that

⁴ The WISHA discrimination statute has not changed since it was originally enacted in 1973. RCW 49.17.160 [1973 c 80§ 16]. Complainants and the Department have relied on *Wilmot* for more than 18 years to conduct their affairs.

plaintiffs can never file a claim for wrongful discharge in violation of public policy, despite this Court's indication in *Wilmot* that the WISHA discrimination statute does provide such a cause of action.

B. The Analysis Conducted by the Court in *Wilmot* Applies to RCW 49.17.160 and Is Useful Because It Shows that the WISHA Discrimination Statutory Remedy Is Inadequate

Although the focus of this Court's analysis under *Korlund* is whether the public policy is adequately protected, *Id.* at 183, FN 2, the remedies available to a whistleblower are inherently linked to whether the remedies available to promote the public policy mandate are comprehensive. This Court may view exclusivity of a statutory remedy, and whether a tort claim is necessary to protect public policy, as distinct legal issues. *Wilmot*, 118 Wn. 2d at 183. However, the question of whether a remedy is exclusive is relevant to determining whether an alternative means of promoting the public policy is insufficient such that the plaintiff can satisfy the Jeopardy element.

AlSCO asserts that the *Wilmot* Court did not consider the Jeopardy element because its decision pre-dated *Gardner*. Defendant's Brief at 30. While it is true that the *Wilmot* decision pre-dated the analysis before this Court, the *Wilmot* Court essentially considered the Jeopardy element when it addressed the adequacy of the remedy provided in the WISHA discrimination's sister statute, RCW 51.48.025:

The statute plainly does not provide an inexpensive and expedient method of redress. If the Director finds a violation of the statute, the Director must bring an action in superior court; if the Director does not find a violation, the employee may institute the action. Nothing in the statute permits the Director to order any relief, nothing in the statute allows for any administrative remedy, and nothing the statute sets any time period for the filing of the action in superior court. Nothing in the statute assures any final judgment within any particular time frame. Nothing in the statute provides certainty of relief upon the Director's determination of a violation, and nothing in the statute precludes an employee from filing an action, with attendant expense and inconvenience to both worker and employer, if the Director does not find a violation. Nothing in the statute prevents an employee from filing a frivolous suit, and nothing in the statute prevents an employer from marshaling resources to defend a suit brought by either the Director or the worker.

Wilmot, 118 Wn.2d at 58.

The *Wilmot* Court stated "it is not simply the presence or absence of a remedy which is significant; rather, the comprehensiveness or adequacy of the remedy provided is a factor which courts and commentators have considered in deciding whether a statute provides the exclusive remedies for retaliatory discharge in violation of public policy." *Id.* at 61. In other words, the *Wilmot* Court did consider the adequacy of the remedy in its analysis and concluded that on its face the statutory remedy provided in RCW 51.48.025 was inadequate. Because the statutes are nearly identical in their procedural requirements, the same analysis applies to RCW 49.17.160. Accordingly, the Court should conclude that

the WISHA discrimination statute's remedies are inadequate and that the complainant alleging a safety and health complaint in violation of the WISHA discrimination statute can meet the Jeopardy element and therefore may bring a private action in wrongful discharge of public policy.

C. Under the *Korslund* Jeopardy Element Analysis, Public Policy Is Not Adequately Safeguarded By the WISHA Discrimination Statute Because If the Department Files an Action in Superior Court, the Department Controls the Litigation and Seeks the Limited Relief Provided by RCW 49.17.160

As a creature of statute the Department only has the specific authority expressly granted by the Legislature through statute or necessarily implied by it. *Ortblad v. State*, 85 Wn.2d 109, 116-118, 530 P.2d 635 (1975); *McGuire v. State*, 58 Wn. App. 195, 199, 791 P.2d 929 (1990). Accordingly, the Department can only seek remedies that the statute authorizes the Department to pursue. RCW 49.17.160 specifically provides a mechanism for filing an original enforcement action by the Department, if the Director makes a determination that RCW 49.17.160 has been violated. When the Department undertakes a discrimination action under RCW 49.17.160, it does so to carry out its statutory purpose and duty—to protect the public interest by investigating complaints of discrimination against employees who voice safety and health concerns in the workplace and seeking relief on their behalf. WAC 296-360-020. The

Department controls the litigation and brings the action to seek remedies that benefit the complainant, but the Department does not represent the complainant.

The Department seeks only remedies provided by RCW 49.17.160, such as back wages and reinstatement. *See* WAC 296-360-020; WAC 296-360-160. The Department does not plead compensatory damages or front pay, only back wages. Back wages would include any reduced pay that resulted from discrimination, such as that resulting from a discriminatory demotion. WAC 296-360-160(1).

As this Court suggested in *Wilmot*, 118 Wn. 2d 46 at 61, regarding its analysis of the industrial insurance discrimination statute, which contains nearly identical language to WISHA discrimination statute: “the specific remedies listed, rehiring or reinstatement with back pay, appear equitable in nature adding doubt about whether the Legislature intended that ‘all appropriate relief’ under the statute means all normally available damages in a tort action, and raising the further question whether the worker is entitled to a jury trial.” While this Court did not answer these questions in *Wilmot*, the Court implied that the Department has no clear authority for doing so. *Id.*

In addition, the Department does not have authority to seek emotional distress damages if the Department filed a WISHA

discrimination cause of action. Generally, emotional distress damages are recoverable in a tort action based on wrongful discharge in violation of public policy. *Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 919, 726 P.2d 434 (1986). However, the Department would not plead emotional distress damages for two reasons. First, the Department does not have a clear mandate that emotional distress damages are included by the term “all appropriate relief.” *Wilmot*, 118 Wn.2d 46 at 61 (“It is not clear whether “all appropriate relief” authorized under the statute would include emotional distress damages.”) Second, the Department’s investigation related to an alleged WISHA discrimination violation would not include an evaluation sufficient to plead facts related to emotional distress damages. The Department does not have specific authority to seek a medical evaluation of a complainant’s mental health conditions and therefore would not do so. *See generally* WAC 296-360.

D. The WISHA Statutory and Regulatory Scheme Is Far Less Comprehensive Than the Federal Energy Reorganization Act (ERA) Addressed by This Court in *Korlund*

Also outlines five remedies available under RCW 49.16.170 that it asserts adequately promote public policy sufficient to show the plaintiff cannot meet the Jeopardy element under *Korlund*: (1) the employee may file a complaint with the Department; (2) the requirement that the Director cause “such investigation to be made that he deems appropriate;” (3) the

ability for Department to continue with the investigation if the complaint is withdrawn; (4) the mandatory requirement for filing in superior court if the Director finds that a violation has occurred; and, (5) in an action in superior court, the court may order “all appropriate relief, including rehiring and reinstatement with back pay.” Defendant’s Brief at 17. A closer examination of these remedies shows that the WISHA discrimination statute should not be construed as the only avenue to address the safety and health discrimination public policy mandate created by RCW 49.17.160 because the WISHA discrimination statute is less comprehensive than the statutory and regulatory scheme found in the federal ERA statute at issue in *Korslund*.

1. The complaint process is insufficient to safeguard public policy because the filing deadline with the Department forecloses action by the Department after only 30 days.

An employee must bring a complaint to the Department within 30 days of the discriminatory action. RCW 49.17.160(2). The 30-day period is tolled only under limited extenuating circumstances and recognized equitable grounds. WAC 296-360-030(4). While ignorance of the law is no legal defense, this Court should recognize as a practical matter that when employees have only 30 days to discover an administrative procedure available for lodging safety complaints, common sense dictates

that the statutory scheme is far less protective than a civil action with a 3-year statute of limitations.⁵ Certainly, the Legislature chose 30 days as a reasonable amount of time to file complaints with the Department, and this Court should defer to the Legislature on matters of policy, such as a statutory deadline for filing a complaint with an administrative agency. However, that short timeframe shows that the Legislature recognized that there was a pre-existing private common law remedy and only meant RCW 49.17.160 to supplement the existing claims in tort with an investigative process, not to exclude them.

AlSCO suggests that the 60-day appeal deadline found in the ERA statute at issue in *Korslund* is comparable to the time-frame for filing a WISHA discrimination complaint with the Department. Defendant's Brief at 21-22. These timeframes are simply not comparable. Under the ERA, an employee alleging a violation of the statute actually has 180 days to file a written complaint to the Secretary of Labor to request an investigation. 42 U.S.C. § 5851(b)(1)(2008). The 60-day appeal period found in the ERA addresses an appeal from a final order directing specific

⁵ AlSCO argues that because Mr. Cudney made complaints regarding Mr. Bartich's previous DUI incidents to the employer for years, it shows that he could have made similar complaints to the Department. Defendant's Brief at 21. Although the threshold question is when Mr. Cudney suffered the adverse action for the purposes of RCW 49.17.160, not when Mr. Cudney became aware of Mr. Bartich's illegal actions, it is hard to understand how an employer's years of inaction regarding a serious workplace and public hazard should be used as evidence showing that Mr. Cudney had an adequate remedy in an administrative forum.

relief by the Secretary of Labor after an investigation has been completed and after the party has had an opportunity to have a hearing before a federal administrative law judge (ALJ). 42 U.S.C. § 5851(b); 29 C.F.R. § 24.106 (2008); 29 C.F.R. § 24.107 (2008). In other words, at the point that the 60-day deadline expires, an ERA complainant has had the advantage of an investigation, a full opportunity to put on testimony before an ALJ, presumably has waited some period of time for the ALJ to issue his order, and then has had a full 60 days to write a petition for review addressing the findings of fact and conclusions of law issued by the ALJ. In contrast, RCW 49.17.160 provides no administrative adjudicative process.

2. The requirement for investigation by the Department does not supplant the employee's private cause of action.

AlSCO emphasizes the statutory requirement for investigation and suggests that if a complaint is received, the Director “must perform an investigation *using all appropriate means*.” Defendant’s Brief at 20 (emphasis added). This phrase simply does not appear in the statute and is unsupported by what the statute actually states. When the Director receives a complaint, the Director needs only “to cause such an investigation to be made as [s]he deems appropriate.” RCW 49.17.160(2). While the Department does conduct investigations, including witness

interviews and document requests, there is no statutory requirement or regulation that sets forth what is required.⁶ If the Department chose to do so, it could simply request a written response from the employer addressing a complainant's allegations and make the determination whether the statute was violated on that basis alone. Indeed, the Department could review the complaint on its face and determine that it does not meet the criteria for a violation and do no further investigation. Simply put, the Legislature left the extent of the investigation up to the discretion of the Department. The statute and the regulations are entirely silent about what constitutes an adequate investigation. RCW 49.17.160; WAC 296-360. Given the limited role played by the Department's investigative authority, it is highly unlikely that the Legislature intended this authority to preempt private causes of action.

3. The Department typically defers to a complainant's request to withdraw a complaint because the Department has consistently interpreted its authority to conduct investigations as supplemental to private rights of action.

AlSCO emphasizes that the Department can choose to continue an investigation even if a complainant withdraws his complaint to support its argument that the remedy is comprehensive. Defendant's Brief at 15-16.

⁶ Because the Department did not receive a complaint in this matter, the Department did not participate in earlier proceedings. Accordingly, the record lacks any documentation of Department policies and procedures addressing WISHA discrimination investigations.

While it is true that the Department may continue with an investigation if a complaint is withdrawn, Also does not disclose that a complete reading of WAC 296-350-050 shows that the Department should defer to Complainant's wishes rather than continuing an investigation solely for the purposes of safeguarding public policy: "However, a voluntary and uncoerced request from a complainant to withdraw his/her complaint shall generally be accepted." WAC 296-360-050. This provision recognizes that the Department's investigation is not meant to supplant the complainant's private right of action, but to provide the complainant the additional benefit of a Department investigation. A complainant may withdraw his complaint at any time prior to issuance of a merit determination. There is no provision in the statute or regulations that requires the Department to issue a non-merit determination upon the request of the employer, if the complainant chooses to withdraw his complaint. Accordingly, if a complainant believes that he is likely to receive an unfavorable finding by the Department, he may choose to withdraw his complaint and file a private right of action rather than receive a non-merit determination letter.

4. **The Department has consistently interpreted its authority to file merit cases as supplemental to private causes of action, not a replacement for them.**

The “mandatory” filing requirement has some important limitations. Under WAC 296-360-020, the Department interprets “shall” in 49.17.160 to mean that the Director must assure that enforcement of the WISHA discrimination statute occurs. The Department promulgated the regulations with the understanding that a complainant has a private action for wrongful discharge in violation of public policy. If a complainant brings an action on her own behalf, the Department need not pursue the identical remedy because the purpose of the statute is fulfilled.

Furthermore, the Department is authorized under RCW 49.17.160 to take action limited to the WISHA discrimination complaint. The Department does not have authority to take action on any other statutory or common law claims that may relate to a Complainant’s workplace rights. Complainants often allege a multitude of claims with general damages and special damages including wrongful discharge in violation of public policy, other forms of discrimination, and emotional distress. The Department also has the authority to defer to findings in arbitration or other proceedings, “...the division should defer to the jurisdiction of other forums established to resolve disputes that may also be related to RCW 49.17.160 complaints.” WAC 296-360-060(3). Again, it is highly unlikely that the Legislature intended the Department’s relatively narrow

authority to litigate to preempt the broad private causes of action a complainant may have.

5. The WISHA discrimination statute does not provide an administrative adjudicative process like that provided for by the federal ERA.

As this Court emphasized in *Korslund*, “the ERA provides an administrative process for *adjudicating* whistleblower complaints and provides orders to the violator to ‘take affirmative action to abate the violation.’” 156 Wn.2d at 182. An order under the ERA can require reinstatement of the complainant, back pay, compensatory damages; and attorney and expert witness fees. 42 U.S.C. § 5851(b)(2)(B). The WISHA discrimination statute does not authorize any administrative hearing process.

RCW 49.17.160 provides for an investigative scheme and filing in superior court, but does not provide an administrative review process.⁷ Instead, a merit finding must be enforced by an original action filed by the Attorney General’s Office. Sole reliance on the Attorney General’s Office for enforcement of RCW 49.17.160 is not an adequate remedy and does not achieve the Legislature’s stated goals of protecting individuals who raise safety and health concerns in the workplace. *Allen v. State Board of*

⁷ Violations of RCW 49.17 are generally reviewed by the Board of Industrial Insurance Appeals, RCW 49.17.140, but RCW 49.17.160 limits jurisdiction to superior court for WISHA discrimination violations.

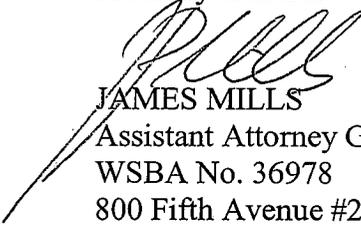
Elections, 393 U.S. 544, 556, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969) (private right of action is implied where enforcement of the Voting Rights Act rested solely upon the Attorney General). A truly comprehensive remedy would include an inexpensive and expedient administrative remedy allowing a hearing on the merits without filing an original action in superior court.

IV. CONCLUSION

For the reasons stated above, the Department of Labor and Industries requests that this Court find that RCW 49.17.160 does not preclude a separate claim by a terminated employee for wrongful discharge in violation of public policy.

RESPECTFULLY SUBMITTED this 11th day of December, 2009.

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