

No. 83124-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

in

MATTHEW CUDNEY,

Plaintiff,

vs.

ALSCO, INC., a Nevada corporation,

Defendant.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. These name changes were effective January 1, 2009.

WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of injured persons seeking legal redress under the civil justice system, including an interest in the rights of employees and the proper interpretation and application of the common law tort of wrongful discharge in violation of public policy.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case, before the Court on certification from the United States District Court for the Eastern District of Washington, raises questions regarding the scope of the “jeopardy” element of the common law tort of wrongful discharge in violation of public policy. See “Certification to Washington State Supreme Court” (May 18, 2009) (Certification).

After he was terminated by ALSCO, Inc. (ALSCO), Matthew Cudney (Cudney) filed suit against the company in state court. The case

was removed to the district court. The facts relevant to this amicus brief are drawn from the district court's certification and the briefing of the parties in this Court. See Certification at 2-4; Cudney Br. at 1-18; ALSCO Br. at 1-7.

Cudney asserts a claim for the common law tort of wrongful discharge in violation of public policy, first recognized by this Court in Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984). In order to recover for this tort, the employee must prove four elements: (1) the existence of a clear public policy ("clarity" element); (2) that discouraging the conduct in which the employee engaged would jeopardize the public policy ("jeopardy" element); (3) that the public policy-linked conduct caused the discharge ("causation" element); and (4) the employer must not be able to offer an overriding justification for the discharge ("absence of justification" element). See Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 941, 913 P.2d 377 (1996); see also Cudney Br. at 20-21 (listing elements); ALSCO Br. at 9 (same).¹

Under the certified facts, Cudney alleges that his employment was terminated because he reported to a local ALSCO human resources manager that a regional manager appeared to be under the influence of alcohol while in the workplace, and left the workplace in that condition driving a company vehicle. Cudney bases his claim for wrongful discharge on two alternative sources of public policy, the Washington Industrial

¹ This four-part test was drawn from Henry H. Perritt, Jr., Workplace Torts: Rights and Liabilities § 3.7 (1991). See Gardner, 128 Wn.2d at 941.

Safety and Health Act (WISHA), Ch. 49.17 RCW, and criminal laws against drunk driving, RCW 9.91.020, RCW 46.61.502 & .504 (DUI laws). ALSCO concedes that the public policies embodied in these laws satisfy the clarity element of Cudney's claim. See Certification at 2.

The parties dispute whether Cudney satisfies the jeopardy element of his claim. Cudney contends, as a matter of law, that the jeopardy element is satisfied as to each public policy invoked, and that other means of vindicating these public policies are either irrelevant or inadequate. See Cudney Br. at 24-38. ALSCO contends that Cudney cannot satisfy the jeopardy element of the wrongful discharge claim as a matter of law because existing remedies provided by WISHA (in particular the anti-discrimination provisions and procedures of RCW 49.17.160 and WAC 296-360-005 et seq.) and procedures for enforcing DUI laws (calling 9-1-1 to report a violation and criminal prosecution) are adequate to vindicate public policy. See ALSCO Br. at 10-39.²

² Both parties treat the jeopardy element and the adequacy of alternate means as a matter of law in this case. See Certification at 2. However, the jeopardy element may involve questions of fact under appropriate circumstances. See Ellis v. Seattle, 142 Wn.2d 450, 463-64, 13 P.3d 1065 (2001) (treating jeopardy element as question of fact); Hubbard v. Spokane County, 146 Wn.2d 699, 715-18, 50 P.3d 602 (2002) (treating jeopardy element as question of fact but seeming to decide adequacy of alternate means of enforcing public policy as question of law); Korslund v. Dyncorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 182, 125 P.2d 119 (2005) (stating adequacy of alternate means *may* present a question of law); Brundridge v. Fluor Servs., Inc., 164 Wn.2d 432, 443, 191 P.3d 879 (2008) (stating the court may rule on the adequacy of an alternate means as a matter of law *if* the procedures are undisputed). There may be other instances where the jeopardy element will turn on questions of fact. For example, it may involve fact finding if the employee contends a seemingly adequate alternate means of enforcing a public policy is illusory or toothless in fact. This aspect of the jeopardy element is not implicated in this certification.

Uncertainties regarding the proper interpretation and application of the jeopardy element in this case apparently surfaced during the course of summary judgment proceedings in the district court, resulting in this certification. See Certification at 4:12-19. The causation and absence of justification elements of the wrongful discharge claim are not raised by the certification order.

III. ISSUES PRESENTED

The district court certified the following two questions to this Court:

QUESTION NO. 1: Does the Washington Industrial Safety and Health Act (WISHA), in particular RCW 49.17.160, and accompanying Washington Administrative Code (WAC) regulations (WAC 296-360-005 et seq. and WAC 296-800-100 et seq.), adequately promote the public policy of ensuring workplace safety and protecting workers who report safety violations so as to preclude a separate claim by a terminated employee for wrongful discharge in violation of public policy?

QUESTION NO. 2: Do the DUI laws of the State of Washington, in particular RCW 9.91.020, RCW 46.61.504, and RCW 49.61.502 [*sic*—presumably RCW 46.61.502], adequately promote the public policy of protecting the public from drunken drivers so as to preclude a separate claim by a terminated employee for wrongful discharge in violation of public policy?

Certification at 3-4. These questions require the Court to clarify the proof required to establish the jeopardy element of the common law tort of wrongful discharge in violation of public policy. See id. at 2-3.

IV. SUMMARY OF ARGUMENT

This Court should answer “No” to both certified questions.

Overview

Conceptually, this Court has repeatedly recognized that the jeopardy element of the tort of wrongful discharge in violation of public policy distinguishes between two types of cases: (1) where public policy *directly relates* to the employee's conduct; and (2) where the employee's conduct is deemed *necessary* for the effective enforcement of the policy. In the first type of case, where there is a direct relationship between the public policy and the employee's conduct, the employer's discharge of the employee for engaging in that conduct ipso facto jeopardizes the public policy, and it should not be relevant whether there are alternate means of promoting the policy. Only in the second type of case, where the employee's conduct must be found to be necessary for the enforcement of the policy, does the necessity analysis appropriately entail evaluating whether alternate means of promoting the policy are inadequate under the circumstances. To the extent that this Court's precedent does not reflect this distinction, it should be overruled as incorrect and harmful.

Re: WISHA Public Policy

There is a direct relationship between public policy and an employee's conduct when the policy specifically encourages or requires the employee to engage in the conduct in question. WISHA encourages employees to report safety concerns to their employers, including reports of alcohol use in the workplace. Discharging an employee for reporting valid safety concerns should satisfy the jeopardy element because such

retaliation will otherwise surely discourage employees from doing precisely what WISHA contemplates they should do. It should not be relevant whether alternate means of promoting the policy embodied in WISHA are adequate. However, if the Court does consider the alternate remedies available under WISHA in its jeopardy analysis, they are in fact inadequate.

Re: DUI Laws Public Policy

In the absence of a direct relationship between public policy and an employee's conduct, the employee's conduct may nonetheless satisfy the jeopardy element when necessary for the effective enforcement of the policy. While DUI laws do not specifically encourage or require anyone—let alone employees—to report violations, an employee's report to his or her employer that a fellow employee is driving an employer-provided vehicle while under the influence of alcohol is necessary for the effective enforcement of the public policy embodied in DUI laws. This is a pivotal means of preventing drunk driving because both the fellow employee and the employer-provided vehicle are subject to the employer's right of control.

Without minimizing the importance of reports to law enforcement authorities such as 9-1-1 calls, these measures are inadequate to ensure effective enforcement of DUI laws. Whether law enforcement will be able to timely investigate a report, locate the drunk driver, find reasonable suspicion to stop, and probable cause to arrest is uncertain. Similarly,

whether the prosecutor will then exercise discretion to charge with a crime and whether the fact finder will find evidence beyond a reasonable doubt to convict essentially leave the enforcement of DUI laws to chance. Prompt employer intervention may eliminate the need for reliance upon the vagaries of the criminal justice system.

V. ARGUMENT

A. **Consideration Of Alternate Means To Promote Public Policy Has No Place In “Direct Relationship”-Type Wrongful Discharge Cases And Should Be Limited To “Necessary For Effective Enforcement”-Type Cases; To The Extent It Is Contrary, *Korslund* Should Be Overruled In Part.**

This Court described the jeopardy element of a wrongful discharge claim in Gardner as follows:

Under the second element, the employee’s discharge must jeopardize the public policy. To establish jeopardy, plaintiffs must show they engaged in particular conduct, and the conduct *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy. Perritt § 3.14 at 75-76. This burden requires a plaintiff to “argue that other means for promoting the policy ... are inadequate.” Perritt § 3.14 at 77. Additionally, the plaintiff must show how the threat of dismissal will discourage others from engaging in the desirable conduct.

128 Wn.2d at 945 (bold emphasis added). This formulation is a paraphrase of Henry Perritt’s treatment of the jeopardy element.³ In his updated treatise, Perritt confirms:

Conceptually, proving jeopardy involves proving several subordinate factual propositions:

³ The citations in Gardner to Perritt are to Henry H. Perritt, Jr., Workplace Torts: Rights and Liabilities (1991) (hereafter “Workplace Torts”). A more recent Perritt treatise is referenced in this brief. See Henry H. Perritt, Jr., Employee Dismissal Law and Practice (5th ed. 2009) (hereafter “Employee Dismissal Law”).

1. That the plaintiff engaged in particular conduct, such as an act while off duty, a protest of an employer's policy, or a refusal of an employer's order;
2. That the conduct proven in step 1 furthers the public policy asserted, *either because the public policy directly promotes the conduct* (as in the public policy in favor of jury service) *or because the conduct is necessary to effective enforcement of the public policy* (as in a public policy against excess consumer loan charges, which depends on vigilance by bank employees);
3. That threat of dismissal will discourage the conduct.

Perritt, Employee Dismissal Law § 7.06 at 7-67 (emphasis added).

Prior to Gardner the jeopardy and clarity elements of a wrongful discharge claim tended to be lumped together. See 128 Wn.2d at 941. The Court adopted Perritt's formulation in order to foster a more consistent analysis of wrongful discharge claims. See id.; see also Hubbard v. Spokane County, 146 Wn.2d 699, 709 n.16, 50 P.3d 602 (2002) (noting separation of jeopardy and clarity elements).

The Gardner (and Perritt) formulation of the jeopardy element is phrased in the disjunctive. An employee may satisfy the jeopardy element either by showing that his or her conduct directly relates to the public policy in question, or in the alternative by showing that his or her conduct is necessary for effective enforcement of the public policy. The employee is not required to show both a direct relationship and that his or her conduct is necessary for effective enforcement of the public policy.

The additional language in the quotation from Gardner at 945, not reflected in Perritt's formulation, requiring the employee to show that alternate means for promoting public policy are inadequate, should be read

only as referencing the “necessary for the effective enforcement” method of satisfying the jeopardy element. Logically, the question of alternate means arises only in connection with consideration of this type of claim because here the employee must justify the *necessity* of his or her conduct.

In cases where the employee claims that there is a direct relationship between his or her conduct and the public policy—where, in Perritt’s words, public policy “directly promotes” the employee’s conduct—discharge of the employee for such policy-based conduct ipso facto jeopardizes the public policy because it will surely discourage others from engaging in the same desirable conduct, thus undermining the policy. There is no basis for requiring an additional showing that the conduct was necessary for the effective enforcement of the public policy, nor for a related showing that alternate means for promoting public policy are inadequate.

This understanding is consistent with Perritt’s conceptual formulation of the jeopardy element, which does not include any reference to alternate means for promoting public policy. See Perritt, Employee Dismissal Law § 7.06 at 7-67. It is only in connection with his discussion of necessity that Perritt refers to alternate means. See id. § 7.06 at 7-69 (noting “[t]he jeopardy analysis is a bit different”; discussing alternate means in necessity-type cases).

The Court did not consider alternate means of promoting the public policies at issue in Gardner because it found a direct relationship between

the employee's conduct and these policies. See 128 Wn.2d at 945. In Gardner, an armored car driver was discharged for leaving his vehicle, in violation of his employer's work rule, in order to rescue a hostage. The Court held that his response to the hostage situation "directly served both the good Samaritan policy and the policy of saving lives," identified by the Court as the applicable public policies. Id. at 945. While the Court noted the employee's testimony that no one else was in a position to help the hostage, it did not address alternate means of promoting these policies, despite references in the dissent to alternate means such as summoning help by using the vehicle's two-way radio, public address system, and sirens. See id. at 958-59 (Madsen, J., dissenting).⁴

After Gardner, this Court's subsequent cases have consistently repeated the disjunctive direct relationship/necessity formulation of the jeopardy element. See e.g. Danny v. Laidlaw Transit Servs., Inc., 165 Wn.2d 200, 222, 193 P.3d 128 (2008) (lead opinion); Brundridge v. Flour Fed. Servs., Inc., 164 Wn.2d 432, 440, 191 P.3d 879 (2008); Korslund v. Dyncorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 181-82, 125 P.3d 119 (2005); Hubbard, 146 Wn.2d at 713. However, the Court has not confined the alternate means analysis to the necessity prong of the jeopardy

⁴ The imminence of the harm in Gardner was not the reason why the Court did not consider alternate means of promoting the public policies. Instead, imminence related solely to the question of whether the employee in Gardner reasonably believed that the hostage's life was in danger. See 128 Wn.2d at 946; see also Ellis v. Seattle, 142 Wn.2d 450, 461, 13 P.3d 1065 (2001) (discussing Gardner; holding imminence is related to reasonableness of employee's belief that the law may be violated in the absence of his or her action).

element. This brief asks the Court to retrace its steps and determine whether it must do so. This requires reviewing prior precedent and the gravamen of the particular wrongful discharge claim in various cases.

Ellis v. Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2001), exemplifies the direct relationship-type case. In Ellis, the employee alleged that he had been discharged for prospectively refusing to disable a public address (PA) system that was linked to a fire alarm system, in part because he lacked certification to work on the fire alarm system, and in part because the resulting modification to the fire alarm system had not been authorized by the fire department. See 142 Wn.2d at 461 (referring to lack of “proper authorization and assurance”). The Court held that this allegation satisfied the jeopardy element of his wrongful discharge claim: “[f]iring Ellis for raising questions about the legality of what he was told to do jeopardizes the public policy of following the fire code mandate to permit only certified persons to work on the fire alarm system.” Id. at 461. While not expressly stated by the Court, there was a direct relationship between the public policy requiring certification to perform certain work and the employee’s conduct in refusing to perform the work, since he lacked the required certification. Presumably because the refusal to disable the PA system was directly related to the public policy, the Court did not engage in any consideration of alternate means, such as calling the fire department to inquire or complain. See id. at 460-64.

The Court in Ellis did discuss whether the employee's conduct was "necessary to enforce the public policy," but not in the sense of alternate means of promoting the public policy. See 142 Wn.2d at 462-64. Instead, the Court's discussion focused on underlying factual questions: whether the work involved the fire alarm system or merely the PA system; and whether the City actually would have asked Ellis to perform the work without authorization from the fire department, since the refusal to perform the work was prospective. See id. at 463-64. There is no indication that the Court considered Ellis to be a necessity-type of case requiring consideration of alternate means.

Hubbard v. Spokane County, 146 Wn.2d 699, 50 P.3d 602 (2002), exemplifies the necessity-type case. In Hubbard the plaintiff-employee alleged that he was discharged for complaining about and trying to prevent violations of the local zoning code and RCW 42.23.070(1), relating to the code of ethics for municipal officers. See 146 Wn.2d at 713-14. The zoning code and RCW 42.23.070(1) did not specifically encourage or require the employee to complain. The employee was simply trying to ensure that zoning decisions complied with applicable law. In this sense, while not expressly stated by the Court, Hubbard should be viewed as a necessity case. Accordingly, the Court considered whether the prospect of an administrative appeal of the zoning decision constituted an adequate alternative means to safeguard the public policies embodied in the zoning

code and RCW 42.23.070(1), ultimately concluding that it was not. See id. at 716-17.

Perhaps because the Court had not previously pinpointed the difference between direct relationship and necessity-type cases in considering alternate means for promoting public policy, the analysis was collapsed in Korslund v. Dyncorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 125 P.3d 119 (2005). In Korslund, a group of employees alleged that they were constructively discharged for reporting violations of the Energy Reorganization Act (ERA). The ERA contained an express anti-retaliation provision for making such reports. See Korslund at 181 (quoting 42 U.S.C. § 5851). The Court found that this provision evidenced “a clear public policy encouraging and protecting [the employees’] right to report without fear of retaliation.” Id. In this sense, there was a direct relationship between the public policy and the employees’ conduct. Nonetheless, the Court stated “of particular importance here, the plaintiff also must show that other means of promoting the public policy are inadequate,” citing Gardner and Hubbard. See Korslund at 181-82. In this way, the Court imported the consideration of alternate means, relevant to necessity-type cases (such as Hubbard), into a direct relationship-type case. See Korslund at 193-94 (Chambers, J., dissenting, noting that majority opinion in Korslund conflates direct relationship and necessity-type cases).⁵

⁵ Following Korslund, a plurality of the Court in the lead opinion in Danny, supra, discussed the jeopardy element and alternate means of promoting public policy. In Danny, an employee alleged that she was discharged for taking time off work to protect herself and her children from domestic violence. A majority of the Court held that there is

The result in Korslund can best be understood as an example of the Court's guarded approach to wrongful discharge in violation of public policy tort claims. See Korslund, 156 Wn.2d at 180 (recognizing narrow construction); Thompson, 102 Wn.2d at 232 (adopting rule of narrow construction). Where the full panoply of tort remedies for the same conduct is otherwise available to an employee, the Court seems hesitant to recognize an essentially duplicative, freestanding common law claim. See e.g. Bennett v. Hardy, 113 Wn.2d 912, 923-26, 784 P.2d 1258. (1990) (declining to address wrongful discharge in violation of public policy claim for age discrimination where implied cause of action for the same conduct with the same remedies was found to exist under RCW 49.44.090). This tendency may explain why the Court in Korslund based its decision on the remedies available to the employees under the ERA. See Korslund at 182 (discussing sufficiency of remedies available under 42 U.S.C. § 5851(b)(2)(B)); cf. Blackburn v. Martin, 982 F.2d 125, 131 (4th Cir. 1992) (indicating compensatory damages under 42 U.S.C. § 5851(b)(2)(B)(ii) include emotional distress). This same tendency may also explain why the Court has upheld a wrongful discharge claim when the full panoply of remedies is not otherwise available to the employee by

a clear public policy against domestic violence, but limited its holding to the clarity element. See 165 Wn.2d at 221 (lead opinion: "we simply hold that Washington State has a clear public policy of protecting domestic violence survivors and their children and holding domestic violence perpetrators accountable"); id. at 230 (Fairhurst, J., concurring: "the question presented in this case involves only the clarity element"). Since domestic violence laws did not encourage or require time off work at that time, Danny is not a direct relationship-type case. The lead opinion's discussion of alternate means of promoting the policy against domestic violence is correct because it was a necessity-type case.

contract or statute. See Smith v. Bates Tech. Coll., 139 Wn.2d 793, 805-06, 991 P.2d 1135 (2000) (noting lack of authority for emotional distress damages under collective bargaining agreement or in Public Employment Relations Commission proceedings under RCW 41.56.160, in rejecting exhaustion and exclusivity arguments); see also Danny, 165 Wn.2d at 232-33 (Madsen, J., concurring/dissenting, comparing adequacy of remedies in Korslund with those in Smith).

Under the foregoing analysis, the portion of Korslund that imports the alternate means analysis into direct relationship-type cases should be disapproved. See In re Stranger Creek & Tributaries in Stevens County, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (articulating incorrect and harmful test for overruling precedent). This aspect of Korslund is incorrect because it deviates from the conceptual formulation announced in Gardner and carried forward in subsequent cases, thereby hindering the consistent analysis of wrongful discharge claims Gardner sought to impose. See Gardner at 941. It is harmful because, in cases where the employee's conduct directly relates to public policy, it imposes an additional proof requirement, thereby diluting the public policy at issue and disserving the public interest that is at the heart of this tort remedy.

B. WISHA Directly Promotes Reporting A Fellow Employee Is Under The Influence Of Alcohol In The Workplace And Operating A Company Vehicle In That Condition, And The Jeopardy Element Is Satisfied Without Regard To Whether Alternative Means Exist To Promote The Public Policy.

Cudney alleges he was terminated because he reported to an appropriate superior that a regional manager was under the influence of

alcohol while in the work place, and while driving a company vehicle. If true, such a retaliatory discharge directly discourages the public policy underlying WISHA and imperils the public interest in encouraging safe working conditions. At an intuitive level, these circumstances should present a classic example of when the jeopardy element should be deemed met.

The tort of wrongful discharge in violation of public policy is available to employees terminated for whistleblowing activities involving the public interest. See Gardner, 128 Wn.2d at 935-37. These activities may include an employee's internal complaints or reports in appropriate circumstances. See Perritt, Employee Dismissal Law § 7.09[D][3], [4] (collecting cases, pro and con, where internal report is basis for discharge). Here, Cudney asserts he was motivated by the public policy underlying WISHA, and ALSCO understandably concedes this public policy fulfills the "clarity" element for proof of liability. See Certification at 2.

WISHA unquestionably embodies a public policy that may serve as a predicate for this wrongful discharge tort. See RCW 49.17.010 (defining purpose of WISHA as assuring "insofar as reasonably possible, safe and healthful working conditions for every man and woman working in the state of Washington"); RCW 49.17.160 (prohibiting discharge of employee, inter alia, "because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter")⁶; see also

⁶ The current versions of RCW 49.17.010 and RCW 49.17.160 are reproduced in the Appendix to this brief.

Wilson v. City of Monroe, 88 Wn.App. 113, 122-26, 943 P.2d 1134 (1997) (recognizing WISHA prohibits discrimination against employees who file complaints, and that its remedies are non-exclusive in nature), *review denied*, 124 Wn.2d 1028 (1998).⁷

The first certified question essentially asks whether Cudney can meet the jeopardy element based upon WISHA's public policy. The Court should conclude that he can, and answer "No" to the first certified question. Under Gardner, 128 Wn.2d at 945, one method of establishing the jeopardy element is to show that the employee's conduct *directly relates* to the public policy at issue. See § A, supra. In these circumstances, the employee need only further show that the threat of dismissal will discourage others from engaging in the desirable conduct. See id.

Both of the above requirements are met here under the facts set forth in the certification. Cudney's reporting to a superior of another employee being apparently under the influence of alcohol directly relates to and promotes the public policy embodied in WISHA. Generally, employees are prohibited from using alcohol or being under the influence of alcohol in the workplace. See WAC 296-800-11025 (requiring

⁷ ALSCO appears to argue that RCW 49.17.160 provides the exclusive remedy for employees discharged for exercising rights under WISHA, relying on Jones v. Industrial Electric, 53 Wn.App. 536, 538-39, 768 P.d 520 (1989). See ALSCO Br. at 15. In Wilmot, 118 Wn.2d at 62-66, this Court held a similar statutory remedy under the Industrial Insurance Act (IIA), Title 51 RCW, was not exclusive and in so doing criticized and disapproved of the analysis in Jones. The Court of Appeals opinion in Wilson correctly concludes that, under Wilmot, WISHA's civil remedy provision, RCW 49.17.160, is not exclusive.

employers to prohibit alcohol in the workplace and barring employees under the influence of alcohol from the worksite). Moreover, the method chosen by Cudney to notify his employer of a violation of this prohibition is one contemplated by the WISHA implementing regulations. WAC 296-360-150(1) provides in relevant part:

Review of WISHA and examination of the legislative history discloses that, as a general matter, WISHA grants no specific right to employees to walk off the job because of potential unsafe conditions at the work place. *A hazardous condition that may violate WISHA will ordinarily be corrected by the employer, once brought to its attention.* If the employer does not correct a hazard, or if there is a dispute about the existence of a hazard, the employee normally can ask the division to inspect the work place pursuant to RCW 49.17.110, or can seek help from other public agencies that had the responsibility for safety and health. Under such circumstances, an employer would not violate RCW 49.17.160 by disciplining an employee who refuses to work because of an alleged safety or health hazard.

(Emphasis added.) Similarly, WAC 296-360-100(3) provides:

The protection offered employees by WISHA would be seriously undermined if employees were discouraged from lodging complaints about industrial safety and health matters with their employers. Complaints to employers, if made in good faith, are related to WISHA, and an employee is protected against discharge or discrimination caused by a complaint to the employer.

(Emphasis added.)⁸ Under these implementing regulations, Cudney's conduct in reporting the alcohol use directly relates to WISHA's public policy, if the fact finder determines Cudney's conduct was actually motivated by the public interest represented in WISHA.

The only remaining question should be whether ALSCO's discharge of Cudney under such circumstances would "discourage others

⁸ The full text of the current versions of WAC 296-360-100, WAC 296-360-150 and WAC 296-800-11025 are reproduced in the Appendix to this brief.

from engaging in the desirable conduct." Gardner at 945. This requirement is also met under the certified facts. If Cudney can be fired under these circumstances, the method of resolving safety concerns by employees lodging complaints directly with their employers will be discouraged, and the public interest in enforcement undermined.

As explained in § A, in determining that Cudney has established prima facie proof of the jeopardy element, it does not matter whether Cudney had other avenues for reporting safety violations. See e.g. RCW 49.17.160 (authorizing complaint to director of the Department of Labor & Industries, with potential civil relief). This Court has made clear that unless a statutory remedy is exclusive in nature, or provides relief equivalent to the wrongful discharge tort remedy, the existence of the statutory remedy will not prevent the employee from suing the employer at common law for wrongful discharge in violation of public policy. See § A, supra; Wilmot, 118 Wn.2d at 65 (IIA remedy not exclusive); see also Wilson, 88 Wn.App. at 125 (same); Bennett, 113 Wn.2d at 923 (declining to consider wrongful discharge remedy given recognition of implied cause of action grounded in statute).

Nonetheless, to the extent the Court requires Cudney and similarly situated employees to demonstrate the inadequacy of other means of enforcing the public policy, this requirement is met here. The remedy provided by WISHA in RCW 49.17.160 is not comparable to the remedy available under this tort. See Korslund, 156 Wn.2d at 182. The WISHA

remedy sounds in equity, and does not include general damages. See Wilson, 88 Wn.App. at 125-26 (relying on analysis in Wilmot of similar IIA remedy); Wilmot, 118 Wn.2d at 55-62 (assessing apparent nature of remedy provided by RCW 51.48.025, in course of determining whether it provides exclusive remedy for discharged employees). The remedy provided by RCW 49.17.160 is inadequate under a Korshund analysis. See Korshund at 182.⁹

C. Under A “Necessary For Effective Enforcement” Analysis Of DUI Laws, Criminal Prosecution Is Not An Adequate Alternative Means Of Promoting The Public Policy Embodied In Those Laws, With Respect To An Employee Driving An Employer-Provided Vehicle Under The Influence Of Alcohol.

Neither Cudney nor ALSCO references any DUI laws that encourage or require employees, or even members of the general public, to report violations. Therefore, such reports arguably are not directly related to the public policy embodied in DUI laws. Consequently, an employee’s report under the circumstances presented here must be found to be necessary for the effective enforcement of DUI laws. See § A, supra. This requires examining whether an adequate alternate means of promoting the public policy is available under these DUI laws.¹⁰

⁹ ALSCO urges that the remedy under RCW 49.17.160 is adequate based upon the Court of Appeals’ exclusivity analysis in Jones v. Industrial Electric, supra. See ALSCO Br. at 15-17. The analytical approach in Jones was specifically disapproved in Wilmot, 118 Wn.2d at 66. Following Wilmot, the Court of Appeals in Wilson correctly assessed the nature of the remedies available under RCW 49.17.160.

¹⁰ The current versions of the DUI laws involved, RCW 9.91.020, RCW 46.61.502 and RCW 46.61.504, are reproduced in the Appendix to this brief. There are purposive statements regarding 9-1-1 calls, e.g., RCW 38.52.500 & .501, but this brief assumes they do not encourage or require employees to report driving under the influence to their employers.

ALSCO contends that criminal prosecution of drunk drivers is an adequate alternative means to ensure the effective enforcement of DUI laws. See ALSCO Br. at 34-38. Accordingly, ALSCO argues that Cudney should have called 9-1-1 rather than reporting to his employer. See id. at 37-38. This argument does not include any concession that Cudney would have satisfied the jeopardy element of his wrongful discharge claim if he had called 9-1-1 rather than reporting to his employer. See id. Instead, focusing on a statement in the lead opinion in Danny to the effect that an employee must show his or her conduct was the “*only* available adequate means” to promote the effective enforcement of public policy, ALSCO proposes a *Catch-22* situation for employees, insofar as the mere existence of any alternative remedy would foreclose a wrongful discharge claim. Presumably, under this argument, if Cudney had called 9-1-1 instead of reporting to his employer, ALSCO would argue that he should have reported to his employer, as contemplated by WISHA. In this way, ALSCO’s argument seems to avoid any consideration of the *adequacy* of the alternative remedies it proposes.

The adequacy of alternate remedies involves a comparison of their relative efficiency in promoting the enforcement of the public policy at issue. In Hubbard, the employer argued that administrative appeal of zoning decisions was an adequate alternate means of promoting the public policy underlying the local zoning code and the municipal code of ethics, and that the employee’s internal complaints about violations of the zoning

code did not satisfy the jeopardy element of his wrongful discharge claim.

See Hubbard, 146 Wn.2d at 716-17.¹¹ In rejecting this argument, the Court

held:

Even though a zoning decision can be challenged administratively, this alternative is insufficient to safeguard the public policies embodied in the zoning code and RCW 42.23.070(1). Because the appellate procedures in RCW 36.70.830 require that an aggrieved citizen receive notice of the zoning actions *and* act within a relatively short time frame (within 20 days of the action), it would often be left up to chance whether the public policy was enforced. *In contrast, it would be more efficient to allow county employees to prevent these types of violations before they occurred.*

Id. at 717 (emphasis added). In a footnote to this text, the Court added:

the efficiency in allowing county employees to prevent these types of violations before they occur stems from the employees [*sic*] ability to speak out against the violations without fear of discharge.

Id. at 717 n.23; see also Brundridge, 164 Wn.2d at 443 (describing Hubbard's holding "that to properly analyze the adequacy of an alternative means of protecting the public policy, the court looks at the effectiveness of the specific procedures involved in the alternate means").

A plurality in Danny similarly engaged in a comparison of the relative efficiency of alternative means of promoting public policy, i.e., whether the employee-domestic violence victim could have protected herself and her children from domestic violence equally well without taking leave from work. See 165 Wn.2d at 222-23 (lead opinion). The plurality's focus on the remedies available to the employee in Danny does

¹¹ The complaints in Hubbard were internal, see 146 Wn.2d at 703 ("Hubbard disagreed with [his supervisor's] position and later presented [him] with chapter 36.70 RCW and a copy of the 1986 zoning code to support his position"); id. at 704 ("Hubbard sought the assistance of a county prosecutor in the civil division").

suggest a shift from Hubbard's focus on non-employment-related remedies. See Hubbard, 146 Wn.2d at 717. In this way, the plurality in Danny is more in keeping with Korslund, which also focused on the particular remedies available to the employee. See Korslund, 156 Wn.2d at 182.¹² DUI laws provide no remedy for Cudney in this case. Moreover, in any event, the available non-employment remedies are inadequate under the Hubbard analysis.

In accordance with Hubbard, an employee's internal report of a fellow employee driving an employer-provided vehicle under the influence of alcohol is a more efficient means of preventing drunk driving, and promoting the public policy underlying DUI laws. Reporting to the employer, as opposed to an outside law enforcement agency, furthers the employer's interest in having an opportunity to remedy the illegal conduct or ameliorate its effects, and thereby promotes the public policy underlying DUI laws. See Restatement (Third) of Employment Law § 4.02 cmt. f (Second Tentative Draft, 2009). The employer has the right of control over both the employee and the vehicle. The employer has the

¹² To the extent that Danny and Korslund correctly focus on the particular remedies available to the employee, the Court should take this occasion to disapprove of the statement in Hubbard to the contrary that "other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy." 146 Wn.2d at 717. The employee making a wrongful discharge in violation of public policy claim is akin to a private attorney general. See James W. Hubbell, Retaliatory Discharge and the Economics of Deterrence, 60 U. Colo. L. Rev. 91, 113 (1989) (stating "[e]mployees assume a kind of private attorney general status with respect to those statutes or public policies upon which a retaliatory discharge claim may be based"). Adequate remedies for the employee must be available in order to provide sufficient incentive for the employee to undertake this often daunting task of vindicating public policy.

incentive to exercise that control so as to prevent its employee from driving the employer-provided vehicle under the influence of alcohol, grounded both in its obligation to comply with WISHA and its desire to avoid potential civil liability. The efficiency in allowing an employee to prevent drunk driving by reporting to his or her employer under these circumstances stems from the employee's ability to report seemingly unlawful conduct without fear of discharge for doing so.

Requiring the employee to report the unlawful conduct to law enforcement essentially leaves the enforcement of public policy up to chance. See Hubbard at 717. This is not a criticism of law enforcement or the criminal justice system, any more than Hubbard involved criticism of the zoning appeal process. Rather, it is merely a recognition of the way the criminal justice system functions. After receiving a 9-1-1 call, a law enforcement officer must locate the drunk driver, find reasonable suspicion to stop the driver, and/or probable cause to arrest. The prosecutor then has discretion whether to charge a crime. Assuming that charges are filed, a judge or jury must find evidence beyond a reasonable doubt to convict. This leaves the enforcement of public policy to chance in the sense discussed in Hubbard, and it cannot therefore be considered an adequate alternate means of promoting such policy. On the other hand, prompt employer intervention in response to an employee complaint may eliminate the need for reliance on the vagaries of the criminal justice system.

The Court should answer the second certified question "No."

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief and answer the certified questions accordingly.

DATED this 14th day of December, 2009.


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On behalf of WSAJ Foundation

*Brief transmitted for filing by email; signed original retained by counsel.

Appendix

RCW 49.17.010. Purpose

The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses, and payment of benefits under the industrial insurance act. Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).

[1973 c 80 § 1.]

RCW 49.17.160. Discrimination against employee filing complaint, instituting proceedings, or testifying prohibited--Procedure--Remedy

(1) 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.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this section may, within thirty days after such violation occurs, file a complaint with the director alleging such discrimination. Upon receipt of such complaint, the director shall cause such investigation to be made as he deems appropriate. 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. If the director determines that the provisions of this section have not been violated, the employee may institute the action on his own behalf within thirty days of such determination. In any such action the superior court shall have jurisdiction, for cause shown, to restrain violations of subsection (1) of this section and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within ninety days of the receipt of the complaint filed under this section, the director shall notify the complainant of his determination under subsection (2) of this section.

[1973 c 80 § 16.]

WAC 296-360-100. Discrimination because of a complaint under or related to WISHA.

RCW 49.17.160 prohibits discharge of, or discrimination against, an employee because the employee has filed any complaint under or related to this act.

(1) An example of a complaint made "under" WISHA would be an employee request for inspection pursuant to section 11 (RCW 49.17.110). This is not the only type of complaint protected by RCW 49.17.160, however. The range of complaints "related to" WISHA is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application.

(2) Complaints registered with other state or federal agencies that have the authority to regulate or investigate industrial safety and health conditions are complaints "related to" WISHA.

(3) The protection offered employees by WISHA would be seriously undermined if employees were discouraged from lodging complaints about industrial safety and health matters with their employers. Complaints to employers, if made in good faith, are related to WISHA, and an employee is protected against discharge or discrimination caused by a complaint to the employer.

(4) To come within the protection of RCW 49.17.160, a complaint must relate to conditions at the work place, as distinguished from complaints touching only upon general public safety and health.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. 80-17-015 (Order 80-21), § 296-360-100, filed 11/13/80.]

WAC 296-360-150. Discrimination because of exercise of right afforded by WISHA-- Refusal to work in an unsafe condition.

(1) Review of WISHA and examination of the legislative history discloses that, as a general matter, WISHA grants no specific right to employees to walk off the job because of potential unsafe conditions at the work place. A hazardous condition that may violate WISHA will ordinarily be corrected by the employer, once brought to its attention. If the employer does not correct a hazard, or if there is a dispute about the existence of a hazard, the employee normally can ask the division to inspect the work place pursuant to RCW 49.17.110, or can seek help from other public agencies that have responsibility for safety and health. Under such circumstances, an employer would not violate RCW 49.17.160 by disciplining an employee who refuses to work because of an alleged safety or health hazard.

(2) Occasions arise, however, when an employee is confronted with a choice between not performing assigned tasks or subjecting him- or herself to serious injury or death arising from a hazard at the work place. If the employee, with no reasonable alternative, refuses in good faith to expose him- or herself to the dangerous condition, he or she is protected against subsequent discrimination.

(3) An employee's refusal to work is protected if he or she meets the following requirements:

(a) The refusal to work must be in good faith, and must not be a disguised attempt to harass the employer or disrupt the employer's business;

(b) The hazard causing the employee's apprehension of death or injury must be such that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury; and

(c) There must be insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.

(4) As indicated in subsection (3), an employee's refusal to work is not protected unless it is a good faith response to a hazardous condition. To determine whether an employee has acted in good faith, the division will

consider, among other factors, whether the employee:

- (a) Asked the employer to correct the hazard;
- (b) Asked for other work;
- (c) Remained on the job until ordered to leave by the employer; or
- (d) Informed the employer that, if the hazard was not corrected, the employee would refuse to work.

The lack of one or more of these factors shall not necessarily preclude a finding of good faith if other factors do establish good faith. The division will also consider whether the employer knew that the hazard could cause serious injury or death, or that the hazard was prescribed by a specific safety standard promulgated under WISHA or any other law that relates to the safety and health of a place of employment.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. 80-17-015 (Order 80-21), § 296-360-150, filed 11/13/80.]

WAC 296-800-11025. Prohibit alcohol and narcotics from your workplace.

You must:

* Prohibit alcohol and narcotics from your workplace, except in industries and businesses that produce, distribute, or sell alcohol and narcotic drugs.

* Prohibit employees under the influence of alcohol or narcotics from the worksite.

EXEMPTION: Employees who are taking prescription drugs, as directed by a physician or dentist, are exempt from this section, if the employees are not a danger to themselves or other employees.

[Filed: 5/9/01, effective 9/1/01, RCW 49.17.010, [49.17].040, and [49.17].050, WSR 01-11-038.]

RCW 9.91.020. Operating railroad, steamboat, vehicle, etc., while intoxicated

Every person who, being employed upon any railway, as engineer, motorman, gripman, conductor, switch tender, fireman, bridge tender, flagger, or signalman, or having charge of stations, starting, regulating or running trains upon a railway, or being employed as captain, engineer or other officer of a vessel propelled by steam, or being the driver of any animal or vehicle upon any public highway, street, or other public place, is intoxicated while engaged in the discharge of any such duties, shall be guilty of a gross misdemeanor.

[2000 c 239 § 3; 1915 c 165 § 2; 1909 c 249 § 275; RRS § 2527.]

RCW 46.61.502. Driving under the influence

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) While the person is under the influence of or affected by intoxicating liquor or any drug; or

(c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

(2) The fact that a person charged with a violation of this section is or has been entitled to use a drug under the laws of this state shall not constitute a defense against a charge of violating this section.

(3) It is an affirmative defense to a violation of subsection (1)(a) of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(4) Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (1)(b) or (c) of this section.

(5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

(6) It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if: (a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; or (b) the person has ever previously been convicted of (i) vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), (ii) vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or (iii) an out-of-state offense comparable to the offense specified in (b)(i) or (ii) of this subsection.

[2008 c 282 § 20, eff. June 12, 2008; 2006 c 73 § 1, eff. July 1, 2007; 1998 c 213 § 3; 1994 c 275 § 2; 1993 c 328 § 1; 1987 c 373 § 2; 1986 c 153 § 2; 1979 ex.s. c 176 § 1.]

RCW 46.61.504. Physical control of vehicle under the influence

(1) A person is guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug if the person has actual physical control of a vehicle within this state:

(a) And the person has, within two hours after being in actual physical control of the vehicle, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) While the person is under the influence of or affected by intoxicating liquor or any drug; or

(c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

(2) The fact that a person charged with a violation of this section is or has been entitled to use a drug under the laws of this state does not constitute a defense against any charge of violating this section. No person may be convicted under this section if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway.

(3) It is an affirmative defense to a violation of subsection (1)(a) of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of being in actual physical control of the vehicle and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two hours after being in such control. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(4) Analyses of blood or breath samples obtained more than two hours after the alleged being in actual physical control of a vehicle may be used as evidence that within two hours of the alleged being in such control, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any

drug in violation of subsection (1)(b) or (c) of this section.

(5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

(6) It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if: (a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; or (b) the person has ever previously been convicted of (i) vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), (ii) vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or (iii) an out-of-state offense comparable to the offense specified in (b)(i) or (ii) of this subsection.

[2008 c 282 § 21, eff. June 12, 2008; 2006 c 73 § 2, eff. July 1, 2007; 1998 c 213 § 5; 1994 c 275 § 3; 1993 c 328 § 2; 1987 c 373 § 3; 1986 c 153 § 3; 1979 ex.s. c 176 § 2.]