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No. 83882-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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ROBERT PIEL & JACQUELIN PIEL, husband and wife,

Appellants,

v.

THE CITY OF FEDERAL WAY, a Municipality
Organized pursuant to the laws of the
State of Washington,

Respondent.

**BRIEF OF AMICUS CURIAE
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION**

FILED
SUPREME COURT
STATE OF WASHINGTON
2012 AUG 22 P 4:02
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ORIGINAL

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I. INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association (“WELA”) is an organization of Washington lawyers devoted to protecting employee rights. WELA is a chapter of the National Employment Lawyers Association (“NELA”). WELA has appeared as amicus curiae numerous times before this Court. *See* WELA Motion for Leave to Appear as Amicus Curiae.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case is whether Robert Piel, a public employee who claims he was discharged for engaging in statutorily protected labor union activity, has a cause of action for wrongful termination in violation of public policy, despite the availability of an administrative remedy that might have been used to challenge his discharge.

This Court held in *Smith v. Bates Technical College*, 139 Wn.2d 793, 805-06, 991 P.2d 1135 (2000), that the administrative remedy is not exclusive, and aggrieved employees may sue for wrongful termination in violation of public policy. The trial court nonetheless dismissed Piel’s claims, finding that, despite *Smith*, this Court’s decision in *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005), foreclosed any wrongful termination claim where there was an

administrative remedy available. Clerk's Papers ("CP") 771. A wrongful termination claim is only precluded if alternative remedies are "adequate" to protect the public policy at issue. The trial court failed to analyze the adequacy of the alternative here, and thus failed to apprehend significant distinctions between this case and *Korlund*, which involved a much heartier and more direct administrative remedial option. Unlike in *Korlund*, and unlike in the more recent case of *Cudney v. ALSCO Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011), the alternative administrative remedy here is not a reliable or adequate means of protecting the important public policies embodied in Washington's statutes safeguarding public employees' rights to organize and present grievances to their employers.

Further, because the policy in this case is concerned with protecting employees (unlike for example the drunk driving laws in *Cudney*), protection of that policy depends on employees being able to take action to vindicate those protections. The administrative remedy in this case is not adequate to enable employees to do so, and the summary judgment dismissal of Mr. Piel's claim should be reversed.

III. STATEMENT OF THE CASE

Plaintiff Robert Piel and his wife brought claims against Mr. Piel's employer, the City of Federal Way, following his discharge by the Federal

Way Police Department in 2006. He alleged wrongful termination in violation of public policy based on the statutory rights of public employees to organize and form unions and to collectively bargain and pursue workplace grievances. *See* RCW 41.56.040 & 140. The superior court dismissed this claim on summary judgment, concluding that Mr. Piel could not prove that his discharge for engaging in union activities would “jeopardize” the public policy protecting such activities, because the other remedies available to Piel “are adequate to protect the public policy.” CP 771. Specifically, the court cited RCW 41.56.160, which authorizes the Public Employee Relations Commission (PERC) “to prevent any unfair labor practice and to issue appropriate remedial orders.” The superior court found that the availability of an administrative complaint procedure under which PERC may investigate and remedy unfair labor practices precluded any claim of wrongful termination based on RCW 41.56.

This Court took direct review and the parties briefed the issues in 2010. The Court later deferred decision. The Court has now placed the case on its calendar for oral argument on September 13, 2012.

IV. ARGUMENT

Wrongful termination in violation of public policy is a common-law tort adopted in many states and first recognized by this Court in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081

(1984). It is considered an exception to the “employment at will” doctrine. *Id.* at 231. “The policy underlying the exception is that the common law doctrine cannot be used to shield an employer's action which otherwise frustrates a clear manifestation of public policy.” *Id.* The Court has articulated four essential elements to a claim of wrongful termination in violation of public policy: (1) the existence of a clear public policy (the “clarity” element); (2) that discouraging the employee’s conduct would jeopardize the public policy (“jeopardy”); (3) that the conduct caused the employee’s discharge (“causation”); and (4) that the employer cannot offer an overriding justification for the discharge (“absence of justification”). *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996).

There is no question that Mr. Piel has alleged a clear public policy in the statutory right to organize and participate in union-related activities. RCW 41.56.040 & 140; *Vancouver Sch. v. Serv. Employees*, 79 Wn. App. 905, 918, 906 P.2d 946 (1995) (broadly defining public employee rights protected by RCW 41.56). Such rights are part of Washington’s “long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000); *Int’l Assn. of Firefighters v. Yakima*, 91 Wn.2d 101, 109, 587 P.2d

165 (1978) (right of public employees to join and be represented by labor unions is remedial and should be construed liberally).

The trial court found a failure of proof on only the “jeopardy” element of Mr. Piel’s claim. To establish jeopardy, the plaintiff must show that the conduct for which he claims he was discharged “*directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy.” *Gardner*, 128 Wn.2d at 945 (emphasis in the original) (citing Henry H. Perritt, Jr., WORKPLACE TORTS: RIGHTS AND LIABILITIES § 3.14, at 75-76 (1991)). As part of this showing, the plaintiff must “argue that other means for promoting the policy ... are inadequate,” and show “how the threat of dismissal will discourage others from engaging in the desirable conduct.” *Id.*

The latter inquiry is the only component of the jeopardy element that is a factual issue for the jury.

While the question whether the jeopardy element is satisfied generally involves a question of fact, the question whether adequate alternative means for promoting the public policy exist may present a question of law, *i.e.*, where the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy.

Korslund, 156 Wn.2d at 182; *see also Cudney*, 172 Wn. at 536 n. 4 (“the jeopardy element . . . generally involves a question of fact,’ as well as a question of law”). The remedies available through PERC would not

reliably protect employees who are punished or threatened for exercising their union-related rights, and therefore would not be adequate to protect the public policy upon which those rights are founded.

A. An Administrative Complaint to PERC is Not an Adequate Alternative Means of Protecting Individual Employees' Rights to Engage in Union Activities.

The issue presented here is whether RCW 41.56.160 provides an adequate means to protect the public policies embodied in RCW 41.56.040 & 140. This Court first addressed the adequacy of alternative statutory remedies in *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 60-62, 821 P.2d 18 (1991). There the Court analyzed the adequacy of the administrative remedies available to workers who claim their employer discharged them in retaliation for claiming worker's compensation benefits. It observed that while RCW 51.48.025(4) sets forth some remedies for retaliatory discharge, "it does not clearly authorize all damages which would be available in a tort action." *Id.* at 61. In particular, the Court doubted that emotional distress damages would be available to an injured employee. "We think such damages are necessary to constitute an adequate remedy." *Id.* at 62.

It is true that this Court later downplayed this declaration when it noted in *Korlund* that *Wilmot* was concerned with the separate question of exclusivity, *i.e.*, whether the worker's compensation statute was

intended to be the *only* remedy for retaliation against workers who file claims. *Korlund*, 156 Wn.2d at 168. Nonetheless, *Wilmot* was asking the same underlying question presented here: Whether the statutory remedies were “adequate” to protect the public policies at issue.

[I]t is not simply the presence or absence of a remedy that 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.

Wilmot, 118 Wn.2d at 61 (emphasis added). There is no reason why the adequacy of remedies would be evaluated differently for purposes of jeopardy analysis than for purposes of exclusivity analysis.

Indeed, in *Wilmot* the Court evidently viewed those two inquiries as related. It expressly referenced the jeopardy-related question, which it had left open in *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 367, 753 P.2d 517 (1988): “whether a cause of action exists for wrongful discharge in violation of public policy when the declaration of public policy is declared in a statute already providing a remedy.” *See Wilmot*, 118 Wn.2d at 60-61. And it expressly overruled the Court of Appeals’ subsequent answer to that question: that there was no such cause of action. *Id.* at 66 (overruling *Jones v. Industrial Electric-Seattle, Inc.*, 53 Wn. App. 536, 538, 768 P.2d 520 (1989)).

Regardless whether *Korslund* retreated from the view expressed in *Wilmot*, logically, it cannot be that all remedial schemes are “adequate” within the context of the jeopardy element. Otherwise, the term “adequate” would have no meaning, and there would be no reasoned basis for distinguishing between alternative remedies which are “adequate” and those which are “inadequate.” It necessarily follows that there are some alternative remedial schemes which are inadequate; otherwise the jeopardy element could *never* be satisfied. There are several powerful reasons to find the alternative in this case to be inadequate.

1. Employees Will Rarely be Able to Use the PERC Remedy, and Will Not be Represented by Counsel.

First, PERC adjudicates very few, if any, claims by employees against their employers. Claims under RCW 41.56 are generally brought to PERC by unions or employers, not individual employees. *See, e.g.,* www.perc.wa.gov/rules.asp (listing applicable rules in cases brought by unions and employers). Unions are by definition concerned with collective interests, not individual interests. *See Brundridge v. Fluor Fed. Servs. Inc.*, 109 Wn. App. 347, 355, 35 P.3d 389 (2001) (in collective bargaining arbitration, “the interests of the individual may be subordinated to the collective interests of all employees.”); *Longshoremen (ILWU) v. Pacific Maritime Ass’n.*, 441 F.2d 1061 (9th Cir. 1971) (holding union

may unilaterally reject an offer of settlement over grievant's objection); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-339 (1953) (unions may settle even a meritorious grievance, even if the basis of the decision is union finances).

Any employee who did attempt to bring his own claim to PERC would find it very hard to obtain professional assistance from an attorney, because PERC rarely awards attorney's fees to prevailing parties, and few workers can afford the cost of qualified counsel on their own. Essentially, the only way an individual could recover attorney's fees in a PERC proceeding is if he could show the defense to his claim was frivolous. *See Pasco Housing Auth. v. PERC*, 98 Wn. App. 809, 991 P.2d 1177 (2000) (Commission may award fees "if it determines that the fees are necessary to make its orders effective, *and* the defenses to the unfair labor practice charges are frivolous, *or* the violation evinces a pattern of conduct showing a patent disregard of good faith bargaining obligations." (emphasis in original)). That is a very high standard that most litigants cannot meet. Without a guarantee of recovering attorney's fees if he prevails, an employee cannot reasonably hope to obtain legal assistance in bringing his wrongful termination claim to PERC.

Employee rights generally cannot be effectively enforced without fee-shifting.¹ Recognizing this, the Legislature has provided that any employee who successfully recovers wages is entitled to a reasonable attorney's fee. RCW 49.48.030. The Legislature "evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payments of wages," including fee-shifting provisions. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998) (referencing RCW 49.48.030). "[A]ttorney fees are authorized under the remedial statutes to provide incentives for aggrieved employees to assert their statutory rights." *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994). Without any realistic prospect of recovering attorney's fees, the ability of employees to vindicate their rights is marginal, at best. This, in turn, makes the PERC procedure impractical and therefore inadequate.

¹ See *Riverside v. Rivera*, 477 U.S. 561, 579 (1986) (explaining why "enforcement of civil rights laws cannot be entrusted to private-sector fee arrangements"); *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 809, 98 P.3d 1264 (2004) ("Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief.").

2. Employees Will Not Be Able to Obtain Discovery Needed to Prove Their Claims.

Second, PERC offers employees no right to engage in the discovery process in order to substantiate their claims. *See, e.g.*, WAC 10-08-001 *et seq.* Discovery is often absolutely critical to successfully proving an unlawful motive on the part of an employer.² Without access to an employer's records concerning its policies and practices, employees would often face an insurmountable disadvantage. *See id.*; *see also Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 684 (2000) (holding that employees must be entitled to discovery in order for arbitration to be adequate alternative forum), *cited with approval in Zuver v. Airtouch Comms. Inc.*, 153 Wn.2d 293, 318 n. 16, 103 P.3d 753 (2004). If employees cannot effectively prosecute their claims of retaliation before PERC, then PERC is not an adequate means of protecting against retaliation.

² *See, e.g., Johnson v. Department of Social & Health Servs.*, 80 Wn. App. 212, 228-30, 907 P2d 1223 (1996) (discussing use of comparator data to show motive); *Gomez v. Martin Marieta Corp.*, 50 F.3d 1511, 1518 (10th Cir. 1995) (ordering discovery to enable employee to test whether employer treated him differently in order to show motive); *see also Korslund*, 156 Wn. 2d at 178 (wrongful discharge in violation of public policy is an intentional tort).

3. Employees' Damages Will Be Substantially Limited.

Finally, as this Court observed in *Smith*, PERC is not authorized to award compensatory damages for emotional distress to an aggrieved employee. *See Smith*, 139 Wn.2d at 805-06. Such damages are an important part of any “make-whole” remedy and this Court has long held them recoverable for wrongful termination in violation of public policy. *Cagle v. Burns & Roe*, 106 Wn2d 911, 918-19, 726 P.2d 434 (1986). As noted, the Court previously stated that “such damages are necessary to constitute an adequate remedy.” *Wilmot*, 118 Wn.2d at 62.

Each of these deficiencies—the unavailability of attorney’s fees, discovery, and emotional distress damages—sharply reduces the prospect that the PERC process would adequately protect Washington’s public policy that prohibits retaliation against employees who engage in union-related activities.

B. *Korlund* and *Cudney* Are Distinguishable.

The trial court concluded that, despite *Smith* and *Wilmot* and the shortcomings in the PERC process, this Court’s decision in *Korlund* foreclosed any wrongful termination tort claim based on RCW 41.56. In doing so, the court overlooked the significant differences between the statutory remedies available in that case and in this one. In *Korlund*, the employees claimed jeopardy to the public policies expressed in the Energy

Reorganization Act of 1974, 42 U.S.C. § 5851, which prohibits retaliation against workers who report waste or fraud in nuclear industry operations. *Korslund*, 156 Wn.2d at 181. That statute provides an administrative process for adjudicating alleged retaliation against whistleblowers. *Id.* at 182 (citing 42 U.S.C. § 5851(b)(2)(B)).

The process is specifically geared for individual employees, and does not require or contemplate union involvement. 42 U.S.C. § 5851(b). The employee is entitled to comprehensive discovery.³ And the process provides “comprehensive remedies” to protect the public policy of prohibiting retaliation. *Korslund* at 182. Specifically, it provides tort-like remedies including reinstatement, back pay, and compensatory damages, as well as attorney’s fees and expert witness fees. *Id.*; 42 U.S.C. § 5851(b)(2)(B). These remedies are far more robust, and therefore much more likely to provide effective protection of the policy at issue, than can be found in RCW 41.56 and the PERC process.

³ See 10 CFR Section 1003.8(a) (“In accordance with the provisions of this section and as otherwise authorized by law, the Director may sign, issue and serve subpoenas; administer oaths and affirmations; take sworn testimony; compel attendance of and sequester witnesses; control dissemination of any record of testimony taken pursuant to this section; subpoena and reproduce books, papers, correspondence, memoranda, contracts, agreements, or other relevant records or tangible evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person.”).

Nor is *Cudney* dispositive of this case. In *Cudney*, the plaintiff had been fired after reporting that a co-worker was driving a company vehicle while intoxicated. 172 Wn.2d at 527-28. He relied on two sources of public policy in his claim of wrongful termination: the Washington Industrial Safety and Health Act of 1973 (WISHA), RCW 49.17, and the laws against drunk driving. *Id.* at 530-31. The Court found that the administrative remedy in WISHA was adequate because it contained “hardy statutory remedies that protect the relevant public policies.” *Id.* at 530. Specifically, the Court observed that the Department of Labor & Industries (L&I) is required to investigate alleged retaliation against employees who report workplace safety issues, and is “*required* to bring suit” against the employer if it finds evidence that supports the employee. *Id.* at 531 (citing RCW 49.17.160) (emphasis in original). Once a case is filed, “[t]he statute requires superior courts to order *all* appropriate relief for cause shown.” *Id.* (emphasis in original).⁴ These “robust statutory

⁴ Moreover, after the Director denies the claim, pursuant to WISHA, the employee may pursue a statutory claim in Superior Court with independent counsel, but must again file within 30 days. RCW 49.17.160(2). After filing a statutory claim, the employee is entitled to a trial de novo, including a right to trial by jury. Under PERC, by contrast, an employee may only appeal on the administrative record pursuant to the Administrative Procedure Act. *See Local 2916, IAFF v. PERC*, 128 Wn.2d 375, 380, 907 P.2d 1204 (1995).

remedies” were deemed sufficient to protect the workplace safety policies in WISHA. *Id.* at 536.

The Court in *Cudney* also found that the state’s DUI laws were adequate to protect the public policy against drunk driving. The Court noted that the alternative means of protecting the policy need not be available to a particular employee so long as they are adequate to safeguard the public policy at stake. *Cudney*, 172 Wn.2d at 538 (quoting *Hubbard v. Spokane County*, 146 Wn.2d 699, 717, 50 P.3d 602 (2002)). However, there is an important difference between *Cudney* and *Hubbard* on the one hand and this case on the other: the public policies in those cases concerned protecting the public generally as distinguished from protecting the interests of individual employees. In this case, the public policy relied upon is intended specifically to protect the interests of employees. RCW 51.46.040 & 140.

Where, as here, the public’s interest is identical to the employee’s interest, the alternative means must be adequate to protect the employee for the public policy to be adequately protected.

Employers cannot be permitted to intimidate employees into foregoing the benefits to which they are entitled in order to keep their jobs. To hold otherwise in this context would create a chilling effect by permitting an employer to indirectly force an employee to give up certain statutory rights.

Henry J. Perritt, Jr., EMPLOYEE DISMISSAL LAW AND PRACTICE § 706, at 7-67 (5th ed. 2010 and 2011 supplement) (quoting *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994) (internal citations omitted)).

Here, the policy on which Mr. Piel's claim is based relates directly to his and other employees' rights and protections as employees. He exercised those rights and suffered termination as a result. There is no effective way to promote and safeguard the policy against such retaliatory actions except through a legal challenge by the affected employee against the offending employer. And for that legal challenge to be undertaken, the process must offer "adequate" remedies to the employee to make such challenge practical. As shown above, the PERC complaint process does not offer adequate remedies to be a practical alternative. Employees do not and likely will not invoke PERC to challenge their individual retaliatory terminations, because the remedies are not sufficiently "robust" to entice either the employee or private counsel to take on the considerable task of prosecuting an intentional tort.

V. CONCLUSION

The jeopardy element of a claim for wrongful termination in violation of public policy serves to ensure that the claim is only available where it is truly necessary to adequately and effectively protect the policy

at issue. In this case, where the public policy is to protect employees, the public's interest is identical to the employee's interests.

The inquiry into the "adequacy" of alternative remedies presupposes that some alternative means of protecting a policy are *inadequate*. The remedies available in this case are clearly inferior to those available to the employees in *Korlund* and *Cudney*, and are not adequate to ensure that workers are truly free to engage in union activities or that employers are actually held accountable for retaliating against such workers. The trial court erred in dismissing Mr. Piel's claims as a matter of law.

DATED this 14th day of August, 2012.

BRESKIN JOHNSON & TOWNSEND PLLC

By /s/ Daniel F. Johnson

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Certificate of Service

I, Sylvia Louise Rollins, hereby certify that on August 14, 2012, I electronically filed the foregoing with the Clerk of the Court for the Washington Supreme Court via Email to Supreme@courts.wa.gov.

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Dear Clerk,

Attached please find for filing the Brief of Amicus Curiae Washington Employment Lawyers Association in *Piel v. City of Federal Way*, Supreme Court no. 83882-8, being filed by Daniel F. Johnson, WSBA #27848, email: djohnson@bjtlegal.com, phone (206) 652-8660, by his assistant, Sylvia Rollins, email: admin@bjtlegal.com.

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