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SUPREME COURT NO. 83882-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT PIEL & JACQUELINE PIEL, husband and wife,

Petitioners,

v.

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

Respondent.

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

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ORIGINAL

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I. INTRODUCTION

As noted by amicus Washington Employment Lawyers Association (“WELA”), Washington has a “long and proud history of being a pioneer in the protection of employee rights.” *See, e.g., Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). In recognition of this proud history, and in order to safeguard the right of employees to organize, the Washington Legislature enacted RCW 41.56. Contrary to the arguments made by WELA, RCW 41.56 provides numerous safeguards to protect and promote the rights of employees to organize and participate in union-related activities. Among these safeguards is the right for individual employees to have a “full and fair opportunity” to litigate claims of unfair labor practices before the Public Employment Relations Commission (“PERC”). *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 317, 96 P.3d 957 (2004) (holding that plaintiff had a full and fair opportunity to litigate unfair labor claims before PERC, and that therefore no procedural unfairness would result from applying collateral estoppel to PERC findings). These legislatively-approved remedies are plainly sufficient to promote Washington’s public policy to protect employees’ right to organize.

WELA either ignores or downplays the clear statutory remedies set forth in RCW 41.56. But the remedies provided by RCW 41.56 are at

least as protective as those available to the plaintiffs in *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005) and *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011), and these cases therefore control. WELA's attempts to distinguish *Cudney* on the grounds that RCW 41.56 is designed to protect the rights of employees are unconvincing; Washington cases have uniformly recognized that the tort of wrongful termination in violation of public policy ("WTVP") operates to vindicate the *public interest* in prohibiting employers from acting in a manner contrary to fundamental public policy. *See, e.g., Cudney*, 172 Wn.2d at 538; *Smith v. Bates Tech. Coll.*, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000). Because the remedies available under RCW 41.56 are adequate to protect Washington's public policies relating to employees' right to engage in union activities, under both *Korlund* and *Cudney*, a claim for wrongful termination in violation of those public policies is foreclosed.

II. ARGUMENT

A. **RCW 41.56 Provides Remedies That Are Adequate to Protect the Right of Washington Employees to Engage in Union Activities.**

WELA's brief is based upon the assumption that, in order to satisfy the "jeopardy" element of the tort of WTVP, the alternative means of promoting the relevant public policy must provide procedures and

remedies coextensive with those available in civil litigation. But this is simply not true. To the contrary, the tort of WTVP is an exception to the terminable-at-will doctrine that is to be narrowly construed, and used in only those instances in which the statutory protections afforded by the legislature are not sufficient to protect the relevant public interest. *See, e.g., Hollenback v. Shriners Hosps. for Children*, 149 Wn. App. 810, 825, 206 P.3d 337 (2009). This Court has “repeatedly applied this strict adequacy standard, holding that a tort of wrongful discharge in violation of public policy should be precluded unless the public policy is inadequately promoted through other means and thereby maintaining only a narrow exception to the underlying doctrine of at-will employment.” *Cudney*, 172 Wn.2d at 530. The fact that the Legislature’s chosen remedies and procedures may not measure up to those that would be available if the claim were to sound in tort does not automatically justify the recognition of the tort of WTVP. Likewise, there is no support for the suggestion that a remedial scheme must provide for discovery, fee shifting, and all compensatory damages in order to adequately protect the underlying public interest. As noted by this Court in its recent *Cudney* decision, “the point of the jeopardy prong of the analysis ... is to consider whether the statutory protections are *adequate to protect the public policy*,

not whether the claimant could recover more through a tort claim.”¹
Cudney, 172 Wn.2d at 534 n.3 (emphasis in original).

In addition to applying the wrong standard for the jeopardy element of the tort of WTVP, WELA either ignores or downplays the clear statutory remedies provided in RCW 41.56. As discussed in more detail below, the remedies available under RCW 41.56, including the ability to pursue claims of unfair labor practices before PERC, are adequate to promote Washington’s interest in protecting employee rights to organize and engage in union activity. As such, the Piels cannot satisfy the jeopardy element required before a court will recognize the tort of WTVP.

1. PERC has particular expertise in resolving unfair labor practice complaints.

As a preliminary matter, WELA ignores the fact that RCW 41.56 provides employees with the opportunity to pursue their complaints before an agency with particular expertise in this area. The Washington Legislature created PERC to prevent and adjudicate unfair labor practices. *See* RCW 41.56.160(1) (“The commission is empowered and directed to

¹ Contrary to WELA’s claims, this is a different question from that at issue in *Wilmont v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991). In *Wilmont*, the question before the Court was whether the remedies provided by statute were so comprehensive that they would give rise to the conclusion that the Legislature intended the statutory remedies to be exclusive of other remedies. *Id.* at 61. This is substantively different from the question at issue here; namely, whether the remedies provided by statute are sufficient to protect the public policy underlying the statute. As made clear in *Cudney*, the legislatively-chosen remedies could be sufficient to protect the relevant public interest *even if* the remedies are not coextensive with those that would be available if a tort claim were permitted. *Cudney*, 172 Wn.2d at 534 n.3.

prevent any unfair labor practice and to issue appropriate remedial orders.”). Indeed, the public policies that the Piels seek to vindicate are squarely within the public policies that PERC is empowered to enforce—the right of employees to organize and participate in union-related activities. *See* RCW 41.56.040; RCW 41.56.140. *Cf. Christensen*, 152 Wn.2d at 315 (noting that PERC is empowered to enforce public policy at issue regarding the fair and appropriate collective bargaining between public employees and their employers, untainted by discrimination against union activists). PERC’s expertise in enforcing these policies has been explicitly recognized by both the Washington Legislature and this Court. *See id.* (citing RCW 41.58.055(1)); *City of Yakima v. Int’l Ass’n of Fire Fighters*, 117 Wn.2d 655, 674-75, 818 P.2d 1076 (1991); *Clallam Cnty. v. Pub. Emp’t Relations Comm’n*, 43 Wn. App. 589, 596-97, 719 P.2d 140 (1986) (noting PERC’s expertise where allegation of violation of rights protected under the Public Employees’ Collective Bargaining Act, specifically RCW 41.56.140(1), were made). That employees may pursue claims before PERC, an agency with particular expertise in resolving complaints of unfair labor practices, is only one way in which RCW 41.56 promotes Washington’s policy of defending employees’ right to organize.

2. Complaints of unfair labor practices may be filed by employees or their agents.

Contrary to WELA's claims, the right of individual employees to bring unfair practice complaints before PERC is explicitly recognized and protected. *See* RCW 41.56.160(1); WAC 391-45-010 ("A complaint charging that a person has engaged in or is engaging in an unfair labor practice may be filed by *any employee*, employee organization, employer, or their agents.") (emphasis added). *See also Christensen*, 152 Wn.2d at 317. If the facts alleged in the complaint could constitute an unfair labor practice within the meaning of the applicable statute, PERC is required to address the complaint. *See* WAC 391-45-110.

Moreover, the fact that a union, rather than an individual, may pursue an unfair labor practice claim does not mean that the individual has inadequate remedies. This Court rejected a nearly identical argument in *Cudney*, 172 Wn.2d at 534 n.3 (rejecting argument that remedies were not adequate because the Department of Labor & Industries ("L&I"), rather than the complainant, controls the litigation, noting that "if L & I pursues a claim, it enforces the public policies underlying [the Washington Industrial Safety and Health Act]"). Further, in *Christensen*, this Court concluded that representation by a union lawyer in an unfair practices claim did *not* result in procedural unfairness to the employee. 152 Wn.2d

at 316-17. Unions have a clear interest in protecting the rights of employees working on their behalf, and it is in the unions' interest to take action against employers who discriminate against employees who participate in union activities. Unions also have a duty to protect its members from unfair labor practices and to represent them fairly; to the extent that an employee is not treated fairly by a union in pursuit of his or her unfair labor practice complaint, the employee has a potential cause of action against the union. *See, e.g., Muir v. Council 2 Wash. State Council of Cnty. & City Emps., Local 1849*, 154 Wn. App. 528, 531, 225 P.3d 1024 (2009) ("A union breaches its duty of fair representation when its conduct is discriminatory, arbitrary, or in bad faith.").

The cases upon which WELA relies to support its argument that claims pursued by unions under RCW 41.56 are not adequately protective of employee rights are distinguishable. These cases address union obligations in *entirely different contexts*; rather than discussing unions' duties and interests in pursuing complaints of unfair labor practices, these cases discuss union obligations to its members in collective bargaining and pursuing employee grievances under collective bargaining agreements. *See Brundridge v. Fluor Fed. Servs. Inc.*, 109 Wn. App. 347, 35 P.3d 389 (2001) (the interests of an individual may be subordinated in *collective bargaining*); *Longshoremen (ILWU) v. Pac. Maritime Ass'n*, 441 F.2d

1061 (9th Cir. 1971) (issue of fact regarding whether parent union sacrificed interests of employee in grievance pursuit in order to gain a more favorable result in a different dispute); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048 (1953) (discussing union obligations when engaging in collective bargaining). This difference is not insignificant: while union member interests may diverge in the context of collective bargaining, or even grievances arising from collective bargaining agreements, it is in the interest of the union and *all of its members* to ensure that employees' rights to engage in union activities are protected. As such, the fact that complaints of unfair labor practices may be pursued by a union does not mean that this is an inadequate remedy to protect the relevant public policy.

3. PERC affords claimants with the opportunity to obtain necessary documents and information.

The procedural rights of employees pursuing unfair labor practice claims before PERC are also far more robust than WELA suggests. Employees can request that the hearing examiner subpoena witnesses, compel testimony, and order the production of documents or tangible things at PERC hearings. WAC 391-08-300; WAC 391-08-310. Further, because these are public employers, employees have the option to request documents pursuant to a public records request, including without

limitation the “employer[] records concerning its policies and practices” that WELA contends are essential to the pursuit of an unfair labor practice complaint. *See* Public Records Act, Ch. 42.56; Am. Br. at 11. In addition, unions can request information from employers, and employers have the duty to provide relevant and necessary information needed by the union for the proper performance of its duties in the collective bargaining process, or the processing of grievances. *City of Seattle v. Pub. Emp’t Relations Comm’n*, 160 Wn. App. 382, 394, 249 P.3d 650, *rev. denied*, 172 Wn.2d 1005, 257 P.3d 666 (2011)).

This Court has previously approved the procedural protections afforded in PERC administrative hearings. *Christensen*, 152 Wn.2d at 317 (“PERC administrative proceedings are governed by the Administrative Procedure Act (chapter 34.05 RCW) and this court has noted the procedural protections afforded under this act.”). *Cf. Reninger v. Dep’t of Corr.*, 134 Wn.2d 437, 450-51, 951 P.2d 782 (1998) (approving administrative remedies available through hearing before Personnel Appeals Board). Indeed, in *Christensen*, this Court concluded that PERC proceedings present litigants with a “full and fair opportunity” to litigate their claims. *Christensen*, 152 Wn.2d at 317 (concluding that no procedural unfairness would result from applying collateral estoppel to PERC findings). WELA’s claims to the contrary must be rejected.

4. The remedies available under RCW 41.56 are sufficient to promote Washington's policy of protecting the right of employees to engage in union activities.

Not only is PERC a legislatively-authorized agency with particular expertise in resolving unfair labor complaints, but PERC plainly has many of the powers that WELA cites to support its claim that RCW 41.56 does not provide an adequate remedy. For example, WELA insists that employees cannot obtain relief from PERC because it “rarely” awards attorney’s fees. Am. Br. at 9. But legal expenses can be—and are—recovered under RCW 41.56. *See Pasco Hous. Auth. v. State, PERC*, 98 Wn. App. 809, 813, 991 P.2d 1177 (2000); *Lewis Cnty. v. PERC*, 31 Wn. App. 853, 867-68, 644 P.2d 1231 (1982); *see also* WAC 391-45 (unfair labor practice case rules for PERC); WAC 391-45-410 (backpay). More importantly, employees who pursue their claims through their union do not incur attorney’s fees.

WELA’s argument that the remedies available under RCW 41.56 are “substantially limited” is flawed. In cases in which an unfair labor practice is found, the Washington Legislature has authorized PERC to address and prevent unfair labor practices through remedial orders, cease and desist orders, reinstatement orders, and damage awards. It provides:

If the commission determines that any person has engaged in or is engaging in an unfair labor practice, the

commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, and to take such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees.

RCW 41.56.160. Indeed, under WAC 391-45-410, PERC is *required* to issue a remedial order if the Commission or examiner concludes that the employer committed an unfair labor practice. PERC may also petition a superior court for enforcement of its orders. RCW 41.56.160(3).

The fact that PERC cannot award compensatory damages for emotional distress simply does not mean that the remedies available under RCW 41.56 are insufficient to safeguard the public interest in protecting employees' rights to organize. Both *Korlund* and *Cudney* make clear that the available remedies need not be commensurate with those potentially available in a tort action; the question is *not* whether the claimant could recover more in a tort claim, but whether the remedies available are sufficient to protect the relevant public interest. *Cudney*, 172 Wn.2d at 534 n.3; *Korlund*, 156 Wn.2d at 183 (“the question is not whether the legislature intended to foreclose a tort claim, but whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy.”). As discussed above, RCW 41.56 provides comprehensive remedies that are

sufficient to protect Washington's public policy of protecting employees' rights to participate in union activities. As such, the fact that individual employees cannot recover for emotional distress damages does not render these remedies inadequate for purposes of determining whether recognizing the tort of WTVP is necessary in order to protect the relevant public policy.

WELA's argument that PERC does not provide employees with sufficient means to pursue their claims for unfair labor practices is refuted by the statutory scheme put in place by the Washington Legislature, relevant case law, and decades of PERC history. As such, it must be rejected.

B. *Korlund* and *Cudney* Control.

WELA insists that *Korlund* and *Cudney* are distinguishable because of the "significant differences" between the statutory remedies available and those available here. These differences—to the extent they exist—are simply not determinative. The remedies available under RCW 41.56 are every bit as protective as those available to the Plaintiffs in *Korlund* and *Cudney*. As such, these cases control.

WELA first attempts to distinguish the remedies available in *Korlund* by arguing that "[t]he process is specifically geared for individual employees; and does not require or contemplate union

involvement.” Am. Br. at 13. But, as discussed above, RCW 41.56 also permits individual employees to pursue complaints of unfair labor practices (WAC 391-45-010), and there is no support for the claim that union involvement in these complaints somehow lessens the amount of protection for the individuals the union represents. Unions have a strong interest in protecting the rights of employees who are working on their behalf, and thus have an incentive to pursue vigorously all unfair labor practice complaints. WELA’s argument regarding the “comprehensive discovery” available in *Korslund* is also unavailing; as discussed above, employees and unions can subpoena documents or testimony through a PERC hearing examiner, and can also request documents by public disclosure requests. WAC 391-08-300; WAC 391-08-310; RCW 42.56 *et seq.*

Finally, the fact that tort damages are recoverable to whistleblowers under 42 U.S.C. § 5851 is of no moment; the question is not whether the legislature chose the most “robust” or “comprehensive” remedies, but whether the remedies chosen are sufficient to protect the relevant public interest. *Korslund*, 156 Wn.2d at 183 (The other means need only be “adequate to safeguard the public policy.”). As discussed above, the remedies available to employees under RCW 41.56 are sufficient to protect Washington’s public policy in favor of protecting

employees' rights to organize and participate in union activities. As such, *Korlund* is squarely on point here.

WELA's attempt to distinguish *Cudney* also fails. In *Cudney*, a former employee asserted a claim for wrongful termination in violation of public policy, alleging that he was discharged after reporting that a supervisor was driving a company vehicle during business hours while intoxicated. *Cudney*, 172 Wn.2d at 526. The court concluded that the remedies available to the plaintiff (specifically, Washington's Industrial Safety and Health Act (WISHA) and its DUI laws) adequately promote the public policies of insuring workplace safety, protecting workers who report safety violations, and protecting the public from drunken drivers. *Id.* The *Cudney* court examined the remedies available to the plaintiffs, compared them to the remedies available in *Korlund*, and determined that these remedies were sufficiently protective of the relevant public interests. *Id.* at 533. The court therefore concluded that the tort of wrongful discharge in violation of public policy should be precluded. *Id.* at 538.

The remedies available under RCW 41.56 parallel those discussed by the court in *Cudney*. *Id.* at 533. First, as was the case with the statutory provisions in *Korlund* and *Cudney*, RCW 41.56 provides employees with the right to bring their claims before an administrative agency. PERC is specifically "empowered and directed to prevent any

unfair labor practice and to issue appropriate remedial orders.” RCW 41.56.160(1). Provided that the facts alleged in the complaint could constitute an unfair labor practice within the meaning of the applicable statute, PERC is required to act upon the complaint. *See* WAC 391-45-110. Part of PERC’s statutory authority is to engage in fact finding, including holding a public hearing to determine whether an unfair labor practice has occurred. *See, e.g.*, WAC 391-45 (Unfair Labor Practice Case Rules).

Second, like the employees in *Korlund* and *Cudney*, an employee can bring a claim directly to PERC. WAC 391-45-010. Complaints of unfair labor practices are further subject to appeal and review by the full PERC commission, and by the superior court in accordance with the APA. WAC 391-45-350.

Finally, as was the case in *Cudney* and *Korlund*, to the extent that PERC determines that a violation has occurred, it has the authority “to take such affirmative action as will effectuate the purposes and policy of this chapter...” RCW 41.56.160. *See also* WAC 391-45-410 (PERC is required to issue a remedial order if it concludes that an unfair labor practice has occurred). The remedies available under RCW 41.56 thus contain each of the three safeguards found to be sufficient to protect the relevant public interests in *Cudney* and *Korlund*.

WELA's attempt to distinguish the public policies at issue in *Korlund* and *Cudney* on the grounds that RCW 41.56 is designed to protect employees, rather than the general public, is unconvincing. As a preliminary matter, the policy of protecting employees' rights to organize and engage in union activities arguably serves the interests of the general public, and not just employees. As recognized in the National Labor Relations Act:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 U.S.C.A. § 151.

Further, this Court has repeatedly rejected the argument that the remedies need to be sufficient to protect the particular employee, rather than the relevant public policy. *See Cudney*, 172 Wn.2d at 538 ("Finally, we must remember that it is the public policy that must be promoted, not *Cudney's* individual interests."); *Korlund*, 156 Wn.2d at 183 (the means of promoting the public policy need not be available to the person seeking to bring a tort claim, providing that the means are adequate to safeguard

the public policy); *Hubbard v. Spokane Cnty.*, 146 Wn.2d 699, 717, 50 P.3d 602 (2002) (same). WELA's attempt to recast the relevant public policies at issue here does not change the relevant analysis. Because the remedies available under RCW 41.56 are sufficient to protect the public interest in promoting employees' rights to organize and engage in union activities, recognizing the tort of WTVP is unnecessary.

III. CONCLUSION

WELA's attempt to minimize the remedies available to the Piels should be rejected. RCW 41.56 provides remedies adequate to safeguard Washington's public policy of protecting employees' right to organize; as such, it is not necessary to recognize a tort claim in order to protect this policy. This case is governed by *Korlund* and *Cudney*, and the trial court's decision should, therefore, be affirmed.

DATED this 4th day of September, 2012.

Respectfully submitted,

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