

NO. 8 3882-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

King County Cause No. 08-2-02830-5 KNT

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.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

WIGGINS & MASTERS, P.L.L.C.
Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorney for Petitioners

CLERK
2008 NOV 15 AM 8:00
SIGNED
JACQUELINE PIEL
att.

TABLE OF CONTENTS

NATURE OF THE CASE & DECISION	1
ISSUES PRESENTED FOR REVIEW.....	2
GROUND FOR DIRECT REVIEW: RAP 4.2(A)(3) & (4).....	3
CONCLUSION	5

NATURE OF THE CASE & DECISION

Plaintiffs/Petitioners Robert and Jacqueline Piel ask this Court to accept direct review of the Honorable Bruce Heller's decision dismissing their action in *Piel v. Federal Way*, Washington State Superior Court No. 08-2-02830-5 KNT (Oct. 7, 2009) ("Opinion"; copy attached). Judge Heller determined that this Court has overruled – *sub silentio* – its own decision in *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 991 P.2d 1135 (2000) (copy attached). Opinion at 4-5 (discussing *Korslund v. Dyncorp Tri-Cities Sevs., Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005) (copy attached)). As discussed below, this ruling is in error.

Police Lieutenant Piel alleges, *inter alia*, that he was wrongfully discharged for engaging in activities protected under RCW 41.56.040 – the "Right of employees to organize and designate representatives without interference" – such as forming the Federal Way Lieutenant's Assoc.; filing complaints, appeals and protests with Human Resources and others; and filing a grievance. See Opinion at 2-3. While *Smith* does not require exhaustion of remedies by employees covered by a collective bargaining agreement, *Korslund* required exhaustion in other cases. Opinion 4-5. *Korslund* did not – and should not – overrule *Smith*.

Indeed, *Korslund* cites *Smith* once, solely for its holding that a claim for wrongful discharge in violation of public policy is “available to employees who are dischargeable only for cause (and who may be covered by a collective bargaining agreement).” 156 Wn.2d at 178. *Korslund* does not discuss, distinguish, or otherwise mention *Smith*. While this Court was plainly aware of *Smith* during *Korslund*, it nowhere purported to overrule or limit *Smith*’s holding.

Yet Judge Heller’s ruling could render the *Smith* holding a nullity by requiring all unionized government employees to exhaust other remedies before bringing suit for wrongful termination in violation of public policy. This Court should accept direct review to resolve this purported conflict between its decisions – a very important issue with potentially disastrous consequences for unionized government employees across this State.

ISSUES PRESENTED FOR REVIEW

1. Did this Court overrule *Smith* *sub silentio* in *Korslund*?
2. Is this a fundamental and urgent issue of broad public import requiring prompt and ultimate resolution?
3. Should this Court also accept review of ancillary issues?

GROUNDINGS FOR DIRECT REVIEW: RAP 4.2(a)(3) & (4)

Petitioners seek direct review because this case involves (a) “an issue in which there is . . . an inconsistency in decisions of the Supreme Court,” and (b) “a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” RAP 4.2(a)(3) & (4). Judge Heller’s ruling meets both criteria:

In *Korslund*, the Washington Supreme Court held that the plaintiffs had failed to satisfy the jeopardy element because “there was an adequate alternative means of promoting the public policy on which they rely,” namely, remedies available under the Energy Reorganization Acts that protect whistleblowers in the nuclear industry. . . . The City argues that RCW 41.56 contains comprehensive remedies that protect employees alleging retaliation for engaging in protected concerted activities. Piel, on the other hand, argues that the analysis should be governed by *Smith* . . . , not *Korslund*

These arguments raise the question of whether *Smith* and *Korslund* can be harmonized, or whether *Korslund* implicitly limited *Smith*’s emphasis on making tort remedies available to all employees regardless of the remedies already available to them. *Korslund* represents an entirely different approach to wrongful discharge tort claims than *Smith*

As the more recent Supreme Court case, *Korslund* is the controlling authority. Based on *Korslund*, the Court concludes that the remedies available to Piel through PERC are adequate to protect the public policy grounded in RCW 41.56. Since Piel cannot satisfy the “jeopardy” element, his wrongful discharge in violation of public policy claims grounded in RCW 41.56 are dismissed.

Opinion at 4-5.

Unlike in *Korslund*, *Smith* rejected an argument that the protections afforded by the public employee labor relations laws preclude a suit for discharge in violation of public policy. 139 Wn.2d at 803-04. The *Smith* plaintiff's failure to exhaust remedies under RCW Ch. 41.56 or through PERC did not bar her from maintaining a private cause of action for wrongful discharge. *Id.* *Korslund* simply does not address the core holding of *Smith*, which is directly on point and controlling here.

This Court must ultimately resolve the issues raised in Judge Heller's ruling because an appellate court cannot overrule *Smith*. Even if the appellate court distinguished *Korslund* – which is possible – the City would undoubtedly seek review here. This Court should permit prompt resolution of this important issue, particularly because this ruling, if applied broadly, could deprive many unionized government employees in Washington of access to justice in our courts where, as here, a government employer wrongfully terminates them in violation of public policy.

Judge Heller did not rule on several ancillary issues (Opinion at 5 n.2 & 6 n.4) and dismissed the Piels' claims under RCW 49.78, and the tort of invasion of privacy. Opinion at 5-6. While these issues do not independently meet the direct review criteria, for the

sake of judicial economy this Court should accept review of these issues, if and when they are raised in the opening brief.

CONCLUSION

For the reasons stated above, this Court should accept direct review of this Superior Court decision.

RESPECTFULLY SUBMITTED this 13th day of November 2009.

WIGGINS & MASTERS, P.L.L.C.



Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **Statement of Grounds for Direct Review** postage prepaid, via U.S. mail on the 13th day of November 2009, to the following counsel of record at the following addresses:

Counsel for Counsel for Plaintiffs Piel

Stephen M. Hansen
Lowenberg, Lopez & Hansen, P.S.
Commerce Building, Suite 450
950 Pacific Avenue
Tacoma, WA 98402

Counsel for Defendant City of Federal Way

John H. Chun
Otto G. Klein, III
Summit Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104-2682



Kenneth W. Masters, WSBA 22278
Counsel for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ROBERT PIEL & JACQUELINE PIEL,
Husband and wife,

Plaintiffs,

v.

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

Defendant.

No. 08-2-02830-5 KNT

OPINION

I. INTRODUCTION

This case is before the Court on defendant City of Federal Way’s (“City”) motion for summary judgment, plaintiffs Piel’s (“Piel”) motion for partial summary judgment, and the City’s motion to dismiss pursuant to CR 12(c). The motions present the following issues:

(1) whether *Koroslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168 (2005), requires the dismissal of Piel’s wrongful discharge in violation of public policy claims based on RCW 41.56;

(2) whether Piel’s allegation that the City retaliated against him because he took medical leave pursuant to 49.78 should be dismissed; and

1 (3) whether Piel's invasion of privacy allegation should be dismissed.¹

2 **II. DISCUSSION**

3 **A. RCW 41.56 Claims**

4 Piel alleges that he was wrongfully terminated in 2006 and 2007 because he engaged in
5 the following activities protected by RCW 41.56.040:

6 • participation in the formation of the Federal Way Lieutenant's Association
7 through the Washington Public Employee Relations Commission ("PERC");

8 • filing a Complaint with the City's Department of Human Resources in January
9 2005, as authorized by the Employee Guidelines for Employees of the City of Federal Way,
10 concerning his annual Performance Appraisal;

11 • filing a second Complaint with the City's Human Resources Department in
12 January 2005, as authorized by the Employee Guidelines for Employees of the City of Federal
13 Way, when he learned that the performance evaluation he had contested would be placed in his
14 permanent personnel file;

15 • appealing to the City Manager, as authorized by the Employee Guidelines for
16 Employees of the City of Federal Way, concerning proposed discipline resulting from the
17 April 2005 Standards Investigation;

18 • filing a protest, through the Federal Way Lieutenant's Association and its
19 counsel, of his removal from the MAIT (Major Accident Investigation Team);
20
21

22 ¹ Piel has withdrawn his public policy claim based on RCW 51.48.

1 In *Korslund*, the Washington Supreme Court held that the plaintiffs had failed to
2 satisfy the jeopardy element because “there was an adequate alternative means of promoting
3 the public policy on which they rely,” namely, remedies available under the Energy
4 Reorganization Act that protect whistleblowers in the nuclear industry. *Id.*, 156 Wn.2d at 181-
5 182. The City argues that RCW 41.56 contains comprehensive remedies that protect
6 employees alleging retaliation for engaging in protected concerted activities. Piel, on the other
7 hand, argues that the analysis should be governed by *Smith v. Bates Technical College*, 139
8 Wn.2d 793 (2000), not *Korslund*. In *Smith*, the Supreme Court held that a unionized public
9 employee alleging retaliatory discharge could bring a wrongful discharge against public policy
10 claim without having to exhaust the grievance procedure provided by her collective bargaining
11 agreement: “We see no justified reason to deny Smith the opportunity to recover damages for
12 emotional distress – thereby immunizing the alleged tortious conduct of her employer – simply
13 because her administrative and contractual remedies may partially compensate her wrongful
14 discharge.” *Id.*, 139 Wn.2d at 806. Piel points out that, as in *Smith*, none of the remedies
15 available to him through PERC, the Civil Service Commission or the grievance procedure
16 include emotional distress damages.

17 These arguments raise the question of whether *Smith* and *Korslund* can be harmonized,
18 or whether *Korslund* implicitly limited *Smith’s* emphasis on making tort remedies available to
19 all employees regardless of the remedies already available to them. *Korslund* represents an
20 entirely different approach to wrongful discharge tort claims than *Smith*. While *Smith* cites
21 *Gardner* for the proposition that a wrongful discharge tort is available outside the
22 employment-at-will context, *Id.*, 139 Wn.2d at 807, the court did not analyze whether Smith
23 satisfied the four elements of the tort set forth in *Gardner*. *Korslund* clearly did. Instead of

1 focusing on placing unionized employees on the same footing as at-will employees, *Korslund*
2 asked whether the remedies available to the employee were adequate to protect the public
3 policy on which the plaintiffs relied. The court concluded that the remedies available under
4 the ERA were adequate, even though they did not provide emotional distress damages. *Id.*,
5 156 Wn.2d at 182.

6 As the more recent Supreme Court case, *Korslund* is the controlling authority. Based
7 on *Korslund*, the Court concludes that the remedies available to Piel through PERC are
8 adequate to protect the public policy grounded in RCW 41.56. Since Piel cannot satisfy the
9 “jeopardy” element, his wrongful discharge in violation of public policy claims grounded in
10 RCW 41.56 are dismissed.²

11 **B. RCW 49.78 Claim**

12 Piel alleges that in May 2005, the City violated RCW 49.78.130 by inappropriately
13 ordering him to return to work while on medical leave and then criticizing him for
14 performance issues and absences that occurred during his leave.³ As Piel acknowledges, RCW
15 49.78.130 did not provide for a private cause of action. Therefore the claim must be
16 dismissed.

17 Piel has also argued that the alleged violations of RCW 49.48.130 support his wrongful
18 termination in violation public policy claims. As noted above, to state a wrongful discharge

19 ² It is therefore not necessary for the Court to reach other issues presented, including
20 the appropriate statute of limitations applicable to wrongful discharge claims based on RCW
21 41.56, whether the filing of grievances pursuant to Employee Guidelines, as opposed to a
22 collective bargaining agreement, is protected by RCW 41.56, and whether *White v. State*, 131
23 Wn.2d 1(1997)(wrongful discharge tort is limited to discharges) applies to Piel’s 2006
24 termination that was subsequently converted to a demotion by an arbitrator.

³ While Piel’s briefing cited RCW 49.78.330 for this argument, he has since conceded
that RCW 49.78.330 was not in effect in May 2005 and does not apply retroactively.

1 claim, a plaintiff must establish the existence of a clear public policy, i.e., the “clarity
2 element.” *Danny v. Laidlaw Transit Services*, 165 Wn.2d 200, 207 (2008). Since RCW
3 49.78.130 was repealed prior to Piel’s 2006 and 2007 terminations, no public policy based on
4 that statute “existed” at the time of these adverse employment actions.

5 Piel cannot satisfy the “clarity” element for an additional reason. Even if the statute
6 were in effect at the time of his termination, it did not protect an employee’s right to take
7 medical leave, but rather family leave. RCW 49.78.130.020(5). While Piel’s medical leave
8 may have been protected by the federal Family Medical Leave Act, Piel has not relied on that
9 statute. Therefore, Piel’s wrongful discharge claim based on RCW 49.78.130 is dismissed.⁴

10 **C. Invasion of Privacy**

11 Piel alleges invasion of privacy based on the following: On July 7, 2006, Chief
12 Kirkpatrick sent an e-mail to approximately 175 department employees explaining the reasons
13 for Piel’s termination. Subsequently, the Chief answered questions about the termination at a
14 shift briefing. On August 1, 2006, in response to a Public Records Act request, the City

15
16 ⁴ In his motion for partial summary judgment, Piel has asked the Court to rule as a
17 matter of law that he had a protected right under RCW 4.96.020 to file a notice of claim
18 against the City in May 2007. It is unclear why he is seeking this ruling since his partial
19 summary judgment motion does not articulate a wrongful discharge against public policy
20 claim based on RCW 4.96.020. Yet at oral argument, Piel pointed out the close temporal
21 proximity between the May 2007 notice of claim and his July 7, 2006 termination. Arguably,
22 a dismissal based on the threat of a lawsuit could violate public policy. For example, in
23 *Bennett v. Hardy*, 113 Wn.2d 912 (1990), the Supreme Court recognized a wrongful discharge
24 cause of action alleging that an employer terminated an employee after receiving a letter from
the employee’s attorney warning the employer not to commit age discrimination. The court
identified the policy at issue as the right to oppose discriminatory practices under RCW
49.60.210. Here, there is no evidence that Piel’s notice of claim raised issues of discrimination
under RCW 49.60. Furthermore, Piel has not argued for, let alone established, the existence
of a generalized access to justice policy that would protect him under the circumstances of this
case. He therefore fails to establish the “clarity element” of a wrongful discharge claim.
Gardner, supra. Again, the Court does not reach the question of whether *White* bars Piel’s
wrongful discharge claim based on the 2006 termination/demotion.

1 released its Internal Affairs Investigation regarding the circumstances that lead to Piel's
2 termination.

3 The tort of invasion of privacy requires that the disclosure (1) would be highly
4 offensive to a reasonable person, and (2) is not of legitimate concern to the public.
5 Restatement (Second) of Torts, § 652D. *Reid v. Pierce County*, 136 Wn.2d 195, 205 (1998).
6 In *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 727 (1988), the Supreme Court
7 concluded that "a law enforcement officer's actions while performing his public duties . . .
8 do not fall within the activities to be protected under the Comment to § 652D of the
9 Restatement (Second) of Torts as a matter of 'personal privacy'." Piel has presented no
10 evidence that any of the information disclosed about him in the e-mail, during the shift
11 briefing or in the internal affairs investigation report extended into his private life, as opposed
12 to the actions he took as a police officer. The disclosures therefore cannot be characterized as
13 "highly offensive to a reasonable person."

14 The Court is not persuaded by Piel's contention that the disclosure of the investigation
15 report was not of legitimate concern to the public because the allegations had not yet been
16 heard by an arbitrator and were therefore unsubstantiated. At the time of the disclosure, the
17 department had investigated the allegations, found them to be true and therefore terminated
18 Piel. These circumstances are distinguishable from *Tacoma v. Tacoma News Tribune*, 65
19 Wn.App. 140 (1992), wherein the City declined to release information concerning allegations
20 of abuse of a minor after finding them to be unsubstantiated. The mere possibility that Piel
21 might be successful in challenging the City's termination does not render the City's pre-
22 termination investigation unsubstantiated. The Supreme Court recently rejected a similar
23 argument in *Morgan v. City of Federal Way*, __Wn.2d__, 213 P.3d 596, 601 (August 20,

1 2009)(incidents in investigation report are not unsubstantiated simply because they are
2 disputed). Further, if Piel's argument were accepted, no information regarding the conduct of
3 public officials could ever be disclosed until all litigation regarding such conduct was
4 concluded. Such a result would run counter to the legislative policy of assuring "full access to
5 information concerning the conduct of government on every level . . ." RCW 42.17.010(11).

6 Piel's privacy claims are therefore dismissed.

7 **III. CONCLUSION**

8 Accordingly, the Court **GRANTS** the City's motion to dismiss pursuant to CR 12(c)
9 and its motion for summary judgment and **DENIES** Piel's motion for partial summary
10 judgment.

11 IT IS SO ORDERED.

12 ENTERED this 7th day of October, 2009.

13 /s/ Bruce E. Heller
14 BRUCE E. HELLER, JUDGE



LEXSEE 139 WN.2D 793

KELLY SMITH, *Petitioner*, v. BATES TECHNICAL COLLEGE, ET AL., *Respondents*.

No. 67374-8,

SUPREME COURT OF WASHINGTON

139 Wn.2d 793; 991 P.2d 1135; 2000 Wash. LEXIS 77; 15 I.E.R. Cas. (BNA) 1665; 163 L.R.R.M. 2358

June 24, 1999, Oral Argument
January 27, 2000, Filed

PRIOR HISTORY: [***1] Appeal from Superior Court, Pierce County, 94-2-05451-7. Honorable Thomas J. Fel-nagle, Judge.

SUMMARY:

Nature of Action: A state technical college employee sought damages from the technical college, the college district, and four supervisory personnel for wrongful termination in violation of public policy, defamation, and retaliatory discharge under 42 U.S.C. § 1983 for exercising her First Amendment petition clause rights. The employee claimed that she was terminated in retaliation for filing employment related grievances and unfair labor practice complaints.

Superior Court: The Superior Court for Pierce County, No. 94-2-05451-7, Thomas Fel-nagle, J., on September 15, 1995, entered a summary judgment dismissing the wrongful termination claims and the 42 U.S.C. § 1983 claims against the college, dismissed the remaining 42 U.S.C. § 1983 claims after trial, and entered a judgment on a verdict in favor of the defendants on the defamation claim.

Court of Appeals: The court *affirmed* the judgment in an unpublished decision noted at 91 Wn. App. 1008 (1998).

Supreme Court: Holding that the employee could maintain the wrongful termination claim even though she was not an at-will employee, that the employee stated a claim for wrongful termination in violation of public policy, that the employee was not required to exhaust contractual or administrative remedies before seeking redress in court for wrongful termination, and that the employee failed to state a claim under 42 U.S.C. § 1983 for violation of her rights under the First Amendment petition clause, the court *reverses* part of the decision of the Court of Appeals and the judgment dismissing the wrongful termination claim, *affirms* part of the decision of the Court of Appeals and the remainder of the judgment, and *remands* the case to the trial court for further proceedings.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Judgment -- Summary Judgment -- Review -- Role of Appellate Court** An appellate court reviewing a summary judgment engages in the same inquiry as the trial court. The court applies the standard of CR 56(c) after viewing all the facts and the reasonable inferences therefrom most favorably toward the nonmoving party.

[2] **Appeal -- Conclusions of Law -- Review -- Standard of Review** A trial court's conclusions of law are reviewed de novo.

139 Wn.2d 793, *; 991 P.2d 1135, **;
2000 Wash. LEXIS 77, ***; 15 I.E.R. Cas. (BNA) 1665

[3] Employment -- Termination -- Violation of Public Policy -- Right of Action -- Purpose The purpose of the tort of wrongful termination in violation of public policy is to vindicate the public interest in prohibiting employers from violating public policy.

[4] Employment -- Termination -- Violation of Public Policy -- Right of Action -- For-Cause Employees All employees, including those who may be discharged only for cause and at-will employees, may maintain an action for wrongful termination in violation of public policy.

[5] Employment -- Termination -- Violation of Public Policy -- Legal Right or Privilege An employee may not be terminated for exercising a legal right or privilege.

[6] Administrative Law -- Judicial Review -- Exhaustion of Administrative Remedies -- Necessity A party is required to exhaust available administrative remedies prior to bringing a claim in court when (1) the claim is cognizable in the first instance by an administrative agency alone, (2) the agency has clearly established mechanisms for resolving complaints by aggrieved parties, and (3) the administrative remedies can provide the relief sought by the party.

[7] Employment -- Termination -- Violation of Public Policy -- Right of Action -- Exhaustion of Administrative and Contractual Remedies -- Necessity An employee is not required to exhaust contractual or administrative remedies prior to seeking redress in court for wrongful termination in violation of public policy.

[8] Public Employment -- Constitutional Law -- First Amendment Right -- Public Employee -- Adverse Employment Decision -- Test A public employee's claim of retaliation in employment based on the exercise of a First Amendment right is not actionable unless the employee establishes that the conduct (1) is protected by the First Amendment and (2) was a substantial or motivating factor in the adverse employment decision.

[9] Public Employment -- Constitutional Law -- Freedom To Petition for Redress of Grievances -- Public Employee -- Adverse Employment Decision -- Public Concern -- Necessity A public employee's claim of retaliation in employment based on the exercise of the First Amendment right to petition the government for a redress of grievances is not actionable if the employee's grievances do not involve matters of public concern.

COUNSEL: *Eric R. Hansen*, for petitioner.

Christine O. Gregoire, Attorney General, and *Paul J. Triesch*, Assistant, for respondents.

JUDGES: Authored by Richard B. Sanders. Concurring: Gerry L. Alexander, Charles Z. Smith, Charles W. Johnson, Barbara A. Madsen, Faith E Ireland. Dissenting: Richard P. Guy Philip A. Talmadge.

OPINION BY: RICHARD B. SANDERS

OPINION

En Banc. [*796] [**1137] Sanders, J. -- The question is whether the common law tort of wrongful discharge in violation of public policy extends to employees who may be terminated only for cause and, if so, whether an employee must first exhaust administrative or contractual remedies before pursuing such an action. We are also asked to decide whether a public employee establishes a cause of action under 42 U.S.C. § 1983 when a public agency discharges her in retaliation for filing an employment related grievance. We review an unpublished decision of the Court of Appeals which affirmed dismissal of the employee's claims, and reverse in part.

FACTS

Bates Technical College (Bates) [***2] is a vocational-technical institution operated by the State of Washington. *RCW 28B.50.030(11)*. Bates employed Kelly Smith as a traffic programmer for its on-site television station, KBTC-TV, from February 1986 until February 1994.

While employed at Bates, Smith was a state technical college employee entitled to those civil service protections applicable to higher education employees. *See RCW 41.56.024*. Additionally, Smith was at all times a member of the Tacoma Association of Public School Professional-Technical Employees Union (the union). Under the collective bar-

139 Wn.2d 793, *, 991 P.2d 1135, **;
2000 Wash. LEXIS 77, ***; 15 I.E.R. Cas. (BNA) 1665

gaining law for higher education personnel, an institution of higher education and a union may elect to have their relationship and corresponding obligations governed by RCW 41.56. ¹ See *RCW 41.56.201*. Because [*797] Smith's union apparently elected to participate in the collective bargaining process, she was subject to RCW 41.56 and the collective bargaining agreement (CBA) negotiated by her union. The CBA allowed an employee to be disciplined only "for cause" and established a grievance procedure for any claim based on an alleged violation of the CBA, written college policies, regulations and rules, or unfair [***3] and inequitable treatment.

1 RCW 41.56 provides statutory remedies for any alleged unfair labor practices by a state technical college employer. See *RCW 41.56.140, 41.56.160*. This statute also provides classified employees of Washington's technical colleges with the right to engage in union activity and to collectively bargain for rights and benefits beyond those provided by statute. See *RCW 41.56.010, 41.56.122*.

Prior to 1991 Deborah Emond was Smith's immediate supervisor. Smith received favorable performance evaluations from Emond. Following a restructuring at Bates in September 1991, Emond became the station manager. Avon Killion was selected for the position of supervisor of programming and fundraising and became Smith's immediate supervisor. ² This restructuring led to a series [**1138] of problems between Smith and her supervisors.

2 According to Smith, Killion had been "very supportive of [her] and had written laudatory letters . . . that had been placed in her personnel file." Pet. for Review at 4. After Killion was dismissed for poor performance in October 1993, Paul Jackson became Smith's supervisor. Jackson ultimately recommended Smith's dismissal.

[***4] In July 1993 Smith filed her first grievance alleging Emond violated the CBA by unilaterally changing her job description. After filing this grievance Smith's relationship with Emond began to seriously deteriorate. According to Smith, Emond refused to respond to Smith and avoided making eye contact with her. Although Smith demanded this grievance be submitted to arbitration, she withdrew her demand shortly before the arbitration was scheduled to begin.

Smith filed a second grievance to contest the docking of her pay for leaving the work area at a time other than her scheduled lunch or break period. John Thorpe, senior vice president of Bates, denied Smith's grievance, finding: "Your conduct in this situation constitutes misconduct and insubordination. You are hereby reprimanded for this misconduct and insubordination and your personnel file will so reflect this." Ex. 3.

In late October 1993 Smith took medical leave, ostensibly [*798] due to job stress. While on leave, Smith received two letters from Emond requesting return of certain documents, suggesting Smith had stolen them. Smith responded to the first letter by stating she did not steal the items mentioned by Emond. In [***5] a letter dated January 10, 1994, Smith was reprimanded for failing to provide the data requested by Emond. Smith grieved this reprimand. Additionally, in a memorandum addressed to Emond, Smith detailed numerous problems she experienced after returning from medical leave. According to Smith, Emond did not help her resolve these problems.

Upon her return to work, Smith began cross-training Karin Jackson as a backup in Smith's position. According to Karin Jackson, Smith allegedly made threatening remarks about several co-workers whom Smith believed were a "clique." Karin Jackson reported this alleged incident to Sally Cofchin, Bates' Director of Personnel. Cofchin and several other managers met with Smith to confront her with Karin Jackson's accusations. Although Smith admits she discussed her anger and the workplace stress, Smith contends she did not threaten any employee of Bates. In December 1993, Smith responded by grieving the allegations leveled against her.

In January 1994 Smith filed an additional grievance after being required to submit a leave slip for her late arrival to work. When asked to submit the leave slip, Smith allegedly became enraged and shouted at her supervisor [***6] and another employee. As a result of this conduct Smith was issued a reprimand, which she subsequently grieved. Smith filed yet another grievance alleging her supervisor violated the confidentiality of the grievance process by circulating her letter of reprimand to three employees of Bates.

On February 11, 1994 William Mohler, president of Bates, dismissed Smith from her employment. This action followed a meeting between management and Smith designed to avoid the dismissal. Smith filed a grievance to contest her termination under the CBA, which proceeded to arbitration. The arbitrator issued an award in favor of Smith, ruling:

[*799] [Smith] was not terminated for cause and following progressive discipline. The College shall promptly offer to reinstate her to her former position and shall make her whole for all direct and indirect benefits lost due to her improper termination. The College shall also remove from [Smith's] personnel

139 Wn.2d 793, *; 991 P.2d 1135, **;
2000 Wash. LEXIS 77, ***; 15 I.E.R. Cas. (BNA) 1665

[file] all records pertaining to the course of dealing leading to this case including particularly the February 2 letter warning of possible termination and all of the documents referenced in that letter.

Clerk's Papers [***7] at 88. Bates complied with the order by reinstating Smith, reimbursing her lost wages and benefits, and purging her personnel file. Smith received back pay for three months in the amount of \$ 10,728.00 plus accrued benefits in the amount of \$ 2,765.93 for social security, retirement, health insurance, and medical aid/industrial insurance.

In addition to filing these numerous grievances, Smith filed four separate unfair labor practice (ULP) complaints with the Public [**1139] Employment Relations Commission (PERC). Two ULPs preceded Smith's dismissal and two followed her dismissal. In these ULPs, Smith complained of retaliation for filing her earlier grievances and challenged her dismissal by Bates.

Before PERC could address these claims, Smith filed a complaint in Pierce County Superior Court. Smith ultimately sued Bates, the college district of which it is a part, and four supervisory personnel, seeking monetary damages for wrongful discharge in violation of public policy, defamation, and violation of her First Amendment rights pursuant to 42 U.S.C. § 1983.

Bates moved for summary judgment on all the claims. The trial court granted Bates' motion in part, [***8] dismissing Smith's wrongful termination claim for failure to exhaust her remedies with PERC. The trial court also dismissed Smith's § 1983 claim as to the college, but not the individuals. At the conclusion of the trial the court granted the defense motion to dismiss the remaining § 1983 claims. The trial court reasoned: "There needs to be a public element [*800] involved in either the speech or the petition. And since counsel for plaintiff has admitted that there is no public issue here, I think that Binkley [v. *City of Tacoma*, 114 Wn.2d 373, 787 P.2d 1366 (1990)], Gearhart [v. *Thorne*, 768 F.2d 1072 (9th Cir. 1985)], and the decisions from the other six circuits control." Report of Proceedings at 690. The trial court allowed the defamation claim to proceed, but the jury found Smith had not been defamed. However the trial court awarded Smith \$ 10,407.50 for attorneys fees incurred in the successful arbitration proceeding.

The Court of Appeals, Division Two, affirmed the decision of the superior court in an unpublished opinion. *Smith v. Bates Technical College*, No. 19937-8-II (Wash. Ct. App. May 29, 1998). We granted review confined to the [***9] issues of the common law tort of wrongful discharge in violation of public policy and 42 U.S.C. § 1983.

ANALYSIS

[1] [2] When reviewing a grant of summary judgment, we engage in the same inquiry as the trial court. *RAP 9.12; Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993). A summary judgment will be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See CR 56(c); Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). All facts and reasonable inferences are reviewed in the light most favorable to the nonmoving party; all questions of law are reviewed de novo. *Id.* Because the trial court decision involves questions of law, our review of both issues in this case is de novo. *See Department of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993).

I. Tort of Wrongful Discharge in Violation of Public Policy

[3] Under Washington common law, an employer could generally discharge an employee with or without cause absent an agreement to [***10] the contrary. *Roberts v. Atlantic [*801] Richfield Co.*, 88 Wn.2d 887, 891, 568 P.2d 764 (1977). However, an employer's absolute prerogative to discharge an employee has not remained unfettered. In *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), we joined a growing number of jurisdictions when we recognized a cause of action in tort for wrongful discharge in violation of public policy. "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.* at 231. We explained "The exception has been utilized in instances where application of the terminable at will doctrine would have led to a result clearly inconsistent with a stated public policy and the community interest it advances." *Id.* (citing *Roberts 88 Wn.2d at 897*). To clarify the purpose underlying the public policy exception, we compared two cases from other jurisdictions:

[I]n *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (W. Va. 1978) a bank employee was discharged after [***11] attempting to make his employer comply with the state consumer credit and protection laws. [**1140] The West Virginia Supreme Court held that despite the general rule, the bank

139 Wn.2d 793, *; 991 P.2d 1135, **;
2000 Wash. LEXIS 77, ***; 15 I.E.R. Cas. (BNA) 1665

could be liable for wrongful discharge because the discharge would otherwise frustrate a clear manifestation of public policy, protection of consumers of credit. In contrast to the result reached in *Harless*, when the interest alleged by the plaintiff/employee has been found to be purely private in nature and not of general public concern, the general rule applied and no liability attached to the employer's action. See, e.g., *Campbell v. Ford Indus., Inc.*, 274 Ore. 243, 546 P.2d 141 (1976) (employee/stockholder allegedly fired for pursuing stockholders' rights against employer).

Thompson, 102 Wn.2d at 231-32. Thus, in Washington the tort of wrongful discharge is not designed to protect an employee's purely *private interest* in his or her continued employment; rather, the tort operates to vindicate the *public interest* in prohibiting employers from acting in a manner contrary to fundamental public policy.

The threshold issue in this case is whether [***12] the tort of [*802] wrongful discharge extends to employees who are terminable only for cause. Affirming the summary dismissal of Smith's wrongful discharge claim, the Court of Appeals noted this remedy is "generally, if not exclusively, applied to employment at will situations." *Smith*, slip op. at 8 (quoting *Micone v. Town of Steilacoom Civil Serv. Comm'n*, 44 Wn. App. 636, 643 n.2, 722 P.2d 1369 (1986)). Smith contends the tort of wrongful discharge should not be limited to at-will employees, but should be extended to cover employees who may be dismissed only for cause. Conversely, Bates argues the wrongful discharge doctrine does not apply to classified state employees who are protected by a CBA and statutory remedies.

At first glance, Bates' argument finds support in prior decisions that broadly suggested the common law tort of wrongful discharge applies only to at-will employees. In *Reninger v. Department of Corrections*, 134 Wn.2d 437, 951 P.2d 782 (1998), we questioned the viability of the tort "where other relief is available to an affected employee." *Reninger*, 134 Wn.2d at 445 (citing *Micone*, 44 Wn. App. at 643 n.2, [***13] and *Albright v. State*, 65 Wn. App. 763, 768-769, 829 P.2d 1114 (1992)). And in *White v. State*, 131 Wn.2d 1, 929 P.2d 396 (1997), we declined to extend the tort to include wrongful transfers and refused to subject each disciplinary decision of the employer to judicial scrutiny. "This is particularly true in instances like this one where an employee's rights are already protected by civil service rule, by a collective bargaining agreement, and by civil rights statutes." *Id.* at 20. Furthermore, the United States District Court for the Eastern District of Washington observed: "[T]he claim of 'discharge in violation of public policy' exists only as a narrow exception to the at-will doctrine; there is no such claim in cause-only employment." *Keenan v. Allan*, 889 F. Supp. 1320, 1367 (E.D. Wash. 1995), *aff'd*, 91 F.3d 1275 (9th Cir. 1996).³

³ Although Bates' argument appears to find support in other jurisdictions, see, e.g., *Silva v. Albuquerque Assembly & Distrib. Freeport Warehouse Corp.*, 106 N.M. 19, 738 P.2d 513, 515 (1987); *Phillips v. Babcock & Wilcox*, 349 Pa. Super. 351, 503 A.2d 36, 38 (1986), these cases are of limited value here. Citing its own state's authority, the *Silva* court explained: "The express reason for recognizing this tort, and thus modifying the terminable at-will rule, was 'the need to encourage job security' for those employees not protected from wrongful discharge by an employment contract." *Silva*, 738 P.2d at 515 (quoting *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613, 619 (Ct. App. 1983), *rev'd in part on other grounds*, 101 N.M. 687, 687 P.2d 1038 (1984)). The *Phillips* court similarly recognized: "The wrongful discharge cause of action was never intended to provide a forum to vindicate public policy and punish those who deviate from it." *Phillips*, 503 A.2d at 37. Rather, the Pennsylvania Supreme Court "was clearly concerned with the protection of 'corporate personnel in the areas of employment not covered by labor agreements.'" *Id.* (quoting *Geary v. U.S. Steel Corp.*, 456 Pa. 171, 181, 319 A.2d 174 (1974)). As *Thompson* clearly did not adopt the tort of wrongful discharge in violation of public policy in order to "encourage job security" or to protect personnel "not covered by labor agreements," we find these cases unpersuasive.

[***14] However, we find compelling the arguments made in favor [*803] of extending the tort to all employees. In *Wilson v. City of Monroe*, 88 Wn. App. 113, 121, 943 P.2d 1134 [**1141] (1997), *review denied*, 134 Wn.2d 1028, 958 P.2d 318 (1998), Division One held the cause of action for wrongful termination in violation of public policy extends to *all* employees and may be brought "notwithstanding the existence of other remedies." Allowing a former municipal employee to sue for wrongful termination in retaliation for "whistleblowing," the court reasoned, "[T]he tort cause of action for termination in contravention of public policy is not confined to at-will employment situations, but is available to all employees because the tort embodies a strong state interest in protecting against violations of public policy." *Wilson*, 88 Wn. App. at 115-16. The court recognized the tort of wrongful discharge in violation of public policy is distinct from an action based in contract and explained:

139 Wn.2d 793, *; 991 P.2d 1135, **;
2000 Wash. LEXIS 77, ***; 15 I.E.R. Cas. (BNA) 1665

Wilson's right to be free from wrongful termination in contravention of public policy may not be altered or waived by private agreement, and [***15] is therefore a nonnegotiable right. Furthermore, the right does not originate in the CBA provision that requires just cause for termination, or depend on interpretation of the CBA--*the right is independent of any contractual agreement* between Wilson and the City.

Id. at 117-18 (emphasis added) (footnote omitted).

Holding the tort of wrongful discharge in violation of public policy does not extend to employees who may be [*804] dismissed only for cause simplistically ignores the fundamental distinction between tort and contract actions. As the court explained in *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 176, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980), the theoretical reason for labeling a discharge as "wrongful" is not based on the terms and conditions of an employment contract, but rather arises out of the employer's duty to conduct its affairs in compliance with public policy. Relying on this logic, the California Court of Appeals held:

[T]here is no logical basis to distinguish in cases of wrongful termination for reasons violative of fundamental principles of public policy between situations in which the employee [***16] is an at-will employee and in which the employee has a contract for a specified term. The tort is independent of the term of employment.

Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 1166, 226 Cal. Rptr. 820, 826 (1986); see also *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988). Professor Prosser has explained:

"[Whereas] [c]ontract actions are created to protect the interest in having promises performed," "[t]ort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . ."

Koehrer, 181 Cal. App. 3d at 1165 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 613 (4th ed. 1971); see also *Foley*, 47 Cal. 3d at 667 n.7 ("What is vindicated through the cause of action is not the terms or promises arising out of the particular employment relationship involved, but rather the public interest in not permitting employers to impose as a [***17] condition of employment a requirement that an employee act in a manner contrary to fundamental public policy."). It logically follows when *any* employee is terminated in violation of a clear mandate of public policy, the employee should be permitted to recover for the violation of his or her legal rights.

[*805] Bates makes much of the remedies afforded Smith through her CBA. But while the contractual remedies available to certain employees redress violations of the underlying employment contract, these remedies do not protect an employee who is fired not only "for cause" but also in violation of public policy. Bates' position thus illogically grants at-will employees *greater* protection from these tortious terminations due to an erroneous presumption the contractual employee does not "need" such protection.

Further, Bates fails to acknowledge additional and distinct remedies would be available to Smith were she allowed to sue in tort. See *Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 919, 726 P.2d 434 (1986) (damages for emotional distress are recoverable in tort action based on wrongful termination in violation [**1142] of public policy). Although [***18] Bates correctly notes PERC has the authority to issue "appropriate remedial orders," *RCW 41.56.160(1)*, Bates cites no authority for the proposition PERC is authorized to award damages for emotional distress. Further, while PERC is "empowered and directed to prevent any unfair labor practice," *RCW 41.56.160(1)*, PERC does not have the authority to adjudicate wrongful discharge tort actions. See *State ex rel. Graham v. Northshore Sch. Dist. No. 417*, 99 Wn.2d 232, 240, 662 P.2d 38 (1983) ("The declaration of legal rights and interpretation of legal questions is the province of the courts and not of administrative agencies."). Thus, Bates' assumption that Smith's pending action before PERC will fully resolve her wrongful discharge claim is wholly unsupported.

In *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280, 85 Ill. Dec. 475 (1984), the court granted union members protected by a CBA the right to sue in tort for wrongful discharge and focused on the different remedies available.

139 Wn.2d 793, *; 991 P.2d 1135, **;
2000 Wash. LEXIS 77, ***; 15 I.E.R. Cas. (BNA) 1665

[*808] terminable at-will or for cause--to sue for wrongful discharge in violation of public policy acknowledges the fundamental distinction between an action based in tort and one based in contract. Accordingly, we hold Smith may bring an action in tort for wrongful [***23] discharge in violation of her protected legal right to file grievances.

II. Exhaustion of Remedies

Smith argues if the tort of wrongful discharge is not limited to at-will employees, employees should not be required to exhaust administrative or contractual remedies before bringing an action in tort. The Court of Appeals disagreed, holding: "Employees subject to the civil service laws must first exhaust their administrative remedies before seeking relief or appealing to superior court." *Smith*, slip op. at 8 (citing *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997)).

[6] The doctrine of exhaustion of administrative remedies is well established in Washington. In general, a party must exhaust all available administrative remedies prior to seeking relief in superior court. *Citizens for Mount Vernon*, 133 Wn.2d at 866 (citing *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992)). The court will not intervene and administrative remedies must be exhausted when: (1) a claim is cognizable in the first instance by an agency alone; (2) the agency has [***24] clearly established mechanisms for the resolution of complaints by aggrieved parties; and (3) the administrative remedies can provide the relief sought. *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984). The principle is founded on the belief that the judiciary should give proper deference to the body possessing expertise in areas outside the conventional expertise of judges. *Id.*; *Retail Store Employees Union, Local 1001 v. Washington Surveying & Rating Bureau*, 87 Wn.2d 887, 906, 909, 558 P.2d 215 (1976).

[7] Bates argues that because Smith did not pursue her [*809] ULPs with PERC, she did not exhaust her administrative remedies to the extent required by law. Due to this failure Bates asserts the trial court properly exercised its discretion to dismiss Smith's wrongful termination claim. But Bates' argument ignores the fundamental distinction between a wrongful discharge action based in tort and an action based upon an alleged violation of an employment contract or a CBA. As we have explained, the tort of wrongful discharge seeks to vindicate the public interest in prohibiting employers [***25] from acting in a manner contrary to fundamental public policy. Because the right to be free from wrongful termination in violation of public policy is independent of any underlying contractual agreement or civil service law, we conclude Smith should not be required to exhaust her contractual or administrative remedies.

Courts that extend the wrongful discharge tort to employees such as Smith do not require exhaustion. The court in *Wilson* held that a former municipal employee was not [**1144] required to exhaust his collective bargaining remedies before bringing a wrongful discharge claim.

Wilson's right to be free from wrongful termination in contravention of public policy may not be altered or waived by private agreement, and is therefore a nonnegotiable right. Furthermore, the right does not originate in the CBA provision that requires just cause for termination, or depend on interpretation of the CBA--the right is independent of any contractual agreement between Wilson and the City. This is true even though resolution of the dispute may require examination of the same set of facts as would arbitration under the CBA.

Wilson, 88 Wn. App. at 117-18 [***26] (footnotes omitted). Similarly, courts in other jurisdictions have also held exhaustion is not a prerequisite to bringing a claim for wrongful discharge in violation of public policy. *See Finch v. Holaday-Tyler Printing, Inc.*, 322 Md. 197, 206, 586 A.2d 1275, 1980 (1991) (no need to resort to arbitration because issue addressed by arbitration would not be determinative of wrongful discharge claim); *Midgett*, 473 N.E.2d at 1285 [*810] (plaintiff need not plead the exhaustion of contract remedies to bring an action in tort).

The Court of Appeals recently addressed this question in a similar context. In *Milligan v. Thompson*, 90 Wn. App. 586, 953 P.2d 112 (1998), a state employee argued the statute of limitations on his discrimination and tort claims tolled during the pendency of the appeal of his dismissal to the State of Washington Personnel Appeals Board (PAB). The court disagreed, reasoning because exhaustion was not required the statute of limitations was not tolled.

Nor was [the plaintiff] required to exhaust his administrative remedies before bringing his tort actions because there is no showing that those claims [***27] were initially cognizable by the PAB alone, were within its special expertise, or that the PAB could provide the relief he sought.

139 Wn.2d 793, *, 991 P.2d 1135, **;
2000 Wash. LEXIS 77, ***; 15 I.E.R. Cas. (BNA) 1665

It would be unreasonable to immunize from punitive damages an employer who unjustly discharges a union employee, while allowing the imposition of [***19] punitive damages against an employer who unfairly terminates a nonunion employee. The [*806] public policy against retaliatory discharges applies with equal force in both situations.

Midgett, 473 N.E.2d at 1284. Similarly in *Retherford v. AT&T Communications of Mt. States, Inc.*, 844 P.2d 949 (Utah 1992), the court reasoned:

When an employer's act violates both its own contractual just-cause standard and a clear and substantial public policy, we see no reason to dilute the force of the double sanction. In such an instance, the employer is liable for two breaches, one in contract and one in tort. It therefore must bear the consequences of both.

Id. at 960. We too see no justified reason to deny Smith the opportunity to recover damages for emotional distress--thereby immunizing the alleged tortious conduct of her employer--simply because her administrative and contractual remedies may partially compensate her wrongful discharge.

[4] Finally, our decision here is consistent with *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996). In *Gardner*, we extended the [***20] tort of wrongful discharge and held the employer, Loomis Armored, violated public policy by discharging an employee for disobeying a company rule in order to save a woman from a life-threatening hostage situation. As Justice Madsen correctly noted in her dissent, the majority there applied the public policy doctrine to a "for cause" employee, refusing to limit the remedy to at-will employment situations:

Loomis' employee handbook states that violation of the rule forbidding a driver from leaving an armored vehicle will be grounds for termination. Thus, the majority has applied a formerly narrow exception to the terminable-at-will doctrine to a situation where an employer provided just cause for termination and where the employment-at-will rule is inapplicable. The result of the majority's analysis is that the public policy exception to employment-at-will now applies to a fifth, completely incompatible category; that is, where this court *disagrees* with an employer's definition of just cause for termination, as set forth in the workplace rules.

[*807] *Gardner*, 128 Wn.2d at 952 (Madsen, J., dissenting) (citation omitted). Thus as the *Gardner* [***21] majority opted to extend the tort of wrongful discharge in violation of public policy to a situation *outside* the employment at-will context, we now find it unnecessary to distinguish between at-will and for-cause employees as the tort is equally applicable to all.

[5] Bates contends even if the tort of wrongful discharge is extended to all employees, Smith has not stated a claim for wrongful discharge in violation of public policy. When determining whether a clear mandate of public policy is violated, we consider "whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme." *Thompson*, 102 Wn.2d at 232 (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (1982)). Prior judicial decisions may also establish the public policy. *Thompson*, 102 [**1143] Wn.2d at 232. A cause of action for wrongful discharge in violation of public policy exists where an employee is fired for exercising a legal right or privilege. *Gardner*, 128 Wn.2d at 936 (citing *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989)).

[***22] Here, Smith alleges her termination violated the public policy against discharging an employee for pursuing a grievance. As RCW 41.56 and Washington precedent establish a public employee's pursuit of a grievance is a protected legal right, Smith has identified a relevant public policy. See RCW 41.56.140(3) (unfair labor practice for public employer to discriminate against a public employee who has filed an unfair labor practice charge); *Clallam County v. Public Employment Relations Comm'n*, 43 Wn. App. 589, 599, 719 P.2d 140 (1986) (unfair labor practice for a public employer to discharge an employee for engaging in the protected right of pursuing a grievance).

Extending the tort of wrongful discharge to *all* employees advances the underlying purpose of the tort by prohibiting *any* employer from frustrating the important public policies of this state. Further, allowing employees--whether

Milligan, 90 Wn. App. at 597; see also *Morales v. Westinghouse Hanford Co.*, 73 Wn. App. 367, 869 P.2d 120 (1994).

The logic of *Milligan* applies with equal force to the instant case. Bates has made no showing PERC has the authority to adjudicate wrongful discharge tort actions or that these actions are within its special expertise. Rather, PERC is simply "empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders." *RCW 41.56.160(1)*. Further, PERC must petition the superior court for the enforcement of its orders. *RCW 41.56.160(3)*. And while *RCW 41.56.160(2)* authorizes "such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees," it does not clearly authorize all damages that would be available in a tort action. See *Cagle*, 106 Wn.2d at 919 (damages for emotional distress recoverable in tort action based on wrongful termination in violation of public policy).

[***28] Our conclusion Smith is not required to exhaust her administrative remedies is even more compelling after examining one of our recent decisions. In *Reninger v. Department of Corrections*, 134 Wn.2d 437, 445, 951 P.2d [*811] 782 (1998), two prison guards resigned after being demoted and reassigned to positions they felt were unreasonably dangerous. Although they had several statutory remedies available to them, they did not challenge their reassignments under the Industrial Safety and Health Act (*RCW 49.17*) or civil service laws. They did appeal their dismissals to the PAB, which denied their appeal and found they had been fired for gross misconduct. *Id.* at 443. We affirmed the Court of Appeals, finding the decision of the PAB had collateral estoppel effect in the superior court proceeding for wrongful constructive discharge. *Id.* at 454.

Under *Reninger*, an employee who loses in an administrative proceeding will be collaterally estopped from attempting to prove the distinct tort of wrongful discharge in violation of public policy. Thus, if employees are required to exhaust all available administrative remedies in order to [***29] bring a civil suit for wrongful termination, the administrative remedy could be the *only* available remedy. Such a rule goes beyond the usual [*1145] understanding of exhaustion as a *prerequisite* to seeking judicial relief, see *Citizens for Mount Vernon*, 133 Wn.2d at 866, and ignores the fundamental distinction between contract and tort actions.

Because a wrongful termination claim is independent of any contractual agreement or statute and PERC does not have the exclusive authority or expertise to decide tort claims, we hold Smith should not have been required to exhaust her contractual or administrative remedies before suing in superior court.

III. First Amendment Claim

The Court of Appeals also upheld the dismissal of Smith's claim under 42 U.S.C. § 1983, ruling: "[Smith's] grievances stemmed from disputed charges of insubordination and misconduct she claims were made in retaliation for Smith's actions. As in *Gearhart*, these are 'matters only of personal interest' that are not protected by the First Amendment." *Smith*, slip op. at 5 (quoting *Gearhart v. Thorne*, 768 F.2d 1072, 1073 [*812] (9th Cir. 1985)). [***30] Smith contends the First Amendment petition clause⁴ protects the right of a public employee to file an official grievance involving matters of personal interest.

4 The First Amendment guarantees "the right of the people . . . to petition the government for a redress of grievances." *U.S. CONST. amend. I*.

[8] Under 42 U.S.C. § 1983, a public employee may state a cause of action for discharge or other discipline resulting from the exercise of rights guaranteed under the First Amendment. See *White v. State*, 131 Wn.2d 1, 10, 929 P.2d 396 (1997). A public employee who alleges retaliatory discharge from government employment must show: (1) the conduct that triggered the discharge was protected under the First Amendment, and (2) the protected conduct was a substantial or motivating factor in the adverse employment decision. See *White*, 131 Wn.2d at 10; *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 278, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). [***31] If the employee is able to prove these elements, the burden then shifts to the employer to prove it would have made the same decision in the absence of the employee's protected conduct. See *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 287; *Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 787 P.2d 1366 (1990).

Where the alleged retaliation is based on expressive conduct constituting speech, a court must first determine whether the speech can be characterized as addressing a "matter of public concern." *Connick v. Myers*, 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

139 Wn.2d 793, *; 991 P.2d 1135, **;
2000 Wash. LEXIS 77, ***; 15 I.E.R. Cas. (BNA) 1665

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147. If the court determines the speech involves matters of public concern, it must then balance the employee's interest in exercising his or her right to freedom of speech [*813] [***32] against the interest of the State "as an employer, in promoting the efficiency of the public services it performs through its employees." *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)).

Smith's expressive conduct here was not limited to speech. It included filing both formal grievances through her CBA and filing ULPs with PERC. Smith argues this conduct triggered the protection of the petition clause of the First Amendment--rather than the freedom of speech clause--and asks us to hold the petition clause does not implicate the "public concern" element established in *Connick*. Instead, Smith believes all employees who file internal grievances with a governmental employer receive protection from adverse employment actions, regardless of the private nature of the grievance.

Smith's argument is based upon a flawed premise. Smith apparently presumes that [**1146] because she filed formal workplace grievances with "the government," this conduct triggered the petition clause of the First Amendment. But this position [***33] ignores the government's role as an *employer* and would accord greater rights to government employees. "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." *Connick*, 461 U.S. at 147.

Smith's position would require us to elevate the protection afforded by the petition clause above that afforded by the other clauses of the First Amendment, "a premise that is undermined by the Supreme Court's repeated references to these clauses as being overlapping." *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 701 (5th Cir. 1985). As the Supreme Court observed in *McDonald v. Smith*, 472 U.S. 479, 482, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985), "the right to petition is cut from the same cloth as the other [*814] guarantees of that Amendment, and is an assurance of a particular freedom of expression."

Moreover, seven of the eight circuit courts addressing this issue have held a public employee who alleges he or she was disciplined [***34] in retaliation for filing a grievance against the employer does not state a claim under § 1983 unless the grievance addressed a matter of public concern. *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) ("The First Amendment right to petition the government for a redress of grievances . . . is 'generally subject to the same constitutional analysis' as the right to free speech." (quoting *Wayte v. United States*, 470 U.S. 598, 610 n.11, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985))); *Day*, 768 F.2d at 703 ("An employee's complaint to her superior on a personal matter is no more a matter of public concern when embodied in a letter to him requesting a hearing than it is when spoken to him."); *Rice v. Ohio Dep't of Transp.*, 887 F.2d 716, 721 (6th Cir. 1989) ("[Plaintiff] was not 'speak[ing] out as a citizen' when he filed his reverse discrimination charge."), *vacated on other grounds* by 497 U.S. 1001, 110 S. Ct. 3232, 111 L. Ed. 2d 744 (1990); *Altman v. Hurst*, 734 F.2d 1240, 1244 n.10 (7th Cir. 1984) (per curiam) ("[A] private office dispute cannot be constitutionalized [***35] merely by filing a legal action."); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1262 (7th Cir. 1988) ("[W]e decline to hold as a matter of law that the fact that [the employer] may have terminated [the employee] in retaliation for threatening to file a grievance constitutes a *per se* violation of the first amendment."); *Gearhart*, 768 F.2d at 1073 (per curiam) (grievances related to "matters only of personal interest," and do not invoke first amendment protection" (quoting *Connick*, 461 U.S. at 147)); *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir. 1984) (per curiam) ("[P]laintiff's grievance is protected under the First Amendment only if it related to a matter of public concern."). Cf. *Boyle v. Burke*, 925 F.2d 497, 505-06 (1st Cir. 1991) (dicta). Only the Third Circuit has disagreed, holding a grievance or lawsuit brought by a public employee is constitutionally protected, regardless of whether it involved [*815] a matter of public concern. *San Filippo v. Bongiovanni*, 30 F.3d 424, 442 (3d Cir. 1994).

The Ninth Circuit recently criticized the holding of *San Filippo* in *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997), *cert. denied*, 524 U.S. 952, 118 S. Ct. 2368, 141 L. Ed. 2d 737 (1998).

139 Wn.2d 793, *; 991 P.2d 1135, **;
2000 Wash. LEXIS 77, ***; 15 I.E.R. Cas. (BNA) 1665

[T]he Third Circuit's analysis . . . diverges from the Supreme Court's teachings that the primary function of the First Amendment is to facilitate participation in a free political process and that the First Amendment extends its guarantees to public employees in order to encourage such participation. Moreover, it equates the government's conduct as employer with its conduct as government. When government as employer disciplines an employee for pursuing litigation, it does not act as "the very government" which established the mechanism for redress in accordance with its constitutional obligation, but rather in its role as an employer.

Rendish, 123 F.3d at 1223. Following the majority of the circuits, the court held, "Regardless [**1147] of whether the right to grieve an employment dispute is characterized as the exercise of the right to petition or the right to free speech, the same public concern requirement applies." *Id.*

[***37] [9] We believe the better reasoned view is that a public employee's claim against a public employer under 42 U.S.C. § 1983 alleging a violation of the employee's petition clause rights under the First Amendment must satisfy the public concern requirement articulated in *Connick*. To hold otherwise could provoke judicial scrutiny to every institutional response to a comment. See *Wilson v. State*, 84 Wn. App. 332, 342-43, 929 P.2d 448 (1996). As we so recently held in *White*, the absence of a public concern in the exercise of a First Amendment right defeats a public employee's cause of action against a public employer under 42 U.S.C. § 1983, *White*, 131 Wn.2d at 20.

In the present case, the content of Smith's grievances cannot be characterized as involving matters of public concern. Accordingly, we do not need to scrutinize the [*816] reasons for her dismissal, see *Connick*, 461 U.S. at 146, and hold the trial court properly dismissed Smith's claims against Bates and its employees under 42 U.S.C. § 1983.

CONCLUSION

As our prior case law has [***38] not clearly defined the scope of the common law tort of wrongful discharge in violation of public policy, we now expressly hold the common law tort is available to all employees without regard to whether an employee is terminable at-will or may be discharged only for cause. We also hold an employee need not exhaust contractual or administrative remedies before bringing an independent tort action for wrongful discharge in violation of public policy. Accordingly, we reverse the trial court's summary dismissal of Smith's wrongful termination claim and remand to the trial court for trial on this issue.

Although Smith's complaint alleges a violation of the petition clause of the First Amendment, we conclude a public employee states a claim under 42 U.S.C. § 1983 against a public employer for violation of First Amendment rights only if the employee's expression implicates a matter of public concern. Because Smith's grievances involved purely private matters, we affirm the trial court's dismissal of Smith's § 1983 claim.

Smith, Madsen, Alexander, and Ireland, JJ., concur.

Johnson, J., concurs in the result.

DISSENT BY: TALMADGE, J.

DISSENT

Talmadge, J. (concurring in [***39] part/dissenting in part) -- I agree with the majority that Kelly Smith failed to establish a cause of action under 42 U.S.C. § 1983 against Bates Technical College and the individual defendants (Bates) for allegedly exercising her First Amendment rights because her expression to Bates related to a purely private concern. But I dissent on the issue of whether the common law tort of wrongful discharge in violation of public policy extends [*817] to employees like Smith, who have the protection of civil service laws or collective bargaining agreements and who may be terminated only for cause. The majority ignores the historical rationale for the tort and our case law in extending the cause of action beyond at-will employees. I would affirm the trial court's dismissal of Smith's complaint.

The majority correctly notes that under Washington common law, an employer could generally discharge an employee with or without cause absent an agreement or statutory system regulating the employment relationship to the contrary. *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887, 891, 568 P.2d 764 (1977). But an employer's absolute prerogative to discharge [***40] an employee is not unfettered. In fact, in recent years we have created certain exceptions to the terminable-at-will doctrine. For example, we joined most jurisdictions in recognizing a cause of action in tort for

wrongful discharge in violation of a clear mandate of public policy. See *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984) (adopting this narrow exception because it properly balances the interest of both the employer and the employee). "The policy underlying the exception [to the terminable-at-will rule] 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.* at 231. Consequently, an employee has a common law cause of action in tort for wrongful discharge, even if the employee's service is at the will of the employer, if the discharge contravenes a clear mandate of public policy. See *id.* at 232. In essence, this common law tort affords job security protections to employees who, unlike civil servants or employees subject to a collective bargaining agreement (CBA), may have no other remedy for arbitrary [***41] employer conduct.

We have applied this exception to the terminable-at-will [*818] rule only in cases where the public policy is clear. ⁵ In fact, in only a few cases have we found a violation of public policy. See, e.g., *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 950, 913 P.2d 377 (1996) (an armored truck driver's discharge for leaving the truck to save a woman from imminent death violated public policy, although such a holding did not invalidate the defendant's work rule regarding drivers leaving the truck). See also *Bravo v. Dolsen Co.*, 125 Wn.2d 745, 758, 888 P.2d 147 (1995) (finding employer's discharge of nonunionized plaintiffs for engaging in "concerted activities" violated public policy); *Bennett v. Hardy*, 113 Wn.2d 912, 924-25, 784 P.2d 1258 (1990) (applying the *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989) whistleblowing analysis and finding the employer's alleged wrongdoing--unlawful age discrimination--together with the employee's reasonable response to the conduct, violated public policy). But see, e.g., *Keenan v. Allan*, 91 F.3d 1275, 1281 (9th Cir. 1996) [***42] (although public policy encourages good faith reporting of improper governmental action, because the plaintiff failed to show causation or to rebut the defendant's proffer of an alternative "overriding justification" for her dismissal, the court found no public policy violation). See also *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 876 P.2d 435 (1994) (finding no violation of public policy (public safety) where the defendant failed to show he communicated his opposition to alleged violations of a certification procedure and he never personally refused to implement a company program violating "public policy").

5 Public policy "concerns what is right and just and what affects the citizens of the State collectively." *Roberts v. Dudley*, 92 Wn. App. 652, 659, 966 P.2d 377 (1998) (quoting *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989)).

The fundamental issue in this case is whether the common law tort of wrongful discharge extends to an employee [***43] who is terminable only for cause. Affirming the summary dismissal of Smith's wrongful discharge claim, the Court of Appeals noted this remedy is "generally, if not exclusively, applied to employment at-will situations." *Smith v. Bates* [*819] *Technical College*, No. 19937-8-II, slip op. at 8 (Wash. Ct. App. May 29, 1998) (quoting *Micone v. Town of Steilacoom Civil Serv. Comm'n*, 44 Wn. App. 636, 643 n.2, 722 P.2d 1369 (1986)). See also *Albright v. State*, 65 Wn. App. 763, 829 P.2d 1114 (1992). Our prior decisions confirmed this. In *Reninger v. Department of Corrections*, 134 Wn.2d 437, 445, 951 P.2d 782 (1998), for example we stated:

DOC argues the doctrines of wrongful discharge or constructive wrongful discharge do not apply to employees who are not terminable at-will. *Reninger* and *Cohen*, given their civil service status, were not terminable at-will employees. *Indeed, our case law has questioned the viability of such a tort where other relief is available to an affected employee. See, e.g., Micone v. Town of Steilacoom Civil Serv. Comm'n*, 44 Wn. App. 636, 643 n.2, 722 P.2d 1369 (questioning "whether [***44] the doctrine of constructive discharge even applies to employment governed by civil service rules"), *review denied*, 107 Wn.2d 1010 (1986); *Albright v. State*, 65 Wn. App. 763, 768-69, 829 P.2d 1114 (1992) (same).

134 Wn.2d at 445 (emphasis added). Furthermore, the United States District Court for the Eastern District of Washington observed: "the claim of 'discharge in violation of public policy' exists only as a narrow exception to the at-will doctrine; there is no such claim in cause-only employment." *Keenan v. Allan*, 889 F. Supp. 1320, 1367 (E.D. Wash. 1995), *aff'd*, 91 F.3d 1275 (9th Cir. 1996). Similarly, in *White v. State*, 131 Wn.2d 1, 929 P.2d 396 (1997), we declined to extend the tort to include wrongful transfers and refused to subject each disciplinary decision of the employer to judicial scrutiny. "This is particularly true in instances like this one where an employee's rights are already protected by civil service rule, by collective bargaining agreement, and by civil rights statutes." *Id.* at 20.

Other jurisdictions have also adopted the view that the [***45] common law tort of wrongful discharge applies only to at-will employees. See *Cullen v. E.H. Friedrich Co.*, 910 F. Supp. 815, 821 (D. Mass. 1995) (under Massachu-

setts law, [*820] "[t]he cause of action [for wrongful discharge in violation of public policy] is only available to 'at-will' employees"; *Luethans v. Washington Univ.*, 894 S.W.2d 169, 173 (Mo. 1995) ("a wrongful discharge action is only available to an employee at-will"); *Silva v. Albuquerque Assembly & Distrib. Freeport Warehouse Corp.*, 106 N.M. 19, 738 P.2d 513, 515 (1987) ("Obviously, if an employee is protected from wrongful discharge by an employment contract, the intended protection afforded by the retaliatory discharge action is unnecessary and inapplicable"); *Phillips v. Babcock & Wilcox*, 349 Pa. Super. 351, 503 A.2d 36, 38 (1986) ("We hold that an action for the tort of wrongful discharge is available only when the employment relationship is at-will."); *Hermreck v. United Parcel Serv., Inc.*, 938 P.2d 863, 867 (Wyo. 1997) ("Where an employment contract is present, there does not exist any necessity for invoking a separate [***46] action for the tort of retaliatory discharge as to vindicate public policy."); *Tomlinson v. Board of Educ.*, 226 Conn. 704, 730 n.18, 629 A.2d 333, 347 n.18 (1993) (because plaintiff is not an employee at-will, she "is not entitled to invoke the common law doctrine of wrongful discharge as a separate cause of action in tort."); and *Stiles v. American Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449, 452 (1999) (Toal, J., concurring) (Wrongful discharge tort "is not designed to overlap an employee's statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists."). Cf. *Wilson v. City of Monroe*, 88 Wn. App. 113, 121, 943 P.2d 1134 (1997), review denied, 134 Wn.2d 1028, 958 P.2d 318 (1998).

The majority largely overlooks this great weight of authority from around the United States and allows Smith a cause of action in tort for her allegedly wrongful discharge, *even though the statutory and contractual remedies worked for her*. The majority affords public employees greater protection than other workers [***47] in our state and provides significant disincentives for public employees to use the statutory and contractual mechanisms created for protection of their employment rights. Why use a CBA's [*821] arbitration clause or the Public Employment Relations Commission (PERC) when the majority permits a public employee to go to court?

In the final analysis, the common law tort of wrongful discharge in violation of public policy should be available only to persons who are terminable-at-will. This tort was designed to afford employees job security protection from employer actions in violation of public policy when those employees had no other viable protections in contract or at law; that is not the case here. For employees who have the extensive protection of civil service laws or CBAs, their job security is embodied in statutory "for cause" termination provisions and the negotiated job security of a CBA. Thus, Smith, as both a public employee and a union member, is protected administratively as well as through her negotiated CBA. *RCW 28B.52.025*; *RCW 41.56.024*. Indeed, Smith's CBA afforded her a swift, certain remedy in arbitration, which resulted in her restoration to employment, and back [***48] pay. Moreover, Smith still has unfair labor practice complaints pending before PERC, which has the authority to issue "appropriate remedial orders[.]" *RCW 41.56.160(1)*. Furthermore, such orders are subject to considerable judicial deference. See *Municipality of Metro. Seattle v. Public Employment Relations Comm'n*, 118 Wn.2d 621, 826 P.2d 158 (1992).⁶

⁶ This is not to say that an employee's civil service or CBA protections somehow forestall a cause of action specifically created by statute. For example, in *Riccobono v. Pierce County*, 92 Wn. App. 254, 265-66, 966 P.2d 327 (1998), the court held a county employee with civil service and collective bargaining remedies was entitled to sue for wrongful discharge under RCW 49.60, Washington's law against discrimination, without exhausting civil service or CBA remedies. Where the Legislature has created general *statutory* protections for employees, employees who are beneficiaries of civil service or CBA protection are still entitled to such remedies in court.

[***49] The majority finds that employees protected by civil service or CBAs may still seek the common law cause of action because the remedies afforded by an action in court may exceed those available through civil service or a CBA. Majority at 805. This refrain from the majority was expressly rejected by this court in *Reninger* in the context of an [*822] argument regarding the preclusive effect of administrative actions on subsequent court proceedings. The majority now tries to do by the back door what was not done in response to a more straightforward argument in *Reninger*.

The majority also believes that it can discern a clear violation of public policy here. Ordinarily, in determining whether a clear mandate of public policy has been violated, we consider "whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme." *Thompson*, 102 Wn.2d at 232 (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (1982)). In *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996), we established a framework for discerning a clear [***50] mandate of public policy. What constitutes such a clear mandate is a question of law. See *Dicomes v. State*, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989).

139 Wn.2d 793, *; 991 P.2d 1135, **;
2000 Wash. LEXIS 77, ***; 15 I.E.R. Cas. (BNA) 1665

We have generally allowed public policy tort actions in four situations: (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation; (3) where employees are fired for exercising a legal right or privilege; and (4) where employees are fired in retaliation for reporting employer misconduct. *See Gardner, 128 Wn.2d at 936* (quoting *Dicomes, 113 Wn.2d at 618*). The touchstone of these exceptions is whether the employer's discharge violates some public rather than some private interest. *See Dicomes, 113 Wn.2d at 618* ("Although there is no precise line of demarcation dividing matters that are . . . public . . . from matters purely personal, . . . a matter must strike at the heart of a citizen's social rights, duties, and responsibilities . . .") (quoting *Pal-mateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876, 52 Ill. Dec. 13 (1981)*).

The majority [***51] discerns a "clear mandate of public policy" from the very statute its opinion effectively undercuts. If the public policy mandate of CBAs and PERC is so clear, the majority should simply allow that public policy to be applied as the Legislature envisioned in Kelly Smith's case. [*823] Instead, the majority appears to suggest only the judiciary knows best.

Finally, in this case, the majority purports to short circuit the process created by the Legislature to determine if a violation of public policy has occurred. Thus, public employees need not exhaust either civil service or CBA remedies to determine if they were terminated "for cause." Rather, the courts now become available to any public employee claiming wrongful treatment. The courts are substituted for PERC or arbitrators under CBAs. This unfathomable extension of judicial power, heedless of any restraint, is not only unsupported in law, but also positively dangerous to public employers and employees. The expertise of PERC and labor arbitrators may be freely disregarded in favor of court actions before judges whose expertise in public labor law certainly is not as great. Again, we rejected this argument in *Reninger* only [***52] to see it now revived by the majority without the slightest attention being paid to principles of stare decisis. *See Reninger, 134 Wn.2d at 450*.

CONCLUSION

Our prior case law on the scope of the common law tort of wrongful discharge in violation of public policy broadly hinted the tort is confined to at-will employment because civil service statutory protections and the provisions of CBAs appropriately protected employee job security. We should expressly hold the common law tort is available only to employees who are terminable-at-will, and affirm the trial court decisions in favor of Bates.

Guy, C.J., concurs with Talmadge, J.



LEXSEE 156 WN.2D 168

STEVEN M. KORSLUND ET AL., *Respondents*, v. DYNCORP TRI-CITIES SERVICES, INC., ET AL., *Petitioners*.

No. 75662-7

SUPREME COURT OF WASHINGTON

156 Wn.2d 168; 125 P.3d 119; 2005 Wash. LEXIS 990; 23 I.E.R. Cas. (BNA) 1607; 152 Lab. Cas. (CCH) P60,128

June 7, 2005, Oral Argument
December 22, 2005, Filed

PRIOR HISTORY: [***1]

Korslund v. DynCorp Tri-Cities Servs., 121 Wn. App. 295, 88 P.3d 966, 2004 Wash. App. LEXIS 752 (2004)

SUMMARY:

Nature of Action: Three employees sought damages from their former employer, a subcontractor at the Hanford Nuclear Reservation, and from the general contractor for wrongful discharge and wrongful retaliation in violation of public policy and breach of promises of specific treatment in specific situations. The plaintiffs also sought punitive damages under Virginia law if any of their claims were actionable. The plaintiffs claimed that they were subjected to unlawful, adverse treatment arising from their allegations of safety violations, mismanagement, and fraud at the Hanford site.

Superior Court: The Superior Court for Benton County, No. 98-2-00979-6, Vic L. VanderSchoor, J., on November 15, 2002, entered a summary judgment in favor of the defendants.

Court of Appeals: The court *affirmed* the judgment in part, *reversed* it in part, and *remanded* the case for further proceedings at 121 Wn. App. 295, 88 P.3d 966 (2004), holding that, as to one of the plaintiffs, the record supported a claim of wrongful discharge in violation of public policy, that the claims of wrongful retaliation in violation of public policy were not cognizable, that the record supported the claims of breach of promises of specific treatment in specific situations, and that Virginia law did not apply to allow the plaintiffs to recover punitive damages.

Supreme Court: Holding that the trial court properly dismissed the tort claims alleging discharge and retaliation in violation of public policy but that material issues of fact precluded summary judgment on the claims of breach of promises of specific treatment in specific situations, the court *affirms* the decision of the Court of Appeals in part, *reverses* it in part, and *remands* the case for further proceedings.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Employment -- Termination -- Violation of Public Policy -- Right of Action -- In General A claim for wrongful discharge in violation of public policy may arise when an employer discharges an employee for reasons that contravene a clear mandate of public policy.

[2] Employment -- Termination -- Violation of Public Policy -- Categories Claims of wrongful discharge in violation of public policy generally arise where employees are fired for refusing to commit an illegal act, for performing a public duty or obligation, for exercising a legal right or obligation, or for engaging in whistleblowing activity.

[3] Employment -- Termination -- Violation of Public Policy -- Right of Action -- Exception to At-Will Employment Rule The cause of action for wrongful discharge in violation of public policy is an exception to the rule that employment contracts that are indefinite in duration may be terminated at will by either the employer or the employee.

[4] Employment -- Termination -- Violation of Public Policy -- Right of Action -- For-Cause Employees The cause of action for wrongful discharge in violation of public policy is available to employees who are dischargeable only for cause (and who may be covered by a collective bargaining agreement).

[5] Employment -- Termination -- Violation of Public Policy -- Intent To Discharge Wrongful discharge in violation of public policy is an intentional tort -- the plaintiff must establish wrongful intent to discharge in violation of public policy.

[6] Employment -- Termination -- Violation of Public Policy -- Elements -- In General A cause of action for wrongful discharge in violation of public policy is not established unless (1) the employee proves (a) the existence of a clear public policy (the clarity element), (b) that discouraging the employee's conduct would jeopardize the public policy (the jeopardy element), and (c) that public-policy-linked conduct caused the dismissal (the causation element) and (2) the employer is unable to offer an overriding justification for the dismissal.

[7] Employment -- Termination -- Violation of Public Policy -- Elements -- Discharge -- Actual or Constructive -- Intolerable Working Conditions -- Medical Leave -- Permanence -- Necessity For purposes of an action for wrongful discharge in violation of public policy, constructive discharge from employment may be shown where the employer deliberately made the employee's working conditions so intolerable that the employee was required for medical reasons to permanently leave the workplace. A medical leave must be comparable to termination of employment to qualify as a constructive discharge for purposes of the wrongful discharge action, and therefore constructive discharge is not shown where the employee leaves the workplace for medical reasons but the employee continues to receive employment benefits and is still considered to be an active employee, or where the employee's ability to return to work is protected in some other way.

[8] Employment -- Termination -- Violation of Public Policy -- Elements -- Jeopardy -- Proof To establish the jeopardy element of an action for wrongful discharge in violation of public policy, the plaintiff must show that he or she engaged in particular conduct directly relating to or necessary for the effective enforcement of the public policy. The plaintiff must prove that discouraging the particular conduct would jeopardize the public policy. The plaintiff must also show that other means of promoting the public policy are inadequate.

[9] Employment -- Termination -- Violation of Public Policy -- Elements -- Jeopardy -- Question of Law or Fact While the question whether the jeopardy element of an action for wrongful discharge in violation of public policy 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 where the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy.

[10] Employment -- Termination -- Violation of Public Policy -- Elements -- Jeopardy -- Energy Reorganization Act -- Whistleblowing Procedures -- Effect The administrative process for adjudicating whistleblower complaints under 42 U.S.C. § 5851(b)(2)(B) of the federal Energy Reorganization Act provides sufficient protection of the public policy expressed in 42 U.S.C. § 5851(a)(1)(A) of encouraging and protecting employee reporting of statutory violations in nuclear industry operations without fear of retaliation or reprisal to preclude an action for wrongful discharge in violation of public policy based on that public policy.

[11] Employment -- Employee Policy Manual -- Effect -- Promise of Treatment -- Enforcement -- In General Where an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, the promises are enforceable components of the employment relationship.

[12] Employment -- Employee Policy Manual -- Effect -- Promise of Treatment -- Enforcement -- Elements of Claim An employee seeking judicial enforcement of a claimed promise of specific treatment in specific situations as

156 Wn.2d 168, *; 125 P.3d 119, **;
2005 Wash. LEXIS 990, ***; 23 I.E.R. Cas. (BNA) 1607

set forth in an employee manual or handbook or similar document must prove (1) that the statement or statements of the policy made in the manual, handbook, or document amount to a promise of specific treatment in specific situations; (2) justifiable reliance on the promise; and (3) breach of the promise by the employer.

[13] Employment -- Employee Policy Manual -- Effect -- Promise of Treatment -- Question of Law or Fact Each of the elements of a claim for breach of a promise of specific treatment in specific situations as set forth in an employee manual or handbook generally presents a question of fact that may be decided as a matter of law if reasonable minds could not differ as to its resolution.

[14] Employment -- Employee Policy Manual -- Effect -- Promise of Treatment -- Enforcement -- Relationship to Breach of Contract Action An employee's claim of breach of a provision in an employee manual or handbook promising specific treatment in specific situations rests on a justifiable reliance theory; it is not an express or implied contract claim and is not analyzed as a contract claim.

[15] Employment -- Employee Policy Manual -- Effect -- Promise of Treatment -- Enforcement -- Discharge From Employment -- Necessity Actual discharge from employment is not a necessary prerequisite to a claim of breach of a promise of specific treatment in specific situations as set forth in an employee manual or handbook.

[16] Employment -- Employee Policy Manual -- Effect -- Promise of Treatment -- Collective Bargaining Agreement -- Effect An employee who is covered by a collective bargaining agreement is not necessarily precluded from pursuing a claim against the employer for breach of a promise of specific treatment in specific situations as expressed in an employee manual or handbook.

[17] Employment -- Employee Policy Manual -- Effect -- Terminable-at-Will Relationship -- In General An employee's written acknowledgment that the employment relationship is terminable at will by either the employer or the employee does not preclude the possibility of an alteration in the employment relationship by language in an employee manual or handbook issued by the employer if such language constitutes (1) a promise of specific treatment in specific situations or (2) a modification of the employment contract (if the formalities of contract modification are met).

[18] Employment -- Employee Policy Manual -- Effect -- Promise of Treatment -- Protection Against Retaliation -- Mandatory Language -- "Will" A statement of company policy in an employee manual or handbook is not too indefinite if the policy statement provides that some corrective action will be taken against management or employees if the policy is violated and that disciplinary action will be taken against any supervisor who retaliates, directly or indirectly, or who encourages others to retaliate against an employee who reports a violation of the policy.

[19] Employment -- Employee Policy Manual -- Effect -- Promise of Treatment -- Reliance -- Justifiable Reliance -- Inducement To Remain on Job The justifiable reliance element of an employee's claim for breach of a promise of specific treatment in specific situations as expressed in an employee manual or handbook requires a showing that the employee was aware of the specific promise allegedly breached and was induced by that specific promise to remain on the job and not seek other employment.

COUNSEL: *Larry E. Halvorson and Michael B. Saunders* (of *Halvorson & Saunders, P.L.L.C.*), for petitioners.

Victorial L. Vreeland (of *Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, P.L.L.C.*), for respondents.

Russell C. Brooks and Deborah J. La Fetra on behalf of Pacific Legal Foundation, amicus curiae.

Jayne L. Freeman on behalf of Washington Defense Trial Lawyers, amicus curiae.

*Jeffrey L. Needle and Susan B. Mindenberg*s on behalf of Washington Employment Lawyers Association, amicus curiae.

Debra L.W. Stephens and Bryan P. Harnetiaux on behalf of Washington State Trial Lawyers Association Foundation, amicus curiae.

JUDGES: MADSEN, J. CHAMBERS, J. (concurring/dissenting).

OPINION BY: MADSEN

OPINION

En Banc.

[**122] [*172] P1 Madsen, J. -- Steven M. Korslund, Virginia A. Miller, and John Acosta (the plaintiffs) brought suit against DynCorp Tri-Cities Services, Inc., and [***2] Fluor Daniel Hanford, Inc. (DynCorp), arising from alleged retaliation and harassment by DynCorp management and employees in response to the plaintiffs' reports of safety violations, mismanagement, and fraud at the Hanford Nuclear Reservation. Two plaintiffs, Korslund and Miller, claim that they were constructively discharged in violation of public policy. [*173] All three plaintiffs urge that they have raised valid claims of retaliation in violation of public policy and that their employer breached promises of specific treatment in specific situations. We conclude that the trial court properly granted summary on the tort claims alleging discharge and retaliation in violation of public policy, but that material issues of fact preclude summary judgment on the plaintiffs' claims that their employer breached promises of specific treatment in specific situations.

FACTS

P2 In October 1996, Fluor became the prime Department of Energy contractor at the Hanford site, and its subcontractor DynCorp took over responsibility for the Fire Systems Maintenance (FSM) group. Jon Finley became manager of the FSM group, and his supervisor was Fire Chief Don Good, who reported to Mike Dallas, DynCorp's director [***3] of operations. Miller and Acosta were partnered journeymen electricians who had worked in the FSM group since 1979. They were covered by collective bargaining agreements. Korslund was the fire systems administrator and lead engineer in the group. At the time DynCorp took over, Korslund signed an employment application that stated that employment was at will.

P3 Starting early in 1997, the plaintiffs made a series of oral and written reports and complaints, some anonymous, relating to health and safety issues, abuse of overtime, abuse of work hours, misuse of government funds, nepotism, improper gifting of equipment, improper use of government property, and threats and retaliation against them for reporting. Many of the reports implicated Finley. The plaintiffs allege they were mistreated, threatened, harassed by managers and coworkers, and retaliated against in numerous ways. For example, Miller had raised concerns, both anonymously and in a meeting on August 1 that did not include Finley, that other workers were harassing her because she had raised issues about abuse of work hours. [*174] On August 4, 1997, allegedly in response to one of the anonymous complaints, Finley issued a memorandum [***4] outlining his expectations about workers' starting times and breaks. Miller alleges that other workers were upset that she had raised the issue and that she and Acosta were ostracized, threatened, and harassed by the group's pipe fitters. She says that she complained about it to another supervisor, but nothing was done.

P4 On September 10, 1997, Finley issued written warnings to Miller and Acosta for extremely serious misconduct and insubordination when they did not move their equipment from a Suburban to a van in a timely fashion. They had used the Suburban for years and believed that Finley wanted it for his own use because it was a nicer vehicle. Both filed union grievances. Then, allegedly as part of his retaliatory conduct and harassment, on September 29, 1997, Finley told Miller that she would have to begin work at 7:30 instead of 8:00, which he said conflicted with the start time of other FSM electricians. Miller alleges that Finley knew that the later starting time was necessary because she has a special needs child.

P5 On November 21, 1997, Finley, and others (including a union representative), met [**123] with Miller and notified her that she was being transferred from FSM in order to [***5] remove her from what she considered to be a hostile work environment and to accommodate her scheduling needs relating to her child. She was to receive the same salary, benefits, seniority, and job position. Miller filed a union grievance, which was later withdrawn. She never actually transferred because she left work. She alleges the proposed transfer was retaliatory and that in the new position she would have been unable to maintain certain credentials and would have been lower in relative seniority because many workers at the new location had seniority.

P6 In the meantime, on July 25, Finley appointed another man to the FSM electrical lead position, removing Korslund's lead engineer title. Korslund alleges that his work authority and job responsibilities were also diminished. [*175] His work hours were not changed and his salary was not reduced. In August, Korslund was asked to submit a revised

156 Wn.2d 168, *, 125 P.3d 119, **;
2005 Wash. LEXIS 990, ***; 23 I.E.R. Cas. (BNA) 1607

conflict of interest questionnaire to show his personal relationship with Ms. Miller. The request was later rescinded. On September 17, 1997, Korslund met with Dallas and told him about overtime abuses, theft, and bribery in the FSM group and then sent him a 15-page memorandum raising 29 concerns, [***6] some of which were safety and ethical concerns. DynCorp's president then appointed Don Hay to investigate. After the investigation was complete, Korslund was called to a meeting on November 14, 1997, where, he alleges, he was not permitted to dispute findings accusing him of misconduct. He also says he was threatened with termination if he would not support and trust management. In October 1997, Korslund sent a letter to DynCorp's corporate ethics office in Virginia and included reports that health and safety principles were being violated, unqualified persons were directing the work, and he was being harassed for reporting.

P7 Promises contained in policy manuals, which the plaintiffs contend were breached, are discussed below in connection with the claim of breach of promises of specific treatment in specific situations.

P8 All three plaintiffs allege that DynCorp's actions caused them physical and emotional injury. Korslund suffered a panic attack, displayed symptoms associated with posttraumatic stress disorder, aggravated work related high blood pressure, and stomach and bowel problems. In November 1997, Korslund was placed on disability by a Hanford psychologist. He received full [***7] salary for three months on paid medical leave and then was on short-term disability until June 1998. In July 1998, he applied for unemployment benefits, contending he had been constructively discharged. DynCorp responded saying Korslund was still employed but on long-term disability. The Employment Security Department found that an insurer had denied long-term disability benefits, determined that Korslund had quit work with good cause, and awarded unemployment [*176] benefits. Korslund notified DynCorp in September 1998 that he had accepted other employment, requested the balance of benefits due him and a rollover of his pension funds, and then moved to Virginia for the new job.

P9 Also in November 1997, Miller was placed on medical disability by a physician. A number of health care professionals determined in 1997 and 1998 that she suffers from too many medical and psychological problems to return to work. She relocated to Virginia with Korslund. In October 2000, Miller was found to be disabled and awarded social security disability benefits. Acosta remained at work with DynCorp. He was treated for problems of depression, nervousness, sleeplessness, anxiety, and fear.

P10 The plaintiffs sued [***8] DynCorp, bringing claims, among others, of wrongful discharge in violation of public policy and breach of promises of specific treatment in specific situations. DynCorp moved for summary judgment, which the trial court granted, concluding that the plaintiffs had failed to show they were constructively discharged and that as a matter of law DynCorp did not make promises of specific treatment in specific situations in its policy manuals. The plaintiffs appealed. The Court of Appeals reversed dismissal of Korslund's wrongful discharge claim, holding, among other things, that Korslund did not have to formally quit [**124] or resign to show constructive discharge; instead, the court determined, Korslund raised a sufficient fact question as to whether he permanently left the workplace on medical leave as a result of DynCorp's creation of intolerable working conditions. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 121 Wn. App. 295, 313-16, 88 P.3d 966 (2004). The court affirmed dismissal of Miller's wrongful discharge claim on the basis that reasonable minds could not differ that she had not permanently left her job. *Id.* at 316. The Court of Appeals also reversed [***9] summary judgment on the plaintiffs' claims of breach of promises of specific treatment in specific situations, concluding that the plaintiffs had raised fact questions as to each element of the cause of action. *Id.* at 325-31. The court declined to recognize a cause [*177] of action for wrongful retaliation in violation of public policy, ruling that it was precluded from doing so by *White v. State*, 131 Wn.2d 1, 929 P.2d 396 (1997). The Court of Appeals rejected the plaintiffs' argument that Virginia's law of punitive damages should apply. *Korslund*, 121 Wn. App. at 334-36.

P11 We granted DynCorp's petition for discretionary review. The plaintiffs have also raised issues on discretionary review.

ANALYSIS

P12 This case is here for review of the trial court's grant of summary judgment in favor of DynCorp. Accordingly, review is de novo, with this court engaging in the same inquiry as the trial court. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707-08, 50 P.3d 602 (2002). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c)*; *Hubbard*, 146 Wn.2d at 707. [***10] The facts and reasonable inferences therefrom are construed most favorably to the nonmoving party. *Id.* Summary judgment should be granted if reasonable persons could reach but one conclusion from the evidence presented. *Id.*

Claim of Wrongful Discharge in Violation of Public Policy

156 Wn.2d 168, *; 125 P.3d 119, **;
2005 Wash. LEXIS 990, ***; 23 I.E.R. Cas. (BNA) 1607

P13 The first question raised by the parties is whether a claim of wrongful constructive discharge in violation of public policy can be brought where the employee "permanently leaves" the job on medical leave but does not quit or resign.¹

¹ DynCorp urges the court to consider whether constructive discharge should support a claim of wrongful discharge in violation of public policy. While we have not analyzed this issue, we have stated that a cause of action for wrongful discharge in violation of public policy may be based on either express or constructive discharge. *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 238, 35 P.3d 1158 (2001). DynCorp offers no reason why the theory of constructive discharge should not apply in the context of the tort of wrongful discharge in violation of public policy, and we find no compelling reason why the tort cannot be based on constructive discharge.

[***11] [*178] [1] [2] [3] [4] P14 A claim for wrongful discharge in violation of public policy may arise when an employer discharges an employee for reasons that contravene a clear mandate of public policy. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996). The cases addressing the claim generally involve situations where employees are fired for refusing to commit an illegal act, for performing a public duty or obligation, for exercising a legal right or privilege, or for engaging in whistleblowing activity. *Id.* at 938; *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989). The cause of action was first recognized in this state as an exception to the rule that employment contracts that are indefinite in duration may be terminated at will by either the employer or the employee. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 231-33, 685 P.2d 1081 (1984); see *Hubbard*, 146 Wn.2d at 707. The cause of action is also available to employees who are dischargeable only for cause (and who may be covered by a collective bargaining agreement). *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 801-07, 991 P.2d 1135 (2000); [***12] see *Wilson v. City of Monroe*, 88 Wn. App. 113, 119-21, 943 P.2d 1134 (1997).

[5] [6] P15 The claim of wrongful discharge in violation of public policy is a claim [**125] of an intentional tort - the plaintiff must establish wrongful intent to discharge in violation of public policy. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 177, 876 P.2d 435 (1994); *Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 726 P.2d 434 (1986). To satisfy the elements of the cause of action, the "plaintiff must prove (1) the existence of a clear public policy (*clarity* element); (2) that discouraging the conduct in which [he or she] engaged would jeopardize the public policy (*jeopardy* element); and (3) that the public-policy-linked conduct caused the dismissal (*causation* element)." *Hubbard*, 146 Wn.2d at 707 (citing *Gardner*, 128 Wn.2d at 941). Then, (4) "the defendant must not be able to offer an overriding justification for the dismissal" (*absence of justification* element)." *Hubbard*, 146 Wn.2d at 707 (quoting *Gardner*, 128 Wn.2d at 941).

P16 The Court of Appeals held that the tort of wrongful discharge [***13] in violation of public policy is available to a [*179] worker if the employer makes working conditions so intolerable that the employee is forced to leave the workplace for medical reasons rather than quit or resign. The court relied on the analysis in *White v. Honeywell, Inc.*, 141 F.3d 1270 (8th Cir. 1998), where an employee brought a claim of constructive discharge in violation of the Civil Rights Act, 42 U.S.C. § 2000e. She had not formally quit but instead had taken an unpaid medical leave. The Eighth Circuit held that the trial court improperly instructed the jury that it had to find the employee "quit" her job, reasoning that it was

not prepared to say that "quit" is the magic word in a constructive discharge instruction. A person who has suffered a forced unpaid medical leave of absence, from which she is unable to return and which resulted from objectively intolerable working conditions, is in no better position than one who was forced to quit as a result of objectively intolerable conditions. In either case, the employer has, through objectively intolerable conditions, forced the employee out of active service. We believe it is sufficient [***14] for a plaintiff to prove that an employer deliberately rendered working conditions intolerable and thus forced the employee to permanently "leave" the employment; the employee need not prove that she technically "quit" in every case.

White, 141 F.3d at 1279, quoted in *Korslund*, 121 Wn. App. at 315; see also *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 381 (W.D. N.C. 1988) (sex discrimination claim under Civil Rights Act; employee left work on unpaid medical leave).

156 Wn.2d 168, *; 125 P.3d 119, **;
2005 Wash. LEXIS 990, ***; 23 I.E.R. Cas. (BNA) 1607

P17 As DynCorp points out, Washington cases generally describe constructive discharge as involving deliberate acts by the employer that create intolerable conditions, thus forcing the employee to quit or resign. *See Bulaich v. AT&T Info. Sys.*, 113 Wn.2d 254, 261, 778 P.2d 1031 (1989); *Martini v. Boeing Co.*, 137 Wn.2d 357, 366 n.3, 971 P.2d 45 (1999); *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 631, 700 P.2d 338 (1985). However, we have not previously considered and rejected the constructive discharge theory advanced by the plaintiffs.

[*180] P18 DynCorp also contends that the Court of Appeals' holding is [***15] inconsistent with the principle that the tort should be "narrowly construed in order to guard against frivolous lawsuits." *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 446, 951 P.2d 782 (1998) (quoting *Gardner*, 128 Wn.2d at 936). The rule of narrow construction was first stated when the public policy tort was adopted as an exception to the at-will doctrine. *Thompson*, 102 Wn.2d at 232. The court recognized the need to guard against frivolous lawsuits and unwarranted judicial intervention in personnel decisions. *Id.* The rule of narrow construction announced in *Thompson* is primarily concerned, however, with the need to identify an existing clear mandate of public policy. *Id.*; *Roberts v. Dudley*, 140 Wn.2d 58, 65, 993 P.2d 901 (2000). It does not foreclose following an analysis like the Eighth Circuit's in *White*.

[7] P19 We agree that an employee who is forced to permanently leave work for medical reasons may have been constructively discharged. Deliberately creating conditions so intolerable as to make the employee so ill that he or she must leave work permanently [**126] is functionally the same as forcing the [***16] employee to quit.

P20 However, we are also aware that employers must comply with a number of laws, such as the Washington Law Against Discrimination (*chapter 49.60 RCW*), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101), and the Family and Medical Leave Act of 1993 (29 U.S.C. § 2601). Employers often elect or are mandated to leave jobs open, grant leaves of absence to allow employees to obtain medical treatment or recovery time, and provide reasonable accommodation to help employees return to work. An employee on medical leave is often still an employee. Accordingly, where the employee continues to receive employment benefits and is still considered to be an active employee, or where his or her ability to return to work is protected in some other way, that employee has not been constructively discharged. The leave must be, in other words, comparable to termination of employment.

[*181] P21 Here, we need not consider whether either Korslund or Miller has presented sufficient evidence to take the issue of constructive discharge to a trier of fact because the public policy cause of action is otherwise foreclosed in this case. As a matter [***17] of law, the plaintiffs have not satisfied the jeopardy element of the tort of wrongful discharge in violation of public policy because there is an adequate alternative means of promoting the public policy on which they rely.

[8] [9] [10] P22 To explain our reasoning, we first turn to the clarity element. The clarity element requires establishing the existence of a clear mandate of public policy and is a question of law for the court. *Hubbard*, 146 Wn.2d at 708; *Dicomes*, 113 Wn.2d at 617. The plaintiffs contend that a clear mandate of public policy is found in the federal *Energy Reorganization Act of 1974 (ERA)*, which provides that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et. seq.*)." 42 U.S.C. § 5851(a)(1)(A). This provision is intended to protect the health and safety of the public and to protect against waste and fraud in nuclear industry operations. The ERA makes [***18] it illegal for employers to retaliate against employees who are in the best position to observe and report what they believe to be violations. Thus, as the plaintiffs argue, there is a clear public policy encouraging and protecting their right to report without fear of retaliation or reprisal.

P23 In order to establish jeopardy, "a plaintiff must show that he or she 'engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy.'" *Hubbard*, 146 Wn.2d at 713 (quoting *Gardner*, 128 Wn.2d at 945). The plaintiff has to prove that discouraging the conduct that he or she engaged in would jeopardize the public policy. *Ellis v. City of Seattle*, 142 Wn.2d 450, 460, 13 P.3d 1065 (2000). And, of particular importance here, the [*182] plaintiff also must show that other means of promoting the public policy are inadequate. *Hubbard*, 146 Wn.2d at 713; *Gardner*, 128 Wn.2d at 945.

P24 While the question whether the jeopardy element is satisfied generally involves a question of fact, *Hubbard*, 146 Wn.2d 699 at 715, the question [***19] 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. *See id.* at 716-17.

156 Wn.2d 168, *; 125 P.3d 119, **;
2005 Wash. LEXIS 990, ***; 23 I.E.R. Cas. (BNA) 1607

P25 As explained, the plaintiffs identify the public policy to protect "the health and safety of the public and to protect against waste or fraud of public funds in the operations of the nuclear industry," and they say that "to effectuate its purpose, the law prohibits retaliation against employees, who are in the best position to observe potential misconduct and who are strongly encouraged to report it." Suppl. Br. of Pl./Resp't at 6. The ERA provides an administrative process [**127] for adjudicating whistleblower complaints and provides for orders to the violator to "take affirmative action to abate the violation;" reinstatement of the complainant to his or her former position with the same compensation, terms, conditions of employment; back pay; compensatory damages; and attorney and expert witness fees. 42 U.S.C. § 5851(b)(2)(B). The ERA thus provides comprehensive [***20] remedies that serve to protect the specific public policy identified by the plaintiffs.

P26 The plaintiffs urge, however, that the Court of Appeals correctly reasoned that the statutory remedies under 42 U.S.C. § 5851(1)(a) are not mandatory and exclusive and therefore do not bar the common law tort claim. It is true that the federal law is not mandatory and exclusive. The United States Supreme Court has held that 42 U.S.C. § 5851 does not preempt state common law tort claims. *English v. Gen. Elec. Co.*, 496 U.S. 72, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990); see *Norris v. Lumbermen's Mut. Cas. [*183] Co.*, 881 F.2d 1144, 1150 (1st Cir. 1989) (the statutory remedy is permissive, not mandatory).

P27 However, the Court of Appeals relied on *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991), and confused two distinct legal issues. *Wilmot* addressed the issue whether a provision in the *Industrial Insurance Act (Title 51 RCW)* precluded a tort cause of action for retaliation for filing a workers' compensation claim. We examined the relevant statute to determine whether the [***21] legislature intended that the statute, including its remedies, was mandatory and exclusive and thus precluded the public policy tort cause of action. *Id.* at 53-66. Here, however, 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. Moreover, the Court of Appeals' analysis conflicts with *Hubbard*, where we said that the "other means of promoting the public policy need not be available" to the person seeking to bring the tort claim "so long as the other means are adequate to safeguard the public policy." *Hubbard*, 146 Wn.2d at 717.

P28 We conclude that the remedies available under the ERA are adequate to protect the public policy on which the plaintiffs rely.² Therefore, as a matter of law, Korslund's and Miller's claims of wrongful discharge in violation of public policy fail.

2 Other jurisdictions addressing the adequacy of remedies under the ERA split on the issue whether they are adequate, but they tend to consider the adequacy of redress for the employee rather than whether the public policy is adequately protected. Compare *Masters v. Daniel Int'l Corp.*, 917 F.2d 455, 457 (10th Cir. 1990) (remedies under 42 U.S.C. § 5851(b)(2)(B) adequate), with *Norris*, 881 F.2d at 1151 (remedies under 42 U.S.C. § 5851(b)(2)(B) do not adequately redress employee because punitive damages not available).

[***22] Claim of Wrongful Retaliation in Violation of Public Policy

P29 The Court of Appeals declined the plaintiffs' request that it recognize a claim for wrongful retaliation in violation of public policy, reasoning that the decision in *White*, [*184] 131 Wn.2d 1, prevented it from doing so. *Korslund*, 121 Wn. App. at 316-17. In *White*, we declined to recognize a cause of action for wrongful transfer in violation of public policy.

P30 We, too, decline to consider the cause of action in this case, but for a different reason. The public policy claimed to have been violated is the same policy embodied in the ERA that the plaintiffs rely on for their claim of wrongful discharge in violation of public policy. As we have explained, that public policy is adequately protected by the remedies available under the ERA. Accordingly, the plaintiffs cannot show that public policy will be jeopardized if we do not recognize the proposed tort.

P31 Finally, the plaintiffs argue that Virginia's punitive damages law should apply to their public policy tort claims. Because we conclude that as a matter of law the plaintiffs' tort claims fail, we do not reach the issue of punitive [***23] damages.

[**128] Promises of Specific Treatment in Specific Situations

P32 We next turn to the plaintiffs' claims that DynCorp breached promises of specific treatment in specific situations.

156 Wn.2d 168, *; 125 P.3d 119, **;
2005 Wash. LEXIS 990, ***; 23 I.E.R. Cas. (BNA) 1607

[11] [12] [13] [14] P33 In *Thompson*, this court recognized a cause of action for breach of promise of specific treatment in specific situations:

[I]f an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of *specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship.

Thompson, 102 Wn.2d at 230. The employee must prove these elements of the cause of action: (1) that a statement (or statements) in an employee manual or handbook or similar document amounts to a promise of specific treatment in specific situations, (2) that the employee justifiably relied on the promise, and (3) that the promise was [*185] breached. *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340-41, 27 P.3d 1172 (2001); *Thompson*, 102 Wn.2d at 233. Each of these elements presents an issue of fact. [***24] *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 525, 826 P.2d 664 (1992); *Thompson*, 102 Wn.2d at 233. The issues may be decided as matters of law, however, if reasonable minds could not differ in resolving them. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 105, 864 P.2d 937 (1994); *Swanson*, 118 Wn.2d at 522. The *Thompson* specific treatment claim is not an implied or express contract claim but is independent of a contractual analysis and instead rests on a justifiable reliance theory. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 34-36, 959 P.2d 1104 (1998); *Swanson*, 118 Wn.2d at 525; *Gaglidari v. Denny's Rests., Inc.*, 117 Wn.2d 426, 433, 815 P.2d 1362 (1991); *Thompson*, 102 Wn.2d at 229-30.

[15] P34 DynCorp first contends that a specific treatment claim can be brought only when the employee is discharged. We disagree. While *Thompson* factually involved a claim of wrongful discharge, the court's legal analysis concerned an employer's act in issuing a policy manual that "can lead to obligations that govern the employment relationship." *Thompson*, 102 Wn.2d at 229. [***25] Enforceable obligations may exist where there has been no discharge. See, e.g., *Lawson v. Boeing Co.*, 58 Wn. App. 261, 263, 792 P.2d 545 (1990) (employee offered choice between demotion and discharge and chose demotion). None of the elements of the specific treatment cause of action suggest that the claim is only available if the employee is discharged.

P35 DynCorp argues, however, that the employee must show that he or she was induced to stay on the job and not seek other employment and suggests that this means a specific treatment claim can be brought only if the employee is terminated. The requirement of inducement goes to the question of justifiable reliance. See *Bulman*, 144 Wn.2d 335. Showing that one has stayed on the job in reliance on promises made is a distinct matter from showing that a promise of specific treatment was made and then breached.

[*186] P36 DynCorp says, though, that *Trimble v. Washington State University*, 140 Wn.2d 88, 91, 993 P.2d 259 (2000), stands for the proposition that absent termination a plaintiff fails to state a claim. This is a mischaracterization of *Trimble*. There we concluded that as a matter of [***26] law the plaintiff failed to produce sufficient evidence on the promise and breach elements of the specific treatment cause of action to take to a trier of fact. *Id.* at 94-96. Nothing in the analysis indicates that a plaintiff fails to state a claim for relief if he or she was not terminated.

P37 Discharge of the employee is not a prerequisite to bringing a *Thompson* specific treatment claim.

P38 DynCorp next argues that a claim of breach of promise of specific treatment in specific situations can be brought only "[w]hen the employment relationship is not evidenced by a written contract and is indefinite in duration." [**129] *Thompson*, 102 Wn.2d at 229. DynCorp maintains that the Court of Appeals erred when it held that the fact that Miller and Acosta were covered by a collective bargaining does not bar them from bringing a specific treatment claim.

P39 As the Court of Appeals reasoned, DynCorp takes its quotation from *Thompson* out of context. The relevant passage from *Thompson* states:

[E]mployers may be obligated to act in accordance with policies as announced in handbooks issued to their employees. *When the employment relationship is not evidenced [***27] by a written contract and is indefinite in duration, the parties have entered into a contract whereby the employer is essentially obligated to only pay the employee for any work performed. In this contractual relationship, the employer exercises substantial control over both the working relationship and his employees by retaining independent control of the work relationship. Thus, the employer can define the work relationship. Once an*

156 Wn.2d 168, *; 125 P.3d 119, **;
2005 Wash. LEXIS 990, ***; 23 I.E.R. Cas. (BNA) 1607

employer takes action, for whatever reasons, an employee must either accept those changes, quit, or be discharged. Because the employer retains this control over the employment relationship, unilateral acts of the employer are binding on his employees and both parties should understand this rule.

[*187] However, *absent specific contractual agreement to the contrary*, we conclude that the employer's act in issuing an employee policy manual can lead to obligations that govern the employment relationship. Thus, the employer's reason for unilaterally issuing an employee policy manual or handbook, purporting to contain the company policy vis-a-vis employee relations, becomes relevant.

Thompson, 102 Wn.2d at 229 (emphasis added).

[16] P40 As [***28] the Court of Appeals correctly said, the language relied on by DynCorp is part of this court's description of the classic at-will relationship. *Korslund*, 121 Wn. App. at 325. The second italicized reference to contractual agreement means that promises in an employee handbook or manual may be given effect provided that they do not conflict with a specific, enforceable contractual term.³ The fact that an employee is covered by a collective bargaining agreement does not always, as a matter of law, bar the employee from bringing a claim of breach of promise of specific treatment in specific situations.

3 As we explained in *Swanson* in the context of addressing disclaimers, the employer-employee working relationship may subsequently be modified, either through contract formation or modification or through an employer's issuance of employee handbooks or manuals containing promises of specific treatment. *Swanson*, 118 Wn.2d at 531-35.

P41 In a related vein, DynCorp contends that [***29] *Korslund* cannot maintain this cause of action because when DynCorp took over operations at Hanford, *Korslund* signed an employment application stating that his employment was at will. The Court of Appeals held that *Korslund* was not thereby precluded as a matter of law from bringing a specific treatment claim. The court relied on *Grimes v. Allied Stores Corp.*, 53 Wn. App. 554, 768 P.2d 528 (1989), for the proposition that employee handbooks may contractually modify a written contract for terminable at-will employment provided the formalities of contract formation are satisfied.

P42 DynCorp contends that *Korslund's* signing the application stating that his employment was at will precludes his justifiable reliance on promises in employee policy [*188] manuals as a matter of law. DynCorp also relies on *Grimes* because in that case the employee did not offer any evidence to show that the parties intended to be contractually bound by statements in the policy manual. *Grimes*, 53 Wn. App. at 557.

[17] P43 As discussed in *Swanson*, the employment relationship can be altered through the employer's issuance of policy manuals either as a matter of promises of specific [***30] treatment in specific situations or as a matter of contract modification, provided, in the latter case, that the formalities of contract formation are met. *Swanson*, 118 Wn.2d at 531-35. It would [**130] be inconsistent with *Thompson* and its progeny to conclude that once an application containing an at-will provision is signed, the employer is thereafter free to make whatever promises it wishes to make without any obligation to carry them out.

P44 Here, there is sufficient evidence to create a factual question on the question whether DynCorp modified the employment relationship with *Korslund* by issuing its policy manuals with promises of specific treatment in specific situations. DynCorp distributed the ethics booklet to *Korslund* each year and required him to acknowledge receipt and attend a training session.

P45 Turning now to the elements of the specific treatment claim, DynCorp initially argues that the only promises in an employee manual or handbook on which the specific treatment claim can be based are promises of termination only for cause or only after exhaustion of specified disciplinary measures, citing cases where factually these were the circumstances. As we have explained, [***31] there is nothing in the *Thompson* analysis that limits the specific treatment claim to promises involving discharge.

P46 The next question is whether there is sufficient evidence that DynCorp made promises to the employees. The trial court granted summary judgment on the basis that DynCorp did not make promises of specific treatment in specific situations. The Court of Appeals reversed, reasoning that the plaintiffs presented sufficient evidence of [*189] promises of specific treatment.⁴ First, Fluor's Employee Concerns Program included a document titled "Resolving Employee Concerns," which provides in part:

156 Wn.2d 168, *; 125 P.3d 119, **;
2005 Wash. LEXIS 990, ***; 23 I.E.R. Cas. (BNA) 1607

Management must ensure that employees who raise concerns or who testify or otherwise participate in congressional investigations are not harassed, intimidated, or subject to any discriminatory or retaliatory actions. Any employee who engages in or condones any of these actions against another employee will be subject to appropriate corrective measures.

Clerk's Papers (CP) at 2862. Second, DynCorp's parent corporation issued a policy statement titled "PS330 -- Business Ethics and Compliance with Laws and Regulations," applicable to all subsidiaries, that required establishment [***32] of written standards of business ethics and conduct, which each employee would be required to read and acknowledge. The resulting booklet, "Ethics: Standards of Business Ethics and Conduct," provides in part:

All employees of DynCorp, its divisions and its subsidiaries are required to fully comply with these Standards of Conduct. Employees are required to report violations of the Standards and assist the Company, when necessary, in investigating violations.

....

Disciplinary action will be taken when:

....

any supervisor retaliates, directly or indirectly, or encourages others to retaliate against an employee who reports a violation of these Standards.

CP at 3234.

4 The Court of Appeals rejected employee Korslund's argument that one document, a Fluor document titled "Administering Progressive Discipline," contained promises of specific treatment in specific situations. *Korslund*, 121 Wn. App. at 332-34. The plaintiffs have not argued the Court of Appeals erred in this conclusion.

[***33] [18] P47 DynCorp contends that the alleged promises do not promise specific treatment in specific situations but instead vest too much discretion in the employer for the alleged promises to be enforceable. *See Trimble*, 140 Wn.2d [*190] at 95. "[G]eneral statements of company policy" do not constitute promises of specific treatment in specific situations. *Thompson*, 102 Wn.2d at 231.

P48 However, the alleged promises provide that *some* corrective action *will* be taken against management or other employees who harass, intimidate, or subject an employee to any discriminatory or retaliatory actions for raising concerns, or condone such conduct, and that disciplinary action *will* be taken against any supervisor who retaliates, directly or indirectly, or encourages others to retaliate against an employee who reports a violation of the Standards of Conduct. Thus, [**131] while there is discretion as to what action is taken, there is no discretion that some disciplinary action will be taken. Contrary to DynCorp's contention, this case is therefore unlike *Stewart v. Chevron Chemical Company*, 111 Wn.2d 609, 613-14, 762 P.2d 1143 (1988), where the court held [***34] that a termination policy stating that management "should" consider certain factors in layoff decisions was too indefinite to create an obligation.

P49 Plaintiffs have at least raised a question of fact as to whether DynCorp made promises of specific treatment in specific situations. They have also presented evidence that DynCorp did nothing, and thus breached the promises. (The issue of breach has not been raised at this stage of the proceedings.)

[19] P50 Next, DynCorp contends that the Court of Appeals erred when it concluded that establishing justifiable reliance does not require the plaintiff to produce evidence of inducement to remain on the job. *Korslund*, 121 Wn. App. at 327. The court distinguished cases where the employee was unaware of the policies allegedly breached and so could not prove justifiable reliance. *Id.* DynCorp maintains that the employee must prove that he or she was aware of the specific promises allegedly breached and that those specific promises induced him or her to remain on the job and not seek other employment. We agree.

P51 In *Bulman*, we held that the justifiable reliance element cannot be established where the employee does not [*191] even show awareness [***35] of the specific promises allegedly breached. *Bulman*, 144 Wn.2d at 350. We rejected the premise that an employee could show justifiable reliance by showing that an atmosphere of job security and fair treatment induced the employee to stay on the job and not seek employment elsewhere. *Id.* at 342-43. We reaf-

156 Wn.2d 168, *; 125 P.3d 119, **;
2005 Wash. LEXIS 990, ***; 23 I.E.R. Cas. (BNA) 1607

firmed earlier cases that said that the employee must have been aware of the specific promise allegedly breached and that specific promise must have induced the employee to remain on the job and not seek other employment. *Id.* at 343-44, 350; see *Stewart*, 111 Wn.2d at 614. Thus, the Court of Appeals erred insofar as it reasoned that a plaintiff does not have to show inducement.

P52 Whether the plaintiffs justifiably relied on promises of specific treatment in specific situations is a fact question appropriately left for the trial court's consideration on remand.

CONCLUSION

P53 We agree that a claim of constructive wrongful discharge in violation of public policy may, under some circumstances, be brought where an employer deliberately creates intolerable working conditions and thus forces the employee to permanently leave [***36] the workplace on medical leave. However, plaintiffs Korslund and Miller are foreclosed from bringing the wrongful discharge claim because, as a matter of law, the jeopardy element has not been satisfied since the remedies under the ERA adequately protect the relevant public policy and in fact are designed to carry out public policy encouraging whistleblowing. Therefore, summary judgment was proper on this claim.

P54 Because the same public policy is at issue with respect to the new tort the plaintiffs want recognized, i.e., wrongful retaliation in violation of public policy, we conclude the jeopardy element could not be satisfied and accordingly decline to consider whether to recognize such a tort.

[*192] P55 We agree with the Court of Appeals that there is a material issue of fact as to whether DynCorp made promises of specific treatment in specific situations and remand for further proceedings.

Alexander, C.J., and C. Johnson, Bridge, Owens, Fairhurst, and J.M. Johnson, JJ., concur.

CONCUR BY: CHAMBERS (In Part)

DISSENT BY: CHAMBERS (In Part)

DISSENT

P56 Chambers, J. (concurring/dissenting) -- I part ways with the majority on two grounds. First, the majority unnecessarily reaches an issue not properly before us. On plaintiffs' claims of wrongful discharge and wrongful [***37] retaliation in violation of public policy, the trial court did not make any factual determinations with regard to the jeopardy element. Despite this, and in my view without [**132] appropriate factual basis, the majority holds as a matter of law that the plaintiffs fail to satisfy the jeopardy element. Given the record, I would not so precipitously reach this issue.

P57 Second, while I agree "that an employee who is forced to permanently leave work for medical reasons may have been constructively discharged," majority at 180, I disagree that that same employee cannot be found to be constructively discharged merely because she continues to receive some employment benefits. It is antithetical to any remedy grounded in public policy to require an employee to suffer great economic consequences and forgo needed medical, disability, and other benefits the offending employer is already obligated to provide before seeking redress for wrongful discharge. In my view, it is a question of fact whether such employees have been constructively discharged.

P58 In this case, present and former Hanford employees have brought actions for, among other things, wrongful discharge and wrongful retaliation for reporting [***38] alleged employer misconduct. Plaintiffs contend they observed and reported acts and omissions which threatened the health and safety of the plant and the community, wasted and misused government property and funds, and showed [*193] abuse of authority. As a result of the alleged misconduct and management's failure to respond, Steven M. Korslund initially sought medical leave, but ultimately quit. Virginia A. Miller sought long term medical disability. John Acosta continues to work at the Hanford facility.

THE JEOPARDY ELEMENT

P59 The trial court granted summary judgment in favor of DynCorp Tri-Cities Services, Inc., on the sole grounds that plaintiffs failed to show they were constructively discharged and that DynCorp did not make any promises of specific treatment in its policy manuals. The trial court *did not* grant summary judgment in favor of DynCorp because plaintiffs were unable to prove that important policies of the State would be jeopardized. The Court of Appeals was correct to conclude that "[w]hether a plaintiff has satisfied the jeopardy element is a question of fact." *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 121 Wn. App. 295, 320, 88 P.3d 966 (2004) (citing [***39] *Hubbard v. Spokane County*,

146 Wn.2d, 699, 715, 50 P.3d 602 (2002); *Ellis v. City of Seattle*, 142 Wn.2d 450, 463, 13 P.3d 1065 (2000)). Given the record, this court should not reach such an important and fact driven issue.

P60 Since the majority does reach the jeopardy issue, I write separately to express my disagreement. The remedies offered to employees under the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851, are neither mandatory nor exclusive. For instance, administrative remedies under the ERA are permissive only; they do not supplant common law torts nor do they provide the same remedies to an injured employee. 42 U.S.C. § 5851(h). In addition, the ERA is more restrictive, it does not permit direct civil action by the employee, it does not provide for jury trials, and it is limited to complaints which the employee elects to submit to the Department of Labor. *See generally* 42 U.S.C. § 5851.

P61 Proof of jeopardy to public policy is an *either/or* test: that is, the employee must show that her conduct furthers [*194] a clear mandate of public policy *either* because [***40] that policy directly promotes the conduct *or* because the conduct is necessary to the effective enforcement of the policy. *See Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 945, 913 P.2d 377 (1996); HENRY H. PERRITT, JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES § 3.14, at 75 (1991). Nevertheless, the majority, without any record or factual finding to support its conclusion, reaches up into the thinnest of atmospheres to conclude as a matter of law that plaintiffs cannot meet the jeopardy element because the ERA allegedly provides an adequate alternative means of promoting the public policy. Majority at 181, 183.

P62 Additionally, an employee can prove jeopardy by a showing of imminent harm. When imminent harm is threatened, the jeopardy element "may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action." *Ellis*, 142 Wn.2d at 461. [**133] In other words, the plaintiff need not prove an actual violation of public policy but merely show that they had an objectively reasonable belief that a violation would occur. *Id.*

P63 In *Ellis*, this court found imminent harm threatened, and thus [***41] the jeopardy element satisfied, when the plaintiff refused orders to disable the fire alarm system at Key Arena because the plaintiff reasonably believed that disabling the system would not only break the law, but jeopardize public safety. *Id.* In my humble opinion, an employee's good faith concerns about safety procedures at a nuclear power plant may very well be categorized as "imminent harm," on the same or greater level than the facts found to be sufficient in *Ellis*.

P64 I must emphasize again, the trial court in this case, in granting summary judgment, never reached this issue, and the majority has now foreclosed this issue by ruling as a matter of law the jeopardy element cannot be satisfied. I respectfully disagree and would await a case that squarely presents the issue.

[*195] WHEN IS AN EMPLOYEE DISCHARGED?

P65 Constructive discharge is the imposition on the employee of intolerable working conditions which cause the employee to abandon his job. *Bulaich v. AT&T Info. Sys.*, 113 Wn.2d 254, 262, 778 P.2d 1031 (1989). An employee should not be required to either forgo mitigating options short of resignation and suffer the economic consequences (such as the loss of all [***42] employment benefits) or refrain from reporting workplace conduct that violates public policy. Miller, for example, was treated for symptoms of anxiety, poor concentration, poor memory, and panic attacks. Major stressors included her fears of retaliation and being targeted at work. She was also diagnosed with major depressive disorder, irritable bowel syndrome, hypertension, and glaucoma -- all a likely consequence of the intolerable working conditions she was placed under. A Social Security administrative law judge found that the "medical evidence establishes" she (Miller) has "severe impairments: an affective disorder [depression] and an anxiety disorder," that she "lacks the residual functional capacity to perform basic mental requirements of any work [and] is unable to perform the requirements of her past relevant work." Clerk's Papers at 382. She was awarded Social Security benefits. The evidence is substantial that plaintiff Miller not only abandoned her employment, but the evidence shows she was simply unemployable. Surely, Miller should not, as a matter of law, have had to forgo all her employment benefits before bringing a wrongful discharge action. Unfortunately, the [***43] majority seems to reach this ominous conclusion.

PROMISES OF SPECIFIC TREATMENT

P66 Finally, on the issue of specific promises, I read the majority as affirming our holding in *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 27 P.3d 1172 (2001) and the jury instruction approved therein. I therefore agree with the majority's resolution with regard to that issue.

[*196] CONCLUSION

156 Wn.2d 168, *; 125 P.3d 119, **;
2005 Wash. LEXIS 990, ***; 23 I.E.R. Cas. (BNA) 1607

P67 I would remand this case back to the trial court to determine: (1) whether the plaintiffs can satisfy the jeopardy element by showing imminent harm, and if not, (2) whether the plaintiffs can show there are not other means of promoting the public policy which are adequate. *Gardner*, 128 Wn.2d at 945 (citing PERRITT, *supra*, § 3.14, at 77). Without these factual determinations, this court cannot reasonably decide whether the torts of wrongful discharge and retaliation in violation of public policy exist in this case. I would also hold that an employee need not forgo her employment benefits in order to maintain actions for wrongful discharge and retaliation in violation of public policy. Because I agree this case must be returned to the trial court, I concur in part and dissent in part.

[***44] Sanders, J., concurs with Chambers, J.