RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Apr 28, 2015, 4:32 pm
BY RONALD R. CARPENTER
CLERK

No. 90946-6

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Filed
Washington State Supreme Court
APR 30 2015
Ronald R. Carpenter
Clerk

GREGG BECKER,

Plaintiff/Respondent,

vs.

COMMUNITY HEALTH SYSTEMS, INC., et al.,

Defendants/Petitioners.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

George M. Ahrend
WSBA No. 25160
16 Basin St., S.W.
Ephrata, WA 98823
(509) 764-9000

Bryan P. Harnetiaux
WSBA No. 5169
517 E. 17th Avenue
Spokane, WA 99203
(509) 624-3890
OID #91108

On Behalf of
Washington State Association for Justice Foundation

ORIGINAL

TABLE OF CONTENTS

		Pages
I.	IDENTITY AND INTEREST OF AMICUS CURIAE	1
II.	INTRODUCTION AND STATEMENT OF THE CASE	1
	Re: Becker v. Cmty. Health Sys.	2
	Re: Rose v. Anderson Hay & Grain Co.	4
	Re: Rickman v. Premera Blue Cross	6
III.	ISSUES PRESENTED	7
IV.	SUMMARY OF ARGUMENT	7
V.	ARGUMENT	9
	A. Overview Of Wrongful Discharge Before And After Adoption Of The Perritt Test In *Gardner*.	11
	1. *Thompson* and the original wrongful discharge formulation.	11
	2. *Gardner* and adoption of the Perritt test.	17
	B. Under The Doctrine Of Stare Decisis, Use Of The Perritt Test For Determining Liability For Wrongful Discharge In Violation Of Public Policy Should Be Abandoned As "Incorrect and Harmful."	21
	1. The Perritt test is "incorrect."	21
	2. The Perritt test is "harmful."	27

C. The Court Should Return To The Principles First Announced In *Thompson*, And Reformulate The Proof Requirements For Wrongful Discharge In Violation Of Public Policy Along The Lines Of Those Used In Resolving WLAD Retaliation Claims. 29

VI. CONCLUSION 33

APPENDIX

TABLE OF AUTHORITIES

Pages

Cases

Adkisson v. Seattle,
42 Wn.2d 676, 258 P.2d 461 (1953) 27

Allison v. Housing Authority,
118 Wn.2d 79, 821 P.2d 34 (1991) 16

Becker v. Cmty. Health Sys.,
182 Wn.App. 935, 332 P.3d 1085 (2014), *review granted*,
182 Wn.2d 1009 (2015) 1, 7, 10, 21

Bennett v. Hardy,
113 Wn. 2d 912, 784 P.2d 1258 (1990) 14

Bernathy v. Walt Failors, Inc.,
97 Wn.2d 929, 653 P.2d 280 (1992) 29

Bernot v. Morrison,
81 Wash. 538, 143 Pac. 104 (1914), *dismissed*,
250 U.S. 648 (1919) 23

Bott v. Rockwell Int'l,
80 Wn. App. 326, 908 P.2d 909 (1996) 33

Bravo v. Dolsen Companies,
125 Wn. 2d 745, 888 P.2d 147 (1995) 14, 22-23

Briggs v. Nova Servs.,
166 Wn. 2d 794, 213 P.3d 910 (2009) 31

Cagle v. Burns & Roe, Inc.,
106 Wn. 2d 911, 726 P.2d 434 (1986) 15, 29, 31

Christensen v. Grant Cnty. Hosp. Dist. No. 1,
152 Wn. 2d 299, 96 P.3d 957 (2004) 11

Christensen v. Swedish Hospital,
59 Wn.2d 545, 368 P.2d 897 (1962) 29

Cudney v. ALSCO, Inc.,
172 Wn.2d 524, 259 P.3d 244 (2011) passim

Danny v. Laidlaw Transit Servs.,
165 Wn.2d 200, 193 P.3d 128 (2008) 10, 18, 24

Dicomes v. State,
113 Wn. 2d 612, 782 P.2d 1002 (1989) 12-13, 31-32

Ellis v. City of Seattle,
142 Wn. 2d 450, 13 P.3d 1065 (2000) 18, 20, 32-33

Gardner v. Loomis Armored, Inc.,
128 Wn.2d 931, 913 P.2d 377 (1996) passim

Harris v. Dept. of Labor & Indus.,
120 Wn.2d 461, 843 P.2d 1056 (1993) 7

Hubbard v. Spokane County,
146 Wn. 2d 699, 50 P.3d 602 (2002) 18-20, 24

Hunsley v. Giard,
87 Wn.2d 424, 553 P.2d 1096 (1976) 23

In re Parentage of L.B.,
155 Wn. 2d 679, 122 P.3d 161 (2005) 23

Kloepfel v. Bokor,
149 Wn. 2d 192, 66 P.3d 630 (2003) 23, 27

Korslund v. DynCorp Tri-Cities Srvs., Inc.,
156 Wn.2d 168, 125 P.3d, 119 (2005) passim

Long v. Odell,
60 Wn.2d 151, 372 P.2d 548 (1962) 7

Marquis v. City of Spokane,
130 Wn. 2d 97, 922 P.2d 43 (1996) 28

Martini v. Boeing Co.,
137 Wn. 2d 357, 971 P.2d 45 (1999) 31

Mohr v. Grant,
153 Wn. 2d 812, 108 P.3d 768 (2005) 22

Piel v. City of Federal Way,
177 Wn.2d 604, 306 P.3d 879 (2013) passim

Potter v. Wash. State Patrol,
165 Wn.2d 67, 196 P.3d 691 (2008) 22

Rickman v. Premera Blue Cross,
183 Wn. App. 1015, 2014 WL 4347625 (2014), *review granted*,
182 Wn.2d 1009 (2015) 1

Rose v. Anderson Hay & Grain Co.,
183 Wn.2d 785, 335 P.3d 440 (2014), *review granted*,
182 Wn.2d 1009 (2015) 1

Selberg v. United Pac. Ins. Co.,
45 Wn. App. 469, 726 P.2d 468, *review denied*,
107 Wn. 2d 1017 (1986) 32

Smith v. Bates Technical Coll.,
139 Wn. 2d 793, 991 P.2d 1135 (2000) passim

State v. Devin,
158 Wn.2d 157, 142 P.3d 599 (2006) 10

Thompson v. St. Regis Paper Co.,
102 Wn. 2d 219, 685 P.2d 1081 (1984) passim

Washington Water Power v. Graybar Electric Co.,
112 Wn.2d 847, 774 P.2d 1199 (1989) 22

Weiss v. Lonnquist,
173 Wn.App. 344, 293 P.3d 1264 (2013) 19

Wilmot v. Kaiser Alum. & Chem. Corp.,
118 Wn. 2d 46, 821 P.2d 18 (1991) passim

Wilson v. City of Monroe,
88 Wn.App. 113, 943 P.2d 1134 (1994), *review denied*,
134 Wn.2d 1028 (1998) 26

Wlasiuk v. Whirlpool Corp.,
81 Wn. App. 163, 914 P.2d 102, 932 P.2d 1266 (1996) 33

Constitution, Statutes and Rules

Ch. 49.60 RCW 9

CR 12(b)(6) 2-3

Energy Reorganization Act of 1974, § 211, 42 U.S.C. § 5851 19

RCW 49.16.160 19

RCW 49.32.020 14

RCW 49.60.020 31

RCW 49.60.210 16

RCW 51.48.025 13

Other Authorities

1 W. Page Keeton et al, Prosser & Keeton on Torts (5th ed. 1984) 27

Henry H. Perritt, Jr., Employee Dismissal Law and Practice
(3d ed. 1992 & Supp. 2015) 10, 24

Henry H. Perritt, Jr., Workplace Torts: Rights and Liabilities
(1991) 10

James W. Hubbell, Retaliatory Discharge and the Economics of Deterrence, 60 U. Colo. L. Rev. 91, 113 (1990) 28

WPI 330.05 9, 32

WPI 330.81, 330.82 & 330.83 32

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the proof requirements for persons pursuing a claim for the tort of wrongful discharge in violation of public policy.

II. INTRODUCTION AND STATEMENT OF THE CASE

This is one of three cases pending before the Court that provide it with the opportunity to reexamine the elements of the tort of wrongful discharge in violation public policy.[1] In each of these three cases, application of the current four-part test for establishing this tort is at issue,

[1] The three cases are: Becker v. Cmty. Health Sys., 182 Wn.App. 935, 332 P.3d 1085 (2014), *review granted*, 182 Wn.2d 1009 (2015); Rose v. Anderson Hay & Grain Co., 183 Wn.2d 785, 335 P.3d 440 (2014), *review granted*, 182 Wn.2d 1009 (2015); and Rickman v. Premera Blue Cross, *noted at* 183 Wn. App. 1015, 2014 WL 4347625 (2014), *review granted*, 182 Wn.2d 1009 (2015). These cases are set for argument before the Court on the same day. With the permission of the Court, WSAJ Foundation has filed amicus curiae briefs in each of these cases, with identical texts. See Commissioner Pierce Letter to Counsel, April 13, 2015.

particularly with respect to whether the so-called "jeopardy element" of the test is met. For purposes of this brief, the following facts are relevant regarding each of the cases before the Court.

Re: Becker v. Cmty. Health Sys.[2]

Gregg Becker (Becker) worked as chief financial officer for Rockwood Clinic PS (Rockwood), indirectly owned by Community Health Systems Inc. (CHS). Becker sued Rockwood and CHS for wrongful discharge in violation of public policy, alleging he was forced to resign because he refused to report a $4 million operating loss for 2012 that he reasonably believed would overstate income and understate expenses, thereby fraudulently misleading investors and subjecting him to potential criminal liability. See Becker, 182 Wn.App at 939-40. Rockwood/CHS moved to dismiss Becker's claim under CR 12(b)(6), because he could not establish the jeopardy element of the four-part test governing the tort of wrongful discharge in violation of public policy, first adopted in Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 913 P.2d 377 (1996). In particular, they contended that "a myriad of statutes and regulations adequately promote the public policy of honesty in corporate

[2] The underlying facts in Becker are drawn from the Court of Appeals opinion, and the briefing of the parties. See Becker, 182 Wn.App at 938-40; Rockwood/CHS Br. at 4-11; Becker Br. at 3-20; Rockwood/CHS Reply Br. at 3-5; Rockwood/CHS Pet. for Rev. at 3-6; Becker Ans. to Pet. for Rev. at 2-15; Rockwood/CHS Reply to Ans. to Pet. for Rev. at 1; Rockwood Supp. Br. at 2-5; CHS Supp. Br. at 5-6; Becker Supp. Br. at 1-12.

financial reporting, rendering a private common law tort remedy superfluous." Becker at 939.

The superior court denied the CR 12(b)(6) motion, and the Court of Appeals granted discretionary review regarding whether proof of the jeopardy element failed as a matter of law because other available means for promoting the public policy of honesty in corporate financial reporting are adequate. See id. at 940. The Court of Appeals affirmed denial of the motion to dismiss. The opinion of the court by Judge Brown concludes that other remedies available to Becker do not prevent him from meeting the jeopardy element under these circumstances, concluding neither Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 125 P.3d 119 (2005), nor Cudney v. ALSCO, Inc., 172 Wn.2d 524, 259 P.3d 244 (2011), are controlling. Judge Brown concluded that the outcome is more in keeping with Thompson v. St. Regis Paper Co., 102 Wn. 2d 219, 685 P.2d 1081 (1984), first adopting the tort of wrongful discharge in violation of public policy, Gardner, supra, adopting the four-part test for the tort, and the Court's recent decision in Piel v. City of Federal Way, 177 Wn.2d 604, 306 P.3d 879 (2013). See Becker at 944-51 (Brown, J., with Lawrence-Berry, J., concurring). In reaching its decision, the court stated "we reform our jeopardy analysis under the reasoning of *Thompson, Gardner*, and *Piel.*" Id. at 947.

Judge Fearing authored a separate two-judge concurrence in Becker, noting confusion in cases addressing the jeopardy element, and concluding that the decisions in Cudney and Piel cannot be reconciled. See Becker at 954-63 (Fearing, J., concurring, joined by Lawrence-Berry, J.). Nonetheless, the concurrence concludes the jeopardy element is met under the circumstances, relying principally on the analysis in Thompson and Piel, supra. See Becker, 182 Wn.App at 954 (Fearing, J., concurring). Judge Fearing also suggests the elements of this tort should be reexamined, and proposes a different test for proving liability. See id. at 961-65.

This Court granted the Rockwood/CHS petition for review challenging the Court of Appeals' jeopardy element determination. See Rockwood/CHS Pet. for Rev. at 1-2; see also Becker Ans. to Pet. for Rev. at 1-2.

Re: Rose v. Anderson Hay & Grain Co.[3]

Charles Rose (Rose) worked as a commercial truck driver for Anderson Hay & Grain Company (AHG). He sued AHG for wrongful discharge in violation of public policy. He alleged that he was terminated

[3] The underlying facts in Rose are drawn from the Court of Appeals opinion, and the briefing of the parties. See Rose, 183 Wn.App. at 786-88 (following review of a prior opinion and Supreme Court remand back to the Court of Appeals for reconsideration in light of Piel, supra); Rose Br. on Remand at 1-2 (incorporating facts in original petition for review); AHG Br. at 2-3 (incorporating prior briefing); Rose (Second) Pet. for Rev. at 4-7; AHG Ans. to (Second) Pet. for Rev. at 3-4; Rose Supp. Br. at 2-5.

for refusing to complete his shift as a driver, claiming that had he done so he would have exceeded the maximum allowable hours of service under federal safety regulations and been required to falsify time sheets. See Rose, 183 Wn.App at 787. AHG moved for summary judgment of dismissal, asserting that Rose could not satisfy the jeopardy element of the four-part test governing this tort because a federal administrative remedy adequately protects the public policy reflected in relevant federal safety regulations. See id. at 787-88. The superior court granted dismissal, and the Court of Appeals affirmed, concluding that the remedy available to Rose was similar to those found adequate is Korslund and Cudney, and that the jeopardy element was not met as a matter of law. See id. at 790-93. The Court distinguished Piel because, while the federal act in question indicated it was not intended to affect rights otherwise available under federal or state law, this provision did not address common law remedies. See Rose at 791. The court also distinguished its recent opinion in Becker because "Mr. Becker would be personally responsible if he committed the crime that his employer requested..." and "because there was no other means for promoting the public policy of honesty in corporate financial reporting." Rose at 792.

This Supreme Court granted Rose's petition for review urging that the Court of Appeals erred in dismissing Rose's wrongful discharge claim. See Rose (Second) Pet. for Rev. at 3-4.

Re: Rickman v. Premera Blue Cross[4]

Ericka Rickman (Rickman) served in a management capacity for a subsidiary of Premera Blue Cross (Premera). Rickman sued Premera for wrongful discharge in violation of public policy, alleging she was discharged because she expressed concern to a supervisor that a potential change in Premera's business practice would violate health insurance privacy laws. In turn, Premera contended that Rickman was terminated because she had violated Premera's conflict of interest policies.

Premera's motion for summary judgment of dismissal was granted, and the Court of Appeals affirmed by unpublished opinion, agreeing with Premera's contention that the jeopardy element could not be met as a matter of law. See Rickman, 2014 WL 4347625 at *6-*7. The court concluded:

> Given the existence of Premera's internal reporting system, which—as evidenced, in part, by the prompt investigation following [the] complaint against Rickman—appears, on this record, to be functioning effectively, we conclude that the system provided an available alternative means by

[4] The underlying facts in Rickman are drawn from the Court of Appeals unpublished opinion, and the briefing of the parties. See Rickman, 2014 WL 434 7625 at *1-*4; Rickman Br. at 2-5; Premera Br. at 3-15; Rickman Amd. Reply Br. at 3; Rickman Pet. for Rev. at 2-7; Premera Ans. to Pet. for Rev. at 3-8; Rickman Supp. Br. at 2-5; Premera Supp. Br. at 4.

which Rickman could have reported her concerns, thereby promoting the public policy in favor of maintaining and protecting patient privacy interests.

Id. at *7 (brackets added). This Court granted Rickman's petition for review challenging, among other things, the Court of Appeals' jeopardy element analysis. See Rickman Pet. for Rev. at 1-2, 13-16.

III. ISSUES PRESENTED

1. Whether the Court should abandon as unworkable the current four-part "Perritt test" for determining liability under the tort of wrongful discharge in violation of public policy, adopted in Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 913 P.2d 377 (1996), and overrule cases applying this test as "incorrect and harmful?"

2. If the Court abandons the current four-part test, what formulation should take its place?[5]

IV. SUMMARY OF ARGUMENT

The Court should abandon the four-part test for wrongful discharge in violation of public policy, adopted as a guide for analyzing this tort in

[5]These same issues were identified in WSAJ Foundation's request to the Court for amicus curiae status and permission to file a joint amicus curiae brief in Becker, Rose and Rickman. See WSAJ Foundation letter request, April 2, 2015. This request was granted, without objection, and the Court directed that identical briefs be filed in each case. See Commissioner Pierce Letter to Counsel, April 13, 2015. The parties' briefing in these three cases does not explicitly address whether the four-part test first announced in Gardner should be abandoned. But see Becker Ans. to Pet. for Rev. at 2 (referencing Thompson, supra, and urging that "[t]his state's law should return to the consistency of its earlier opinions"); id. at 16-18 (similar). While amicus curiae normally cannot raise new issues, this principle is not without exception. See Long v. Odell, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (noting that "appellate courts will not enter into the discussion of points raised only by amicus curiae"); Harris v. Dept. of Labor & Indus., 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993)(addressing issue raised only by amicus curiae when necessary to reach a proper decision). In any event, the Court of Appeals opinions in Becker call into question the validity of the current four-part test, and place this issue squarely before the Court. See Becker, 182 Wn. App. at 947 (Brown, J.); id. at 954-65 (Fearing, J., concurring).

Gardner, supra, from treatises authored by Henry H. Perritt. Under the doctrine of stare decisis; Gardner and subsequent cases applying this test should be overruled as "incorrect and harmful." The Perritt test—in particular the jeopardy element and its consideration of whether alternative means are adequate to promote public policy—is "incorrect" because:

1. It disparages the role of the common law, regardless of the fact that other statutory remedies are merely cumulative, not exclusive;

2. It is imprecise and fraught with confusion and uncertainty, rendering the outcome in any given circumstances unpredictable;

3. It fails to take into account the *nonnegotiable* nature of the employee's right to act in furtherance of public policy;

4. It provides an undeserved degree of solicitude for employers who engage in *intentional* misconduct that frustrates public policy; and

5. The justification for the test has been unreflectively tied to the terminable at will doctrine, despite the fact that the duty to act in accordance with clear public policy, grounded in tort, is independent of the contractual relationship between employer and employee, and the fact that violation of this duty constitutes an abuse of the employment relationship.

The Perritt test is "harmful" because it tends to shield employers from accountability for intentionally discharging an employee for reasons that are contrary to clear public policy, undermining both the compensatory and deterrent functions of tort law.

The Court should return to its pre-Gardner precedent for wrongful discharge in violation of public policy. In keeping with such precedent,

this tort is akin to a claim of retaliation under the Washington Law Against Discrimination, Ch. 49.60 RCW (WLAD). A jury instruction modeled after WPI 330.05, the pattern instruction for WLAD retaliation claims, would provide that liability is determined as follows:

The public policy of the State of Washington is: [*specified by the court*].

To establish a claim of wrongful discharge in violation of public policy, plaintiff has the burden of proving each of the following propositions:

1. That plaintiff acted in furtherance of the public policy defined above, including conduct by plaintiff based upon [*his/her*] reasonable belief that [*he/she*] was acting in furtherance of the public policy; and

2. That defendant discharged plaintiff; and

3. That a substantial factor in defendant's decision to discharge plaintiff was plaintiff's action in furtherance of the public policy.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for plaintiff on this claim. On the other hand, if any one of these propositions has not been proved, then your verdict should be for defendant on this claim.

Plaintiff does not have to prove that [*his/her*] action in furtherance of the public policy was the only factor or the main factor in defendant's decision to discharge plaintiff, nor does plaintiff have to prove that [*he/she*] would not have been discharged but for [*his/her*] action in furtherance of the public policy.

V. ARGUMENT

Introduction. In 1984, the Court recognized the common law tort of wrongful discharge in violation of public policy. See Thompson v. St. Regis Paper Company, 102 Wn.2d at 231-33. Subsequently, in Gardner v. Loomis Armored, 128 Wn.2d 935-36, 941-42, the Court adopted the four-

part test for determining liability for this tort developed by Professor Perritt. See Henry H. Perritt, Jr., Workplace Torts: Rights and Liabilities, §§ 3.7-3.21 (1991); Henry H. Perritt, Jr., Employee Dismissal Law and Practice, §§ 1.13-1.63 (3d ed. 1992 & Supp. 2015). Since adoption of the Perritt test, attention has principally focused on whether the second element, the so-called "jeopardy element," is met. See e.g. Korslund, 156 Wn.2d at 181; Danny v. Laidlaw Transit Servs., 165 Wn.2d 200, 222-26, 193 P.3d 128 (2008) (Owens, J., lead opinion); Cudney, 172 Wn.2d at 529-38; Piel, 177 Wn.2d at 610-18. Application of the jeopardy element figures prominently in each of the three cases presently before the Court—Becker, Rose and Rickman.

In the Court of Appeals opinion in Becker, Judge Fearing criticizes the Perritt test because it has engendered confusion among practitioners and lower court judges with regard to the proper application of the jeopardy element, and proposes a formulation to replace this test. See Becker, 182 Wn. App. at 954-65 (Fearing, J., concurring). This brief follows up on Judge Fearing's criticisms of the Perritt test and urges the Court to overrule Gardner on this point because continued use of this test is "incorrect and harmful." See State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (recognizing doctrine of stare decisis requires a clear showing that rule is incorrect and harmful before it will be abandoned).

A. Overview Of Wrongful Discharge Before And After Adoption Of The Perritt Test In *Gardner*.

1. *Thompson* and the original wrongful discharge formulation.

In Thompson, the Court first recognized a common law tort claim for wrongful discharge in violation of public policy, in order to promote "public policy and the community interest it advances," and to prevent employers from using the employment relationship to frustrate a clear manifestation of public policy. 102 Wn.2d at 231. While wrongful discharge was first described as an "exception" to the terminable at will doctrine, the Court has subsequently recognized that the tort is independent of the underlying contractual agreement between employer and employee, and may surface in various employment contexts.[6]

The Court described the elements of a wrongful discharge claim in Thompson as follows:

The employee has the burden of proving his dismissal violates a clear mandate of public policy. Thus, to state a cause of action, the employee must plead and prove that a stated public policy, either legislatively or

---

[6] See Smith v. Bates Technical Coll., 139 Wn. 2d 793, 801-07, 991 P.2d 1135 (2000) (holding wrongful discharge applies to employees terminable only for cause under civil service laws and collective bargaining agreement); id., 139 Wn. 2d at 809 (holding exhaustion of administrative remedies does not apply to wrongful discharge "[b]ecause the right to be free from wrongful termination in violation of public policy is independent of any underlying contractual agreement or civil service law"; brackets added); see also Christensen v. Grant Cnty. Hosp. Dist. No. 1, 152 Wn. 2d 299, 311, 96 P.3d 957 (2004) (quoting Smith for the proposition that "'the right to be free from wrongful termination in violation of public policy is independent of any underlying contractual agreement or civil service law'"); Korslund, 156 Wn. 2d at 178 (citing Smith for the proposition that wrongful discharge is "available to employees who are dischargeable only for cause (and who may be covered by a collective bargaining agreement)").

judicially recognized, may have been contravened. This protects against frivolous lawsuits and allows trial courts to weed out cases that do not involve any public policy principle. It also allows employers to make personnel decisions without fear of incurring civil liability. However, once the employee has demonstrated that his discharge may have been motivated by reasons that contravene a clear mandate of public policy, the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee. Thus, employee job security is protected against employer actions that contravene a clear public policy.

Id. at 232-33.

From the outset, the Court has characterized this tort claim as a "narrow" one, in the sense that it requires a clear mandate of public policy. See Thompson at 232-33. Thus, in describing the elements of the claim, the Court requires the employee to identify "a clear mandate of public policy" that "may have been contravened," and directs courts "to weed out cases that do not involve any public policy principle." Id.

The question of whether a clear mandate of public policy exists is an issue of law for the Court to decide. See Dicomes v. State, 113 Wn. 2d 612, 617, 782 P.2d 1002 (1989). Public policy is discerned from "the letter or purpose of a constitutional, statutory, or regulatory provision or scheme" or "[p]rior judicial decisions." Thompson at 232 (brackets added; quotation omitted). A clear mandate of public policy is generally implicated in four types of circumstances:

(1) where the discharge was a result of refusing to commit an illegal act; (2) where the discharge resulted due to the employee performing a public duty or obligation; (3) where the termination resulted because the

employee exercised a legal right or privilege; and (4) where the discharge was premised on employee "whistleblowing" activity.

Dicomes, 113 Wn. 2d at 618 (citations omitted).

Wrongful discharge is, in an important sense, independent of the underlying public policy on which it is based: neither the existence nor the absence of other remedies precludes this common law claim. When the public policy in question is derived from a statute that provides an *express* remedy to the discharged employee, the statutory remedy does not displace the common law claim unless it is deemed to be exclusive. See Wilmot v. Kaiser Alum. & Chem. Corp., 118 Wn. 2d 46, 53-66, 821 P.2d 18 (1991) (holding employee may file claim for wrongful discharge based on retaliation for filing workers' compensation claim independent of remedy provided by RCW 51.48.025); see also Smith, 139 Wn.2d at 808-11 (refusing to apply exhaustion of remedies doctrine to foreclose wrongful discharge claim, in part because statutory administrative remedy is not exclusive). Whether the statutory remedy is exclusive "depends upon the particular statute's language and provisions, and may, under appropriate circumstances, depend in part upon other manifestations of legislative intent." Wilmot at 54. Absent an express exclusivity or preemption provision, this inquiry includes consideration of the nature of the remedies available to the discharged employee. Id. at 61 (stating "it is

not simply the presence or absence of a remedy which is significant; rather, the comprehensiveness, or adequacy, of the remedy provided is a factor which courts and commentators have considered in deciding whether a statute provides the exclusive remedies for retaliatory discharge in violation of public policy").

Where a statute provides an *implied* remedy to the discharged employee, there is no question of exclusivity, and the common law wrongful discharge claim can exist side-by-side with the implied statutory remedy. See Bravo v. Dolsen Companies, 125 Wn. 2d 745, 755-58, 888 P.2d 147 (1995) (holding "little Norris-LaGuardia Act," RCW 49.32.020, which gives rise to an implied cause of action for interference with concerted action, "also gives rise to a tort of discharge in violation of a clear mandate of public policy"). As explained by the Court:

> In *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn. 2d 46, 821 P.2d 18 (1991), we established the analytical framework under which we consider whether a wrongful discharge claim can be brought in tort if a remedy is already provided in a statute. Because that inquiry involves an examination of the text of the statutory provision granting the remedy to determine whether the Legislature intended it to be the exclusive means of recovery, the *Wilmot* analysis is not suited to cases like this one, in which there is an implied, rather than an explicit, statutory remedy.

Id., 125 Wn. 2d at 757 n.3.[7]

---

[7] In a previous case, the Court declined to address whether a wrongful discharge claim could be maintained at the same time as an implied statutory cause of action based on the same facts. See Bennett v. Hardy, 113 Wn. 2d 912, 924, 784 P.2d 1258 (1990). Bravo seems to have resolved the issue not addressed in Bennett.

Lastly, where a statute or other source of public policy provides *no remedy* to the discharged employee, the common law wrongful discharge claim simply follows from the existence of a clear public policy. See e.g. Thompson, 102 Wn. 2d at 234 (allowing wrongful discharge claim based on federal act imposing criminal liability and related internal accounting controls).

Wrongful discharge in violation of public policy is an *intentional* tort, analogous to discriminatory or retaliatory discharge in violation of the WLAD. See Cagle v. Burns & Roe, Inc., 106 Wn. 2d 911, 915-18, 726 P.2d 434 (1986) (authorizing recovery of emotional distress damages for intentional tort of wrongful discharge, in part based on "analogous" WLAD law).

The burdens of production and persuasion placed on the employer and employee in the wrongful discharge context are similar to those imposed in employment discrimination and retaliation actions. See Wilmot, 118 Wn. 2d at 67-73. In order to avoid summary judgment or a directed verdict in the employer's favor, the employee has an initial burden of *production* to establish a prima facie case regarding the first element from Thompson, i.e., that "a stated public policy ... may have been contravened" by his or her discharge. If the employee meets this initial burden, then the defendant has the burden of *production* regarding

the second Thompson element, i.e., that the discharge "was for reasons other than those alleged by the employee," in order to avoid summary judgment or a directed verdict in the employee's favor. However, if both parties meet their respective burdens of production, so there are genuine issues of fact, the overall burden of *persuasion* rests upon the employee. See Wilmot at 67-73.

Under Thompson, the elements of a prima facie case of wrongful discharge are recognized as being conceptually similar to employment discrimination and retaliation actions. See Wilmot at 67-69. In Wilmot, employees alleged that their employer discharged them in retaliation for filing workers' compensation claims. The Court listed the elements of a claim for wrongful discharge as follows:

> plaintiff must show (1) that he or she exercised the statutory right to pursue workers' benefits under RCW Title 51 or communicated to the employer an intent to do so or exercised any other right under RCW Title 51; (2) that he or she was discharged; and (3) that there is a causal connection between the exercise of the legal right and the discharge, *i.e.*, that the employer's motivation for the discharge was the employee's exercise of or intent to exercise the statutory rights.

Wilmot at 68-69.[8]

---

[8] In Wilmot, the Court adopted the "substantial factor" test for determining the causal connection between the exercise of the legal right and the discharge. See 118 Wn. 2d at 74. In Allison v. Housing Authority, 118 Wn.2d 79, 85 & 95-96, 821 P.2d 34 (1991), decided the same day as Wilmot, the Court applied the same substantial factor standard to WLAD retaliation claims under RCW 49.60.210. Wilmot described Allison as involving "[a] question regarding similar tests and the respective burdens of proof in the context of age discrimination." Wilmot, 118 Wn. 2d at 71 n.2 (brackets added).

2. *Gardner* and adoption of the Perritt test. In Gardner, the Court adopted the Perritt test as a "guide for analyzing" wrongful discharge claims, stating "adoption of this test does not change the existing common law in this state." 128 Wn. 2d at 941. Under this four-part test, a plaintiff is required to prove that: (1) a clear public policy exists (*clarity* element); (2) allowing the employer to discourage the conduct in which the plaintiff engaged would jeopardize the public policy (*jeopardy* element); (3) the public policy-linked conduct caused the discharge (*causation* element); and (4) there is no overriding justification for the discharge (*absence of justification* element). See id.

The Court noted that Washington law already contained the clarity and jeopardy elements, although they had been analyzed together in Thompson and subsequent cases. See id. The Court further expressed the hope that analyzing these elements separately would promote "a more consistent analysis." Id. at 941. To satisfy the jeopardy element, it explained that:

> plaintiffs must show they engaged in particular conduct, and the conduct *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy. This burden requires a plaintiff to "argue that other means for promoting the policy ... are inadequate." Additionally, the plaintiff must show how the threat of dismissal will discourage others from engaging in the desirable conduct.

Id. at 945 (alterations in original; citations omitted).

Cases following Gardner have generally focused on the adequacy of alternate means of promoting the public policy, culminating in what the Court has described as a "strict adequacy standard." Cudney at 530 (citing Gardner, supra; Hubbard v. Spokane County, 146 Wn. 2d 699, 50 P.3d 602 (2002), Korslund, supra, & Danny, supra). This standard has its roots in the 3-Justice lead opinion in Danny, which states, without citation to authority, that the plaintiff's conduct must be "the *only available adequate means*" for promoting the public policy. 165 Wn. 2d at 222 (Owens, J., lead opinion; italics in original). The Court in Cudney elevated this statement in the Danny lead opinion to a holding, and it is now used as the touchstone for determining whether the jeopardy element of the Perritt test can be satisfied. See Cudney at 530 & 536-37.[9]

---

[9] Cases from Gardner to Cudney have analyzed the jeopardy element in general, and the adequacy of alternate means of promoting public policy in particular, in different ways. It is questionable whether Gardner actually applied the jeopardy element. Instead, the Court focused on the employee's belief that his conduct was required to vindicate public policy, and the effect of his discharge on other employees. See 128 Wn. 2d at 946 (finding jeopardy element satisfied in part because "[a] jury could easily find Gardner believed his conduct was necessary to rescue Ms. Martin from an imminent life threatening situation[,]" and in part because upholding the discharge would discourage employees from acting the same in the future; brackets added); see also id. at 959 (Madsen, J., dissenting, stating "[m]ore importantly, the majority's discussion of Gardner's subjective belief does not satisfy the showing required by the Perritt test that other means for promoting the policy would be inadequate"; brackets added). Ellis v. City of Seattle, 142 Wn. 2d 450, 461, 13 P.3d 1065 (2000), did not consider alternative means of promoting public policy. See also Cudney, 172 Wn. 2d at 535-36 (confirming Ellis did not consider alternate means of promoting public policy). As in Gardner, the Court in Ellis focused on the belief of the employee. See Ellis, 142 Wn. 2d at 461 (stating "[i]n the context of concerns regarding public safety where imminent harm is present, we hold the jeopardy prong of the *Gardner* test may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action"). Hubbard found the alleged alternate means of promoting public policy—a zoning appeal—was

Under the strict adequacy analysis, it does not matter whether the alternative means of enforcing the public policy provides any remedy to the discharged employee. See Hubbard, 146 Wn. 2d at 717; Korslund at 183; Cudney at 538; see also Weiss v. Lonnquist, 173 Wn.App. 344, 293 P.3d 1264 (concluding state bar association disciplinary process was adequate means of protecting the public policy in question, foreclosing wrongful discharge claim), *review denied*, 178 Wn. 2d 1025 (2013).

Recently, in Piel, the Court limited application of the adequacy analysis articulated in Cudney, because the statutory scheme in question had previously been determined by the Court to be nonexclusive on grounds that its remedies were deemed inadequate, and also because the Legislature had specifically indicated that the administrative remedy in

---

inadequate because providing employees with the incentive to act in furtherance of public policy by internally challenging the zoning determination of a supervisor is "more efficient." 146 Wn. 2d at 717; id. at 729 (Madsen, J., dissenting, disagreeing with "the majority's declaration of a 'more efficient' standard for promoting public policy"). Korslund found administrative remedies available under the Energy Reorganization Act of 1974 § 211, 42 U.S.C. § 5851, to an employee who raised safety and other concerns at a nuclear facility were adequate to promote public policy because they were "comprehensive." 156 Wn. 2d at 182; accord Cudney at 532. Cudney found administrative remedies available under the Washington Industrial Safety and Health Act, RCW 49.16.160, to an employee who raised concerns about drunk driving by a manager in a company car during business hours were "robust," and therefore adequate to promote public policy, relying principally on Korshund. Cudney at 536. Cudney also found that reporting the drunk driving to law enforcement was more "immediate" than reporting to the employer, and constituted an adequate alternate remedy. Id. at 537.

question was intended to be in addition to other available remedies. See Piel, 177 Wn.2d at 610-18.[10]

This Court has mainly resolved jeopardy element adequacy issues as a matter of law, particularly when examining the alternate remedy on its face. See Korslund, 156 Wn.2d at 168; Cudney, 172 Wn.2d at 532-34; Piel, 177 Wn.2d at 616-18. In both Korslund and Cudney the Court found alternate remedies adequate as a matter of law, even though they were neither mandatory nor exclusive. See Korslund at 182-83; Cudney at 534-35. Thus, while the Court has said that "whether the jeopardy element is satisfied generally involves a question of fact," frequently this issue is resolved without trial. See Korslund at 182 (citing Hubbard, 146 Wn.2d at 715); Cudney at 531-38; but see Ellis, 142 Wn.2d at 458-64 (reversing dismissal of wrongful discharge claim and remanding for trial on whether the employee had an objectively reasonable belief that his conduct would violate municipal fire code safety provisions).

[10] In Rose, the Court of Appeals distinguished Piel because the statutory scheme in question did not portray the nonexclusive nature of its remedies in the exact same way. See 183 Wn. App. at 791. The statute examined in Rose indicated the statutory scheme was not intended to affect any right available to the employee under federal or state law, and the court read this provision as not encompassing common law claims. See id.

B. Under The Doctrine Of Stare Decisis, Use Of The Perritt Test For Determining Liability For Wrongful Discharge In Violation Of Public Policy Should Be Abandoned As "Incorrect and Harmful."

Judge Fearing's concurrence in Becker correctly pinpoints the unpredictability surrounding jeopardy element analysis under the Perritt test. See Becker, 182 Wn. App. at 957 (Fearing, J., concurring). He also accurately notes that "the jeopardy element is encumbered with many layers of rules beyond the employee simply showing that her conduct directly related to the public policy", id. at 958; and that "the law of wrongful discharge in violation of public policy may advance by turning back time to before *Gardner*, when the employee only needed to show his discharge implicated a clear mandate of public policy", id. at 962. The Court should abandon the Perritt test, and overrule contrary precedent on this point of law as "incorrect and harmful."

1. The Perritt test is "incorrect."

Re: Role of the Common Law. Under current jeopardy element adequacy analysis, employers argue that the wrongful discharge common law remedy is superfluous or unnecessary. See Becker, 182 Wn.2d at 939; CHS Supp. Br at 4. The common law is freestanding, and should not be discounted in this manner. It may be limited by constitutional principles, such as the impact of the First Amendment on proof requirements for

"public figure" defamation claims. See Mohr v. Grant, 153 Wn. 2d 812, 832, 108 P.3d 768 (2005) (noting First Amendment gives more protection to free speech than common law tort of defamation). The Legislature may also preempt a common law rule, in which event the statutory remedy will be exclusive. See e.g. Washington Water Power v. Graybar Electric Co., 112 Wn.2d 847, 852, 774 P.2d 1199 (1989) (holding Washington Products Liability Act preempts common law product liability remedies). However, the mere existence of a statutory remedy that parallels or potentially overlaps a common law remedy does not render the common law unnecessary or superfluous. See Potter w. Wash. State Patrol, 165 Wn.2d 67, 78-88, 196 P.3d 691 (2008) (holding nonexclusive wrongful impoundment of vehicle statute does not preclude common law conversion claim); Smith, 139 Wn.2d at 808-11 (refusing to foreclose wrongful discharge in violation of public policy claim based upon exhaustion of remedies doctrine in absence of legislative declaration indicating *exclusive* agency jurisdiction); Bravo, 125 Wn.2d at 756-58 (upholding the right to pursue both implied statutory claim and wrongful discharge claim); Wilmot, 118 Wn.2d at 55-63 (holding nonexclusive statutory remedy does not preclude wrongful discharge claim).

In Korslund, this Court swept aside the Wilmot non-exclusivity analysis because it predated adoption of the Perritt test and thus did not

address the adequacy issue. See Korslund at 183. But this does not answer the question why the existence of other nonexclusive remedies should be taken into account in determining whether the jeopardy element is met when a common law remedy would not otherwise be foreclosed. Certainly, in fashioning a common law remedy the Court may impose additional proof requirements. See e.g. Hunsley v. Giard, 87 Wn.2d 424, 436, 553 P.2d 1096 (1976) (imposing objective symptomology requirement for *negligent* infliction of emotional distress); Kloepfel v. Bokor, 149 Wn. 2d 192, 66 P.3d 630 (2003) (not requiring objective symptomology for *intentional* infliction of emotional distress). But the basis for doing so must be grounded in reason and common sense. Wilmot, Smith and Bravo, supra, show that the mere existence of a statutory remedy does not itself justify the strict adequacy analysis. That analysis must be justified in its own right.

Re: Confusion and Uncertainty. Reason and common sense are the cardinal principles of the common law. See Bernot v. Morrison, 81 Wash. 538, 544, 143 Pac. 104 (1914), *dismissed*, 250 U.S. 648 (1919); In re Parentage of L.B., 155 Wn. 2d 679, 689, 122 P.3d 161 (2005). The two opinions in Becker reflect an unacceptable level of confusion and uncertainty in the jeopardy element adequacy analysis. See Becker, supra. Although Piel arguably marks one outer limit to the current adequacy

analysis, it nonetheless leaves the jeopardy element inquiry undisturbed, noting that "[e]ach public policy tort claim must be evaluated in light of its particular context." 177 Wn.2d at 604. Given the likelihood of any number of context-specific adequacy disputes, the current standard is unworkable.

Even Professor Perritt seems unable to eliminate this confusion and uncertainty in his recent criticism as to why the Cudney adequacy analysis is incorrect. See Cudney, 172 Wn. 2d at 536-38 (regarding the adequacy analysis with respect to the wrongful discharge claim based upon the public policy against drunk driving); Perritt, Employee Dismissal Law and Practice at 7-82.1 through 7-82.4. In Cudney, the Court held that, as to the public policy claim based upon laws against driving while intoxicated, the jeopardy element could not be met by the employee reporting concerns to his employer because of the availability of law enforcement remedies, including the 911 reporting system. See Cudney at 536-38. Professor Perritt questions this analysis, distinguishing aspects of the jeopardy analysis in Hubbard and Danny, supra. See Employee Dismissal Law and Practice at 7-82.3-4. Professor Perritt's complex assessment of the jeopardy element itself reveals the difficulty of predicting when this element will be met in any given case. It does not meaningfully explain why in Hubbard an employee's internal report meets the adequacy requirement, while in Cudney it does not. This analysis, like

the test itself, lacks precision. In the end, application of the jeopardy element of the Perritt test is unduly vague, fostering an unhealthy lack of predictability. While the other elements of the Perritt test do not appear to be as problematic, the entire test is a poor substitute for a more traditional approach to determining tort liability, discussed in § C, below.

Re: Terminable At Will Doctrine. Employers and aligned amicus curiae repeatedly invoke the need for the jeopardy element adequacy analysis in order to safeguard against erosion of the terminable at will doctrine. See CHS Supp. Br. at 7, 10-12; Rockwood Supp. Br. at 5; Premera Supp. Br. at 4; Pacific Legal Fdn. Am. Br. at 3-11; AHG Ans. to (Second) Pet. for Rev. at 7-8. The Court itself has supported this view. See Cudney, 172 Wn. 2d at 530. However, the "strict adequacy standard" required under the jeopardy element cannot be justified based upon concerns over undermining the terminable at will doctrine. Id.

The duty to act in accordance with clear public policy, grounded in tort, is independent of any contractual relationship between employer and employee. Moreover, many wrongful discharge cases do not involve employment that is terminable at will. See e.g. Smith, supra. It is an abuse of the employment relationship, whether that relationship is deemed to be at will or otherwise, to intentionally discharge an employee for reasons

that are contrary to clear public policy. The terminable at will doctrine provides no safe harbor for such tortious conduct.

The nature of at will employment has been incorrectly over-emphasized in support of the jeopardy element "strict adequacy standard." The terminable at will doctrine is fully honored, and the proper balancing of employer and employee rights secured, by the requirement that there be a *clear* public policy at stake. This is a question of law for the court, and it is this determination of public policy that serves as the principal safeguard against diminishing employers' legitimate interests.

Re: Nonnegotiable Nature of Right. This Court has recognized that an employee's right not to be discharged in violation of clear public policy is *nonnegotiable* in nature. See Smith, 139 Wn.2d at 809 (quoting with approval Wilson v. City of Monroe, 88 Wn.App. 113, 943 P.2d 1134 (1997), *review denied*, 134 Wn.2d 1028 (1998)). This principle is at odds with the notion that any private, contract-based remedy may suffice for jeopardy element purposes to defeat recovery. For example, Rickman essentially renders this common law remedy illusory by finding that an employer's functioning internal remedy forecloses a wrongful discharge claim. See Rickman 2014 WL 4347625 at *7. If true, employers have it within their own power to immunize themselves from common law tort liability for violation of public policy, even though, under the analysis in

Smith, they could not attempt to negotiate away the employee's right to be protected against retaliatory action for acting in furtherance of public policy. See 134 Wn. 2d at 802-06.

Re: Intentional Tort. As *intentional* tortfeasors, employers who wrongfully discharge employees in violation of public policy are undeserving of the solicitude reflected in the current jeopardy element adequacy analysis. See Kloepfel, 149 Wn. 2d at 200 (stating "[c]ourts generally establish rules which make liability more likely to attach to intentional wrongdoers than to those who are merely negligent" and "Washington is no exception to this rule"; brackets added); Adkisson v. Seattle, 42 Wn.2d 676, 682-83, 258 P.2d 461 (1953) (refusing to allow an intentional tortfeasor to raise defense of plaintiff's failure to mitigate damages); see generally 1 W. Page Keeton et al, Prosser & Keeton on Torts, § 8 at 36-37 & § 65 at 461-62 (5th ed. 1984) (recognizing imposition of greater responsibility and consequences on intentional tortfeasors).

2. The Perritt test is "harmful."

Use of the Perritt test for determining liability for wrongful discharge in violation of public policy is harmful because the required jeopardy element adequacy analysis has unduly limited the availability of this common law remedy. As the adequacy analysis has evolved, employees discharged for furthering a clear mandate of public policy are

denied this relief because other means of enforcing the public policy exist, even when no other remedy is available to the employee. Under these circumstances, the compensatory function of tort law is lost. At the same time, the deterrent function of tort law is also undermined. Under the private attorney general concept, an employee wrongfully discharged has the incentive to pursue a common law remedy and, in being allowed to do so, *serves the public interest* by safeguarding the particular public policy at issue. See James W. Hubbell, Retaliatory Discharge and the Economics of Deterrence, 60 U. Colo. L. Rev. 91, 113 (1990) (identifying private attorney general underpinnings of wrongful discharge in violation of public policy); cf. Marquis v. City of Spokane, 130 Wn. 2d 97, 109, 922 P.2d 43 (1996) (stating "a plaintiff bringing a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of the highest priority").

In Thompson, the Court's goal in recognizing this tort was to strike the proper balance between the interests of employers and employees. See 102 Wn. 2d at 232. The Perritt test has resulted in a harmful imbalance favoring employers.

C. The Court Should Return To The Principles First Announced In *Thompson*, And Reformulate The Proof Requirements For Wrongful Discharge In Violation Of Public Policy Along The Lines Of Those Used In Resolving WLAD Retaliation Claims.

The traditional framework for evaluating potential tort liability asks whether the defendant owed the plaintiff a duty, whether that duty was breached, and whether the breach proximately caused plaintiff damages. See generally Bernathy v. Walt Failors, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1992) (regarding negligence claim); see also Christensen v. Swedish Hospital, 59 Wn.2d 545, 548-49, 368 P.2d 897 (1962) (regarding willful misconduct claim).

This traditional framework readily applies to evaluating claims for wrongful discharge in violation of public policy. The employer's duty is simple and straightforward—the employer cannot impose as a condition of employment a requirement that the employee act in a manner contrary to fundamental public policy, nor can it subject the employee to punishment for acting in accordance with such public policy. See Smith, 139 Wn.2d at 804; Thompson, 102 Wn.2d at 232-33. An employer who discharges an employee because he or she acted in furtherance of public policy breaches this duty. See Smith at 804. Unquestionably, an employee who is wrongfully discharged may recover all damages caused by the employer's wrongful act. See Cagle, 106 Wn.2d at 919.

The Court should return to the framework for wrongful discharge in violation of public policy that animated its early decisions in Thompson and Wilmot, supra, which drew from the analogous proof requirements for retaliation claims under the WLAD. See § A, supra. A jury instruction setting forth the elements for proving liability for wrongful discharge in violation of public policy would be along the following lines:

The public policy of the State of Washington is: [*specified by the court*].

To establish a claim of wrongful discharge in violation of public policy, plaintiff has the burden of proving each of the following propositions:

1. That plaintiff acted in furtherance of the public policy defined above, including conduct by plaintiff based upon [*his/her*] reasonable belief that [*he/she*] was acting in furtherance of the public policy; and

2. That defendant discharged plaintiff; and

3. That a substantial factor in defendant's decision to discharge plaintiff was plaintiff's action in furtherance of the public policy.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for plaintiff on this claim. On the other hand, if any one of these propositions has not been proved, then your verdict should be for defendant on this claim.

Plaintiff does not have to prove that [*his/her*] action in furtherance of public policy was the only factor or the main factor in defendant's decision to discharge plaintiff, nor does plaintiff have to prove that [*he/she*] would not have been discharged but for [*his/her*] action in furtherance of the public policy.

This proposed instruction captures the fundamental requirements for establishing liability for wrongful discharge, and does so in a manner that is in keeping with Thompson's requirement that this tort be limited in

nature so as not to encroach upon employers' legitimate prerogatives. See 102 Wn.2d at 232. The formulation is based upon the WPI pattern instruction regarding WLAD retaliation claims. See WPI 300.05.[11]

Under the proposed instruction, the trial court determines as a matter of law that a clear public policy is at issue, and defines that policy. The first element requires the plaintiff to prove that he or she acted in furtherance of the public policy. Under the second and third elements, the plaintiff must prove that a discharge occurred and that plaintiff's action in furtherance of public policy was a "substantial factor" in the employer's decision making.[12] The employer is free to point to other legitimate reasons for the discharge, and it is for the jury to determine whether the plaintiff ultimately meets the burden of proof, unless the issue can be resolved as a matter of law. See e.g. Dicomes, 113 Wn. 2d at 623-24.

The proposed liability instruction is appropriate regardless of whether the discharge is based upon the employee refusing to commit an illegal act, performing a public duty or obligation, exercising a legal right

---

[11] WPI 300.05 and its Comment are reproduced in the Appendix to this brief. While the WLAD is subject to a statutory rule of liberal construction, RCW 49.60.020, this rule of construction has not tempered the Court's invocation of WLAD precedent in crafting the wrongful discharge remedy. See Cagle, supra; Wilmot, supra.

[12] This brief assumes that Becker's claim is actionable. See Briggs v. Nova Servs., 166 Wn. 2d 794, 808 n.7, 213 P.3d 910 (2009) (C. Johnson, concurring, indicating constructive discharge should be actionable); id., 166 Wn. 2d at 831 (Owens, J., dissenting, joined by 3 additional Justices, agreeing constructive discharge should be actionable); cf. Martini v. Boeing Co., 137 Wn. 2d 357, 363-77, 971 P.2d 45 (1999) (allowing recovery of damages proximately caused by violation of WLAD without need to show constructive discharge).

or privilege, or whistleblowing. See Dicomes at 618.[13] The Court has previously applied the substantial factor test to this tort in determining whether the employer's discharge is a result of plaintiff's action in furtherance of public policy. See Wilmot, 118 Wn. 2d at 71-73; see also Gardner, 128 Wn. 2d at 942 (stating the causation standard adopted in Wilmot is "firmly established in Washington common law"). The same test is used in determining liability under the WLAD for unlawful retaliation by the employer. See WPI 330.05.

In determining whether plaintiff acted in furtherance of public policy, the proposed instruction allows the jury to consider whether plaintiff's conduct was based upon the "reasonable belief" that he or she was acting in furtherance of the public policy. This reasonable belief standard is grounded in the Court's teachings in both Gardner, 128 Wn.2d at 945-46, and Ellis, 142 Wn.2d at 460-61.[14] A similar reasonable belief standard applies to WLAD retaliation claims. See WPI 330.05.

---

[13] The proposed instruction will need to be supplemented with instructions regarding damages. See e.g. WPI 330.81, 330.82 & 330.83. Supplemental instructions relating to employer defenses may also be required. See Dicomes, 113 Wn. 2d at 623-24 (noting plaintiff employed means to report employer's misconduct that were unreasonable under the circumstances); cf. Selberg v. United Pac. Ins. Co., 45 Wn. App. 469, 472, 726 P.2d 468 (1986) (indicating "[w]hen the employee's conduct in protest of an unlawful employment practice so interferes with his job performance that it renders him ineffectual in the position for which he was employed, such conduct is not protected" under the WLAD), *review denied*, 107 Wn. 2d 1017 (1986).

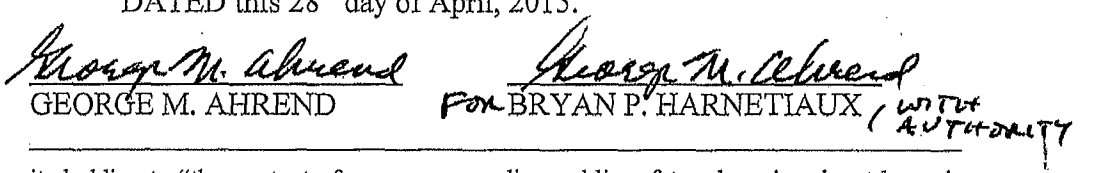
[14] In Ellis, the Court permitted a wrongful discharge claim to proceed to trial on the disputed question of whether the employee had an objectively reasonable belief that his employer's actions violated public policy. See 142 Wn. 2d at 460-61. The Court limited

This Court should reframe the elements of wrongful discharge in violation of public policy, returning to a more traditional liability analysis along the lines of the above-proposed instruction. This should put an end to the turmoil that has accompanied development of this tort in recent years, while at the same time restoring the proper balance between the rights of employers and employees. Both bench and bar would greatly benefit from such a course correction.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief, and resolve this appeal accordingly.

DATED this 28th day of April, 2015.



GEORGE M. AHREND

FOR BRYAN P. HARNETIAUX (WITH AUTHORITY)

---

its holding to "the context of concerns regarding public safety where imminent harm is present." Id. at 461 (citing Gardner). In so doing, the Court indicated that it would not "at this time disturb the holdings" in two Court of Appeals decisions, Bott v. Rockwell Int'l, 80 Wn. App. 326, 908 P.2d 909 (1996), and Wlasiuk v. Whirlpool Corp., 81 Wn. App. 163, 914 P.2d 102, 932 P.2d 1266 (1996). Ellis, 142 Wn. 2d at 461. The Court portrayed these decisions as requiring "actual violations of law, policy, or regulation ... in situations involving financial misconduct." Id. at 460 (ellipses added). The reasonable belief standard set forth in the proposed instruction should not be limited to situations involving imminent threats of harm to human life. This is not required for WLAD retaliation claims, and the public policies giving rise to wrongful discharge should not be placed on a lower plane. Employees may not have the time or wherewithal to confirm the actual metes and bounds of the public policy at issue before acting. If their belief is objectively reasonable, that should be enough. The reasonableness of their belief, in any case, will depend on the particular facts and circumstances. If the employee acts unreasonably as a matter of law, then the claim will be dismissed. Otherwise, the issue is for the trier of fact. Bott does not hold otherwise, as the proposed instruction in that case appears to have sought a *subjective* good faith standard. See 80 Wn. App. at 331, 333-34. However, Wlasiuk appears to reject the reasonable belief standard, and should be disapproved. See 81 Wn. App. at 179-80. To the extent Ellis is read as approving Wlasiuk, it may have to be overruled on this point.

APPENDIX

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.05 (6th ed.)

Washington Practice Series TM
Washington Pattern Jury Instructions--Civil
Database updated June 2013
Washington State Supreme Court Committee on Jury Instructions
Part XVI. Employment
Chapter 330. Employment Discrimination

WPI 330.05 Employment Discrimination—Retaliation

It is unlawful for an employer to retaliate against a person for
[opposing what the person reasonably believed to be discrimination on the basis of [age] [creed] [disability] [religion] [sexual orientation] [honorably discharged veteran status] [military status] [marital status] [national origin] [race] [gender]] [and] [or] [providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred].
To establish a claim of unlawful retaliation by (name of employer), (name of plaintiff) has the burden of proving each of the following propositions:
(1) That (name of plaintiff) [was opposing what [he] [she] reasonably believed to be discrimination on the basis of [age] [creed] [disability] [religion] [marital status] [national origin] [race] [gender] [honorably discharged veteran status] [military status]] [or] [was [providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred]; and
(2) That a substantial factor in the decision to [discipline] [demote] [deny the promotion] [terminate] was the plaintiff's [opposition to what [he] [she] reasonably believed to be discrimination or retaliation] [or] [[providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred].
If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any one of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].
(Name of plaintiff) does not have to prove that [his] [her] [opposition] [participation in the proceeding] [was] [were] the only factor or the main factor in (name of defendant's) decision, nor does (name of plaintiff) have to prove that [he] [she] would not have been [disciplined] [demoted] [denied the promotion] [terminated] but for [his] [her] [opposition] [participation].

NOTE ON USE

Use the bracketed phrases as appropriate. It may be appropriate to substitute other allegedly retaliatory acts in proposition (2).
Use this instruction instead of WPI 330.01, Employment Discrimination—Disparate Treatment—Burden of Proof, or WPI 330.02, Employment Discrimination—Disparate Impact—Business Necessity—Definition.
This instruction is not designed for use in a statutory "whistleblower" case pursuant to RCW Chapter 42.40.
For a discussion of honorably discharged veteran status and military status, see the Comment to WPI 330.01, Employment Discrimination—Disparate Treatment—Burden of Proof.

COMMENT

The instruction was revised in 2010 to incorporate statutory amendments that added protected status protection to sexual orientation, honorably discharged veteran status, and military status.
The elements of a retaliation claim are based upon RCW 49.60.210(1), Delahunty v. Cahoon, 66 Wn.App. 829, 832 P.2d 1378 (1992); Allison v. Housing Housing Authority of City of Seattle, 118 Wn.2d 79, 821 P.2d 34 (1991); Schonauer v. DCR Entertainment, Inc., 79 Wn.App. 808, 905 P.2d 392 (1995); Milligan v. Thompson, 110 Wn.App. 628, 42 P.3d 418 (2002); Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 991 P.2d 1182 (2000).
"A discharge will support an award of damages when (1) the employee engaged in a statutorily protected [opposition] activity, (2) an adverse employment action was taken, and (3) the statutorily protected activity was a substantial factor in the employer's adverse employment decision." Schonauer v. DCR Entm't, Inc., 79 Wn.App. at 827 (citing *Allison* and *Delahunty*). See also Coville v. Cobarc Services, Inc., 73 Wn.App. 433, 869 P.2d 1103 (1994) (adding the term "opposition"); Davis v. West One Automotive Group, 140 Wn.App. 449, 166 P.3d 807 (2007).

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

Substantial factor. An individual asserting a claim under this provision must prove a retaliatory motive was a "substantial factor" in the challenged decision, but need not prove it was the only factor or a "determining factor." Allison v. Housing Auth., supra. This element can be met by establishing that "the employee participated in an opposition activity, the employer knew of the opposition activity, and the employee was discharged." Graves v. Department of Game, 76 Wn.App. 705, 712, 887 P.2d 424 (1994) (citing Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991), and *Allison*). Complaints about the conduct of a supervisor that do not allege discrimination are insufficient to impute knowledge of protected opposition to employer. Graves v. Dep't of Game, supra.

Protected activity. The employee must oppose "practices forbidden by this chapter," i.e., the law against discrimination, and opposition to a practice not forbidden by the statute is not protected activity. Coville v. Cobarc Servs., Inc., 73 Wn.App. at 440. RCW 49.60.210(2) makes it unlawful for a government agency or government manager or supervisor to retaliate against a "whistleblower" as defined in RCW Chapter 42.40, however, unless the retaliation is for complaining of discrimination. The elements of a statutory "whistleblower" claim differ from those under RCW 49.60.210(1), and a different instruction should be used.

In Ellis v. City of Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2000), the court held that to establish a RCW Chapter 49.60 claim of retaliation, the employee need only show he/she reasonably believed there was discrimination and complained about it, and need not prove actual discrimination.

Adverse employment action. Adverse employment actions may include: failure to promote, Davis v. Department of Labor and Industries, 94 Wn.2d 119, 615 P.2d 1279 (1980); reduction of pay, Kirby v. City of Tacoma, 124 Wn.App. 454, 98 P.3d 827 (2004); and demotion or transfer, Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002).

[Current as of October 2010.]

Westlaw. © 2013 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

OFFICE RECEPTIONIST, CLERK

To: Shari Canet
Cc: "Keller Allen"; "Mary Palmer"; "Stellman Keehnel"; "Katherine Heaton"; "Mary Schultz"; "Jeffrey Needle"; "Toby Marshall"; "Gregory Staeheli"; "Ronald Van Wert"; "Andrea Schmitt"; "Joel Nichols"; "Robert Howie"; Skylar Sherwood"; Stewart Estes; George Ahrend; Bryan Harnetiaux
Subject: RE: Becker v. Community Health Sys., Inc. (S.C. #90946-6), Rose v. Anderson Hay & Grain Co. (S.C. #90975-0), & Rickman v. Premera Blue Cross (S.C. #91040-5)

Received 4-28-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Shari Canet [mailto:scanet@ahrendlaw.com]
Sent: Tuesday, April 28, 2015 4:30 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: "Keller Allen"; "Mary Palmer"; "Stellman Keehnel"; "Katherine Heaton"; "Mary Schultz"; "Jeffrey Needle"; "Toby Marshall"; "Gregory Staeheli"; "Ronald Van Wert"; "Andrea Schmitt"; "Joel Nichols"; "Robert Howie"; Skylar Sherwood"; Stewart Estes; George Ahrend; Bryan Harnetiaux
Subject: Becker v. Community Health Sys., Inc. (S.C. #90946-6), Rose v. Anderson Hay & Grain Co. (S.C. #90975-0), & Rickman v. Premera Blue Cross (S.C. #91040-5)

Re: Becker v. Community Health Sys., Inc. (S.C. #90946-6), Rose v. Anderson Hay & Grain Co. (S.C. #90975-0), & Rickman v. Premera Blue Cross (S.C. #91040-5)

Dear Mr. Carpenter:

On behalf of the Washington State Association for Justice Foundation, identical briefs are submitted for filing in each of the above-referenced cases, as instructed by Commissioner Pierce in her letter of April 13, 2015.

In addition, motions to file an over length brief (or for alternative relief) are submitted for filing in each of the above-referenced cases.

Counsel for the parties are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

--
Shari M. Canet, Paralegal
Ahrend Law Firm PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000 ext. 810

Fax (509) 464-6290

The information contained in this email transmission and any attachments is CONFIDENTIAL. Anyone other than the intended recipient is prohibited from reading, copying, or distributing this transmission and any attachments. If you are not the intended recipient, please notify the sender immediately by calling (509) 764-9000.