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NO. 91040-5

WASHINGTON STATE SUPREME COURT

ERICKA RICKMAN,

Petitioner

vs.

PREMERA BLUE CROSS,

Respondent

Answer of Petitioner to Briefs of Amici Curiae Washington Employment
Lawyers Association and Washington State Association for Justice
Foundation

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ORIGINAL

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A. Introduction

Premera Blue Cross ("Premera") terminated Ericka Rickman ("Ericka") after she expressed concerns that Premera intended to engage in a "risk bucketing" plan that would violate health insurance privacy laws. CP 187-194. Premera determined that the "risk bucketing" plan was, indeed, unlawful and ended the discussion. CP at 67. The Division I Court of Appeals upheld the trial court's summary judgment dismissal of Ericka's public policy wrongful discharge case, finding "no issues of material fact exist as to whether discouraging Rickman's conduct would jeopardize the public policy of maintaining and protecting patient privacy interests[.]" and concluding that Premera's internal anonymous reporting system "provided an available adequate alternate means by which Rickman could have reported her concerns[.]" (See Petition for Review at A-0012 - A-0013, A-0015).

Ericka agrees with the amicus briefs filed by the Washington Employment Lawyers Association (WELA) and the Washington State Association for Justice Foundation (WSAJF). Specifically, Ericka supports WELA and WSAJF's argument that returning the tort to its roots as announced in Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984), coupled with a proof paradigm mirroring the Washington Law Against Discrimination (WLAD), will provide much

needed clarity to employers, employees, courts, and practitioners. Still, the Court need not abandon recent jurisprudence to rule in Ericka's favor.

Ericka also supports WELA's arguments that 1) Cudney v. AlSCO, Inc., 172 Wn.2d 524, 259 P.3d 244 (2011), cannot be harmonized with other important Supreme Court decisions, 2) the tort should exist regardless of the existence of alternate means of promoting public policy as long as the employee's behavior "directly relates" to the enforcement of the public policy at issue, and 3) alternate non-exclusive means of promoting the public policy are "inadequate" for the purposes of the "jeopardy" element.

B. Returning The Tort of Wrongful Discharge in Violation of Public Policy to its Roots Would Provide Clarity Missing From Current Washington Jurisprudence.

The tort of wrongful discharge in violation of public policy is rooted in protecting workers whose behavior promotes public policy. To that end, Ericka endorses the position of WSAJF and WELA that the Court should return the tort to its roots as first announced in Thompson, supra, and should reformulate the tort to mirror the liability analysis of claims for wrongful discharge in violation of Washington's Law Against Discrimination (WLAD). Rickman agrees with WELA and WSAJF that the only question that matters is whether whether the employee's action directly relates to the public policy. If the employer terminates the

employee because she took action that directly relates to the public policy, the law should recognize the tort of wrongful discharge in violation of public policy. Washington jurisprudence now requires analyzing the minutia of "adequate" public policy promotion on case by case basis. See Piel v. City of Federal Way, 177 Wn.2d 604, 617, 306 P.3d 879, 885 (2013) ("Each public policy tort claim must be evaluated in light of its particular context."). Requiring an employee to simply prove her actions directly related to the public policy will provide clarity to the tort missing from current Washington jurisprudence.

C. Cases Are In Conflict.

Rickman agrees with WELA and with Judge Fearing's concurrence in Becker v. Community Health Systems, 182 Wn.App. 935, 332 P.3d 1085 (2014) that Hume v. American Disposal Co., 124, Wn.2d 656, 880 P.2d 998 (1994), Ellis v. City of Seattle, 142 Wn.2d 450 13 P.3d 1065 (2000), Wilson v. City of Monroe, 88 Wn.App. 113, 943 P.2d 1134 (1997), and Piel, *supra*, are difficult to harmonize with Cudney, *supra*. If, as Cudney states, the remedy to the individual truly does not matter¹, then there is no tort. In fact, the remedy to the individual and promotion of the public policy are inextricably intertwined in the tort.

¹ See Cudney, *supra*, 172 Wn.2d at 538, 259 at 250.

Citing Hubbard v. Spokane Cnty., 146 Wash. 2d 699, 50 P.3d 602 (2002), and relying on the Hubbard Court's citation to Perritt², the Cudney Court overemphasized that "it is the public policy that must be promoted, not Cudney's individual interests." Cudney, supra, 172 Wn.2d at 538, 259 at 250. The Cudney Court took the Hubbard Court's reference to Perritt out of context. The Hubbard Court rightly articulated that the jeopardy inquiry under the Perritt test does not end with the existence of other means of promoting the public policy independent of individual remedies:

The plaintiff must also "show how the threat of dismissal will discourage others from engaging in the desirable conduct." Finally, in determining whether the public policy has been contravened or jeopardized, a court must look to the "letter *or* purpose of a statute."

Hubbard, 146 Wn.2d at 713, 50 P.3d at 609-10, quoting Dicomes v. State, 113 Wn.2d 612, 620, 782 P.2d 1002 (1989).

Despite the existence of other means of promoting the public policy apart from remedies available to the individual whistleblower, the Hubbard Court correctly found Hubbard satisfied the jeopardy element: "Hubbard's actions would arguably have been necessary to enforce the public policy articulated both by the zoning code and RCW 42.23.070(1)." Hubbard, 146 Wn.2d at 716, 611, 50 P.3d at 611. The Hubbard Court reached this conclusion by looking at the purpose of the zoning statute at

² 1 Henry H. Perritt, Jr., Workplace Torts: Rights And Liabilities § 3.14 at 77 (1991)

issue and considering how Hubbard's dismissal would likely be viewed as a warning to others. Id. at 716-17, 50 P.3d at 611-12. The Hubbard Court further reasoned that,

Because the appellate procedures in RCW 36.70.830 require that an aggrieved citizen receive notice of the zoning actions *and* act within a relatively short time frame (within 20 days of the action), it would often be left up to chance whether the public policy was enforced. In contrast, it would be more efficient to allow county employees to prevent these types of violations before they occurred.

Hubbard, 146 Wn.2d at 717, 50 P.3d at 611.

Providing a private right of action for individuals who are terminated for actions that promote public policies serves the letter and purpose of the laws those individuals seek to uphold and enforce. Washington jurisprudence has long recognized this principle. WELA correctly articulates that Cudney cannot be harmonized with other important Supreme Court decisions recognizing the existence of the tort of wrongful discharge in violation of public policy despite the existence of other statutory and administrative means of promoting public policy.

D. Non-Exclusive Alternate Means of Promoting Public Policy are “Inadequate” for the Purposes of the “Jeopardy” Element.

Ericka agrees with WELA that, if the Court retains the current formulation of the "jeopardy" element, it should conclude that non-

exclusive alternate means of promoting public policy are, by definition, inadequate.

In Ericka's case, the appellate court erroneously found Premera's non-exclusive, internal, anonymous reporting mechanisms adequate to promote the public policy. See Petition for Review at 13-16, A-0015. Not even Cudney, *supra*, and Weiss v. Lonquist, 173 Wn.App. 344, 293 P.3d 1264 (2013), contemplate that an internal, anonymous reporting system would ever be adequate to promote public policy. Almost every company has some mechanism for reporting suspected misconduct, accompanied by an anti-retaliation provision. Surely not even the Cudney Court envisioned a scenario where corporations could shield themselves from liability for wrongful termination of whistleblowers simply by adopting internal, anonymous reporting mechanisms.

The statutory complaint provisions of HIPAA and WUHCIA are likewise inadequate alternative means of promoting the public policy in the present case, both because they are non-exclusive, and because these laws only provide complaint mechanisms for *actual* rather than *potential* noncompliance. See Petition for Review at 10-13.

The non-exclusivity of the statutory and administrative remedies under the Health Insurance Portability and Accountability Act (HIPAA)³ is the "strongest possible evidence" that they are "not adequate to vindicate a violation of public policy." Piel, *supra*, 177 Wn.2d at 617, 306 P.3d at 884. Further, UHCIA's remedies are limited to actual damages and prevailing party attorney's fees. See RCW 70.02.170. Piel supports survival of the tort in Ericka's case despite the existence of these remedies. See Id. at 614-615, 617, 306 P.3d at 883, 884. Finally, were the Court to agree with the appellate court that Premera's non-exclusive, internal, anonymous reporting system were an adequate alternate means of promoting public policy, it would set a dangerous precedent. Employers would be free to discharge whistleblowers with impunity by simply adopting such systems regardless of their effectiveness.

E. Conclusion

For the foregoing reasons, Ericka supports the arguments of amici curiae WELA and WSAJF.

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³ Except as otherwise provided by 42 U.S.C. 1320d - 5(b)(1) and 42 U.S.C. 299b - 22(f)(3), a penalty imposed under this part is in addition to any other penalty prescribed by law. 45 C.F.R. § 160.418.

DATED this 21 day of May, 2015.

DENO MILLIKAN LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "Joel P. Nichols", written over a horizontal line.

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DECLARATION OF SERVICE

I, Joan L. Brown, declare as follows: On May 21, 2015 I sent via e-mail (by agreement of the parties) and by regular U.S. Mail, Postage prepaid, a true and correct copy of the Answer of Petitioner to Briefs of Amici Curiae Washington Employment Lawyers Association and Washington State Association For Justice Foundation to:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Erika Rickman v. Premera Blue Cross, Inc.
Supreme Court Case No. 91040-5

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Dear Clerk:

Attached for filing is the Answer of Petitioner to Briefs of Amici Curiae Washington Employment Lawyers Association and Washington State Association for Justice Foundation.
Petitioner's Attorney is copied on this email. *I apologize for missing the document in the first e-mail.*

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