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NO. 95531-0

SUPREME COURT OF THE STATE OF WASHINGTON

JARED KARSETTER AND JULIE KARSETTER

Petitioners,

V.

KING COUNTY CORRECTIONS GUILD,

Respondent.

RESPONDENT KING COUNTY CORRECTIONS GUILD'S BRIEF IN
RESPONSE TO AMICUS CURIAE BRIEF OF THE WASHINGTON
EMPLOYMENT LAWYERS ASSOCIATION

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IDENTITY OF RESPONDENT

Respondent is the King County Corrections Guild (“Guild”), which was appellant below.

ARGUMENT

I. WELA’s Contention That Karstetter May Recover Damages for Breach of Contract is Untenable in Light of its Admission That the Guild Was Privileged to Unilaterally Terminate its Attorney-Client Relationship with Karstetter.

WELA argues that Karstetter properly states a claim for breach of contract, despite acknowledging that “the public policy reflected in RPC 1.16(a) [was] satisfied” when the Guild elected to “terminate Karstetter’s representation.” WELA Brief at 12. To support this theory, WELA urges that a party may recover damages for an injury resulting from actions a defendant was privileged to take. This contention makes no sense and should be rejected.

As an initial matter, the Guild and WELA agree on one critical point. WELA correctly observes that “[t]he public policy advanced by [RPC 1.16(a)(3)] prevents an attorney’s representation over a client’s objection.” WELA Brief at 11. As a result, WELA reasons, the provisions in Karstetter’s contract which provide for “just cause” discharge and an opportunity to correct “are in direct conflict with RPC 1.16(a)” and are therefore “injurious to the public and [] unenforceable.” *Id.* Karstetter’s protestations notwithstanding, this is the only logical conclusion to draw

from the Rules of Professional Conduct.

RPC 1.16 reflects the long-standing common law rule in Washington. Time and again, this Court has confirmed that “a client may discharge his attorney at any time with or without cause.” *Belli v. Shaw*, 98 Wn.2d 569, 577, 657 P.2d 315 (1983) (citing *Kimball v. Pub. Utility Dist. 1*, 64 Wn.2d 525, 391 P.2d 205 (1964)); *Barr v. Day*, 124 Wn.2d 318, 329, 879 P.2d 912 (1994); *Wright v. Johanson*, 132 Wash. 682, 692, 233 P. 16 (1925). This rule was already deemed “firmly established” nearly a century ago. *Wright*, 132 Wash. at 692 (quoting *Martin v. Camp*, 219 N.Y. 170, 174, 114 N.E. 46 (1916)). In *Wright*, the Washington Supreme Court adopted the analysis of the New York Court of Appeals, which explained that the at-will termination rule “springs from the personal and confidential nature of the relation which such a contract of employment calls into existence.” *Id.*; see also *Kimball*, 64 Wn.2d at 257 (“This rule, though a harsh and stringent one against the attorney...is thought necessary for the protection of the client in particular and the public in general.”). In other words, the Court recognized that the lynchpin of the attorney-client relationship is *trust*. Whereas other kinds of employment and economic relationships may operate successfully and therefore be subject to contractual obligations in spite of personal mistrust between parties, a lawyer can fulfill his role as confidant, fiduciary, and

counselor only when his client has ongoing faith that he will keep his secrets and act in his interest. Without that understanding, the client will likely withhold from the attorney information relevant to legal matters and forgo seeking legal advice on potential courses of conduct. Since a lawyer cannot effectively perform his duties in the absence of interpersonal trust, it follows that the client cannot be required to continue receiving inadequate and unwanted services.

In *Barr*, the Court articulated the intuitively unjust nature of foisting legal services upon an unwilling client. There, after one of two co-counsels was released by the client's instruction, the dismissed attorney remained on the record in the underlying matter and participated in the proceedings in association with the remaining counsel, although he no longer interacted with the client directly. *Barr*, 124 Wn.2d at 326-27. In denying the dismissed counsel a portion of the contingency fee from settlement proceeds, the Court found that despite his continued participation in the case, the attorney had been "effectively discharged" when the client expressed her desire to dismiss him – before the execution of the settlement agreement. *Id.* at 328. The Court eloquently explained why, for purposes of determining fees, the duration of the attorney's service must be tied to the date the client sought to discharge him: "Given the special nature of the attorney-client relationship, *we find the image of a*

client unwillingly saddled with an attorney she neither wants nor needs highly disturbing.” Id. (emphasis added).

Although WELA does not dispute the weight of authority on this point, it attempts to show that a breach of contract claim may survive a client’s lawful discharge of a putatively contractually-protected attorney. WELA invokes *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 331 P.3d 1147 (2014), which states in *dicta* that a contract between a client and attorney is not void merely because its terms incorporate a technical violation of the Rules of Professional Conduct. *Id.* at 87. It is possible, the Supreme Court states, that “notwithstanding the violation, the contract itself does not contravene the public policy underlying” a given rule. *Id.* at 89. Thus, “[t]he underlying inquiry in determining whether a contract is unenforceable because it violates public policy is whether the contract itself is injurious to the public.” *Id.* at 87. WELA concedes, as it must, that in order to effectuate the public policy expressed by RPC 1.16, a client must be allowed to terminate its attorney at will. WELA Brief at 11. Yet it urges that permitting an attorney to pursue a breach of contract claim for that very termination does not subvert the public policy in question. WELA thereby implies that any ethical violation arising from a contract claim against a former client is, under *LK Operating*, *de minimis*.

WELA’s effort to distinguish the public policy implications of

these protections is fatally flawed. At a conceptual level, it is not possible to compartmentalize the right to terminate an attorney at-will and the lack of a right to enforce a contract that purports to limit the first right. Comment 4 to RPC 1.16 is a direct expression of the public policy guaranteeing a client the freedom to terminate legal counsel at any time. Voiding conflicting contracts is an immediate and necessary consequence of applying that policy, not an afterthought.

The actual holding in *LK Operating* confirms this. There, the Supreme Court affirmed the rescission of a joint venture agreement between a law firm and its client because it violated former RPC 1.8's rule against entering into a business transaction with a current client. *LK Operating*, 181 Wn.2d at 83-85. The Court found that "former RPC 1.8(a)'s requirements are mandatory, clear, and go directly to the formation and terms of business transactions, *including contracts*, between attorneys and their clients." *Id.* at 88 (emphasis added). Rather than consider the violation's effect on the venture's prospective economic opportunities, the Court homed in on the validity of the existing agreement. It determined that "[t]here is no way to enter a contract in violation of former RPC 1.8(a) without implicating the formation or terms of the contract itself." *Id.* at 89. As a result, the terms of the joint venture were void "as a matter of law." *Id.* at 85. Comment 4 to Rule 1.16 is

similarly mandatory and clear, *see* RPC 1.16, and is qualified only to the extent a lawyer must be paid for services already rendered. *See infra*. It is therefore equally impossible to enter into a contract in violation of RPC 1.16 without implicating the terms of the contract itself – including its just cause, opportunity to correct, and duration provisions. That means Karstetter’s contract does not fall within the limited exception *LK Operating* described where “an RPC violation may have some relation or connection to a contract, but the contract itself does not violate the public policy announced in the rule and so is still enforceable.” *LK Operating*, 181 Wn.2d at 88.¹

WELA is also wrong at a policy level. The very right that WELA concedes clients possess would be illusory if, after the client exercised it, the terminated attorney could bring a breach of contract action against his former client. It takes no stretch of the imagination to predict that few, if any, clients would avail themselves of the right to terminate a distrusted counsel in the face of an inevitable lawsuit.

An analogous claim came before the Missouri Court of Appeals, where a plaintiff argued that although the defendant landowner had a right

¹ Aside from contracts with only tenuous connections to relevant RPCs, the Supreme Court also highlighted those RPCs whose violation would not require voiding a contract either “because they are unlikely to be relevant, or because they are discretionary or aspirational, encouraging certain activities without prohibiting or condemning a particular course of action.” *LK Operating*, 181 Wn.2d at 88. RPC 1.16 and Comment 4 thereto are directly relevant to the contract at issue. Further, they are neither discretionary nor merely aspirational. If a client chooses to terminate its attorney, he *must* abide by the decision.

to dam against surface water coming off plaintiff's land, "if he exercises such right it is a reckless act for which he may be enjoined or required to pay damages." *Johnson v. Leazenby*, 202 Mo. App. 232, 216 S.W. 49 (Mo. 1919). Exposing the absurdity of this argument, the Court of Appeals responded succinctly, "A right, becoming a wrong if exercised, is a right denied, and, of course, is a worthless thing." *Id.* (emphasis added). The same is true here. In order to ensure that the client discretion contemplated by RPC 1.16 not become "worthless," the Court must void the contract provisions purporting to insulate Karstetter from at-will termination.

Because these contract provisions are void, it is simply not possible for the Guild to incur liability for engaging in the legally protected act of discharging him. The legal principle underlying this conclusion is distilled in the maxim *damnum absque injuria*, "harm without injury in the legal sense." *Colwell v. Etzell*, 119 Wn. App. 432, 441, n.2, 81 P.3d 895 (2003) (quoting BLACK'S LAW DICTIONARY 354 (5th ed.1979)). In the contractual context, *damnum absque injuria* entails that when a public policy negates a purported contractual right, the right's deprivation is not a compensable loss; it is merely a collateral cost of living in a society that legislates for the public good. *See Seattle v. Hurst*, 50 Wash. 424, 433, 97 P. 454 (1908) (dismissing argument that city ordinance impaired contract because "[i]f thereby pre-existing private

rights are restrained or limited, the restraint or limitation is *damnum absque injuria*” and noting that “[a]ll contracts are subject to [municipal] power, the exercise of which is neither abridged nor delayed by reason of existing contracts”). Here, where public policy reflected in RPC 1.16 voids Karstetter’s contractual job protections, the Guild’s supposed breach of those protections cannot, as a matter of law, create an actionable breach of contract claim because the Guild never invaded any legally protected interest of Karstetter’s. *See, e.g., Lewis v. Siegman*, 135 Or. 660, 666, 296 P. 51 (Or. 1931) (“a party who has performed in reliance on the void contract cannot recover for breach of the contract, for the contract is unenforceable, but he may recover what he has parted with, or reasonable compensation therefor”); *Reed v. Herren*, 423 So.2d 139, 143 (Ala. 1982) (where a contract’s non-compete clause was “void and unenforceable,” “[i]t follows [] that [plaintiff] is not entitled to damages for the breach of the void contractual provision”).

In a footnote, WELA tries to escape this conclusion by parsing the distinction between specific performance and damages remedies. *See* WELA Brief at 10, n.3. But this is not a question of remedies. Before Karstetter can seek a remedy of any sort, he must first establish the availability of a cause of action – which, for the reasons discussed, does not exist here. Long ago, the Washington Supreme Court addressed and

dispensed with WELA's theory:

Nor does the fact that the appellant is seeking to recover damages for a breach of the contract, rather than to enforce a specific performance, alter the case. Before there can be a recovery in damages for the breach of a contract, there must be an enforceable contract. Damages flow from the violation of legal rights, not for the violation of mere moral obligations, however strong they may appeal to the conscience. Unless the appellant had the legal right at some time to specifically enforce the contract set out in his complaint, his present action will not lie.

Chamberlain v. Abrams, 36 Wash. 587, 591, 79 P. 204 (1905) (emphasis added), *abrogated in part on other grounds*, 78 Wn.2d 821, 479 P.2d 919 (1971); *see also Richardson v. Taylor Land & Livestock Co*, 25 Wn.2d 518, 532, 171 P.2d 703 (1946) (citing *Chamberlain* for same proposition); *Cowley v. N. Pac. Ry. Co.*, 68 Wash. 558, 563, 123 P. 998 (1912) (“...[A] cause of action must show a legal or equitable right in one party and a wrong in the other party touching the subject-matter of the action. If these elements do not coexist, a cause of action does not arise.”).²

Next, WELA seizes on language from Comment 4 to argue that RPC 1.16 actually contemplates a discharged attorney filing a breach of contract action, so that there is no tension between the client's right to

² And indeed, in both of the cases WELA cites in its footnote, the court had, in the first instance, found the plaintiff to have stated a valid claim before moving to the remedy issue. *See In re Berry's Estate*, 196 Wash. 252, 256, 82 P.2d 549 (1938) (“By presenting the claim against the estate [on] March 7, 1932, Miss Leveny elected to affirm the contract and demand payment of the balance due thereunder. By allowance of the claim, the executrix agreed that the amount demanded was justly due.”); *Sherman v. Lunsford*, 44 Wn. App. 858, 863, 723 P.2d 1176 (1986) (“Sherman's oral tender of the \$2,000 from his crews share is sufficient performance on his part under these circumstances to maintain the validity of the contract and his equitable position.”).

terminate and an attorney's breach of contract claim. WELA errs. WELA highlights the terminal clause in Comment 4, which provides that the client's right to terminate counsel at will is "subject to liability for payment for the lawyer's services." RPC 1.16, Comment 4. The term "services," WELA implies, encompasses *future* legal services the attorney is, through his discharge, denied the opportunity to provide for the balance of the contract term. WELA Brief at 11-12. Washington courts do not accept WELA's distortion of the meaning of the word "services." Consistent with common parlance, they uniformly hold that the "services" referenced in Comment 4 denote "services" *rendered*. See *Kimball*, 64 Wn.2d at 257 ("...[A] necessary and rightful corollary to this rule which permits the client to discharge his attorney without good cause, is the obligation...to pay the attorney a reasonable fee *for the services he has rendered to the client up to the time the attorney-client relationship is terminated.*") (emphasis added); *Fetty v. Wenger*, 110 Wn. App. 598, 600, n.4, 36 P.3d 1123 (2001) ("Because no breach occurs, a discharged attorney may not sue on a contingent fee agreement, but must sue in quantum meruit arising out of the contract for the reasonable value of the *services rendered through the date of discharge.*") (emphasis added).

As a last line of defense, WELA resorts to naked policy arguments to explain why the breach of contract analysis should differ for in-house,

as opposed to retained, counsel. WELA stresses that employing in-house attorneys provides several financial and practical advantages for organizations, which they should not be permitted to reap without facing the possibility of a breach of contract action.³

First, this argument makes no effort to account for RPC 1.16 and the other authority cited by the Guild here and previously in its Supplemental Brief, *see* Guild's Supp. Brief at 6-11, which permits no exception to the general rule regarding the right of any client to terminate its legal counsel notwithstanding the putative contrary rights of the attorney. Second, the theory, even if accepted, would not apply to the instant dispute. WELA contends that organizations which employ in-house counsel obtain unfettered access to these attorneys and control the terms and conditions of their employment. But if that is the case, Karstetter, by his own allegations, never submitted to such control and never granted the Guild such unfettered access. As a consequence, the Guild never obtained the benefit of this putative bargain. For instance, the Complaint pleads that Karstetter (1) represented clients besides the Guild, CP 6-7 ¶¶ 21, 30, which necessarily placed a fetter on the Guild's access; (2) hired his own staff whom he paid from his own firm's payroll, CP 7-8, ¶¶ 27, 34; (3) operated an office in a different location from the Guild's,

³ The Guild explained in its Supplemental Brief, *see* Guild's Supp. Brief at 11-14, and discusses further *infra* why, even if an exception exists for in-house attorneys, Karstetter cannot state a breach of contract claim.

CP 2-3, ¶¶ 5, 7; and (4) maintained independent business relationships with non-Guild persons, CP 7, ¶ 29. Cases from various jurisdictions agree that attorneys with these indicators do not, as a matter of law, work “in-house.” See *United States v. Schwartz*, 541 F.3d 1331, 1341, n.35 (11th Cir. 2008) (attorney not “in-house” who was retained by company but who “maintained other clients as well”); *Chilingrian v. Fraser*, 194 Mich. App. 65, 70, 486 N.W.2d 347 (Mich. 1992) (attorney was not city’s “in-house” counsel when his “firm provided legal services to a number of other clients” and he “maintained his own office and had his own support staff at his firm’s location”); *In re Achterberg*, 573 B.R. 819, 828, n.15 (E.D. Cal. Bankrpt. 2017) (attorneys not “in-house” counsel for collection agency when their firm represented other agencies and clients). Since Karstetter was not the Guild’s in-house counsel, WELA’s appeal to protect that kind of attorney is irrelevant here.

For these reasons, WELA’s assertion that Karstetter may pursue a breach of contract claim despite being lawfully terminated is wrong.

II. WELA’s Request to Expand the Definition of “Whistleblower” for Purposes of Establishing the Public Policy Element of a Wrongful Termination Claim Should be Rejected.

WELA argues that the Court of Appeals erred when it held that Karstetter’s Complaint did not state a cause of action for wrongful termination based on his claimed status as a “whistleblower.” It disputes

two of the court's conclusions: (1) that whereas a genuine whistleblower alerts authorities to employer malfeasance, Karstetter merely provided documents the Ombudsman sought in the course of an investigation someone else had initiated; and (2) Karstetter lacked the necessary motivation of furthering the public good in choosing to disclose documents to the Ombudsman. The Court of Appeals' holding is correct as to (1) because it comports with the doctrinal understanding of the concept of whistleblowing, and as to (2) because Washington courts have expressly held that acting on an altruistic motivation is a prerequisite to attaining whistleblower status for wrongful termination claims.

To challenge the Court of Appeals' holding, WELA invokes whistleblower definitions from inapplicable statutes. *See* KCC 3.42.030(E)(2); RCW 42.40.020(10)(b)(1); 42 U.S.C. § 2000e-3(a). These laws deal either with reports of government corruption, as is the case with the local and statute laws, or retaliation for participating in a discrimination investigation, as is the case with Title VII. The Guild is obviously not a government entity and there is no allegation that it has discriminated against a protected class.

By shifting the focus to the text of inapposite statutes, WELA conveniently overlooks the fact that Washington case law has discussed the employee's necessary level of participation to merit whistleblower

status in a wrongful termination suit. In *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989), this Court included “whistleblowing activity” among the four general categories pursuant to which an employee’s discharge could violate “a clear mandate of public policy.” *Id.* at 617, 618. Fleshing out this category further, the Court noted that in evaluating the sufficiency of the employee’s allegations, it would consider “the reasonableness of the manner in which the employee *reported, or attempted to remedy*, the alleged misconduct.” *Id.* at 619 (emphasis added). Later in the opinion, the Court again framed the inquiry as a “determin[ation] [of] whether a discharge contravenes the public policy of protecting employees who *report* employer misconduct.” *Id.* at 620 (emphasis added). The Supreme Court has repeated the “reporting” standard on multiple occasions. *See, e.g., Gardner v. Loomis*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996); *Warnek v. ABB Combustion Eng’r Serv., Inc.*, 137 Wn.2d 450, 461, 972 P.2d 453 (1999). Notably, in the only Washington case which, to the Guild’s knowledge, addresses the sufficiency of such a “report,” a court of appeals held that merely complaining to superiors about the difficulty in reconciling suspect time records and requesting outside assistance did not qualify as “reporting a violation of law or abuse of authority” so as to constitute “whistleblowing activity” for purposes of identifying a public policy mandate. *Dewey v.*

Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 32, 974 P.2d 847 (1999). If complaining about computing data one believes contains evidence of malfeasance is not whistleblowing, then surely the bare ministerial act of turning over documents to a third party upon request is not either.⁴

This Court’s articulation of the meaning of “whistleblower” is consistent with statutory and common law. *See* Whistleblower, BLACK’S LAW DICTIONARY (10th ed. 2014) (“An employee who *reports* employer wrongdoing to a governmental or law-enforcement agency.”); *Richter v. Advanced Auto Parts, Inc.*, 686 F.3d 847, 855 (8th Cir. 2012) (describing “whistleblowing” under Missouri law as “reporting wrongdoings or violations of law to superiors); *Hare v. Zitek*, 414 F. Supp.2d 834, 851 (N.D. Ill. 2005) (quoting Black’s Law definition); *United States ex. rel. Hagerty v. Cyberonics, Inc.*, 95 F. Supp.3d 240, 259, n.9 (D. Mass. 2015) (same); *Bailets v. PA Turnpike Comm’n*, 633 Pa. 1, 13, 123 A.3d 300 (Pa. 2015) (quoting Pennsylvania’s Whistleblower Act, which defines a “whistleblower” as “[a] person who witnesses or has evidence of wrongdoing or waste while employed and who makes a good faith report of the wrongdoing...to one of the person’s superiors, to an agent of the employer or to an appropriate authority”).

⁴ WELA embellishes the nature of Karstetter’s disclosures by comparing his actions to those who “expose [] violations of public policy” and “corroborate[] a whistleblower’s allegations.” WELA Brief at 15. But Karstetter does not allege, and there is no evidence, that the Guild committed a public policy violation. Nor does the Complaint plead that the documents corroborated the claims that triggered the Ombudsman’s investigation.

Furthermore, when confronted with similar facts to the case at bar, courts have held that a person who, upon request, merely transmits documents supporting another party's suspicions of wrongdoing is not a "whistleblower." See *Gonzalez v. Superior Court*, 33 Cal. App. 4th 1539, 1543, n.2, 39 Cal. Rptr.2d 896 (1995) (denying mandamus petition challenging discovery order which required plaintiff to disclose name of individual who stole and conveyed incriminating photographs, because individual was not "whistleblower" entitled to protection; rather, person merely gave photographs to plaintiff, who suspected their incriminating content). Nor is one a whistleblower who discloses information in the course of performing his regular job duties. See *Freeman v. Ace Tel. Ass'n*, 404 F. Supp.2d 1127, 1140 (D. Minn. 2005) (CEO not whistleblower under Minnesota Whistleblower Act when he reported irregularities to board of directors pursuant to his duty to report on company's health); *Massarano v. N.J. Transit*, 400 N.J. Super. 474, 948 A.2d 653 (N.J. 2008) (same under New Jersey whistleblower statute).⁵ So whether he turned over documents while performing normal lawyerly functions or traded in Guild confidences at another's behest, Karstetter was not, under either scenario, acting as a whistleblower.

⁵ The Guild disputes whether Karstetter was simply performing his job duties when he made the disclosures referenced in the Complaint. But Karstetter indisputably alleges that he *perceived* himself to be performing his duties as the Guild's legal counsel when he produced documents sought by the Ombudsman. CP 6, ¶ 22.

Even if his production of requested documents could somehow be construed as whistleblowing activity, Karstetter would still not qualify as a whistleblower because he did not act with the intent to further the public good. WELA does not attempt to show that Karstetter acted with such intent. Instead, it asserts that this showing is unnecessary. It is puzzling then that WELA acknowledges that “[t]o be entitled to whistleblower protection, an employee must desire to further the public good.” WELA Brief at 15. It claims, however, that a plaintiff meets this requirement by engaging in conduct that “furthers a policy of general public concern,” irrespective of “personal and subjective motivation.” *Id.* at 16.

As an initial matter, WELA’s theory is belied by the fact that the standard it cites includes a motivational component – “desire.” It is impossible to evaluate one’s desire without delving into “personal and subjective motivation.” Second, and more importantly, settled Washington law contradicts WELA’s claim. Beginning in *Dicomes*, the Supreme Court has held that a qualifying whistleblower must seek “to further the public good, and not merely private or pecuniary interests.” *Dicomes*, 113 Wn.2d at 620 (basing requirement on West Virginia decision cited in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), “which recognized the need to distinguish between employee conduct motivated by purely private interests, and that conduct motivated by a

concern for the welfare of the general public”). Not only have subsequent cases reaffirmed this requirement, *see Rickman v. Primera Blue Cross*, 184 Wn.2d 300, 313, 358 P.3d 1153 (2015), they have relied upon the absence of proper motivation to dismiss wrongful termination claims. *See Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 671-72, 807 P.2d 830 (1991) (plaintiff lacked requisite motive because her statements revealed that “her concern appears to be directed at urging Christian health care providers to adopt her view rather than furthering the public good”); *Bailey v. Alpha Tech. Inc.*, No. C16-0727-JCC, 2017 WL 5454739, at *2 (W.D. Wa. 2017) (unpublished), *appeal pending* (“Even if there is a clear public policy mandate to prevent violations of federal tax law, Bailey has not presented evidence that her reporting furthered that public policy – she reported the information to Kaiser because he instructed her to and she testified that she did not want the company to get in trouble. What Bailey characterizes as whistleblowing are actions that were part of her job responsibilities, and there is no evidence that her reporting uncovered any misconduct by the Defendants.”).

The motivational inquiry exists for good reason and should not be conducted in the perfunctory manner WELA suggests. The public policy favoring the protection of whistleblowers would be diluted past recognition if it covered actors who had no interest in furthering the

general welfare. It would open the floodgates to wrongful termination claims by discharged employees who, without facing the motivation inquiry, could easily recast mundane interactions as efforts to report employer misconduct. Indeed, that is the very dynamic playing out here. Karstetter alleges that he disclosed certain documents in order to avoid facing a subpoena compelling their production. CP 6, ¶ 22. He plainly had no interest in the implication of their disclosure for the public at large. And he says nothing about the role that the alleged malfeasance – parking reimbursement fraud – played in his decision to turn over documents. His motives were therefore strictly private. In this posture, the Court cannot cloak Karstetter in the mantle of a whistleblower.

III. WELA’s Objection to the Guild’s Discussion of Confidential Information Misapprehends the Nature of the Guild’s Arguments.

WELA chastises the Guild for stating at several points in earlier rounds of briefing that Karstetter disclosed “client confidences.” It notes correctly that the Complaint never uses that term. WELA believes this is fatal to the Guild’s alternative ground for dismissing Karstetter’s breach of contract claim, since it perceives the Guild to have relied on the confidential nature of the documents to assert that their disclosure struck at the heart of the attorney-client relationship. But the Guild’s analysis did not turn on its inference that confidential information was disclosed. It

turned instead on Karstetter's own allegation that the Guild terminated him as its counsel because of his "disclosure of information to the Ombudsman and for disloyalty." Guild's Supp. Brief. at 13 (quoting CP 6-7, ¶ 26). Karstetter's admission was relevant because it demonstrated that his discharge arose from his activities as legal adviser, rather than as an employee. And it was precisely in such circumstances that other jurisdictions have agreed that an in-house counsel's breach of contract claim cannot not lie. *See Kiser v. Naperville Comm'ty Unit*, 227 F. Supp. 2d 954, 965-66; *Golightly-Howell v. Oil, Chemical & Atomic Workers Intern. Union*, 806 F. Supp. 921, 924 (D. Colo. 1992). Even if WELA disputes the confidentiality of the documents at issue, it cannot dispute that Karstetter pled that his termination stemmed from interactions he had with the Ombudsman in his capacity as the Guild's legal representative, and that the Guild communicated the reason for discharge in these terms. Accordingly, the Guild's alternative ground for dismissing Karstetter's breach of contract claim remains intact.

IV. The Debate over the *Thompson* Versus *Perritt* Factors is Immaterial and Does Not Affect the Outcome of This Case.

Rather than present the Court with duplicative arguments, the Guild hereby refers the Court to its discussion of this point in pages 1-9 of its Brief in Response to the Amicus Curiae Brief of the Washington State Association for Justice, filed this day.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted this 2nd day of October, 2018.

SCHWERIN CAMPBELL BARNARD IGLITZIN
& LAVITT LLP

A handwritten signature in cursive script, appearing to read "Dmitri Iglitzin", written in black ink over a horizontal line.

Dmitri Iglitzin, WSBA No. 17673
Benjamin Berger, WSBA No. 52909

DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the state of Washington that on October 2, 2018, I caused the foregoing Respondent King County Corrections Guild's Brief In Response To Amicus Curiae Brief Of The Washington Employment Lawyers Association to be electronically filed with the clerk of the Supreme Court of the state of Washington, and a true and correct copy to be delivered via email service to:

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