100561-0

No: 82010-9

SUPREME COURT OF THE STATE OF WASHINGTON

Patrick Kelley,

Petitioner,

v.

The Boeing Company, a Delaware corporation; and Brian Baird, an individual,

Respondents.

PETITION FOR REVIEW

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I. Nature of the Case and Decision

Patrick Kelley, who had thirty-two years at Boeing, was fired because he participated in a corporate investigation that uncovered Boeing Vice President Brian Baird's misconduct of making false statements of material fact about performance evaluations and violating Boeing policy to lower wages of two employees. In Boeing's third attempt before a third judge, the superior court determined there was no public policy protecting Kelley from retaliatory termination. Summary judgment was granted.

The appellate court affirmed dismissal and held whistleblowers are not protected when they are interviewed by a company investigator, managers are not protected when they raise concerns affecting wages, and *dicta* from *Briggs v. Nova Servs.*, 166 Wn.2d 794, 803, 213 P.3d 910 (2009), is now binding precedent allowing retaliation when concerted activity is an issue about management's changing employment records and violating company policy that affects wages. This petition seeks review.

Kelley is not advocating that every employee enjoys legal protection to complain about his or her bonus. Public policy allows managers to express opinions in evaluations, and employers are allowed to distribute bonuses at their discretion unless otherwise constrained. Many companies issue discretionary bonuses, and the court need not turn all criticisms about bonuses into a protected activity. However, if a company sets policy and

has a long-standing practice to issue a bonus following a formula correlated to the employee's performance, and if a manager intentionally makes a false statement of material fact and violates the written scope of the manager's authority, then answering questions about this misconduct in an investigation enjoys protection—especially when the affected employees have signed releases of all claims and do not have legal rights to fix the managerial misconduct affecting their wages.

Public policy focuses on the unlawful motivation of the firing manager such that it is the motive for termination that triggers legal protection. *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 671, 807 P.2d 830 (1991). Baird and his fellow vice presidents blamed the internal wage complaints on Kelley. Kelley provided information in the company investigation that led to uncovering misconduct by Baird and others, and they fired him for it.

The slip opinion (*Kelley v. Boeing Co.*, _ Wn. App. 2d __, 2021 Wn. App. LEXIS 2913 ("slip opinion")) writes holdings of first impression in contradiction to statutes, regulations, and court cases that, if left unchallenged, will discourage whistleblowers, dissuade forthcoming employees, and contradict *Karstetter v. King Cty. Guild*, 193 Wn.2d 672, 444 P3.d 1185 (2019). A copy of the Unpublished Opinion is attached as Appendix A. The Court should accept review.

II. Brian Baird was intentionally untruthful about Kelley's evaluations of his employees' and violated Boeing policy regarding the formula for employee bonuses.

When Pat Kelley was interviewed by a Boeing investigator, the interview led the investigator to discover the misconduct of his boss, Vice President Brian Baird, who intentionally made false statements of material fact to Boeing's compensation committee and violated written Boeing policy to lower employees' pay for work performed. As a result, Kelley was fired.

Kelley evaluated the performance of two of his employees: Robert Thornton "exceeded expectations," and Daniel Tulcan "met expectations." Based on company policy and formula as well as decades of experience at Boeing, these two employees knew within a narrow range what their bonuses would be. Thornton's "exceeds expectations" translates to a bonus score between 1.10 to 1.20. Tulcan's "met expectations" translates to a bonus score between 0.95 to 1.05. A minor adjustment of 0.05 to their bonus score could happen. Their expectations match their experience and the formula in Boeing's policy. CP 378.

Unrelated to their performance evaluations, these two employees were aware that they could be laid off as part of an upcoming reorganization. Both signed releases of all claims against Boeing as part of a layoff agreement. The agreement provided for the bonuses pursuant to the

formula mentioned in the prior paragraph. The final amount was yet undetermined, but they knew the range to expect.

Vice President Baird knew he was going to lay off Thornton and Tulcan, and he wanted to use bonus money to reward employees who would survive the layoffs. Baird's problem was he could not justify taking as much money as he wanted away from Thornton and Tulcan within Boeing's formulaic policy.

While performance evaluations and bonuses sound abstractly like managerial decisions, Boeing policy provides it is Kelley's evaluation (aka PM) of employees that sets the starting point for bonuses, and then Baird and the compensation committee have constraints on their discretion to score (aka IPS) and distribute bonuses by comparing the impact relative to other employees.[1] CP 226, 228, 512, 1127-28. Baird's fabrication of Kelley's PM scores changed the range Baird could apply to set the IPS, and thus prevented the compensation committee from accurately applying Boeing's formula.

[1] The appellate decision states in one discussion that Kelley sets the bonus score: "Kelley assigned integrated performance scores (IPS) to his direct reports." Slip Opinion at 2. Later, it separates Kelley's performance evaluation from Baird's bonus score in a footnote: "Kelley alleges that 'Baird did not have the right, under Boeing policy, to change [performance management] ratings for employees that report to Kelley.' However, Kelley also admitted that changes to the IPS after he submits them are common." *Id*. at 11 FN 7. The record is clear. Kelley assigns one (PM) and Baird and the vice presidents set the other (IPS).

Baird falsely reported Kelley's evaluations of the employees as "met some expectations," which translates to a bonus score between 0.80 to 0.90. Baird did not have the authority to make these changes. CP 226, 228, 512, 1127-28. Baird then misrepresented his motive for changing their scores within that range. CP 141. Baird did so because Boeing policy prohibits using an anticipated layoff as a factor in awarding bonuses. CP 512, 1154- 55. Boeing's policy dictates that these bonuses are for work already performed, and the layoff was from a reorganization through no fault of the employee.

Thornton and Tulcan were shocked to find out their bonuses were wildly lower than expectations. Because they had signed releases, they had no legal rights to challenge them. They complained internally (Tulcan to Boeing ethics and both to their CEO) by email, carbon copying several vice presidents. CP 191-193, 518-519.

Upon receiving Thornton and Tulcan's wage complaints, the vice presidents noted that these employees had Kelley as their manager, and mistakenly thought Kelley was stirring up trouble. The VPs initiated an investigation and interviewed Thornton, Kelley, and Baird.

Baird was dishonest about what happened, saying the bonuses were determined by the committee because of the relative complexity of the employees' assignments. CP 141-142. Because that was demonstratively

false, he came up with another reason, which ultimately did not persuade anyone. CP 144-145. Finally, he admitted to the investigator (what amounted to a policy violation) that he first set everyone targeted for layoff at a 0.85 bonus score and worked the facts and policy from there. CP 265-266. Baird altered employees' records to let him use the 0.80 to 0.90 range and abused his discretion to judge within that range. The investigator advocated to "remedy" the situation for the affected employees. CP 409.

What the investigator could not know is that individuals at the vice president level had colluded to achieve what he was investigating, and the investigator reported his findings to the same vice president that helped Baird knowingly violate policy. The investigative findings were buried, and no remedy followed. Instead, Kelley was targeted.

III. Because Kelley truthfully reported facts to the Boeing investigator that showed Baird's misconduct, Baird blocked Kelley's promotion and fired him.

On March 30, 2018, Senior Vice President Kevin Schemm emails SVP Jannette Ramos and blind copies their CEO with a career-ending email, "Given, [Pat Kelley's] **leadership behavior the past few months** and **the investigations in process**, he is not the right person" for a job with Ramos. CP 521 (emphasis added). To which the CEO, who was blind copied, writes to Schemm, "Got your six." This was ten days after

Schemm learned of Thornton's complaint to the CEO, CP 518, 1150, and the only investigations at that time were into Baird's conduct, not Kelley's. CP 521, 552. The person who alerted Schemm also wrote to Boeing's vice presidents responding to Thornton's wage complaint, "There is another very similar issue involving Pat Kelley and performance ratings," and "I am working with [the VP that helped Baird] and her team on this." CP 518.

Schemm admits he probably talked to his subordinate, Baird, about Tulcan's email or the issues it raised during this time. CP 1144. And Schemm's source for information about Kelley was Baird. CP 1148-49. SVP Ramos, who considered Kelley as the sole "incumbent" for a VP role in her new organization, decided not to promote Kelley to VP in her organization because of input from Baird and Schemm. CP 512-514, 516.

When Thornton and Tulcan complain to the CEO, the VP that helped Baird violate policy emails the VP level that Kelley is the common denominator and stirring the pot. CP 400. She calls in a favor. She phones the vice president over ethics and investigations. The VP over ethics answers the call, and in turn both presses for Kelley's sentencing hearing and contacts her director of investigations. CP 538, 544, 548-550.

This summary will stop here as the trial court and appellate court both decided this case on the non-existence of a legal duty. So, the facts

explaining how Baird got Kelley fired and how Kelley did not commit the misconduct he is blamed for are not explained in the slip opinion nor fully in this petition.

However, Kelley has the facts to prove his case, and the procedural posture is on summary judgment. No one rises to vice president at Boeing without learning to influence using stealth technology, and there are 31 meticulous pages in the appellate brief to set out the specific facts proving the remaining issues in Kelley's case.

In summary, Kelley told the truth, followed policy, and was a faithful employee. Baird conspired with his fellow vice presidents to cheat employees out of earned wages by lying about performance ratings, violating the written constraints under company policy on their managerial discretion, and working together to keep Kelley from a promotion and to have him fired. Meanwhile, the investigation into Baird's misconduct was buried by his co-conspirator. The investigations into Kelley were corrupt and do not withstand scrutiny. Baird and others were motivated to fire Kelley because he participated in the company investigation into Baird, which found misconduct. The evidence supports a finding that the motive to terminate Kelley violated public policy of encouraging people to tell the truth and do the right thing when they see misconduct that affects wages. Allowing the slip opinion to stand will be an influential anomaly.

IV. Two trial court judges found a duty, yet the third judge found none and granted summary judgment.

Boeing removed the case to federal court and moved to dismiss. The district court denied the motion to dismiss, holding Kelley stated a public policy protecting him from wrongful termination. *Kelley v. Boeing Co*., 2019 U.S. Dist. LEXIS 148639, 2019 WL 4139277. The district court found instructive the recent decision in *Karstetter v. King Cty. Guild*, 193 Wn.2d 672, 444 P3.d 1185 (2019), which protected an employee who "assisted the investigation of a whistle-blowing complaint and … was fired for doing so…." *Id*. at 8-9 (quoting *Karstetter*, *supra* at 685). The case was remanded to superior court.

Boeing moved for dismissal under CR 12(b)(6). The superior court denied the motion finding a duty. Three days before trial, a third judge found no duty and dismissed on summary judgment. Kelley appealed.

V. Issue Presented for Review

Whether public policy protects a whistleblower from retaliatory termination if he or she provides information to a company investigator about employer misconduct affecting wages—even if that person is a manager and there is no government investigation or lawsuit.

VI. Grounds for Discretionary Review

A. Discretionary Review is appropriate.

Discretionary review may be sought in cases involving an issue when there is a conflict in decisions and fundamental and urgent issues of broad public import which requires prompt and ultimate determination. *See* RAP 4.2(a)(3), (4). At issue is whether public policy protects an employee from termination when the employee participates in an intra-company investigation into employer misconduct affecting wages. The standard of review is *de novo*. Slip Opinion at 5.

B. The opinion wrongly holds that salary-exempt witnesses may be retaliated against for telling the truth in an investigation.

1. Public policy protecting witnesses is enshrined in statutes, regulations, and cases.

The slip opinion holds, "Because Kelley did not participate in an investigation with [the Department of Labor and Industries], chapter 49.12 RCW does not apply." Slip Opinion at 9. This holding is contrary to RCW 49.12.130, which protects "any employee because such employee has testified or is about to testify, or because such employer believes that said employee may testify in any investigation or proceeding relative to the enforcement" of that chapter. *See also* RCW 49.12.005(4) (defining "employee" broadly as "employed in the business of the employee's

employer," which would include Kelley). The slip opinion contradicts the statute and public policy.

There are no reported opinions interpreting or applying this statute, *Thompson v. St. Regis Paper Co*., 102 Wn.2d 219, 226, 685 P.2d 081 (1984) (noting only that the statute is a constraint on "[t]he employer's absolute prerogative to discharge employees"), so this opinion holding that the entire chapter does not apply because it was not a government investigation will carry undue weight taking policy in the wrong direction.

Unpublished opinions from the court of appeals may now be cited as authority by advocates, and courts afford them persuasive value. GR 14.1. Three examples of the persuasive effect of unpublished opinions are as follows: *Krienke v. Chase Home Fin. LLC*, No. 35098-0-II, 2007 Wn. App., LEXIS 2668 (cited 11 times in decisions), *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 Wn. App., LEXIS 2392 (cited 13 times), *Pannell v. Food Services of America*, Nos. 24608-9-1, 24702-6-1, 1991 Wn. App., LEXIS 472 (cited 28 times).

Should the slip opinion stand, it benefits big business at the expense of the truth and employees. Big businesses have the resources to conduct in-house investigations and fire employees who have evidence against those in power. Witnesses will know the only safety is to give information in interviews that protects those in power. When Boeing

cannot fulfil its promise to protect those who participate in "ethics investigations," the public is endangered. We have only to look at recent events involving Boeing airplane crashes and the company withholding emails from investigators to see that this is true.

2. Witnesses and exempt employees are protected from retaliation.

The slip opinion holds that, because Kelley was "a manager complaining on behalf of an employee," chapter 49.46 RCW does not apply. Slip Opinion at 12. Setting aside that Kelley was answering an investigator's questions and not "complaining," the opinion is contrary to RCW 49.46.100(2), which protects any employee who has testified or is about to testify relative to the enforcement of that chapter. The court wrongly decided that Kelley enjoyed no protection from terminating him.

The slip opinion contradicts the statute[2] and public policy. The Department of Labor and Industries promulgated a regulation to protect

[2] While chapter 49.46 RCW defines employees as not including salaried-exempt employees, RCW 49.46.010(3), statutory interpretation and public policy protecting witnesses should not apply that definition here in that way—as other courts recognize. The statutes and regulations explaining the chapter use the term "employee" in ways that are meaningless or circular if the slip opinion's definition is imposed indiscriminately. *See, e.g.,* RCW 49.46.010(3)(l) ("employee of the state legislature" is not an employee), (4) (defining "Employer" as not an employer unless it employs non-exempt employees); WAC 296-128-505(4) (referring to "employee" in defining the primary duty test for

interfering with rights under the chapter by termination. WAC 296-128-770(1). It separately protects witnesses. WAC 296-128-770(3). The protection of a whistleblower extends further than those who are interviewed or examined by the department.

3. Washington's tradition of intolerance to retaliation is threatened by the slip opinion's reopening a circuit split.

The slip opinion holds that Kelley was not protected because he spoke informally intra-company. This is an issue of first impression under the cited wage statutes and contradicts public policy.

The federal courts had a circuit split about whether an informal, oral complaint regarding the Fair Labor Standards Act triggered protection from retaliation under 29 U.S.C. § 215(a)(3). *See Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1, 6, 131 S.Ct. 1325 (2011) (citations omitted). Although the federal statute expressly protects those who have "filed any complaint," the U.S. Supreme Court held that informal, oral, intra-company complaints were also protected. *Id*. (protecting plaintiff who "raised a concern" with his shift supervisor and spoke to human resources and operations).

Washington has local laws that parallel the FLSA. The slip opinion in this case makes retaliating against employees that raise issues of local

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exempt workers). As the slip opinion is apparently the first court to do so, it will be wrongly relied upon by future courts if left uncorrected.

concern easier than retaliating against employees concerned with the FLSA. Employees answering questions to corporate investigators should confidently speak the truth, and Washington should not fall behind the nation in protecting those brave enough to do so. The slip opinion is wrongly decided. Because it appears to be the first Washington court to speak on the issue, it will have outsized importance.

4. Sound policy and other courts protect salaried-exempt witnesses brave enough to tell the truth.

The slip opinion holds that Kelley was not protected because he was a manager. Slip Opinion at 12. This is an issue of first impression in Washington in this context. Courts from elsewhere that squarely address the issue in their context hold that salaried-exempt employees, like Kelley, are protected. *See, e.g., Wigley v. Western Florida Lighting, Inc.*, 2005 WL 3312319, 2005 U.S. Dist. LEXIS 31477 (M.D. Fla. 2005); *Benzinger v. Lukoil Pan Ams., LLC*, 447 F. Supp. 3d 99 (S.D.N.Y. 2020)*; Predzik v. Shelter Corp.*, 12 Wage & Hour Cas. 2d (BNA) 13, 2006 WL 2794368, 2006 U.S. Dist. LEXIS 70250; (D. Minn. 2006). The slip opinion is an outlier and of first impression in Washington on this point.

5. The opinion fails to recognize whistleblower protection recently articulated in *Karstetter*.

The slip opinion holds that Kelley was not protected against wrongful termination in violation of public policy. In *Karstetter v. King Cty. Guild*, 193 Wn.2d 672, 685, 444 P.3d 1185 (2019), the Court wrote,

> Washington's whistle-blower provisions are intended to encourage those with knowledge of institutional wrongs to come forward in order to safeguard the public. Such protection is based on, among other things, the commonsense notion that employers should abide by the law and the intrinsic importance of fairness and justice in protecting individuals trying to "do the right thing." Protecting only those who directly reveal information while sacrificing others who assist them would unjustly narrow the scope of whistle-blower statutes and caution future whistle-blowers to think twice before helping other whistle-blowers.

The dissent took issue only with *Karstetter's* role as attorney and did not write against the policy declaration protecting whistleblowers and those who assist in an investigation. *Id*. 687-690. In contrast, the slip opinion is faithful neither to the letter nor spirit of public policy articulated in *Karstetter*. It also contradicts and disrespects the U.S. district court and the previous department in superior court, both of which determined that public policy protected Kelley as alleged in the pleadings.

C. The failures to correct the misuse of *Briggs dicta* furthers management's lies and *ultra vires* actions that affect wages.

When employees protect each other from an employer's abuse of power, the law protects them if it is about terms and conditions of employment but does not protect them in state court under a statute if the

complaint is about managerial decisions. Slip Opinion at 9-10 (quoting RCW 49.32.020; *Briggs v. Nova Servs.*, 166 Wn.2d 794, 803, 213 P.3d 910 (2009). The slip opinion immunizes employers from claims of retaliation when the employee participates "in an internal investigation on behalf of his employees who were denied" pay and when his boss "violated … internal policies" affecting pay. Slip Opinion at 7-11.

The slip opinion quotes and relies on *Briggs*. *Id*. at 8-9. In *Briggs*, eight employees threatened to quit unless the employer fired their boss. *Briggs*, 166 Wn.2d at 799. The dismissal on summary judgment was affirmed. The slip opinion treats the opinion of Justice Jim Johnson, which garnered only two other signing justices, as precedent. It is not. The fractured *Briggs* Court issued two concurring opinions and a four-justice dissent.

Justice Charles Johnson wrote separately that there was a difference between establishing a claim under the statute and the common law wrongful discharge in violation of public policy. *Id.* at 807-810. Justice Madsen concurred in the result on a procedural ground, *id*. at 810, noting the plaintiffs in that case conceded they were dissatisfied in management's effectiveness, not how they were treated as employees. *Id*. at 814.

The four-justice dissent in *Briggs* "part[s] ways with the lead opinion's extremely narrow interpretation of [public] policy," noting this chapter of code has a broader protection and policy than formal union activities or collective bargaining efforts. *Id*. at 818-19. It goes on to note "a statute may provide a clear mandate of public policy to support a wrongful discharge tort claim even where the plaintiff has no claim under the statute. *Id*. at 820 (citations omitted). The state statute does not, as the *Kelley* slip opinion holds, exempt managers and supervisors from protection when engaging in concerted activities. *Id*. at 833. The dissent analyzes state and federal law to find a public policy protection. That analysis would protect Kelley. The slip opinion regards *dicta* in the *Briggs* lead opinion as binding precedent. If left uncorrected, the ink will dry and become law.

VII. CONCLUSION

Washington law protects witnesses, including managers, from wrongful termination when they tell the truth in intra-company investigations. To help employers, employees, and the lower courts, this Court should accept review, hold that public policy protects employees who participate in intra-company investigations into misconduct affecting wages, and reverse and remand the matter to the trial court for further proceedings.

Respectfully submitted this 12th day of January 2022.

I certify this Petition contains 3,760 words in compliance with RAP 18.17.

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Declaration of Service

I caused a copy of the foregoing Appellant's Petition for Review to be served on the following in the manner indicated below:

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on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 12th day of January 2022, in Seattle, Washington.

*s/ Alex Paget*_____
Alex Paget, Paralegal

APPENDIX A

FILED
12/13/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PATRICK KELLEY, an individual, Appellant, v. THE BOEING COMPANY, a Delaware corporation; and BRIAN BAIRD, an individual, Respondents.	No. 82010-9-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Patrick Kelley argues the trial court erred in dismissing his wrongful discharge claim. He alleges that Boeing wrongfully discharged him after he participated in an investigation based on his employees' complaints about their bonuses and annual review. He sought to establish wrongful termination by showing his firing contravened a clear mandate of public policy. Kelley failed to establish the necessary legal error. We affirm.

FACTS

Patrick Kelley began working at The Boeing Company in 1986.[1] In June 2014 he became a director of supplier performance.

In 2017, Gabrielle Wolfe was supporting Kelley as part of her role as a staff analyst, and her cubicle was located outside his office. In March 2017, Wolfe had reported to the Boeing Ethics and Business Conduct Department (Ethics) that a

[1] Although it is clear from the record that Boeing employed Kelley, there is no evidence of a written employment contract. Additionally, Kelley does not allege that he is a member of a union or a member of a protected class.

non-Boeing employee had taken photos while in Kelley's office, a policy violation. Months after this complaint, on August 10, 2017, Kelley called Wolfe into his office and told her that her career would be damaged if she complained to Ethics again. After that conversation, Kelley often commented that he did not trust Wolfe because of her Ethics report and that he did not want her sitting outside his office. Wolfe's job assignment was changed and her work area was moved. Wolfe felt that her changed work assignment and Kelley's behavior toward her resulted from her reporting his behavior, so she filed a retaliation complaint with Ethics.

In late 2017, Kelley conducted annual performance reviews for his employees. As part of the reviews, Kelley assigned integrated performance scores (IPS) to his direct reports. IPS ratings range from 0.00 to 2.00, and managers must ensure that all employees' scores balance to 1.00 on a scale. There is a "fixed pool of resources" and IPS ratings are used to determine distribution of "executive incentive compensation package[s]," including bonuses and shares of stock. Kelley said that after he made recommendations, minor changes to IPS ratings were common.

Kelley gave positive performance reviews to two of his employees, Robert Thornton and Daniel Tulcan. He suggested IPS ratings within the range demonstrating that each had made an impactful contribution to Boeing. Brian Baird was Kelley's supervisor and is another party to this case. Baird and a group of other Boeing vice presidents reviewed and lowered Tulcan's and Thornton's IPS ratings, which affected their bonuses. At the time of the decision-making, Boeing knew that it might layoff both Thornton and Tulcan. Kelley thought that Baird had

lowered IPS ratings for Thornton and Tulcan, and believed this change went against Boeing policy. In March 2018, Thornton and Tulcan complained about the changed scores. An investigation into their compensation occurred, in which Kelley "provided truthful information."

Following an incident occurring in March 2018, Boeing employee Kevin McCarry made a complaint about Kelley to Ethics. McCarry worked for Boeing on an assignment in Belgium. The investigation, conducted by Brandi Bateman, found that Kelley and McCarry had a phone call on March 29, 2018, in which Kelley asked McCarry to cancel a vacation in order to visit a supplier in Germany. McCarry refused. Kelley then contacted McCarry's manager to have McCarry "repatriated." McCarry took his vacation, but spent two days of his planned vacation onsite with the supplier.

In June 2018, Boeing considered Kelley the incumbent candidate to lead the new Enterprise Supplier Performance Organization. However, people involved in the decision stated that Kelley's recent leadership issues and the investigations around his behavior eliminated him as their choice for the role. The position went to another candidate.

In July 2018, Bateman completed her investigation into the incident between McCarry and Kelley. The report states that Kelley denied having a phone conversation with McCarry where Kelley requested that McCarry cancel his vacation. However, McCarry's phone records showed a call between them on the day in question that lasted over eight minutes. In his deposition, Kelley affirmed that they talked on the phone, but denied again that he requested that McCarry

cancel his vacation. But, the report found that after the phone call, Kelley threatened to repatriate McCarry.

Also in July 2018, Boeing investigator Robert Fasold completed his investigation into Wolfe's second ethics complaint. He turned in a draft report finding Wolfe's allegations to be unsubstantiated. In August 2018, Boeing reassigned the Wolfe case to Investigator Kathy Cho stating that Cho had more experience in Equal Employment Opportunity claims. Cho's investigative report was completed in August 2018. Cho found that Kelley made negative comments to Wolfe about contacting Ethics, and that he inferred that Wolfe's career could be impacted if she complained again. The report contained no recommendations or outcomes for Kelley, only findings.

In August 2018, following these investigations, the Boeing Employee Corrective Action Review Board (ECARB) met to "consider possible corrective action" for Kelley. ECARB was comprised of five senior Boeing employees. It reviewed the Wolfe and McCarry investigations, and heard from investigators Cho and Bateman, who stated that they questioned Kelley's honesty throughout the investigations. The ECARB decided to terminate Kelley based on three violations of Boeing policy and his not being completely honest during the investigation. Multiple ECARB members stated that Kelley's involvement in the IPS ratings investigation was not a factor in Kelley's termination.

Kelley believed that Boeing leadership retaliated against him for participating in the compensation investigation regarding Tulcan's and Thornton's IPS ratings. He sued Boeing and Baird in King County Superior Court for wrongful

discharge, breach of implied contract, justified reliance and estoppel, and for retaliation under the equal pay act, chapter 49.58 RCW.[2] Boeing moved for summary judgment, and the trial court granted summary judgment in favor of Boeing. Kelley appeals the order granting summary judgment.

DISCUSSION

I. Standard of Review

The standard of review for summary judgment is de novo. Martin v. Gonzaga Univ., 191 Wn.2d 712, 722, 425 P.3d 837 (2018). Reviewing courts find summary judgment appropriate if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014) (citing CR 56(c)). When reviewing a summary judgment appeal, "we consider all facts, and make all reasonable factual inferences in the light most favorable to the nonmoving party." Id.

II. Tort of Wrongful Discharge

Most employment agreements allow either the employer or employee to terminate the contract "at will." Dicomes v. State, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989). However, Washington applies a "public policy" exception to the at will doctrine. Id. An employee has a "cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy." Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984).

[2] Boeing removed this case to federal court and filed a motion to dismiss, which the court denied. Kelley v. Boeing Co., No. 2:18-cv-01808-RAJ, 2019 WL 4139277, at *2 (W.D. Wash. Aug. 30, 2019). The case was remanded back to King County Superior Court, where Boeing filed another motion to dismiss, which was again denied. Id. at 1.

To create a prima facie case for wrongful discharge, the plaintiff must show that they: (1) expressed or exercised a statutory right; (2) the employer fired the employee; and (3) there was a causal connection between the employee's exercise of their rights and the discharge. Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 68, 821 P.2d 18 (1991).

Courts look to four situations in determining whether an employee expressed or exercised a statutory right. Becker v. Cmty. Health Sys. Inc., 184 Wn.2d 252, 258-59, 359 P.3d 746 (2015). These four situations include whether an employee (1) refused to commit an illegal act; (2) performed a public duty; (3) exercised a legal right or privilege; or (4) was retaliated against for reporting employer misconduct, also referred to as "whistleblowing."[3] Id.

When an employee alleges a wrongful termination claim under one or more of these scenarios, they have the burden to establish a prima facie case. Martin, 191 Wn.2d at 725. The prima facie case needs to show that their "'discharge may have been motivated by reasons that contravene a clear mandate of public policy.'" Id. (quoting Thompson, 102 Wn.2d at 232). A clear mandate of public policy is "'one of law'" and can be demonstrated by "'prior judicial decisions or constitutional,

[3] If the alleged wrongful discharge does not fall neatly into one of these four scenarios, courts run a more refined four-factor Perritt analysis. Becker, 184 Wn.2d at 259 (citing HENRY H. PERRITT, JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES § 3.7 (1991)). However, if a plaintiff clearly argues their wrongful discharge fits within one of these scenarios, courts do not apply the Perritt analysis. See Becker, 184 Wn.2d at 259 (finding plaintiff pleaded a cause clearly arguing a discharge in violation of public policy.) Kelley briefly mentions the Perritt test, but does not argue it applies, or lay out arguments under Perritt's four-factor test. Because Kelley argues that he was fired in violation of a public policy, we do not apply the Perritt analysis.

statutory, or regulatory provisions or schemes.'" Martin, 191 Wn.2d at 725 (quoting Dicomes, 113 Wn.2d at 617). If the employee shows a violation of public policy, the burden shifts to the employer to produce evidence showing a legitimate, nonpretextual and nonretaliatory reason for the discharge. Martin, 191 Wn.2d at 725-26. If the employer shows sufficient evidence, the burden shifts back to the employee to show a pretextual reason for the firing, or, if the employer's reason is legitimate, to show that the public policy conduct was a substantial factor in the employer discharging the worker. Id.

III. Discharge in Violation of Public Policy

Kelley argues that the trial court erred in ordering summary judgment. He claims he took protected action in cooperating with an internal investigation regarding Boeing's policies when it lowered Thornton's and Tulcan's IPS ratings. He believes that this was regarded as objecting to an unfair wage practices. He alleges that these actions protected him from wrongful termination. To prevail on a claim of wrongful discharge due to the exercise of a legal right, Kelley must first show that his firing violated a clear mandate of public policy. Martin, 191 Wn.2d at 723. Kelley asserts he was wrongfully discharged because of two actions. First, he argues that he was terminated for speaking up in an internal investigation on behalf of his employees who were denied expected bonuses. Second, he argues that he was terminated for reporting that Baird violated Boeing's internal policies and lowered the IPS ratings on two employees who were scheduled for lay off.

Kelley argues that public policy exists to support his claim under six different Washington statutory schemes.[4,5,6] We analyze in turn each statutory scheme that Kelley alleges creates a public policy that supports his claim.

A. Chapter 49.12 RCW: Industrial Welfare

Kelley alleges that chapter 49.12 RCW applies here. This chapter generally concerns industrial welfare claims related to health, which is governed by the Department of Labor and Industries (DLI). See RCW 49.12.010, .033. DLI has the power to enforce all laws under chapter 49.12 RCW. RCW 43.22.270(4).

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[4] Kelley also implies, but does not directly argue, that Kelley participating in this wage investigation constitutes whistleblowing. The first step in a whistleblower analysis under wrongful discharge is determining a public policy. Martin, 191 Wn.2d at 725 (analyzing first whether motive for discharge contravened a clear mandate of public policy). Because we find no public policy applies, we do not review Kelley's claims under the remaining whistleblower steps.

[5] In the complaint, Kelley cited to a number of federal laws to argue that they implicitly apply, but he does not make the same argument on appeal. Because he does not raise this issues on appeal, we do not review it. RAP 12.1 ("The appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.").

[6] Kelley also argues that two prior rulings, established that a public policy exists to support his claim. However, Kelley cites to only one ruling, so we discuss only the ruling that he cites to. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (refusing to consider claims not supported by reference to the record) (citing RAP 10.3(a)(5)). In the federal court ruling, the court found that Baird had pleaded enough to survive a motion to dismiss. Kelley, 2019 WL 4139277, at *2. A motion to dismiss has different standards than a motion for summary judgment. See Karstetter v. King County Corr. Guild, 193 Wn.2d 672, 677, 444 P.3d 1185 (2019) ("[A motion to dismiss] is warranted only if we conclude that the plaintiff cannot prove any set of facts justifying recovery."); Martin, 191 Wn.2d at 722 (stating that summary judgment can be granted when the evidence shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law). Kelley does not cite legal authority showing that a decision in a previous motion to dismiss governs a de novo ruling on appeal. Kelley fails to provide support that a prior ruling on a motion to dismiss creates a public policy issue on a ruling of summary judgment. If a claim is not supported by any citation to authority, we do not consider it. Cowiche Canyon, 118 Wn.2d at 809 (citing RAP 10.3(a)(5)).

Kelley did not report any issue regarding Tulcan or Thornton to any government agency. Because Kelley did not participate in an investigation with the DLI, chapter 49.12 RCW does not apply.

B. Chapter 49.32 RCW: Injunctions in Labor Disputes

Chapter 49.32 RCW applies to "concerted activities for the purpose of collective bargaining or other mutual aid or protections." RCW 49.32.020. Engagement in concerted activity, even engagement by nonunionized workers, can show a public policy to create a wrongful termination claim. See Bravo v. Dolsen Cos., 125 Wn.2d 745, 752, 758, 888 P.2d 147 (1995); Briggs v. Nova Servs., 166 Wn.2d 794, 803, 213 P.3d 910 (2009). Courts differentiate between actions that constitute concerted activity, which are protected by the statute, and actions that are managerial decisions, which are not protected by the statute. See Briggs, 166 Wn.2d at 803. "Managerial decisions" include the "wisdom of company practices," including making entrepreneurial decisions, running the business, and hiring and firing employees. Id. at 804. By contrast, "concerted activities" include engaging in activities relating to "'terms and conditions of employment.'" Id. at 803 (quoting RCW 49.32.020).

Kelley argues that he participated in concerted activities on behalf of other employees, including advocating for Thornton and Tulcan against the wrongful withholding of their wages. Kelly implies that his situation is different from Briggs, as that case held that managerial decisions encompassed hiring and firing decisions. In Briggs, the court determined that letters from managers to the company's board of directors contained complaints about managerial decisions,

not terms and conditions of employment. Id. at 805-06. The first letter "addressed the Managers' dissatisfaction with director Brennan's performance in the areas of leadership, administration, finance, board development, corporate culture, and community and government relations." Id. at 799. The second letter addressed the recent firing of two of the eight employees who had written the first letter. Id. at 805. The court described the first letter's list of objections as a "near-perfect equivalent to the United States Supreme Court's references to complaints about 'managerial decisions, which lie at the core of entrepreneurial control,' a category that Court held wholly excluded from the definition of 'terms and conditions of employment.'" Id. (quoting Ford Motor Co. v. Nat'l Labor Relations Bd., 441 U.S. 488, 498, 99 S. Ct. 1842, 60 L. Ed. 2d 420 (1979)). The court concluded the complaints about managerial decisions were not concerted activity, and not protected by chapter 49.32 RCW for purposes of wrongful discharge. Briggs, 166 Wn.2d at 798, 806.

At Boeing, bonuses were allocated from a fixed pool of funds. Kelley, as a director, determined the IPS ratings of his direct reports. Baird and other vice presidents then compared Kelley's allocation with the allocations of other managers. Kelley complained about Baird's modification of the discretionary IPS rating Kelley had originally indicated. Kelley is in a clear managerial role, making discretionary managerial decisions just as Baird did when he and the other vice presidents revised those IPS ratings. Determining and allocating IPS ratings as performed by Kelley and Baird pertain more to running the business rather than the terms and conditions of employment, and it falls squarely under managerial

decision-making. Further, there is no evidence that the second level of discretion performed by the vice presidents was illegal or violated any Boeing policy.[7] This managerial behavior does not constitute concerted activity. Kelley fails to establish that Boeing violated the public policy of chapter 49.32 RCW when firing him.

C. Chapter 49.46 RCW: Minimum Wage Requirements and Labor Standards

Kelley argues that his complaint to Boeing that Tulcan and Thornton did not receive their suggested bonuses constitutes a wage claim under chapter 49.46 RCW. He argues the chapter should be liberally construed to include bonuses as protected wages.

"RCW 49.46.100 prohibits employer retaliation against employees who assert wage claims, and we have held employers who engage in such retaliation liable in tort for violation of public policy under this provision." Hume v. Am. Disposal Co., 124 Wn.2d 656, 662, 880 P.2d 988 (1994). Courts have held contractual bonuses are wage claims. See Flower v. T.R.A. Indus., Inc., 127 Wn. App. 13, 35, 111 P.3d 1192 (2005) (finding bonus provision in employment contract was wages); Durand v. HIMC Corp., 151 Wn. App. 818, 831, 214 P.3d 189 (2009) (finding percentage bonus guaranteed in contract wrongfully withheld). Following Flower and Durand, an employee asserting a wage claim over a contractual bonus may be protected by this statute.

[7] Kelley alleges that "Baird did not have the right, under Boeing policy, to change [performance management] ratings for employees that reported to Kelley." However, Kelley also admitted that changes to IPS ratings after he submits recommendations are common.

Here, Kelley was not making a wage claim on his own behalf. And, he does not assert or provide legal argument to support that chapter 49.46 RCW protects a manager complaining on behalf of an employee. Bonus amounts for Tulcan and Thornton were not guaranteed in their contracts; they were discretionary decisions of management. Neither chapter 49.46 RCW nor the cases cited by Kelley support his claim of a violation of a public policy protection.[8]

D. Chapter 49.48 RCW: Wages—Payment—Collection

Kelley cites to chapter 49.48 RCW to argue that Boeing withheld wages owed to Tulcan and Thornton. Chapter 49.48 RCW covers different types of wage claims. For example, RCW 49.48.010 applies to employers failing to pay their employees at the end of a pay period, RCW 49.48.030 concerns attorney fees, and RCW 49.48.060 contains protections for complaints to DLI. However, the only specific provisions in this chapter that Kelley cites to are the definitions, the penalties, and attorney fees. Kelley does not identify any provisions or any public policy protections in this chapter that apply here.

E. Chapter 49.52 RCW: Wages—Deductions—Contributions—Rebates

Kelley infers that chapter 49.52 RCW creates a public policy protection because Boeing failed to pay Tulcan and Thornton their promised wages as a result of lowering the IPS ratings he had given them. RCW 49.52.050(2) states that an employer cannot withhold wages obligated under "any statute, ordinance, or contract." Kelley does not show that Boeing was obligated to pay the bonuses

[8] We do not foreclose the possibility that this chapter could protect third-party wage complaints or discretionary bonuses in some situations.

to Tulcan and Thornton under statute, ordinance, or contract. Even with their evaluation scores lowered, both Tulcan and Thornton received bonuses. Kelley fails to show that Boeing was contractually obligated to pay Tulcan and Thornton higher bonuses.

F. Chapter 49.58 RCW: Washington Equal Pay and Opportunities Act

Kelley argues that RCW 49.58.050 protects him from retaliation by firing him. The stated intent of chapter 49.58 RCW is equal pay, as there "continues to be a gap in wages and advancement opportunities among workers in Washington, especially women." RCW 49.58.005(1). Kelley has not alleged any issues with equal pay or wage discriminated against anyone due to sex or gender.

None of the six statutory schemes relied on by Kelley provide a public policy protection for the actions Kelley took in this case.

IV. Breach of Implied Contract

Kelley alleges that he signed a Boeing code of conduct.[9] In the original complaint, he argues that this created an implied contract between him and Boeing which altered his at will employment and prohibited Boeing retaliating against him. The Boeing code of conduct is a one page document that covers topics such as conflicts of interest, following applicable laws, and reporting illegal or unethical conduct. It also states "Retaliation against employees who come forward to raise genuine concerns will not be tolerated."

Generally, an employee manual or handbook can alter at will employment. Drobny v. Boeing Co., 80 Wn. App. 97, 101, 907 P.2d 299 (1995). However, if the

[9] Kelley did not provide any evidence that he signed the code of conduct.

manual or handbook includes only general policy statements rather than specific circumstances or specific situations, it does not create an implied contract.[10] Id. Whether an employer has made a specific promise is a question of fact. Id. But, if reasonable minds could not differ in resolving the issue, then a trial court may determine whether a contract promises specific performance as a matter of law. Id. at 101-02.

In Quedado v. Boeing, this court reviewed whether or not the Boeing code of conduct promised specific treatment in specific circumstances to an employee. 168 Wn. App. 363, 370, 276 P.3d 365 (2012). In that case, Boeing demoted Quedado, who alleged that the demotion violated the code of conduct. Id. at 369-70. This court held that the code did not extend specific promises to employees for specific situations. Id. at 370-71. We noted in that case, "Boeing's code was likely intended to foster a general 'atmosphere of fair treatment' for Boeing employees. . . . But such an 'atmosphere' is not enough to modify the at-will relationship." Id. at 371 (citation omitted). The Boeing code of conduct statement about retaliation fosters this atmosphere of fair treatment but does not create an implied contract. Without establishing express promises that have been violated, Kelley cannot sustain his breach of contract claim.

[10] Showing that an employee agreement contains specific circumstances is also the first step in an equitable reliance claim. Quedado v. Boeing Co., 168 Wn. App. 363, 368-69, 276 P.3d 365 (2012). Kelley brings a justifiable reliance claim in his complaint, but because he fails to show that the Boeing code of conduct is more than a generalized document, we do not continue with the equitable reliance analysis.

V. Conclusion

Kelley fails to state a prima facie claim for the tort of wrongful discharge or for retaliation. Summary judgment was properly granted. Kelley's request for attorney fees is denied.

We affirm.

Leach, J.

WE CONCUR:

Andrus, A.C.J.

Mann, C.J.

ROCKE LAW GROUP, PLLC

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