

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 06, 2014, 8:05 am
BY RONALD R. CARPENTER
CLERK

SUPREME COURT NO. 89226-1
COA 309509-III

E CDJ
RECEIVED BY EMAIL

SUPREME COURT, STATE OF WASHINGTON

JANETTE WORLEY,
Appellant

v.

PROVIDENCE PHYSICIAN SERVICES CO.,
Respondent

REPLY TO PETITION FOR REVIEW

Paul J. Burns
Paul J. Burns, P.S.
One Rock Pointe
1212 N. Washington, Suite 116
Spokane, WA 99201
(509) 327-2213
Attorney for Appellant

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
A. INTRODUCTION.....	1
B. FACTS.....	2
C. ARGUMENT.....	5
1. The Court of Appeals decision conflicts with this court's decision in <i>Piel</i>	5
D. CONCLUSION.....	9

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Cudney v. ALSCO, Inc.</i> , 172 Wn.2d 524, 259 P.3d 244 (2011).....	4, 6
<i>Gardner v. Loomis Armored, Inc.</i> 128 Wn.2d 931, 945, 913 P.2d 377 (1996).....	7
<i>Korlund v. DynCorp Tri-Cities Services, Inc.</i> , 156 Wn.2d 168, 125 P.3d 119 (2005).....	4, 6
<i>Piel v. City of Federal Way</i> , 177 Wn.2d 604 (2013) (S.Ct No. 83882-8).....	1, 2, 4, 5, 7, 9
<i>Renz v. Spokane Eye Clinic</i> , 114 Wn. App. 611, 60 P.3d 106 (2002).....	3
<i>Worley v. Providence Physician Services, Co.</i> , 175 Wn. App. 566, 307 P.3d 759 (2013).....	1, 4
 <u>Statutes:</u>	
RCW 43.70.075.....	1, 2, 4, 5, 7-9
 <u>Administrative Codes:</u>	
WAC 246-840-300.....	2

A. INTRODUCTION

In *Piel v. City of Federal Way*, 177 Wn.2d 604 (2013), the Supreme Court held that the existence of statutory remedies does not, in and of itself, preclude a claim for wrongful discharge in violation of public policy. The court noted: “Each public policy tort claim must be evaluated in light of its particular context.” 177 Wn.2d, at 617. In the instant case, the Court of Appeals held that the statutory cause of action under RCW 43.70.075, in and of itself, foreclosed plaintiff Janette Worley’s public policy wrongful discharge claim against her former employer, Providence Physician Services Co. *Worley v. Providence Physician Services Co.*, 175 Wn. App. 566, 307 P.3d 759 (2013). In doing so, the Court of Appeals ignored the context in which Ms. Worley’s public policy wrongful discharge claim arose. The court’s rigid holding that a statutory remedy necessarily precludes a public policy wrongful discharge claim is contrary to this court’s decision in *Piel*. Supreme Court review is appropriate under RAP 13.4(b)(1).

As the court made clear in *Piel*, context is important. RCW 43.70.075 provides a cause of action to a health care employee who is subjected to retaliation for reporting concerns of unsafe health care practices to the Washington State Department of Health. However, in the instant case, Ms. Worley did not report her concerns to the Department of

Health. Therefore, she had no remedy under RCW 43.70.075. Rather, Ms. Worley followed the written policies of her employer and reported her concerns of unsafe health care practices internally to her employer's compliance officer. She was then discharged.

The parties stipulated that the plaintiff established the clarity element of her public policy wrongful discharge claim. There is a clear mandate of public policy which protects health care workers from retaliation for reporting concerns of unsafe health care practices. RCW 43.70.075; WAC 246-840-300. In the context of this case, Ms. Worley reported concerns of this nature internally to her employer's compliance officer. She was then fired. She did not report those concerns to the Department of Health. Indeed, she was fired before she had the opportunity to do so. Therefore, she was not within the protected class of RCW 43.70.075. That statute provides no remedy to vindicate the public policy at issue in this case, or to protect Ms. Worley from retaliation. The Court of Appeals decision in this case is contrary to *Piel* and should be reversed.

B. FACTS

The facts in this case have been set forth in detail in the Petition for Review and Respondent's Answer to that Petition. They will be set forth in summary fashion here to provide context.

Plaintiff Janette Worley is an Advanced Registered Nurse Practitioner (ARNP). She was employed by defendant Providence Physician Services to assist Dr. Andrew Howlett in his orthopedic practice. From a point early on in her tenure of employment, she was asked to read and interpret complex orthopedic diagnostic studies that were beyond her training, expertise, and scope of practice. She was also required to document information in patients' medical charts when she had not seen the patients.

Ms. Worley complained about these scope of practice and medical charting issues to her office manager, Ms. Heidi Brown. The evidence supports a finding that after complaining about these unsafe health care practices, Ms. Worley was retaliated against. She was subjected to a series of disciplinary actions, had her previously agreed upon work schedule changed, and was ultimately given a final disciplinary warning. The timing of these actions in relation to her complaints to Ms. Brown about unsafe health care practices supports a finding that they were retaliatory. See *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 60 P.3d 106 (2002). She then reported her concerns internally to Providence's compliance officer, consistent with the employer's written policies. Within days she was fired.

Ms. Worley sued her former employer alleging inter alia, wrongful discharge in violation of public policy. The trial court dismissed her claim on summary judgment, finding that she could not establish the jeopardy element of the public policy claim because RCW 43.70.075 provided an adequate remedy to vindicate the public policy at issue. The Court of Appeals affirmed, relying on *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011), and *Korlund v. Dyncorp Tri Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 92005). See, *Worley v. Providence Physician Services*, 175 Wn. App. 566, 307 P.3d 759 (2013). The Court of Appeals decision did not cite or discuss this court's decision in *Piel*.

Contrary to the decisions of the trial court and the Court of Appeals, RCW 47.70.075 does not provide an adequate remedy to vindicate the public policy at issue in this case. The parties stipulated to the clarity element. Public policy protects health care workers who report concerns of unsafe health care practices. RCW 43.70.075 protects health care workers who report concerns to the state Department of Health. Ms. Worley did not do so. Therefore, she was not protected by the statute. She reported concerns of unsafe health care practices internally to her employer, consistent with Providence's employment policies. Public policy protects that conduct. Because she did not report to the Department of Health, RCW 43.70.075 provided no remedy. Because there is no

adequate statutory or administrative remedy to protect the public policy at issue in this case, plaintiff has established the jeopardy element. The Court of Appeals erred in holding to the contrary.

C. ARGUMENT

1. The Court of Appeals decision conflicts with this court's decision in *Piel*.

Again, the Court of Appeals held that the remedies provided by RCW 43.70.075 adequately protect the public policy of protecting health care workers who report concerns of unsafe health care practices. The court stated:

The Washington Health Care Act (WHCA), chapter 43.70 RCW provided comprehensive remedies to Ms. Worley to promote the public policy claim. RCW 43.70.075 provides employees and health care professionals an administrative process and legal process for adjudicating whistleblower complaints; thus, the statute provides remedies that adequately promote and vindicate the public policies set forth within the statute and its provisions. Ms. Worley failed to avail herself of the RCW 43.70.075 protections. She could have filed a charge or complaint under RCW 43.70.075 with the Department of Health, but failed to do so.

175 Wn. App., at 763.

In its Answer to the Petition for Review, Providence simply echoes this analysis.

As a preliminary matter, both respondent and the Court of Appeals refer to an “administrative process” under RCW 43.70.075 which provides adequate protection for the public policy at issue. This is simply wrong. There is no “administrative process” under RCW 43.70.075 which provides any remedy at all. Neither the Court of Appeals nor respondent can point to any specific “administrative process” under the Washington Health Care Act which provides any remedy to vindicate the public policy at issue. There is no such administrative process.

This is different from the statutes at issue in *Korlund* and *Cudney*. In *Korlund*, the Energy Reorganization Act of 1974 provided comprehensive remedies, including back pay, compensatory damages, and attorney and expert witness fees, through an administrative process. 156 Wn.2d, at 182. In *Cudney*, the Washington Industrial Safety and Health Act (WISHA) provided identical remedies through a defined administrative process. 172 Wn.2d at 533. There is no similar administrative process providing “comprehensive remedies” under the Washington Health Care Act. The references to an administrative process by respondent and the Court of Appeals are simply wrong.

More importantly, respondent’s argument, and the analysis of the Court of Appeals are erroneous because both misapprehend the context of this case. “Each public policy tort claim must be evaluated in light of its

particular context.” *Piel*, 177 Wn.2d, at 617. RCW 43.70.075 protects health care workers who report concerns of unsafe health care practices to the State Department of Health. Ms. Worley did not make any report to the Department of Health. She reported her concerns internally to Providence’s compliance officer, consistent with Providence’s employment policies. Because she did not report her concerns to the Department of Health, the anti-retaliation provisions of RCW 43.70.075 protected neither her, nor the public policy at issue.

There is no dispute about the clarity element in this case. The parties stipulated that there is a clear mandate of public policy that protects health care workers from retaliation for reporting concerns of unsafe health care practices. In *Piel*, the court stated:

To establish jeopardy, plaintiffs must show that they engaged in particular conduct, and the conduct *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy. This burden requires a plaintiff to “argue that other means for promoting the policy . . . are inadequate.” *Perritt* [, supra,] § 3.14, at 77. Additionally, the plaintiff must show how the threat of dismissal will discourage others from engaging in the desirable conduct.

177 Wn.2d, at 611, quoting *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 945, 913 P.2d 377 (1996).

In the instant case, the record demonstrates that Ms. Worley engaged in particular conduct that directly relates to the public policy at

issue, and was necessary for the effective enforcement of the public policy. Public policy promotes safe health care practices, and protects health care workers who report unsafe health care practices to their employers. Ms. Worley's conduct in this case relates directly to that policy. She was then fired. The only means to vindicate the public policy in this context (internal reporting to the employer) is a wrongful termination in violation of public policy claim. The anti-retaliation claim under RCW 43.70.075 is not available to vindicate the public policy at issue in this case because Ms. Worley made no complaint to the Department of Health. Obviously, the threat of dismissal, the action taken against Ms. Worley in this case, will discourage other employees from making internal reports of unsafe health care practices to their employers. Ms. Worley has established the jeopardy element of her public policy wrongful discharge claim.

Under the Court of Appeals decision, the policy at issue in the context of this case is not vindicated or protected when a health care worker reports such concerns to an employer compliance officer, and then is fired in retaliation for doing so. Stated more clearly, under the Court of Appeals decision, an employer is allowed to violate the public policy by firing an employee who complains internally of unsafe health care practices before she has a chance to report to the Department of Health.

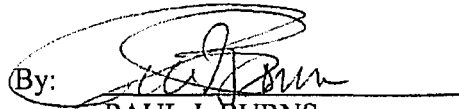
That is precisely what happened in this case. RCW 43.70.075 provides no protection or vindication for the public policy at issue when a health care worker reports concerns of unsafe health care protection internally to her employer. A public policy wrongful discharge claim is the only remedy available to vindicate the public policy at issue in the context of this case, i.e., where an employee is retaliated against for reporting concerns of unsafe health care practices internally to the employer's compliance officer. Therefore, the jeopardy element is established. The Court of Appeals holding to the contrary was in error.

D. CONCLUSION

The Court of Appeals held that the existence of a statutory remedy necessarily precludes a finding of the jeopardy element, and forecloses a public policy wrongful discharge claim. This was contrary to this court's recent decision in *Piel v. City of Federal Way*, 177 Wn.2d 604 (2013). Petitioner respectfully requests the court to grant review, reverse the decision of the Court of Appeals and the trial court, and remand this case to Spokane County for trial on the merits.

RESPECTFULLY SUBMITTED this 5 day of January,
2014.


PAUL J. BURNS, P.S.

By: 
PAUL J. BURNS
WSBA No. 13320
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 6 day of January, 2014, at Spokane, Washington, the forgoing was caused to be served on the following person(s) in the manner indicated:

Michael B. Love	<input type="checkbox"/>	Regular Mail
Workland & Witherspoon	<input type="checkbox"/>	Certified Mail
601 West Main Avenue	<input checked="" type="checkbox"/>	Hand Delivered
Suite 714	<input type="checkbox"/>	Facsimile
Spokane, WA 99201	<input type="checkbox"/>	Overnight Mail
	<input checked="" type="checkbox"/>	Electronic Mail


PAUL J. BURNS

OFFICE RECEPTIONIST, CLERK

From: Paul Burns <paulburns@omnicast.net>
Sent: Sunday, January 05, 2014 12:30 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: mlove@workwith.com
Subject: Worley v. Providence Physician Services - Supreme Court No. 89226-1, COA No. 309509-III
Attachments: Reply - Petition for Review.pdf

Dear Sir/Madam

Attached for filing is Petitioner's Reply in Support of Petition for Review in Worley v. Providence Physician Services, Supreme Court Cause No. 89226-1. A hard copy will follow by regular mail.

Thank you.

Paul Burns

Paul J. Burns
Paul J. Burns, P.S.
1212 N. Washington, Suite 116
Spokane, WA 99201
(509) 327-2213
(509) 327-1377 - FAX