NO. 90946-6

WASHINGTON STATE SUPREME COURT

GREGG BECKER,

Plaintiff,

v.

COMMUNITY HEALTH SYSTEMS, INC. d/b/a COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION d/b/a COMMUNITY HEALTH SYSTEMS PSC, INC. d/b/a ROCKWOOD CLINIC P.S.; and ROCKWOOD CLINIC, P.S.,

Defendants.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Defendants Rockwood Clinic, P.S. and Community Health Systems Professional Services Corporation[1] (hereinafter "Rockwood" and "CHSPSC" or collectively "Defendants") ask this Court to accept review of the Court of Appeals' decision terminating review, designated in Part B.

B. COURT OF APPEALS' DECISION

Defendants request the Supreme Court review the decision of Division III of the Court of Appeals, entered on August 14, 2014 (Appendix at pages A- 001- 034) and its denial of Defendants' Motion for Reconsideration on September 18, 2014. (A-035).

C. ISSUES PRESENTED FOR REVIEW

1. Does the decision of Division III of the Court of Appeals conflict with the decisions of the Supreme Court in *Korslund v. Dyncorp Tri-Cities Servs.*, 156 Wn.2d 168, 125 P.3d 119 (2005) and *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011), and with the decision of Division I of the Court of Appeals in *Weiss v. Lonnquist*, 173 Wn. App 344, 293 P.3d 1264 (2013), *review denied*, 178 Wn.2d 1025, 312 P.3d 652 (2013) and Division III's own decisions in *Rose v. Anderson Hay and*

[1] The Court of Appeals Opinion ("Opinion") erroneously refers to Community Health Systems Inc. as a petitioner. Community Health Systems Inc. was dismissed by the trial court for lack of personal jurisdiction. [CP 916-920] CHSPSC is the proper party. Community Health Systems Inc. is not a party to this action.

Grain Co., 168 Wn. App. 474, 478, 276 P.3d 382 (2012), *review granted and remanded*, 180 Wn.2d 1001, 327 P.3d 613 (2014), *on remand at* ___ Wn. App. ___, 2014 Wash. App. LEXIS 2359 (Sept. 25, 2014) and *Rupert v. Kennewick Irrigation Dist.*, 2014 Wash. App. LEXIS 2449 (Division III Oct. 14, 2014)(A-077-089)?

2. Should the Supreme Court accept review of this case to address an issue of substantial public importance and resolve the significant uncertainty and conflict in the application and interpretation of the law pertaining to the tort of wrongful discharge in violation of public policy?

3. If a statute provides a non-exclusive remedy, does the Supreme Court's decision in *Piel v. City of Federal Way,* 177 Wn.2d 604, 306 P.3d 879 (2013) mandate the conclusion that the jeopardy element is met, even though the statute provides comprehensive criminal, civil and administrative enforcement mechanisms which are more than adequate to protect the public policy?

4. Is the public policy of honest financial reporting promoted by permitting a corporate officer of an SEC-reporting company, who resigns his employment without whistleblowing, to seek private redress through a tort claim, where Congress has created a comprehensive scheme of remedies which requires the officer to report the alleged securities fraud so that action can be taken to protect the public?

D. STATEMENT OF THE CASE

1. Factual Background

Plaintiff Gregg Becker ("Becker") alleges that Community Health Systems, Inc. ("CHSI") is a publicly-traded company that must file reports with the SEC.[2] (CP 728) Becker alleges that Rockwood was acquired by CHSI (CP 726-727) and that all reporting of Rockwood's financial results must be accurate to avoid misleading "creditors and investors about Rockwood's (and thereby CHS's) financial health." (CP 729)

As Rockwood's Chief Financial Officer ("CFO"), Becker alleges he submitted projections for "earnings before interest, tax, depreciation and amortization" ("EBITDA") showing what he believed was an "accurate" predicted operating loss for Rockwood in 2012 of $12 million. (CP 733) Becker then alleges that supervisors asked him to recalculate his projection to show how Rockwood could achieve its target budget EBITDA loss of $4 million. (CP 734)

Becker repeatedly alleges that he reported to Rockwood's CEO and to CHSPSC's internal auditor, among others, his concerns that the EBITDA figure was inaccurate and could mislead investors. (CP 736, 739, 741, 744) Becker alleges he was constructively discharged because

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[2] The plaintiff's factual allegations are presumed true for purposes of a CR 12(b)(6) motion. *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).

he would have been required to "engage in improper accounting practices and corporate fraud" if he had continued in his job. (CP 773-774)

2. Procedural Background

On February 27, 2012, Becker filed a Complaint in Spokane County Superior Court, alleging a state law claim for wrongful discharge in violation of public policy and alleging a federal claim. (CP 3-22; 724-749) Two days later, Becker filed a complaint with OSHA, alleging discriminatory employment practices in violation of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A ("SOX"). (CP 209-222) In his OSHA complaint, as in his state court complaint, Becker asserted that, as CFO, he was directed to provide misleading financial information for CHSI to use with investors and credit facilities, and was constructively discharged. (CP 216)

On March 29, 2012, Rockwood removed the case to the United States District Court for the Eastern District of Washington, based on federal question jurisdiction arising from Becker's SOX claim. (CP 25-94) To facilitate his motion to remand, Becker sought permission to file an Amended Complaint to delete the basis for federal question jurisdiction (i.e., the SOX claim). (CP 659-74, 302-316) The District Court granted Becker's motion (CP 720-723), and he filed an Amended Complaint that is virtually identical to his original Complaint except that it removed all specific references to SOX, instead citing to "numerous financial reporting

requirements by statute and by ethical codes." (CP 724-48) In light of this revision, the U.S. District Court ordered the case to be remanded to Superior Court on May 30, 2012. (CP 749-50; 96-97)

With the case back in Superior Court, Defendants filed a CR 12(b)(6) motion to dismiss Becker's Complaint because he cannot satisfy the jeopardy element of his public policy claim. (CP 802-820, 1318) The Superior Court denied the motion. (CP 1024-26) Pursuant to RAP 2.3(b)(4), the Superior Court certified the Order was appropriate for discretionary review because of the importance of the disputed jeopardy issue and its dispositive effect. (CP 1309-12)

While the matter was pending in the Court of Appeals, on July 23, 2014, OSHA issued a determination on Becker's SOX complaint ("SOX Decision"), confirming its jurisdiction over Becker's SOX complaint, rejecting Becker's complaint on the merits, and setting forth the administrative review procedure available to Becker to challenge the SOX Decision. (A-042-043) Becker appealed the SOX Decision. (A-055-076).[3]

On August 14, 2014 the Court of Appeals issued its opinion

[3] Defendants filed a Motion to Supplement the Record With Post-Argument Development on August 13, 2014 to include the SOX Decision in the appellate record before the Court of Appeals. (A-035-048) Defendants filed a Second Motion To Supplement Record With Post-Argument Development, requesting permission to supplement the Court of Appeals record with Becker's August 21, 2014 appeal of the SOX Decision to an Administrative Law Judge. (A-049-076) The motion to supplement the record was granted. (A-035).

affirming the Superior Court's decision denying dismissal of Becker's public policy claim. (A-001-034) Defendants' Motion for Reconsideration was denied. (A-035)

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals' decision conflicts with the Supreme Court's decisions in *Korslund* and *Cudney* and conflicts with Division I's decision in *Weiss* and Division III's decision in *Rose*. RAP 13.4 (b)(1) and (2). This Petition for Review involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4 (b)(4).

The Court of Appeals erred by finding that SOX does not adequately promote the public policy of honesty in corporate financial reporting. The remedies under SOX are almost identical to the remedies under the ERA, which *Korslund* found to be adequate. The Court of Appeals acknowledged that SOX provides a "comprehensive" remedy but held that the non-exclusivity clause bars the court from finding that SOX is adequate, citing *Piel* at 617. Notably, the ERA also contains a non-exclusivity clause, but *Piel* did not overrule *Korslund's* holding that the ERA provides an adequate remedy, despite the non-exclusivity clause.

The Court of Appeals also erred by finding that the panoply of other state and federal statutes and law enforcement mechanisms are inadequate to promote the public policy because they are too "uncertain."

The federal government's ability—through the SEC, FBI, and DOJ—to investigate and prosecute financial fraud is just as certain, if not more so, than the state police's ability to prevent drunk driving or the bar association's ability to prevent perjury. *See Cudney*, 172 Wn.2d at 536 (holding that the DUI laws adequately protected the public policy); *Weiss* 173 Wn. App. at 359 (holding that the bar association adequately protected the public policy). Division III's *Becker* decision directly conflicts with *Cudney* and *Weiss*.

Because Division III's *Becker* opinion conflicts with Supreme Court precedent and other appellate court decisions, the current state of law for Washington's public policy tort is impossible to reconcile and cannot provide clear guidance for employers and employees to determine their respective rights and responsibilities.

1. This Case is Squarely Controlled by *Korslund*, but the Court of Appeals Refused to Apply *Korslund*

To satisfy the jeopardy element of a public policy wrongful discharge claim, a plaintiff must show that other means of promoting the public policy are inadequate, and that the actions the plaintiff took were **the only available adequate means to promote the public policy**. *Korslund,* 156 Wn.2d at 181-82; *Cudney,* 172 Wn.2d at 530. If there are other adequate remedies available, or if

the public policy is sufficiently promoted through means other than a private suit, the public policy is not in jeopardy and a private cause of action need not be recognized. *Korslund*, 156 Wn.2d at 184.

Becker cannot satisfy the jeopardy element because SOX and numerous other statutes and law enforcement mechanisms provide an adequate alternative remedy and sufficiently promote the public policy. Indeed, Becker is currently taking advantage of the federal administrative process by pursuing a SOX retaliation complaint before OSHA. (CP 209-222) Becker's OSHA complaint is based on the same allegations as his state court Complaint and seeks the same relief. (CP 209-222, 724-48) As required by SOX, OSHA has conducted an investigation and issued a decision on the merits of Becker's claim. (A-042-043) Although OSHA found that Becker's SOX claim lacks merit, the SOX Decision confirms that Becker is covered under SOX and that the SOX administrative procedure is the correct avenue for Becker to seek relief. (A-042) Becker continues to pursue his SOX claim by appealing the SOX Decision and requesting a full hearing before an Administrative Law Judge. (A-055-076) Becker is also entitled to file his SOX claim in U.S. District Court because more than 180 days have passed since he filed his SOX complaint. 18 U.S.C. § 1514A(b)(1). Becker's curious refusal to pursue this available remedy appears to be a calculated move to cloak the wide

array of remedies available to him.

Remedies under SOX include "all relief necessary to make the employee whole." 18 U.S.C. §1514A(c)(1). The remedies available to Becker under SOX are just as robust as the remedies under the ERA at issue in *Korslund*. The following chart compares the remedies available to individuals who fall within the ambit of the ERA and SOX:

	SOX (Becker)	***ERA (Korslund)***
Complaint & Investigation	✓ 29 C.F.R. § 1980.104	✓ 29 C.F.R. § 24.103
ALJ Hearing	✓ 29 C.F.R. § 1980.107	✓ 29 C.F.R. § 24.100; 107
Discovery	✓ 29 C.F.R. § 18.13; 29 C.F.R. § 1980.107	✓ 29 C.F.R. § 18.13 *et. seq.*
Open Public Hearing	✓ 29 C.F.R. § 18.43; 29 C.F.R. § 1980.107	✓ 29 C.F.R. § 18.43
Findings of Fact and Conclusions of Law by ALJ after Hearing	✓ 29 C.F.R. § 1980.109	✓ 29 C.F.R. § 18.57
Remedies	✓ All relief to make employee whole; reinstatement with same seniority status; back pay with interest; compensation for any special damages including litigation costs, expert witness fees, and reasonable attorneys' fees, plus emotional distress. *Lockheed Martin Corp.*	✓ Reinstatement to employment on same terms; back pay; compensatory damages; attorney and expert fees; orders to undertake affirmative action to abate violations. 42 U.S.C. § 5851(b)(2)(B)

	SOX (Becker)	***ERA (Korslund)***
	v. Administrative Review Bd., 717 F.3d 1121, 1138 (10th Cir. 2013); 29 C.F.R. § 1980.109(d)(1)	
Right to have ALJ decision reviewed by Administrative Review Board	✓ 29 C.F.R. § 1980.110	✓ 29 C.F.R. § 24.110
Right to Judicial Review by U.S. Circuit Court of Appeals	✓ 29 C.F.R. § 1980.112	✓ 29 C.F.R. § 112
Judicial Enforcement of Decisions	✓ 29 C.F.R. § 1980.113	✓ 29 C.F.R. § 24.113
Non-Exclusive Nature of Statute	✓ **(3) Rights retained** "Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement." 15 U.S.C. §78u-6(h)(3) **(d) Rights Retained by Employee.—** "Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective	✓ **Nonpreemption.** "This section may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee." 42 U.S.C. § 5851(h).

	SOX (Becker)	***ERA (Korslund)***
	bargaining agreement." 18 U.S.C. § 1514A(d).	

One would be hard pressed to find two cases more alike in terms of adequate alternative means to protect the public policy than Becker's case and *Korslund*. Based on the foregoing, Division III's conclusion that "Because *Korslund* and *Cudney* addressed different enforcement mechanisms, they do not dictate the outcome in Mr. Becker's case," is unsupportable and erroneous. *Korslund* is directly on point, and Becker's public policy claim must be dismissed.

The Court of Appeals chose to contravene *Korslund* and *Cudney*, concluding they "overemphasized the abstract adequacy of statutes and regulations while forgetting the concrete public policy impact of chilling protected employee conduct." (Opinion at 10, A-010) Instead of following precedent, the Court of Appeals relied upon the dissenting opinion in *Cudney* to support the *Becker* decision. The Court of Appeals does not have the authority to ignore *Korslund*. *See State v. Gore,* 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (once the Supreme Court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by the Supreme Court); *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566,

578, 146 P.3d 423 (2006) (when the Court of Appeals fails to follow directly controlling authority of the Supreme Court, it errs).

This Court should accept review to ensure that its decisions in *Korslund* and *Cudney* are applied by the lower courts.

2. Division III's Focus on the Non-Exclusiveness of SOX Is Erroneous

The Court of Appeals erred by focusing solely on the non-exclusivity clause in SOX to determine the adequacy of the protection it provides. Specifically, the Court found that SOX and section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 78u-6, provide **comprehensive** whistleblower protections. (Opinion at p. 12, A-012) Despite the comprehensiveness of these protections, the Court of Appeals held that the SOX remedy was inadequate ***solely*** because SOX contains a non-exclusivity clause, citing *Piel* at 617.

Division III's holding ignores the fact that the ERA statute at issue in *Korslund* has a similar provision to SOX regarding non-exclusivity. *Compare* 42 U.S.C. § 5851(h) *to* 18 U.S.C. § 1514A(d). Despite that provision, *Korslund* holds that the ERA provided the plaintiffs with adequate alternative remedies that precluded the pursuit of a public policy tort claim. Thus, a non-exclusivity clause in a federal statute cannot be

dispositive of the adequacy of a statutory remedy.

In *Cudney*, this Court confirmed that a non-exclusivity clause does not by itself determine the adequacy of alternative remedies. *Cudney* emphasizes *Korslund's* holding that statutory remedies may be adequate to protect the public policy, **even though the statute at issue (ERA) is not mandatory and exclusive**. *Cudney,* 172 Wn.2d at 535 (citing *Korslund*, 156 Wn. 2d at 182-83). The text of the majority's opinion in *Cudney*, in a portion of the opinion central to the holding, leaves no doubt that the current state of the law in Washington is that non-exclusivity of a federal alternative remedy is not a controlling factor on the jeopardy issue:

> The key question in *Korslund* was, in contrast, "whether other means of protecting the public policy [were] adequate so that recognition of a tort claim in these circumstances [was] unnecessary to protect the public policy." *Id.* In fact, *Korslund* specifically found that statutory remedies were adequate to protect the public policy, **even though the United States Supreme Court has found that the same statute was not mandatory and exclusive**. *Id.* at 182-83, 125 P.3d 119. Our analysis here should follow our reasoning in *Korslund.* Even if a similar statute is not mandatory and exclusive, as in *Wilmont*, WISHA is still adequate to protect public policy. *Cudney*, 172 Wn.2d at 535 (emphasis added).

Division III's focus on the non-exclusivity clause as the determining factor for whether a statute adequately protects a public policy reflects a misunderstanding of *Piel.* In *Piel*, the Supreme

Court held that the Washington Legislature's choice to allow a wrongfully discharged employee to pursue additional remedies beyond those provided by statute is the "strongest possible evidence" that the statutory remedies are not adequate to vindicate a violation of public policy. *Piel*, 177 Wn.2d at 617. While *Piel* gives weight to what the Washington Legislature has pronounced, it does not hold that a non-exclusivity clause in a federal statute has the same effect on the jeopardy analysis. Rather, *Piel* makes clear that *Korslund* is still good law and instead distinguishes *Korslund,* stating: "No similar language was identified under the statutory schemes at issue in *Korslund* or *Cudney*." *Piel*, 177 Wn.2d at 617. Because the federal statute at issue in *Korslund* contains a non-exclusivity clause, *Piel* can only be read to ascribe importance to non-exclusivity language when it is the dictate of the Washington Legislature. Congress' choice not to preempt state law is an issue of federal supremacy, not a directive to the courts that federal law is inadequate. Thus, a non-exclusivity clause in a federal statute does not carry the same directive as a non-exclusivity clause in a Washington state statute.

Piel also made it clear that even if a non-exclusivity provision

is in place, a court must still analyze whether the administrative scheme at issue is adequate to "vindicate public policy." *Piel*, 177 Wn.2d at 617. *Piel* is consistent with *Korslund*, which set forth, at 156 Wn.2d at 183, the reason for such analysis:

> [T]he question is not whether the legislature intended to foreclose a tort claim but whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy.

Here, Division III failed to conduct this required analysis. The Court of Appeals' apparent reliance solely on the non-exclusivity of SOX, despite recognizing that comprehensive federal and state remedies exist, is contrary to the holdings in both *Korslund* and *Cudney* -- and does not comport with a fair reading of *Piel.* It is also contrary to its own decision in *Rose v. Anderson Hay & Grain Co.*, *supra*, issued just six weeks after the *Becker* decision. In *Rose*, Division III noted the non-exclusivity provision in the federal Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105(f), but concluded that the remedies available under the CMVSA were more than adequate to protect the public interest in commercial motor vehicle safety, and then affirmed the dismissal of the public policy claim for failure to satisfy the jeopardy element.

The Court of Appeals' holding that SOX is inadequate to

protect the public policy of honesty in financial reporting conflicts with *Korslund*, *Cudney* and *Piel*, as well as *Weiss, Rose* and *Rupert*. The test is not solely to determine whether the alternate remedy declares itself exclusive, but rather whether the remedy is adequate. *See Korslund,* 156 Wn. 2d at 182. Because the SOX administrative procedure is as robust as the ERA administrative procedure found in *Korslund* to be adequate, Becker cannot satisfy the jeopardy element.

3. Becker's Claim Is Not a Compelling Case for Tort Protection

In addition to SOX, Division III reviewed a wide array of other state and federal laws and law enforcement mechanisms all aimed at promoting honesty in corporate financial reporting. The Court of Appeals acknowledged there are comprehensive criminal, civil, and administrative enforcement mechanisms promoting the public policy of honest financial reporting. (Opinion at 8, A-008) Despite the comprehensive nature of these alternative remedies, the Court of Appeals found that they did not prevent Becker from satisfying the jeopardy element for three reasons.

First, the Court of Appeals declared that the situation where an employee is forced to choose between disobeying his employer and disobeying the law is "'[t]he most compelling case for protection' under a public policy tort." (Opinion at 9, A-009) This holding directly

contradicts Division I's holding in *Weiss*. In *Weiss*, a decision the Supreme Court refused to hear on petition for review, a law firm employee (attorney) faced the choice between having to commit perjury or be fired. 173 Wn. App. at 357–60. Division I held that remedies under the WSBA disciplinary rules were adequate to protect the public policy and dismissed her public policy claim. Becker's circumstances are no different than the employee in *Weiss*. *Becker* and *Weiss* cannot be reconciled.

Second, Division III held that Becker should be given a tort remedy to protect the public policy of honesty in financial reporting because of the "uncertainty" of the other enforcement mechanisms. (Opinion at 10, A-010) Corporate financial reporting is highly regulated, and the agencies charged with enforcing financial honesty have significant power and authority, supported by an astonishingly large budget. The statutes and regulations (which Division III found to be "comprehensive") make it illegal for an employer to command its employee to make a false financial report. *See, e.g.*, 18 U.S.C. § 2(a) (illegal to command a CFO to certify a false financial report); RCW 9A.28.020(1), .030(1), .040(1) (illegal to solicit another person to knowingly make a false financial statement). Becker cannot show that having law enforcement do its job and enforce these laws is an inadequate means of promoting the public policy. *Cudney*, 172 Wn.2d at 537.

The Court of Appeals concluded that such law enforcement mechanisms were "uncertain" because they depend on individuals such as Becker complying with laws requiring employees to report alleged attempted financial fraud. (Opinion at 10, A-010) The same "uncertainty" existed in *Cudney* and *Weiss*, but those courts found that the relevant public policies were adequately promoted. In *Cudney*, the DUI law enforcement mechanisms were adequate to promote the public policy against drunk driving because the plaintiff could have dialed 911 to report his supervisor's drunk driving. *Cudney*, 172 Wn.2d at 537. In *Weiss*, the WSBA disciplinary rules were adequate to promote the public policy against perjury, even though they depend on someone reporting the perjury. 173 Wn. App. at 359. *Cudney* and *Weiss* put the onus on the employee to report employer wrongdoing to the relevant authority. *Cudney*, 172 Wn.2d at 536 n.4; *Weiss*, 173 Wn. App. at 360. An employee's choice not to report his concerns so that the relevant agency can take action should not give that employee a tort cause of action.

Third, Division III concluded that the threat of constructive discharge would jeopardize the public policy of honesty in corporate financial reporting by discouraging a CFO like Becker from refusing to submit a false report. (Opinion at 16, A-016) In reaching its conclusion, Division III relied principally on the Perritt treatise, Henry H. Perritt, Jr.,

Employee Dismissal Law and Practice (Supp. 2013), citing it on this key issue at pages 11, 15-16, 18. (A-011, 015-016, 018) Unfortunately, that treatise fails to address the unique circumstances of companies that must report to the SEC and the powerful SOX mechanisms put in place in the last several years.[4]

Contrary to Perritt's unsupported musings, the worst possible outcome for the public policy is to permit a private public policy tort claim for a public company CFO, like Becker, who would quit rather than report the alleged threatened securities violations to the SEC and FBI. That approach sacrifices the public policy for a plaintiff's private gain.

The entire thrust of the SOX enforcement scheme is to induce CFOs such as Becker to report to the authorities instances of threatened securities fraud. The Court of Appeals seemingly accepts Becker's argument that his claim that he was discharged for refusing to commit an illegal act precludes application of whistleblower protections as adequate alternative remedies. This analysis ignores the obvious facts that (1) acting as a whistleblower adequately and powerfully promotes the public policy, as compared with the

[4] The Perritt treatise is of little or no value for this case for the additional reason that Perritt, at 7-82.4, makes no secret that he rejects Washington's decisional authority, *Cudney* especially. Perritt opines not on what Washington law is, but instead on how he would like to change Washington law. He is not an objective reporter.

alternative of staying quiet and quitting, and (2) the CFO's reporting the purported securities fraud is congressionally mandated. By merely quitting, without going to the SEC or FBI, a public company CFO heightens the probability that the company will defraud its investors and quietly pay off the resigning CFO with a quick settlement -- which is precisely the path Becker tried to take in this matter. (CP 1306)

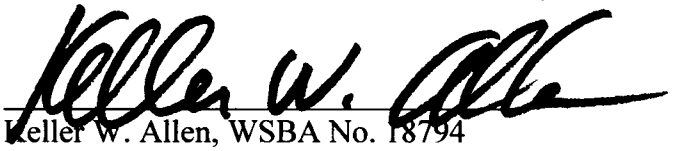
The best method, the sole adequate method, of promoting the public policy of truth in financial reporting **for SEC-reporting companies** is to discourage senior officers from quitting when faced with alleged efforts to defraud shareholders. Creating a state-law tort claim dramatically increases the prospects of private pay-offs to resigning officers while the offending company finds a compliant executive – and meanwhile, investors are defrauded. With all due respect, Perritt and Division III have it backwards regarding what will best promote the at-issue public policy.

F. CONCLUSION

The Court should grant Defendants' Petition for Review to apply the Supreme Court decisions in *Korslund* and *Cudney* and dismiss Becker's public policy tort claim.

Respectfully submitted this 20th day of October, 2014.

LAW FIRM OF KELLER W. ALLEN, P.C.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the following:

Mary Schultz Mary Schultz Law, P.S. 2111 E. Red Barn Lane Spangle, WA 99031 Attorney for respondent/plaintiff	[ ] Via Hand Delivery [X] Via U.S. Mail [ ] Via Facsimile [X] Via Email mary@mschultz.com

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

Executed at Spokane, Washington, this 20th day of October, 2014.

Pamela R. Mengel

Pamela R. Mengel

APPENDIX

FILED
AUGUST 14, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

GREGG BECKER, Respondent, v. COMMUNITY HEALTH SYSTEMS, INC. d/b/a COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION d/b/a COMMUNITY HEALTH SYSTEMS PSC, INC., d/b/a ROCKWOOD CLINIC P.S.; and ROCKWOOD CLINIC, P.S., Petitioners.	)	No. 31234-8-III PUBLISHED OPINION

BROWN, A.C.J. — Rockwood Clinic PS (Rockwood) and its parent company, Community Health Systems Inc. (CHS), successfully petitioned for discretionary review of a decision denying their CR 12(b)(6) motion to dismiss Gregg Becker's claim for wrongful discharge in violation of public policy. Rockwood and CHS contend Mr. Becker cannot establish the jeopardy element because a myriad of statutes and regulations adequately promote the public policy of honesty in corporate financial reporting, rendering a private common law tort remedy superfluous. We disagree with Rockwood and CHS, and affirm.

FACTS

In February 2011, Rockwood recruited Mr. Becker to be its chief financial officer (CFO), a job he performed admirably. CHS had acquired Rockwood with a business strategy to improve profitability. Upon doing so, CHS represented to investors and creditors it expected Rockwood to sustain a $4 million operating loss in 2012. However, in October 2011, Mr. Becker correctly projected Rockwood's earnings before interest, taxes, depreciation, and amortization (EBITDA) as showing a $12 million operating loss in 2012. This projection was significantly important to investors and creditors as a measure of Rockwood's and, by relation, CHS's financial health. Additionally, CHS had to report this projection to the U.S. Securities and Exchange Commission (SEC). As CFO, Mr. Becker had to ensure this projection was not false or misleading.

Rockwood and CHS demanded Mr. Becker recalculate his EBITDA projection to show a target $4 million operating loss in 2012. Mr. Becker refused to submit the $4 million figure because he reasonably believed it would require overstating income and understating expenses, fraudulently misleading investors and creditors in violation of criminal laws. Rockwood and CHS rated his job performance as "'unacceptable,'" placed him on a probationary "'performance improvement plan,'" and gave him an ultimatum to either submit the $4 million figure or lose his job. Clerk's Papers (CP) at 735-36. Then, he told Rockwood's chief executive officer (CEO) and CHS's internal auditor he thought Rockwood and CHS were using the false $4 million figure to fraudulently mislead investors and creditors. Mr. Becker hypothesized that, upon acquiring Rockwood, CHS procured investments and credits using the false $4 million

figure. He reported his concerns to Rockwood and CHS but did not report the misconduct to law enforcement agencies. Soon, Mr. Becker saw signs that Rockwood and CHS were preparing to use his subordinate to submit the false $4 million figure under the auspices of his department. Mr. Becker detailed these matters in writing to Rockwood and CHS, advising them he would have no choice but to resign unless they responded appropriately to abate the misconduct. They sent him a one-line e-mail accepting his resignation the next day.

In February 2012, Mr. Becker sued in superior court for wrongful discharge in violation of public policy. He additionally filed a whistleblower retaliation complaint with the U.S. Occupational Safety and Health Administrative (OSHA). Apparently, his OSHA complaint remains unresolved. Rockwood and CHS removed his civil suit to federal district court. But after Mr. Becker amended his complaint to remove references to federal law, the federal district court remanded his case.

Back in superior court, Rockwood and CHS moved unsuccessfully to dismiss Mr. Becker's amended complaint under CR 12(b)(6) for failure to state a cognizable claim for relief. The trial court certified the ruling for interlocutory review regarding whether Mr. Becker can establish the jeopardy element in his claim for wrongful discharge in violation of public policy. This court granted discretionary review regarding whether other available means for promoting the public policy of honesty in corporate financial reporting are adequate.

ANALYSIS

The issue is whether the trial court erred under CR 12(b)(6) in declining to dismiss Mr. Becker's claim for wrongful discharge in violation of public policy. Rockwood and CHS contend Mr. Becker cannot establish the jeopardy element because a myriad of statutes and regulations adequately promote the public policy of honesty in corporate financial reporting, rendering a private common law tort remedy superfluous. Our review is de novo. *See Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 182, 125 P.3d 119 (2005); *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." CR 8(a)(1). Otherwise, a trial court may dismiss the complaint on motion for "failure to state a claim upon which relief can be granted." CR 12(b)(6). Dismissal is proper if, accepting all factual allegations as true, "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978); *see Barnum v. State*, 72 Wn.2d 928, 929-30, 435 P.2d 678 (1967). Thus, dismissal is proper where the plaintiff has an "'insuperable bar to relief'" appearing on the face of the complaint. *Hoffer*, 110 Wn.2d at 421 (quoting 5 CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE § 1357, at 604 (1969)); *accord Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). We will consider hypothetical situations, including facts argued for the first time on appeal, that the complaint could conceivably allege to justify relief for the plaintiff. *Halvorson v.*

Dahl, 89 Wn.2d 673, 674-75, 574 P.2d 1190 (1978); *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

Washington provides a private common law tort remedy when an employer discharges an at-will employee "for a reason that contravenes a clear mandate of public policy."[1] *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984). This claim usually arises where the employer discharges the employee for (1) "refusing to commit an illegal act"; (2) "performing a public duty or obligation"; (3) "exercis[ing] a legal right or privilege"; or (4) engaging in "'whistleblowing' activity." *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989). But the elements are the same regardless of what conduct prompts this claim.

To prevail on a claim of wrongful discharge in violation of public policy, a plaintiff must establish (1) "the existence of a clear public policy (the *clarity* element)"; (2) "that discouraging the conduct in which [the plaintiff] engaged would jeopardize the public policy (the *jeopardy* element)"; (3) "that the public-policy-linked conduct caused the dismissal (the *causation* element); and (4) "[t]he defendant [is not] able to offer an overriding justification for the dismissal (the *absence of justification* element)." *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996) (adopting these elements from HENRY H. PERRITT, JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES §§ 3.7, .14, .19, .21 (1991) [hereinafter PERRITT, WORKPLACE TORTS]). The parties dispute whether Mr. Becker's amended complaint establishes the jeopardy element.

[1] This claim is available regardless of whether the employer discharges the employee expressly or constructively. *Korslund*, 156 Wn.2d at 177 (citing *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 238, 35 P.3d 1158 (2001)).

To establish the jeopardy element, the plaintiff must show he or she "engaged in particular conduct, and the conduct *directly relates* to the public policy, or was necessary for the effective enforcement of the public policy." *Id.* at 945 (citing PERRITT, WORKPLACE TORTS, *supra*, § 3.14, at 75-76). Thus, the plaintiff must argue "'other means for promoting the policy . . . are inadequate.'" *Id.* (omission in original) (quoting PERRITT, WORKPLACE TORTS, *supra*, § 3.14, at 77). In other words, the plaintiff must argue the actions he or she took were the "*only available adequate means*" to promote the public policy. *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 222, 193 P.3d 128 (2008).

Our Supreme Court first recognized the claim of wrongful discharge in violation of public policy in *Thompson*, 102 Wn.2d at 232. There, a divisional controller sued his corporate employer, alleging the employer discharged him, as a warning to other controllers, for instituting accurate accounting procedures complying with the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78m, 78dd-1 to -2, 78ff. *Id.* at 223, 234. The *Thompson* court held the divisional controller could recover under a private common law tort remedy if he could prove his allegations. *Id.* at 234. The court reasoned the employer's action would contravene the public policy prohibiting bribery of foreign officials and requiring transparency in accounting by discouraging other controllers from complying with the FCPA. *Id.* at 234.

Our Supreme Court first articulated and applied the jeopardy element in *Gardner*, 128 Wn.2d at 941, 945-46. There, an armored vehicle driver sued his employer for wrongful discharge in violation of public policy, alleging the employer discharged him for

exiting the vehicle to disarm an attacker inside a bank. *Id.* at 933-35. The *Gardner* court concluded the threat of discharge would jeopardize the public policy of supporting altruism and protecting human life by discouraging an employee like the driver from rescuing a person from imminent life threatening harm. *Id.* at 945-46. The court reasoned the driver's conduct was both directly related to the public policy and necessary to effectively promote the public policy. *Id.* While the driver technically could have remained in the vehicle and summoned help through its radio, public address system, or siren, the court reasoned his conduct was the only available adequate means for serving the public policy because other people were not then prepared to help. *Id.* at 935, 945-46.

In *Korslund*, 156 Wn.2d at 182-83, our Supreme Court held the comprehensive remedies available under the Energy Reorganization Act of 1979 (ERA), 42 U.S.C. § 5851, adequately promoted public health and safety, and prevented fraudulent use of public funds in the nuclear industry. Specifically, the ERA prohibits specific employers from taking adverse employment action against employees for, among other things, reporting violations of nuclear industry laws. 42 U.S.C. § 5851(a). If an employer takes adverse employment action, the employee may complain to an administrative agency with power to investigate the claim. *Id.* § 5851(b)(1)-(2)(A). If the agency decides the claim has merit, the ERA requires it to order the employer abate the violation; reinstate the employee to his or her former position with the same compensation and employment terms, conditions, and privileges; and pay the employee back pay, compensatory damages, as well as attorney and expert fees and costs. *Id.* §

5851(b)(2)(B). But if the agency does not decide within one year, the ERA allows the employee to sue the employer in federal district court. *Id.* § 5841(b)(4). Because these remedies adequately promoted the relevant public policy, the *Korslund* court was unwilling to provide a private common law tort remedy. *See* 156 Wn.2d at 182-83.

In *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 531-33, 259 P.3d 244 (2011), our Supreme Court held the robust remedies available under the Washington Industrial Safety and Health Act of 1973 (WISHA), RCW 49.17.160, adequately promoted workplace safety. Specifically, WISHA prohibits general employers from taking adverse employment action against employees for, among other things, reporting violations of workplace safety laws. RCW 49.17.110, .160(1). If an employer takes adverse employment action, the employee may complain to an administrative agency with power to investigate the claim. RCW 49.17.160(2). If the agency decides the claim has merit, WISHA requires it to sue the employer in superior court on behalf of the employee. *Id.* But if the agency decides the opposite, WISHA allows the employee to sue the employer in superior court on his or her own behalf. *Id.* In either case, the court may order all appropriate relief, including requiring the employer to cease the violation as well as restore and compensate the employee. *Id.* Again, because these remedies adequately promoted the relevant public policy, the *Cudney* court was unwilling to recognize a provide common law tort remedy. *See* 172 Wn.2d at 536, 538.

In *Cudney*, our Supreme Court additionally held law enforcement action available under Washington statutes criminalizing drunk driving adequately protected the public from drunk driving. *Id.* at 536-38. There, the employee reported to his private employer

that his supervisor drove a company vehicle while intoxicated. *Id.* at 527-28. But the employee did not inform law enforcement agencies, who theoretically could have stopped the supervisor. *Id.* at 537. In those circumstances, the *Cudney* court could not say the actions the employee took were the 'only available adequate means' to protect the public from drunk driving. *Id.* at 536-38.

Then, in *Piel v. City of Federal Way*, 177 Wn.2d 604, 609-17, 306 P.3d 879 (2013), our Supreme Court held the administrative remedies available through the Public Employment Relations Commission (PERC) under chapter 41.56 RCW were inadequate, on their own, to fully vindicate public policy when a public employer discharges a public employee for asserting collective bargaining rights. Unlike *Korslund* and *Cudney*, *Piel* involved a prior case holding PERC remedies failed to fully address the broader public interests involved because it protected personal contractual rights solely. *Id.* at 616-17 (quoting *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 805, 809, 991 P.2d 1135 (2000)). And unlike *Korslund* and *Cudney*, *Piel* involved a statute declaring PERC remedies supplement others and must be liberally construed to accomplish their purpose. *Id.* at 617 (quoting RCW 41.56.905). In those circumstances, the *Piel* court recognized a private common law tort remedy as necessary to fully vindicate public policy. *Id.* at 617.

Meanwhile, our Division of this court issued two opinions adhering to *Korslund* and *Cudney*, though our Supreme Court recently remanded one case for reconsideration in light of *Piel*. *See Worley v. Providence Physician Servs. Co.*, 175 Wn. App. 566, 574-76, 307 P.3d 759 (2013) (holding whistleblower protections available

under the Washington health care act, RCW 43.70.075, adequately promoted workplace safety, ensured compliance with the accepted standard of care, and prevented fraudulent billing in the health care industry); *Rose v. Anderson Hay & Grain Co.*, 168 Wn. App. 474, 478-79, 276 P.3d 382 (2012) (holding the employee remedies available under the Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105, adequately protected truck drivers who refuse to violate commercial motor vehicle safety laws, even though a statute declared these remedies do not preclude others), *remanded*, ___ Wn.2d ___, 2014 WL 1325569. Division One of this court issued another opinion applying *Korslund* and *Cudney*, and our Supreme Court denied review of that case despite *Piel*. *See Weiss v. Lonnquist*, 173 Wn. App. 344, 353-60, 293 P.3d 1264 (holding the misconduct reporting and disciplinary process prescribed by the Washington Rules of Professional Conduct, RPC 3.3 and 8.3, adequately promoted attorney candor toward the tribunal), *review denied*, 178 Wn.2d 1025 (2013).

Our recent cases faithfully analyzed the jeopardy element in a manner we thought the reasoning of *Korslund* and *Cudney* required. We now realize our jeopardy analysis overemphasized the abstract adequacy of statutes and regulations while forgetting the concrete public policy impact of chilling protected employee conduct. *See* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 7.06[A], at 7-82.1 to .4 (Supp. 2013) [hereinafter PERRITT, EMPLOYEE DISMISSAL]. This approach tended to foreclose private common law tort remedies for employees any time statutes or regulations provided some means of promoting public policy. *See Cudney*, 172 Wn.2d at 548 (Stephens, J., dissenting). But doing so actually undermined public policy

enforcement by chilling employee conduct advocating compliance with statutes and regulations. *See* PERRITT, EMPLOYEE DISMISSAL, *supra*, § 7.06[A], at 7-82.3 to.4-1; *id.* § 7.09[D], at 7-173 (5th ed. 2006). Thus, in Mr. Becker's case, we reform our jeopardy analysis under the reasoning of *Thompson*, *Gardner*, and *Piel*.

As the trial court concluded, Mr. Becker's amended complaint implicates the public policy of honesty in corporate financial reporting because he alleged he was constructively discharged after refusing to submit a false or misleading EBITDA projection. To establish the jeopardy element, Mr. Becker must show the threat of constructive discharge would jeopardize the public policy of honesty in corporate financial reporting by discouraging a CFO like him from refusing to submit a false or misleading EBITDA projection. Mr. Becker's refusal must have been either directly related to the public policy or necessary to effectively enforce the public policy. Thus, Mr. Becker's refusal must have been the only available adequate means for promoting the public policy. For the reasons discussed below, we think it undoubtedly was.

Initially, the parties dispute whether Mr. Becker's case concerns constructive discharge for refusing to commit an illegal act, engaging in whistleblower activity, or both. But Mr. Becker clearly elected his legal theory where he alleged, "Rockwood and CHS engaged in retaliation and in adverse employment action against [Mr. Becker] *for his refusal* to engage in improper accounting practices" involving "illegal and unethical acts." CP at 744 (emphasis added). Mr. Becker did not allege Rockwood and CHS constructively discharged him for engaging in whistleblower activity. However, any

whistleblower options available to him are still relevant in determining whether his refusal was the only available adequate means for promoting the public policy.

The parties mainly dispute if other available means for promoting the public policy of honesty in corporate financial reporting are adequate in Mr. Becker's case. First, Rockwood and CHS cite section 806(a) of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A, and section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 78u-6. These statutes provide comprehensive whistleblower protections. *See* 15 U.S.C. § 78u-6(h)(1)-(2); 18 U.S.C. § 1514A(a)-(c). These statutes apply even when an employee reports misconduct he or she reasonably believes is "about to" or "'likely to'" occur. 12 C.F.R. § 240.21F-2(b)(1)(i) (implementing 15 U.S.C. § 78u-6); *Wiest v. Lynch*, 710 F.3d 121, 133 (3d Cir. 2013) (quoting *Sylvester v. Parexel Int'l LLC*, No. 07-123, 2011 WL 2165854, at *13 (U.S. Dep't of Labor Admin. Review Bd. May 25, 2011)) (construing 18 U.S.C. § 1514A). But because these statutes declare their remedies do not preclude others, *see* 15 U.S.C. § 78u-6(h)(3); 18 U.S.C. § 1514A(d), we have the "strongest possible evidence" these remedies are inadequate, on their own, to fully vindicate public policy, *Piel*, 177 Wn.2d at 617. Therefore, we do not reach the parties' remaining arguments on these statutes.

Second, Rockwood and CHS cite numerous statutes imposing criminal penalties on a person responsible for false or misleading statements related to corporate financial reporting. SOX section 302(a) requires both a CEO and CFO to certify in periodic corporate financial reports that

> (2) based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading;
> (3) based on such officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the [corporation] as of, and for, the periods presented in the report.

15 U.S.C. § 7241(a). SOX section 906(a) imposes criminal penalties on a CEO or CFO who willfully certifies the report knowing it contains a false or misleading statement. 18 U.S.C. § 1350(c)(1)-(2). Under long-standing criminal principles, a corporation is responsible for the crime of its CEO or CFO if the corporation "aids, abets, counsels, commands, induces or procures [the] commission [of that crime]." 18 U.S.C. § 2(a).

SOX section 903(a) and (b) enhance criminal penalties for mail fraud and wire fraud while section 807(a) separately criminalizes securities fraud. 18 U.S.C. §§ 1341, 1343, 1348. Under SOX section 902(a), attempting or conspiring to commit any of these crimes invokes "the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 18 U.S.C. § 1349.

Section 24 of the Securities Act of 1933, 15 U.S.C. § 77x, and section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff(a), impose criminal penalties on a person who willfully violates securities laws, including by knowingly making false or misleading statements related to corporate financial reporting or connected to the offer or sale of securities. *See also* Securities Act § 17(a), 15 U.S.C. §§ 77q(a); Securities Exchange Act § 10(b), 15 U.S.C. § 78j(b); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. Moreover, SOX section 1107(a) imposes criminal penalties on a person who

"knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the . . . possible commission of any Federal offense." 18 U.S.C. § 1513(e).

Even a state statute imposes criminal penalties on a corporate agent who "knowingly make[s] or publish[es] or concur[s] in making or publishing any written . . . report . . . or statement of [the corporation's] affairs or pecuniary condition, containing any material statement that is false or exaggerated." RCW 9.24.050. This statute exists to protect members of the public who may rely on such reports or statements but are not conversant with the corporation's finances. *State v. Swanson*, 16 Wn. App. 179, 185-86, 554 P.2d 364 (1976) (citing *State v. Pierce*, 175 Wash. 461, 467, 27 P.2d 1083 (1933); *State v. O'Brien*, 143 Wash. 636, 639, 255 P. 952 (1927)). Attempting, conspiring, or soliciting another person to commit this crime is also a crime. RCW 9A.28.020(1), .030(1), .040(1).

Third, Rockwood and CHS cite statutes and regulations providing an investor a private right of action against a person responsible for false or misleading statements connected to the offer or sale of securities.[2] *See* Securities Exchange Act § 10(b), 15

[2] Accepting all factual allegations as true, we assume, without deciding, the EBITDA projection Rockwood and CHS demanded would not have been protected by the safe harbor provisions of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-5(c)(1). The projection certainly would have been a forward-looking statement. *See id.* § 78u-5(i)(1); *Prime Mover Capital Partners L.P. v. Elixir Gaming Techns., Inc.*, 898 F. Supp. 2d 673, 689 & n.95 (S.D.N.Y. 2012) (citing *Slayton v. Am. Express Co.*, 604 F.3d 758, 766-67 (2d Cir. 2010)). But the complaint implies Rockwood and CHS knew the projection would have been false or misleading, and material to investors and creditors. *See* 15 U.S.C. § 78u-5(c)(1)(A)(ii), (B). Because

U.S.C. § 78j(b); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5; Securities Act of Washington, RCW 21.20.010, .430(1); *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13, 92 S. Ct. 165, 30 L. Ed. 2d 128 (1971); *Janus Capital Grp., Inc. v. First Derivative Traders*, ___ U.S. ___, 131 S. Ct. 2296, 2301, 180 L. Ed. 2d 166 (2011).

Finally, Rockwood and CHS cite statutes granting the SEC administrative powers against a person responsible for false or misleading statements connected to the offer or sale of securities. Specifically, the SEC may initiate an investigation upon complaint or its own initiative, and, if it determines a person has violated or is about to violate securities laws, it may issue a cease and desist order; impose civil monetary penalties; and sue in federal district court for injunctive relief, disgorgement of profits, prohibition from future service as a corporate director or officer, and additional civil monetary penalties. *See* Securities Act §§ 8A, 20, 15 U.S.C. §§ 77h-1, 77t; Securities Exchange Act §§ 21, 21B, 21C, 15 U.S.C. §§ 78u, 78u-2, 78u-3.

These statutes and regulations provide comprehensive criminal, civil, and administrative enforcement mechanisms promoting the important public policies they secure. But those means of promoting public policy do not foreclose private common law tort remedies for employees. *See Cudney*, 172 Wn.2d at 549-50 (Stephens, J., dissenting). "The central idea of the public policy tort is to create privately enforceable disincentives for . . . employers to use their power in the workplace to undermine important public policies." PERRITT, EMPLOYEE DISMISSAL, *supra*, § 7.06[A], at 7-82.3 (Supp. 2013). And the public policy tort may sometimes coexist with comprehensive

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the pleadings do not address the issue, we do not consider whether the projection

criminal, civil, and administrative enforcement mechanisms. *See Piel*, 177 Wn.2d at 614-16. Such coexistence is essential where, as here, the threat of constructive discharge would jeopardize the public policy of honesty in corporate financial reporting by discouraging a CFO like Mr. Becker from refusing to submit a false or misleading EBITDA projection.

Mr. Becker claimed his EBITDA projection correctly showed a $12 million operating loss in 2012 but Rockwood and CHS demanded he recalculate his projection to show a target $4 million operating loss in 2012. Mr. Becker refused to submit the $4 million figure because he reasonably believed it would require overstating income and understating expenses, fraudulently misleading investors and creditors in violation of criminal laws. Rockwood and CHS rated his job performance as "'unacceptable,'" placed him on a probationary "'performance improvement plan,'" and gave him an ultimatum to either submit the $4 million figure or lose his job. CP at 735-36. Then, he told Rockwood's CEO and CHS's internal auditor he thought Rockwood and CHS were using the false $4 million figure to fraudulently mislead investors and creditors. Mr. Becker hypothesized that, upon acquiring Rockwood, CHS procured investments and credits using the false $4 million figure. He reported his concerns to Rockwood and CHS but did not report the misconduct to law enforcement agencies. Soon, Mr. Becker saw signs that Rockwood and CHS were preparing to use his subordinate to submit the false $4 million figure under the auspices of his department. Mr. Becker detailed these matters in writing to Rockwood and CHS, advising them he would have no choice but to

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would have contained any meaningful cautionary statement. *See id.* § 78u-5(c)(1)(A)(i).

resign unless they responded appropriately to abate the misconduct. They sent him a one-line e-mail accepting his resignation the next day.

Mr. Becker's case is "[t]he most compelling case for protection" under a public policy tort because by instructing him to commit a crime for which he would be personally responsible, Rockwood and CHS forced him to choose between the consequences of disobeying his employer and the consequences of disobeying criminal laws. JANIE F. SCHULMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE ch. 5.II.A.1., at 101 (2d ed. 2004). Recognizing this dilemma, "most courts have readily responded . . . by recognizing a cause of action" in similar cases. *Id.* ch. 5.II.A.1.a., at 102; *see also id.* ch. 5.II.A.1.a., at 5-7 (Supp. 2013).

For example, in *McGarrity v. Berlin Metals, Inc.*, 774 N.E.2d 71, 75-79 (Ind. Ct. App. 2002), a CFO sued his corporate employer for wrongful discharge in violation of public policy, alleging the employer discharged him for refusing to fraudulently underreport tax liability in violation of criminal laws. The trial court granted the employer judgment on the evidence and the Indiana Court of Appeals reversed, partly reasoning the common law would not countenance a scenario where the employer could abuse its workplace authority by giving the CFO an ultimatum to either commit an illegal act for which he would be personally responsible or lose his job. *Id.* at 76-78.

Similarly, in *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 779-80 (Tenn. 2010), a CFO sued his corporate employer for wrongful discharge in violation of public policy, alleging the employer discharged him for refusing to make misleading account alterations that would have produced misleading SEC filings. The trial court granted the

employer summary judgment and the Tennessee Supreme Court reversed, partly reasoning the common law did not require the CFO to show he reported the misconduct externally after he refused to participate in it. *Id.* at 787-89.

The jeopardy analysis in Mr. Becker's case "proceeds from the proposition that permitting such dismissals would encourage conduct in violation of [criminal laws], because employers could shield themselves from detection." PERRITT, EMPLOYEE DISMISSAL, *supra*, § 7.06, at 7-72 (Supp. 2012). We recognize the jeopardy element is difficult to satisfy where, as here, statutes and regulations provide comprehensive criminal, civil, and administrative enforcement mechanisms promoting the important public policies they secure. *See id.* § 7.06, at 7-69 to -71. But the jeopardy analysis in Mr. Becker's case does not end there. The jeopardy element becomes easier to satisfy where, as here, the employee has special responsibilities or expertise connected with the public policy and other enforcement mechanisms are less likely to succeed because they depend on the employee's individual pro-compliance efforts. *See id.* § 7.06, at 7-71; *id.* § 7.09[D], at 7-159 (5th ed. 2006). In those circumstances, chilling employee conduct advocating compliance with statutes and regulations renders public policy enforcement uncertain, at best, or a matter of chance, at worst. *See Cudney*, 172 Wn.2d at 548-49 (Stephens, J., dissenting); PERRITT, EMPLOYEE DISMISSAL, *supra*, § 7.06[A], at 7-82.4-1 (Supp. 2013).

In sum, we follow the reasoning of *Thompson*, *Gardner*, and *Piel* to conclude Mr. Becker's amended complaint establishes the jeopardy element. Accepting all factual allegations as true, the threat of constructive discharge would jeopardize the public

policy of honesty in corporate financial reporting by discouraging a CFO like Mr. Becker from refusing to submit a false or misleading EBITDA projection. Mr. Becker's refusal was both directly related to the public policy and necessary to effectively enforce the public policy. And, Mr. Becker's refusal was the only available adequate means for promoting the public policy, given the uncertainty of other enforcement mechanisms and their dependence on his individual pro-compliance efforts. We must evaluate each public policy tort "in light of its particular context." *Piel*, 177 Wn.2d at 617. Because *Korslund* and *Cudney* addressed different enforcement mechanisms, they do not dictate the outcome in Mr. Becker's case. *See id.* Therefore, the trial court did not err under CR 12(b)(6) in declining to dismiss Mr. Becker's claim for wrongful discharge in violation of public policy.

Affirmed.

Brown, A.C.J.

I CONCUR:

Lawrence-Berrey, J.

FEARING, J. (concurring) — The author of the lead opinion admirably analyzes the tort of wrongful discharge in violation of public policy and the tort's jeopardy element, and I concur in the decision of the majority. I agree with the majority that the statutes and regulations, upon which Rockwood Clinic and its parent relies, are closer in nature to the statutes and regulations at issue in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984) and *Piel v. City of Federal Way*, 177 Wn.2d 604, 609-17, 306 P.3d 879 (2013) rather than at issue in *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005) and *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 531-33, 259 P.3d 244 (2011). More importantly, I accept the significance of the majority's observation that the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), despite including comprehensive whistleblower protections, declare their remedies to be nonexclusive. *See* 15 U.S.C. § 78u-6(h)(3); 18 U.S.C. § 1514A(d).

I write separately, however, because I cannot reconcile the teachings of *Piel* and *Cudney*. Yes, one may find distinguishing features between the two decisions, but those differences pale in importance when considering principles upon which the jeopardy element is based. The two decisions, combined with other high court opinions, create confusion amongst practitioners and lower court judges as to the nature and extent of the jeopardy element of a claim for wrongful discharge in violation of public policy. In

addition to deciding disputes between parties, appellate decisions are meant to declare and explain law and to provide guidance to lawyers, litigants, and lower courts, particularly when a busy tort is the subject matter. Pronouncements on the subject of the jeopardy element offer puzzlement, not direction. I thought, upon reading the ruling in *Cudney*, that the tort languidly lay, on life support, in the intensive care unit. *Piel* revived the tort. But practitioners and trial courts must wonder if the next decision will return the tort to the sick bay.

As a cause of action matures, courts insist on promulgating a list of elements necessary to a successful suit. Therefore, in *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996), the state high court congealed a claim for wrongful discharge in violation of public policy into four elements by relying on the treatise, HENRY H. PERRITT JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES (1991). As one of the four elements, plaintiff must establish that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy. The purpose of the jeopardy element is to guarantee "'an employer's personnel management decisions will not be challenged unless a public policy is genuinely threatened.'" *Ellis v. City of Seattle*, 142 Wn.2d 450, 460, 13 P.3d 1065 (2000) (quoting *Gardner*, 128 Wn.2d at 941-42). The jeopardy element was implicitly already part of a prima facie case since the

plaintiff needed to prove his or her firing contravened a clear mandate of public policy. *Thompson*, 102 Wn.2d at 232.

As elements emerge from the legal kiln, courts enamel each element with unnecessary gloss. *Gardner* went beyond listing jeopardy as one of the four elements of the tort of wrongful discharge. The landmark decision added a fluffy description of the element, fraught with ambiguity and nuance that created the puzzlement about which I write. A critical passage in *Gardner* lies on page 945:

> [1] Under the second element, the employee's discharge must jeopardize the public policy. [2] To establish jeopardy, plaintiffs must show they engaged in particular conduct, and the conduct *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy. [Henry H.] Perritt, [Jr., *Workplace Torts: Rights and Liabilities*] § 3.14, at 75-76. [3] This burden requires a plaintiff to "argue that other means for promoting the policy . . . are inadequate." Perritt § 3.14, at 77. [4] Additionally, the plaintiff must show how the threat of dismissal will discourage others from engaging in the desirable conduct.

128 Wn.2d at 945. I numbered the sentences for ease of discussion. Unfortunately, the *Gardner* decision did not limit its description of the jeopardy element to the first sentence or initial statement that discouraging the plaintiff's conduct must jeopardize public policy.

The *Gardner* court wrote in the second sentence of the passage that, to establish the jeopardy element, plaintiff must also show the particular conduct, in which she engaged, *directly relates* to the public policy, or was *necessary* for the effective

enforcement of the public policy. 128 Wn.2d at 945 (citing PERRITT § 3.14, at 75-76). Note that this component of the jeopardy element is in the alternative. The sentence employs the word "or." This "language is a paraphrase of Perritt's treatise (1991), which clearly states the jeopardy analysis in the disjunctive, i.e., the conduct furthers public policy *either* because the policy directly promotes the conduct *or* because the conduct is necessary to effective enforcement of the policy. PERRITT, *supra* § 3.14, at 75-76." *Cudney*, 172 Wn.2d at 540 (Stephens, J., dissenting). If the plaintiff proves her conduct directly relates to a public policy, she should not need to prove her conduct was necessary to effectively enforce the policy. The tort of wrongful discharge in violation of public policy would be easier to apply if *Gardner* ended its discussion of the jeopardy element there.

Gardner added two more sentences. The third sentence reads, "This burden requires a plaintiff to 'argue that other means for promoting the policy . . . are inadequate.'" 128 Wn.2d at 945 (quoting PERRITT § 3.14, at 77). This third sentence launched the many appellate decisions that give rise to the current unpredictability particularly because its relationship to the second or previous sentence in *Gardner* lacks exposition. Showing the lack of other means to enforce the public policy should not be a requirement if the plaintiff's conduct directly relates to the public policy. Showing the lack of another adequate means of enforcing the public policy should only be required if

the plaintiff seeks to prove the tort by showing her conduct was necessary to effectively enforce the policy.

Gardner added even more language to the jeopardy element that now frequently introduces a case's discussion of the element. In the fourth sentence, the high court wrote, "Additionally, the plaintiff must show how the threat of dismissal will discourage others from engaging in the desirable conduct." *Gardner*, 128 Wn.2d at 945.

In later decisions, the state high court imposed more restrictions to the jeopardy element. For instance, in order to establish the jeopardy element, a plaintiff must show that the actions the plaintiff took were the "'*only available adequate means*'" to promote the public policy. *Cudney*, 172 Wn.2d at 530 (quoting *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 222, 193 P.3d 128 (2008)). The point of the jeopardy prong of the tort is to consider whether the statutory protections are adequate to protect the public policy, not whether the claimant could recover more through a tort claim. *Cudney*, 172 Wn.2d at 534. Going even further, the other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy. *Hubbard v. Spokane County*, 146 Wn.2d 699, 717, 50 P.3d 602 (2002) (citing PERRITT, *supra*, § 3.14, at 77). As can be seen, the jeopardy element is encumbered with many layers of rules beyond the employee simply showing that her conduct directly related to the public policy.

Decision after decision has impliedly held that regardless of whether plaintiff's conduct directly relates to the public policy, plaintiff must prove that means other than her civil lawsuit for damages are inadequate to enforce the public policy. *Piel*, 177 Wn.2d 604; *Cudney*, 172 Wn.2d 524; *Danny*, 165 Wn.2d 200; *Korslund*, 156 Wn.2d 168; *Hubbard*, 146 Wn.2d 699; *Ellis*, 142 Wn.2d 450; *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 991 P.2d 1135 (2000); *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991); *Worley v. Providence Physician Servs. Co.*, 175 Wn. App. 566, 307 P.3d 759 (2013); *Weiss v. Lonnquist*, 173 Wn. App. 344, 359, 293 P.3d 1264, *review denied*, 178 Wn.2d 1025 (2013); *Rose v. Anderson Hay & Grain Co.*, 168 Wn. App. 474, 276 P.3d 382 (2012); *review granted*, 180 Wn.2d 1001, 327 P.3d 613 (2014); *Wilson v. City of Monroe*, 88 Wn. App. 113, 123-24, 943 P.2d 1134 (1997). Stated differently, if another "*available adequate means*" promotes the public policy, plaintiff loses even if her conduct directly impacts the public policy. *Danny*, 165 Wn.2d at 222. Nearly all, if not all, public policies have alternative means for enforcement.

Washington decisions often entail reviewing a statutory scheme to determine whether the other available remedies are adequate, and, more in particular, whether the remedies are adequate for the fired employee. Nevertheless, according to another inconsistent rule, whether remedies are adequate for the employee should be immaterial since the other means of promoting the public policy need not be available to a particular

individual so long as the other means are adequate to safeguard the public policy. *Hubbard*, 146 Wn.2d at 717.

Cases irreconcilably examine whether the other means are "adequate." For example, some decisions stand for the proposition that statutory remedies are inadequate, for purposes of the jeopardy element, when the remedies may not allow recovery of emotional distress damages for the discharged employee. *Piel*, 177 Wn.2d 604; *Smith*, 139 Wn.2d 793; *Wilmot*, 118 Wn.2d 46; *Wilson*, 88 Wn. App. 113. Both *Piel* and *Smith* address RCW 41.56.160, a portion of the Public Employees Relations Act. The statute allows the Public Employees Relations Commission to award "payment of damages and the reinstatement of employees" if the employer engages in an unfair labor practice. RCW 41.56.160. Each plaintiff was permitted to proceed with his or her tort claim because whether emotional distress damages could be awarded under the statute was not clear.

Wilmot, 118 Wn.2d 46, examined RCW 51.48.025(4), which prohibits an employer from discharging an employee for filing a workers compensation claim. The statute authorizes the director of the Department of Labor & Industries (Department) to sue, on behalf of the employee, in superior court, and for the court "to order all appropriate relief including rehiring or reinstatement of the employee with back pay." RCW 51.48.025(4). The *Wilmot* court also allowed the employee to proceed with a tort

action because it was unclear whether the statute allowed for an award of emotional distress damages.

Wilson, 88 Wn.2d 113, explored RCW 49.17.160, a portion of the Washington Industrial Safety and Health Act, which prohibits an employer from discriminating against an employee who files a complaint about work safety with the Department of Labor & Industries. The statute allows an employee to file a complaint of discrimination with the Department, and, if the Department refuses to file suit against the employer, the employee may file suit on his own. The statute allows the superior court "for cause shown, . . . restrain violations . . . and order all appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay." RCW 49.17.160. The *Wilson* court allowed the employee to proceed with a private suit because it was unclear whether the statute allowed for an award of emotional distress damages.

But *Piel*, *Wilmot*, and *Wilson* conflict with *Cudney*, which teaches that whether the claimant could recover more through a tort claim is irrelevant to the jeopardy analysis. Therefore, whether plaintiff can recover emotional distress damages under an alternative remedy should be unimportant.

Cudney addresses the same statute, RCW 49.17.160, as *Wilson*. The two cases have conflicting outcomes. Although *Wilson* is a court of appeals decision, the majority decision in *Cudney* does not even mention *Wilson*. Nor does the majority decision in

Cudney mention established precedence that, if the employee cannot recover emotional distress damages under the alternate remedy, the plaintiff satisfies the jeopardy element. *Cudney* ignores rather than overrules the contradictory decisions.

Wilson contradicts *Jones v. Industrial Electric-Seattle, Inc.*, 53 Wn. App. 536, 539, 768 P.2d 520 (1989). In *Jones*, a worker also complained he was fired for reporting unsafe working conditions. Michael Jones, however, did not file a complaint with the Department within the 90-day time period afforded under the statute. This court dismissed his suit for wrongful discharge on the ground that he did not timely complain to the Department. *Wilson* did not mention the decision in *Jones*.

Piel, *Smith*, *Wilmot*, and *Wilson* also conflict with *Hubbard*, which instructs that the other means of promoting the public policy need not be available to the plaintiff. So, whether the plaintiff can recover any damages should be unimportant. The Public Employees Relations Act, the workers compensation laws, and the Washington Industrial Safety and Health Act of 1973 (WISHA) all provide remedies to punish employers who violate their provisions. These statutory schemes even afford some recovery for the discharged employee.

A principal basis upon which we base our decision, in the pending appeal, is language in SOX and Dodd-Frank that mentions its respective remedies are not exclusive. A number of decisions rely upon similar language in the statute being

examined. *Piel*, 177 Wn.2d 604; *Rose*, 168 Wn. App. at 478. But such statutory terms should be irrelevant in a jeopardy analysis, since the tort is independent of the statute and the tort fails if there is another remedy to enforce the public policy, regardless of whether the remedy benefits the discharged employee. *Cudney*, 172 Wn.2d 524; *Danny*, 165 Wn.2d at 222; *Hubbard*, 146 Wn.2d at 717. Also, decisions have allowed the employee to proceed with a private action even without such language in the pertinent statute. *Smith*, 139 Wn.2d 793; *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 888 P.2d 147 (1995); *Wilmot*, 118 Wn.2d 46; *Wilson*, 88 Wn. App. 113.

The majority in *Piel* distinguished between the statute at issue in its decision, RCW 41.56.905, and the statute at issue in *Cudney*. As previously mentioned, *Piel* involved the Public Employees Relations Act, which includes the language, "'The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose.'" *Piel*, 177 Wn.2d at 617 (quoting RCW 41.56.905). No similar language was identified in WISHA, the statutory scheme at issue in *Cudney*. This distinction between the two decisions is unsatisfactory given the other conflicting language between the two decisions. Also, the test is not whether the alternate remedy declares itself exclusive, but rather whether the remedy is adequate.

In short, *Cudney* and *Piel* cannot be reasonably reconciled. The dissent in *Cudney* is correct that the "result departs from long-standing precedent in Washington." *Cudney*,

172 Wn.2d at 538 (Stephens, J., dissenting). The dissent in *Piel* is also correct that "in *Cudney*, we emphasized that whether the jeopardy element is met hinges on the adequacy of the alternative remedies available to protect the public policy, not on whether the remedies fully compensate the individual claimant." *Piel*, 177 Wn.2d at 632-33 (Johnson, J.M., J., dissenting). *Cudney* and *Piel* begin at different departure points and travel in opposite directions. They are two ships passing in the dark of night because they seek to advance different objectives.

I could discuss other examples of pertinent inconsistencies in the jeopardy element's body of law. Examples include: whether the employee fulfills the jeopardy element when his theory focuses on his individual rights rather than the good of the community; whether there is another available adequate remedy when, to obtain the remedy, the employee must file an administrative complaint within a short time period; and whether the alternate remedy is adequate if the employee is not afforded a jury trial. Suffice it to say that the law of wrongful discharge in violation of public policy may advance by turning back time to before *Gardner*, when the employee only needed to show his discharge implicated a clear mandate of public policy. At least, the law could be more consistent if the jeopardy element faithfully followed the language in *Gardner* that the plaintiff need not show her private suit necessary to effective enforcement of the identified public policy as long as her conduct directly related to the policy.

The tort of wrongful termination in violation of public policy is independent of any underlying contractual agreement or statute. Therefore, Washington courts have held that an employee need not exhaust her contractual or administrative remedies to proceed before suing in tort. *Piel*, 177 Wn.2d at 612; *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 311, 96 P.3d 957 (2004); *Smith*, 139 Wn.2d at 808; *Allstot v. Edwards*, 116 Wn. App. 424, 431, 65 P.3d 696 (2003); *Young v. Ferrellgas, L.P.*, 106 Wn. App. 524, 530, 21 P.3d 334 (2001). For the same reason, other remedies that address the violation of public policy should not interfere with establishing the jeopardy element of the tort.

Jeopardy and the other three elements announced in *Gardner* come from a treatise about the tort, HENRY H. PERRITT JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES (1991). *Gardner*, 128 Wn.2d at 945. The four critical *Gardner* sentences concerning jeopardy also derive from the treatise. Although *Gardner* characterizes the Perritt treatise as "leading," one might question this characterization. Although we recognize Henry J. Perritt as an expert in employment law, Perritt fails to analyze the four sentences and the problems they create. The treatise is more a collection of decisions than it is a reasoned discussion of the tort of wrongful discharge.

Gardner lists *Collins v. Rizkana*, 73 Ohio St. 3d 65, 69-70, 652 N.E.2d 653 (1995), as the only decision to parrot Henry H. Perritt, Jr.'s, four elements of the tort of

wrongful discharge in violation of public policy and to have embraced the jeopardy element. A review of decisions across the United States suggests that only Iowa, Utah and Guam have since adopted Perritt's four elements of the tort. *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 282 n.2 (Iowa 2000); *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 404 (Utah 1998); *Ramos v. Docomo Pacific, Inc.*, 2012 Guam 20, 2012 WL 6738152.

82 AM. JUR. 2D *Wrongful Discharge* § 54 (2014) proclaims what may be the majority rule in the United States:

> To prevail, an employee asserting a discharge that undermines public policy must establish a number of key elements, including the following:
>
> (1) the existence of a clear public policy;
> (2) that he or she was engaged in conduct protected by public policy;
> (3) that the employer knew or believed that the employee was engaged in a protected activity;
> (4) that retaliation was a motivating factor in the dismissal decision; and
> (5) that the discharge would undermine an important public policy.

(footnotes omitted). Note that neither jeopardy nor the lack of another adequate remedy is an element.

Interests and goals clash when determining the breadth of the tort of wrongful

discharge in violation of public policy. Society wishes employers to be free to discharge poor performing employees and render management decisions that will not be challenged unless strong public policies interfere. Society does not wish employees to win money by ginning false reasons for termination from employment. Nor does society wish the discharged employee to recover against the employer if the conduct that led to the discharge advanced the employee's own interests, rather than the interests of others or society as a whole. At the same time, society wishes to protect a giraffe, who heroically sticks his or her neck out and does good no matter the cost. The employee's actions in *Gardner* wonderfully illustrate such a heroic deed. If a heroic deed benefits the community but leads to the giraffe's firing, society prefers the employer, not the employee, pay for the loss suffered by the employee. Under such circumstances, the employer has engaged in intentional misconduct and should pay for the loss caused by its conduct.

A description of the tort of wrongful discharge that simply requires the employee to prove a clear mandate of public policy and her conduct directly relates to the policy serves these competing interests. The requirement of a clear manifestation of public policy limits the suits to worthwhile suits. The requirement of causation also limits

recovery to firings that intentionally flaunt a clear public policy. Requiring the discharged employee to prove more compounds, confounds, and contorts the tort.

Fearing, J.

I CONCUR:

Lawrence-Berrey, J.

FILED
September 18, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

GREGG BECKER,	)	
	)	**No. 31234-8-III**
Respondent,	)	
	)	
v.	)	**ORDER DENYING MOTION**
	)	**FOR RECONSIDERATION**
COMMUNITY HEALTH SYSTEMS, INC. d/b/a COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION d/b/a COMMUNITY HEALTH SYSTEMS PSC, INC., d/b/a ROCKWOOD CLINIC, P.S.; and ROCKWOOD CLINIC, P.S.,	)	**AND GRANTING MOTION TO SUPPLEMENT RECORD**
	)	
Petitioners.	)	

THE COURT has considered petitioners' motion for reconsideration of this Court's opinion dated August 14, 2014, and motion to supplement the record, and having reviewed the records and files herein, is of the opinion the motion for reconsideration should be denied and the motion to supplement the record should be granted. Therefore,

IT IS HEREBY ORDERED, petitioners' motion for reconsideration is denied and the motion to supplement the record is granted.

DATED: 9/18/14
PANEL: Jj. Brown, Fearing, Lawrence-Berrey
BY THE COURT:

LAUREL H. SIDDOWAY
CHIEF JUDGE

No. 312348
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

GREGG BECKER,

Respondent,

v.

COMMUNITY HEALTH SYSTEMS, INC. d/b/a COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION d/b/a COMMUNITY HEALTH SYSTEMS PSC, INC. d/b/a ROCKWOOD CLINIC P.S.; and ROCKWOOD CLINIC, P.S.,

Appellants.

MOTION TO SUPPLEMENT RECORD WITH POST-ARGUMENT DEVELOPMENT

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Rockwood Clinic, P.S.

1. IDENTITY OF MOVING PARTY

Petitioners Rockwood Clinic, P.S. and Community Health Systems Professional Services Corporation ("Petitioners") are the moving parties.

2. STATEMENT OF RELIEF SOUGHT

Petitioners request permission to supplement the record with additional relevant information regarding a post-oral argument occurrence, which information is properly subject to judicial notice, and is needed to fairly resolve the issues on review.

3. FACTS RELEVANT TO MOTION

Oral argument occurred in this matter on April 30, 2014 and a decision has not been issued by the Court as of this date.

All parties to this appeal have submitted briefing and argument concerning Respondent Gregg Becker's Sarbanes-Oxley Act ("SOX") complaint filed with the United States Department of Labor/OSHA, which has been pending since February 29, 2012. CP 169-173. The Court of Appeals panel also questioned counsel about the Department of Labor/OSHA proceedings at oral argument in this case.

Recently, on July 23, 2014, the Department of Labor Assistant Regional Administrator issued a determination on Becker's SOX complaint ("SOX Decision") which is relevant to the issues currently

pending before the Court of Appeals. The SOX decision is attached hereto for consideration by the Court.

4. GROUNDS FOR RELIEF AND ARGUMENT

RAP 9.10 and 9.11 permit supplementation of the record. Since all parties have submitted information in their briefs concerning the Department of Labor proceedings, and the panel specifically questioned counsel at oral argument regarding those proceedings, the SOX Decision is plainly relevant to the Court's decision in this matter.

This Court may take judicial notice of the SOX Decision pursuant to RAP 7.3, granting appellate courts authority to perform all acts necessary or appropriate to secure the fair and orderly review of a case. *DeLong v. Parmelee*, 164 Wn. App. 781, 785 n.4, 267 P.3d 410, 412 (2011). The Court may properly "take judicial notice of public records, including the 'records and reports of administrative bodies' such as OSHA. Administrative complaints and agency decisions are the type of public records that are properly the subject of judicial notice." *Fadaie v. Alaska Airlines, Inc.*, 293 F. Supp. 2d 1210, 1214-1215 (W.D. Wash. 2003)(citation omitted). *See also In re Disciplinary Proceeding Against McGrath*, 178 Wn.2d 280, 285-286, 308 P.3d 615, 618, (2013)(Taking judicial notice of opinion that became final after the hearing).

The SOX Decision issued by the Department of Labor confirms its jurisdiction over Becker's SOX complaint, rejects Becker's claim on the merits, and clearly identifies the administrative review procedure available to Becker to challenge the SOX Decision -- in addition to Becker's right to file a SOX complaint in federal district court. The pertinent portions of the SOX Decision are the following:

> This is to advise you that we have completed our investigation of the above referenced complaint under SOX – Sarbanes-Oxley Act [18 U.S.C. §1514A]. In brief, the complaint alleged that he was constructively discharged in retaliation for reporting what he believed to be fraud.
>
> Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Regional X, finds that there is no reasonable cause to believe that Respondent violated the law and issues the following findings:
>
> ... On March 2, 2012, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the above referenced statute. As this complaint was filed within 180 days of the alleged adverse action, it is deemed timely.
>
> Respondent Community Health Systems Inc. is covered under the SOX/DFA because Respondent is a company within the meaning of 18 U.S.C. §1514A....
>
> Respondent Rockwood Clinic, P.S. is covered under the SOX because Respondent is a subsidiary of a company within the meaning of 18 U.S.C. §1514A....

> Complainant is covered under the SOX because Complainant is an employee within the meaning of 18 U.S.C. §1514A.
>
> ***
>
> Respondent and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge....

CONCLUSION

The SOX Decision is relevant to the issues on discretionary review before the Court of Appeals. On the basis of RAP 7.3, 9.10 and 9.11, Petitioners ask the Court of Appeals to review the attached SOX Decision for consideration along with the briefing and argument already submitted.

Respectfully submitted this 13 day of August, 2014.

Mary M. Palmer

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Attorneys for Appellant/Defendant
Community Health Systems
Professional Services Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing, Motion to Supplement Record was caused to be served on the following:

Mary Schultz Mary Schultz Law, P.S. 2111 E. Red Barn Lane Spangle, WA 99031 Attorney for Respondent/Plaintiff	[ ] Via Hand Delivery [X] Via U.S. Mail [ ] Via Facsimile [X] Via Email

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

Executed at Spokane, Washington, this 13th day of August, 2014.

Nancy Kidwell

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration
300 Fifth Avenue, Suite 1280
Seattle, Washington 98104

RECEIVED

JUL 28 2014

LAW FIRM OF
KELLER W. ALLEN, P.C.

July 23, 2014

Mary Schultz Law P.S.
2111 E. Red Barn Lane
Spangle, WA 99031

Re: Community Health Systems, Inc. /Rockwood Clinic, P.S./Becker/0-1960-12-023

Dear Ms. Schultz:

This is to advise you that we have completed our investigation of the above-referenced complaint under SOX - Sarbanes-Oxley Act [18 U.S.C. §1514A] . In brief, the complaint alleged that he was constructively discharged in retaliation for reporting what he believed to be fraud.

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region X, finds that there is no reasonable cause to believe that Respondent violated the law and issues the following findings:

Secretary's Findings

Complainant resigned his position on or about February 23, 2012. On March 2, 2012, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the above referenced statute. As this complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

Respondent Community Health Systems Inc. is covered under the SOX/DFA because Respondent is a company within the meaning of 18 U.S.C. §1514A in that the company has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d))

Respondent Rockwood Clinic, P.S. is covered under the SOX because Respondent is a subsidiary of a company within the meaning of 18 U.S.C. §1514A in that the company has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d))

Complainant is covered under the SOX because Complainant is an employee within the meaning of 18 U.S.C. §1514A.

As a result of the investigation, the burden of establishing that you were retaliated against in violation of the SOX - Sarbanes-Oxley Act [18 U.S.C. §1514A] cannot be sustained. For the reason given you by the investigator on the occasion of your closing conference, the evidence developed during the investigation was not sufficient to support the finding of a violation. Consequently, this complaint is dismissed.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400 North
Washington, D.C. 20001-8002
Telephone: (202) 693-7300
Fax: (202) 693-7365

With copies to:

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300 Fifth Avenue, Suite 1280
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In addition, please be advised that the U.S. Department of Labor does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence for the record. The ALJ who conducts the hearing will issue a decision based on the evidence and arguments, presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the Act. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

The rules and procedures for the handling of SOX cases can be found in Title 29 of the Code of Federal Regulations, Part 1980 and may be obtained at *www.whistleblowers.gov*.

Sincerely,

Steve Gossman
Assistant Regional Administrator

cc: Stellman Keehnel
Keller W. Allen
Chief Administrative Law Judge, USDOL
DWPP Regional Liasion
SEC-Securities & Exchange Commission

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February 29, 2012

VIA REGULAR MAIL:

RECEIVED
OSHA-REGION X
2012 MAR -2 PM 3:04

United States Department of Labor
Occupational Safety and Health Administration
Regional Office
300 Fifth Avenue, Suite 1280
Seattle, WA 98104
(206) 757-6700

Re: WHISTLEBLOWER COMPLAINT

Complainant:

Gregg Becker
c/o Mary Schultz
Mary Schultz Law, P.S.
Attorney at Law
111 S. Post Street, Suite 2250
Spokane, WA 99201

Respondents:

- ***Community Health Systems, Inc. d/b/a Community Health Systems Professional Service Corporation d/b/a Community Health Systems PSC, Inc. d/b/a/ Rockwood Clinic P.S.;***

- ***Rockwood Clinic, P.S., Respondents.***

To Whom It May Concern:

I represent complainant Gregg Becker, the former Chief Financial Officer of the Rockwood Clinic P.S. here in Spokane, Washington.

Rockwood Clinic P.S. is a subsidiary/agency/affiliate of Community Health Systems, Inc., (CHS). CHS is a publicly traded company operating under the stock

symbol CYH. Rockwood's financial information is included in consolidated financial statements of CHS as the reporting company.

Complainant Becker believes CHS/Rockwood have jointly violated the employee protection provisions of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. Complainant Becker, as CFO, was directed by both Respondents to provide misleading financial information to and for the benefit of CHS for its use with investors and credit facilities. Complainant Becker was ultimately forced to resign because of the pressure placed on him, and because of the clearly expressed intent of both respondents to ultimately submit such false information with or without his cooperation, but under his department. This is further explained in the complaint for constructive discharge attached hereto. This complaint was filed in the Spokane County Superior Court this past Monday. To date, neither I nor Complainant have had any explanation or answer from CHS/Rockwood as to whether the false information demanded of CFO Becker was or is being submitted.

In a nutshell, as CFO, Complainant Becker reported directly to Rockwood's CEO, Craig Whiting, but he also reported directly to CHS's Division IV financial executives Stephanie Moore, Maria Caruso and Deb Cooper.

Complainant Gregg Becker engaged in protected activity. His protected activities included, but were and are not limited to, raising SOX compliance issues with management and refusing to engage in conduct he believed to be unlawful. He refused to misreport projected budgets to misrepresent the financial condition of Rockwood, and thereby of CHS, as being substantially more positive and with more cash flow than actually existed.

He reported his refusal and his concerns that such would be law violations to both his own CEO Whiting at Rockwood, and to CHS Division IV personnel as named above, to CHS Vice President and Employment Counsel Rhea Garrett II, as well as to CHS Internal Audit personnel, including Michael Lynd. Mr. Lynd verified to Complainant Lynd's belief that the figure Complainant was being demanded to produce was indeed likely a preacquisition projection of CHS (i.e. a representation of its' intended turn around performance for creditors and investors, which was not being met).

During all relevant times, CEO Whiting, and the CHS Division IV personnel, as well as CHS Employment counsel Rhea Garrett II, were thus all persons to whom this concern was reported and to whom Complainant made clear his refusal to violate SOX reporting laws. Such personnel were also persons from whom answers were demanded, including answers as to what this required false figure was or how it was calculated and why. All named personnel were thus aware of Complainant's reporting, individually

received the reporting, understood this was protected activity, understood his report was of his being required to violate the law to retain his job and reputation as CFO, and refused to cease and desist, or to investigate, or to even answer his questions.

Instead, the named supervisory personnel, in concert, retaliated against complainant and constructively discharged him because of these protected activities. The adverse employment action, retaliation, and constructive discharge included, but is not limited to:

a. Suddenly and without prior notice adversely evaluating CFO Becker as "unsatisfactory" in his performance;

b. Simultaneously placing CFO Becker on a Performance Improvement Plan (i.e., a probationary plan);

c. Demanding that in order to elevate his rating and retain his job per the above he was required to produce the demanded misinformation within five business days;

When CFO Becker refused to violate the law:

d. Circumventing him, in effect relieving him of his duties *de facto* for his failure to produce the required misinformation;

e. Damaging his reputation and future employment opportunities;

f. Constructively discharging him from employment on February 23, 2012.

Complainant CFO Becker reasonably believed that the conduct being demanded of him by both Rockwood and CHS constituted a violation, at a minimum, of his reporting requirements under 15 U.S.C.A. §. 7241 – (i.e., corporate responsibility for financial reports). CFO Becker refused to comply with the requirements.

Complainant Becker has to date suffered a loss of his salary, mental anguish, loss of reputation, loss of advancement opportunities, anxiety and economic loss via uncertainty of position and income, and probable relocation expenses.

Complainant Becker is seeking the following relief:

- Back pay, and back benefits;

- Front pay and front benefits in the form of salary and benefits which CFO Becker should have received had he been allowed to continue to properly perform as CFO;

- Compensation for loss of tenure at his prior position and the financial damage from the loss of that position;

- Compensation for Mr. Becker's emotional distress, loss of reputation and loss of earning capacity by having to refuse such law violations, act on them, leave and now file action to address the damages, including the stigma of filing both a lawsuit and this complaint;

- An order expunging Gregg Becker's unsatisfactory evaluation and Performance Improvement Plan, including ordering the Respondents to move any record of said disciplinary action against him, to preserve such only in the files of Rockwood legal counsel, and to use them only for the purpose of defending rights in this proceeding;

- Abatement, i.e. an order requiring the Respondents to abate and refrain from any further violations of the Whistleblower provisions of the Acts, and requiring the Respondents to explicitly rescind any and all policies and directives to employees of Rockwood and/or its affiliated medical facilities in the Spokane area and elsewhere to misreport finances for the purpose of disclosing credit needs;

- An order prohibiting the Respondent from disclosing any disparaging information about the Complainant to prospective employers, or otherwise interfering with any applications he might make in the future;

- An order prohibiting the Respondents from disclosing or disseminating any reference and/or communications which references the unsatisfactory evaluation and Performance Improvement Plan;

- Exemplary damages, as permitted, in an amount sufficient to deter the Respondent from future violations of the law;

- Reasonable attorney fees for the Complainant's attorney;

- An order reimbursing all costs of this litigation, including reimbursement for deposition fees, travel expenses, and other expenses to collect and produce evidence in this matter;

- Mandatory Posting, i.e. an order requiring the Respondent to issue a notice and provide copies to all employees that:

(1) The Department of Labor has found that the Respondent violated the rights of a whistleblower, Gregg Becker, and ordered that Mr. Becker be made whole;

(2) Describes the laws protecting whistleblowers, setting out any ALJ's orders to the Respondents as policies of the Respondents;

(3) Provides the names and address where complaints of violations may be sent; and,

(4) Informs employees that complaints must be filed within specified time limits after any adverse action; and finally,

- Any other orders necessary to make CFO Becker whole, and,

Mr. Becker can be reached through me at the address below.

Dated this 29 of Feb, 2012.

MARY SCHULTZ LAW, P.S.

MARY SCHULTZ, Attorney for Complainant

GREGG BECKER, Complainant

No. 312348
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

GREGG BECKER,

Respondent,

v.

COMMUNITY HEALTH SYSTEMS, INC. d/b/a COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION d/b/a COMMUNITY HEALTH SYSTEMS PSC, INC. d/b/a ROCKWOOD CLINIC P.S.; and ROCKWOOD CLINIC, P.S.,

Appellants.

SECOND MOTION TO SUPPLEMENT RECORD WITH POST-ARGUMENT DEVELOPMENT

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Attorneys for Defendant/Petitioner
Community Health Systems
Professional Services Corporation

1. IDENTITY OF MOVING PARTY

Petitioners Rockwood Clinic, P.S. and Community Health Systems Professional Services Corporation ("Petitioners") are the moving parties.

2. STATEMENT OF RELIEF SOUGHT

Petitioners request permission to supplement the record with additional relevant information regarding a post-oral argument and post-issuance of the Panel's August 14, 2014 decision occurrence, which information is needed to fairly resolve the issues on review.

3. FACTS RELEVANT TO MOTION

All parties to this appeal have submitted briefing and argument concerning Respondent Gregg Becker's Sarbanes-Oxley Act ("SOX") complaint filed with the United States Department of Labor/OSHA, which has been pending since February 29, 2012. CP 169-173. The Court of Appeals heard oral argument in this matter on April 30, 2014 and issued its decision on August 14, 2014. Concurrently with this Motion, Defendants have filed a Motion for Reconsideration of the Court's August 14, 2014 decision.

During the April 30, 2014 oral argument, the Court of Appeals panel questioned counsel about the Department of Labor/OSHA proceedings. Petitioners thus subsequently submitted, on August 13, 2014, a Motion to Supplement Record With Post-Argument Development,

for consideration of the Department of Labor Assistant Regional Administrator's July 23, 2014 determination on Becker's SOX complaint (the "SOX Decision"), because OSHA's determination on the merits is relevant to the issues that were pending before the Court of Appeals.

On August 14, 2014, this Court issued its decision on the appeal.

On August 21, 2014, Becker appealed the SOX Decision to an Administrative Law Judge, by submitting his objections to the findings in the July 23, 2014 SOX Decision and requesting a hearing on the findings and conclusions ("SOX Appeal Notice"). The SOX Appeal Notice is attached hereto for consideration by the Court.

4. GROUNDS FOR RELIEF AND ARGUMENT

RAP 9.10 and 9.11 permit supplementation of the record. The SOX Appeal Notice is pertinent as it identifies the administrative review procedures available to, and that are being utilized by, Becker to challenge the SOX Decision. Since all parties have submitted information in their briefs concerning the Department of Labor proceedings, and the Panel specifically questioned counsel at oral argument regarding those proceedings, the SOX Appeal Notice is plainly relevant to the Court's decision in this matter.

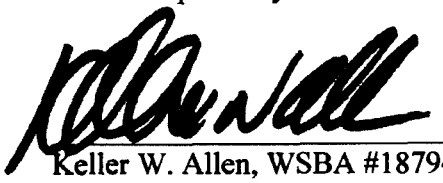
This Court may take judicial notice of the SOX Appeal Notice pursuant to RAP 7.3, granting appellate courts authority to perform all acts

necessary or appropriate to secure the fair and orderly review of a case. *DeLong v. Parmelee*, 164 Wn. App. 781, 785 n.4, 267 P.3d 410 (2011). Further, OSHA proceedings in SOX matters are the type of materials of which courts in fact take judicial notice. *See Fadaie v. Alaska Airlines, Inc.* 293 F. Supp. 2d 1210, 1214-15 (W.D. Wash. 2003)(courts may properly "take judicial notice of public records, including the 'records and reports of administrative bodies' such as OSHA."); *see also In re Disciplinary Proceeding Against McGrath*, 178 Wn.2d 280, 285-86, 308 P.3d 615 (2013)(taking judicial notice of opinion that became final after the hearing).

CONCLUSION

The SOX Appeal Notice is relevant to the issues on discretionary review before the Court of Appeals and to Defendants' Motion for Reconsideration filed concurrently with this Motion. On the basis of RAP 7.3, 9.10 and 9.11, Petitioners ask the Court of Appeals to review the attached SOX Appeal Notice for consideration along with the briefing and argument already submitted.

Respectfully submitted this 3rd day of September, 2014.



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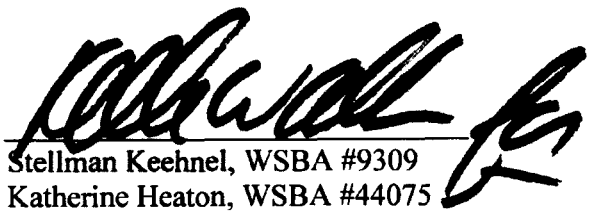

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Attorneys for Appellant/Defendant
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Professional Services Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing, Motion to Supplement Record was caused to be served on the following:

Mary Schultz Mary Schultz Law, P.S. 2111 E. Red Barn Lane Spangle, WA 99031 Attorney for Respondent/Plaintiff	[ ] Via Hand Delivery [X] Via U.S. Mail [ ] Via Facsimile [X] Via Email

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

Executed at Spokane, Washington, this 3rd day of September, 2014.

Pamela R. Mengel

Pamela R. Mengel

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August 21, 2014

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VIA MAIL TO:

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Office of Administrative Law Judges
United States Department of Labor
800 K Street NW, Suite 400 North
Washington, D.C. 20001-8002

Re: ***CHS, Inc./Rockwood Clinic, P.S./Becker/0-1960-12-023***

OBJECTIONS TO FINDINGS

Complainant, Gregg Becker, objects to the finding made by Assistant Regional Administrator Steve Gossman by letter issued July 23, 3014 as follows:

1) The dispositive finding made by Mr. Gossman in favor of his conclusion that no retaliation allegedly existed is that Gregg Becker "resigned" his position on or about February 23, 2012. The finding/conclusion of a "resignation" is erroneous and contrary to state law.

2) The "resignation" of Gregg Becker under his circumstances is considered a "constructive discharge" by CHS, Inc. as a matter of state law. This was recently confirmed by the now published August 14, 2014 decision of the Division III Washington State Court of Appeals in *Becker v. Cmty. Health Sys., Inc., 31234-8-III, 2014 WL 3973083 (Wash. Ct. App. Aug. 14, 2014). Attached at A.* Constructive discharge is in violation of the public policy of the State of Washington. Per Division III, Becker's facts, if true, resulted in his having had no alternative but to offer his resignation, as no other adequate remedies existed for CHS's behavior.

3) There is no dispute between the parties as to the facts of Mr. Becker's discharge. CHS Inc. directed that Mr. Becker, as a Chief Financial Officer, certify numbers Mr. Becker believed to be false, or lose his job. He refused to do so. When Becker came to the conclusion that his CHS superiors were trying to circumvent his

control over his department to get that false report submitted by a "stand-in" while he was on vacation, Mr. Becker told CHS in writing that *if* a falsified report was to be submitted under his auspices, he would have no choice but to resign. CHS promptly "accepted his resignation" in a one line email. As held in *Becker v CHS*, this is not a resignation, but a constructive discharge. *Becker v. CHS, Inc.* Mr. Gossman's finding of July 23, 2014 is contrary to the state law.

4) Applying state law correctly, Mr. Gossman's conclusion that no retaliation existed is also in error, because constructive discharge *is* retaliation. See, e.g., statutes defining retaliation as including, e.g., RCW 49.60.210, and, e.g., *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868, 178 L. Ed. 2d 694 (2011)(defining retaliation as no more than any action taken by an employer that "well might have dissuaded a reasonable worker from making or supporting a charge of improper or unlawful conduct").

REQUEST FOR HEARING.

Complainant Gregg Becker requests a hearing on Mr. Gossman's findings and conclusions, and a stay of that hearing pending state court finality of his constructive discharge/retaliation claim per 29 C.F.R. § 1980.115.

REQUEST FOR STAY.

29 C.F.R. § 1980.115 allows an action to be stayed under special circumstances not contemplated by the provisions of 29 C.F.R. Subpart C, and for good cause shown. Both exist here, and a stay should be ordered.

Mr. Becker and the respondent CHS, Inc. are in the midst of a state court litigation over the very issue decided in Mr. Grossman's letter; that is, the nature of Mr. Becker's termination. The decision is one controlled by state law. The trial court's ruling found Mr. Becker's facts to properly allege a constructive discharge claim because of the manner of his resignation/termination. Having lost at the trial court level, CHS Inc. obtained a stay of the state court litigation to pursue an interlocutory appeal in the Division III Appellate Court. Having now lost there as well, it is likely that CHS will petition for review to the Washington State Supreme Court, which will further delay the factual and legal resolution of the nature of Mr. Becker's termination.

OSHA's ruling necessarily revolves around the nature of Mr. Becker's discharge, as described above in the "Objections" section. The nature of Mr. Becker's termination, as evidenced in the Becker v CHS decision, is a conclusion of fact and state law. A state jury remains on course to determine if Mr. Becker's allegations surrounding his discharge are true based on a full evidentiary record presented by both sides. It thus serves no purpose for this ALJ to determine whether a constructive discharge

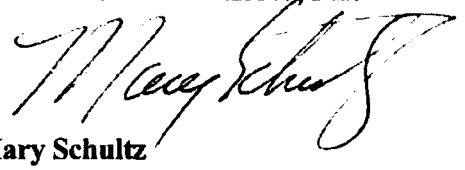
(retaliation) existed when a trial and appellate court are clarifying that very state law and those very facts. Here, uniquely, the state litigation is able to be used by the ALJ without creating conflict between federal and state law, duplication of efforts, and possible conflict in findings. The state results can be determinative at the ALJ level without duplication or conflict.

CHS, Inc. is not prejudiced by the stay. CHS is the party who has pursued the interlocutory appeal regarding the nature of Mr. Becker's discharge, and CHS's actions have delayed resolution by trial. Their filing of a petition for review will delay resolution even further. But once the state claim of constructive discharge is concluded through CHS's appeal, then the administrative findings and rulings can follow on an expedited and efficient basis under res judicata.

In these special circumstances, then, it serves all parties and this administrative body to use the fuller mechanism of the state court litigation to obtain dispositive state law and factual rulings as to whether a constructive discharge (and thus retaliation) occurred, and thereby avoid the need for two separate evidentiary hearings over the same facts and state law, with potentially conflicting results and unnecessary prejudice to all parties.

Mr. Becker requests that this ALJ apply 29 CFR § 1980.115's special circumstances provision for the good cause shown, and that, after three days' notice to all parties, this ALJ issue a stay order to promote justice and the administration of the Act in an efficient fashion for all. Upon determination of the issue of the state law constructive discharge in the state court, then further hearing through this ALJ and/or ARB as to whether "retaliation" existed will be expedited and sound.

MARY SCHULTZ LAW, P.S.



Mary Schultz
Attorney for Complainant Gregg Becker

MS: dn
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EWC/Becker/OSHA/alj_ltr_08.21.14.doc

2014 WL 3973083
Only the Westlaw citation
is currently available.
Court of Appeals of Washington,
Division 3.

Gregg BECKER, Respondent,
v.
COMMUNITY HEALTH SYSTEMS, INC. d/b/a Community Health Systems Professional Services Corporation d/b/a Community Health Systems PSC, Inc., d/b/a Rockwood Clinic P.S.; and Rockwood Clinic, P.S., Petitioners.

No. 31234–8–III. | Aug. 14, 2014.

Synopsis

Background: Employee brought action against employer and its parent for wrongful discharge in violation of public policy. The Superior Court, Spokane County, Kathleen M. O'Connor, J., denied defendants' motion to dismiss, and they petitioned for discretionary review.

[Holding:] The Court of Appeals, Brown, C.J., held that employer's threat of discharge if employee refused to engage in improper accounting methods and submit a false or misleading earnings before interest, taxes, depreciation, and amortization (EBITDA) projection, jeopardized the public policy of honesty in corporate financial reporting, for purposes of determining whether employee's discharge was wrongful discharge in violation of public policy.

Affirmed.

Fearing, J., filed concurring opinion.

Appeal from Spokane Superior Court; Honorable Kathleen M. O'Connor, J.

Attorneys and Law Firms

Stellman Keehnel, Katherine Ann Heaton, DLA Piper LLP, Seattle, WA, Keller W. Allen, Mary Margaret Palmer, Law Firm of Keller W. Allen PC, Spokane, WA, for Petitioners.

Mary Elizabeth Schultz, Mary Schultz Law PS, Spangle, WA, for Respondent.

Opinion

PUBLISHED OPINION

BROWN, A.C.J.

***1** ¶ 1 Rockwood Clinic PS (Rockwood) and its parent company, Community Health Systems Inc. (CHS), successfully petitioned for discretionary review of a decision denying their CR 12(b)(6) motion to dismiss Gregg Becker's claim for wrongful discharge in violation of public policy. Rockwood and CHS contend Mr. Becker cannot establish the jeopardy element because a myriad of statutes and regulations adequately promote the public policy of honesty in corporate financial reporting, rendering a private common law tort remedy superfluous. We disagree with Rockwood and CHS, and affirm.

Exhibit A

FACTS

¶ 2 In February 2011, Rockwood recruited Mr. Becker to be its chief financial officer (CFO), a job he performed admirably. CHS had acquired Rockwood with a business strategy to improve profitability. Upon doing so, CHS represented to investors and creditors it expected Rockwood to sustain a $4 million operating loss in 2012. However, in October 2011, Mr. Becker correctly projected Rockwood's earnings before interest, taxes, depreciation, and amortization (EBITDA) as showing a $12 million operating loss in 2012. This projection was significantly important to investors and creditors as a measure of Rockwood's and, by relation, CHS's financial health. Additionally, CHS had to report this projection to the U.S. Securities and Exchange Commission (SEC). As CFO, Mr. Becker had to ensure this projection was not false or misleading.

¶ 3 Rockwood and CHS demanded Mr. Becker recalculate his EBITDA projection to show a target $4 million operating loss in 2012. Mr. Becker refused to submit the $4 million figure because he reasonably believed it would require overstating income and understating expenses, fraudulently misleading investors and creditors in violation of criminal laws. Rockwood and CHS rated his job performance as " 'unacceptable,' " placed him on a probationary " 'performance improvement plan,' " and gave him an ultimatum to either submit the $4 million figure or lose his job. Clerk's Papers (CP) at 735–36. Then, he told Rockwood's chief executive officer (CEO) and CHS's internal auditor he thought Rockwood and CHS were using the false $4 million figure to fraudulently mislead investors and creditors. Mr. Becker hypothesized that, upon acquiring Rockwood, CHS procured investments and credits using the false $4 million figure. He reported his concerns to Rockwood and CHS but did not report the misconduct to law enforcement agencies. Soon, Mr. Becker saw signs that Rockwood and CHS were preparing to use his subordinate to submit the false $4 million figure under the auspices of his department. Mr. Becker detailed these matters in writing to Rockwood and CHS, advising them he would have no choice but to resign unless they responded appropriately to abate the misconduct. They sent him a one-line e-mail accepting his resignation the next day.

¶ 4 In February 2012, Mr. Becker sued in superior court for wrongful discharge in violation of public policy. He additionally filed a whistle-blower retaliation complaint with the U.S. Occupational Safety and Health Administrative (OSHA). Apparently, his OSHA complaint remains unresolved. Rockwood and CHS removed his civil suit to federal district court. But after Mr. Becker amended his complaint to remove references to federal law, the federal district court remanded his case.

*2 ¶ 5 Back in superior court, Rockwood and CHS moved unsuccessfully to dismiss Mr. Becker's amended complaint under CR 12(b)(6) for failure to state a cognizable claim for relief. The trial court certified the ruling for interlocutory review regarding whether Mr. Becker can establish the jeopardy element in his claim for wrongful discharge in violation of public policy. This court granted discretionary

review regarding whether other available means for promoting the public policy of honesty in corporate financial reporting are adequate.

ANALYSIS

[1] ¶ 6 The issue is whether the trial court erred under CR 12(b)(6) in declining to dismiss Mr. Becker's claim for wrongful discharge in violation of public policy. Rockwood and CHS contend Mr. Becker cannot establish the jeopardy element because a myriad of statutes and regulations adequately promote the public policy of honesty in corporate financial reporting, rendering a private common law tort remedy superfluous. Our review is de novo. *See Korslund v. DynCorp Tri–Cities Servs., Inc.*, 156 Wash.2d 168, 182, 125 P.3d 119 (2005); *Hoffer v. State*, 110 Wash.2d 415, 421, 755 P.2d 781 (1988).

[2] **[3]** ¶ 7 A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." CR 8(a)(1). Otherwise, a trial court may dismiss the complaint on motion for "failure to state a claim upon which relief can be granted." CR 12(b)(6). Dismissal is proper if, accepting all factual allegations as true, "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wash.2d 959, 961, 577 P.2d 580 (1978); *see Barnum v. State*, 72 Wash.2d 928, 929–30, 435 P.2d 678 (1967). Thus, dismissal is proper where the plaintiff has an " 'insuperable bar to relief' appearing on the face of the complaint. *Hoffer*, 110 Wash.2d at 421, 755 P.2d 781 (quoting 5 CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE § 1357, at 604 (1969)); *accord Cutler v. Phillips Petroleum Co.*, 124 Wash.2d 749, 755, 881 P.2d 216 (1994). We will consider hypothetical situations, including facts argued for the first time on appeal, that the complaint could conceivably allege to justify relief for the plaintiff. *Halvorson v. Dahl*, 89 Wash.2d 673, 674–75, 574 P.2d 1190 (1978); *Bravo v. Dolsen Cos.*, 125 Wash.2d 745, 750, 888 P.2d 147 (1995).

[4] **[5]** ¶ 8 Washington provides a private common law tort remedy when an employer discharges an at-will employee "for a reason that contravenes a clear mandate of public policy."[1] *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 233, 685 P.2d 1081 (1984). This claim usually arises where the employer discharges the employee for (1) "refusing to commit an illegal act"; (2) "performing a public duty or obligation"; (3) "exercis[ing] a legal right or privilege"; or (4) engaging in " 'whistleblowing' activity." *Dicomes v. State*, 113 Wash.2d 612, 618, 782 P.2d 1002 (1989). But the elements are the same regardless of what conduct prompts this claim.

***3** **[6]** ¶ 9 To prevail on a claim of wrongful discharge in violation of public policy, a plaintiff must establish (1) "the existence of a clear public policy (the *clarity* element)"; (2) "that discouraging the conduct in which [the plaintiff] engaged would jeopardize the public policy (the *jeopardy* element)"; (3) "that the public-policy-linked conduct caused the dismissal (the *causation* element); and (4) "[t]he defendant [is not] able to offer an overriding justification for

the dismissal (the *absence of justification* element)." *Gardner v. Loomis Armored, Inc.*, 128 Wash.2d 931, 941, 913 P.2d 377 (1996) (adopting these elements from HENRY H. PERRITT, JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES §§ 3.7, .14, .19, .21 (1991) [hereinafter PERRITT, WORKPLACE TORTS]). The parties dispute whether Mr. Becker's amended complaint establishes the jeopardy element.

[7] ¶ 10 To establish the jeopardy element, the plaintiff must show he or she "engaged in particular conduct, and the conduct *directly relates* to the public policy, or was necessary for the effective enforcement of the public policy." *Id.* at 945, 913 P.2d 377 (citing PERRITT, WORKPLACE TORTS, *supra,* § 3.14, at 75–76). Thus, the plaintiff must argue " 'other means for promoting the policy ... are inadequate." ' *Id.* (omission in original) (quoting PERRITT, WORKPLACE TORTS, *supra,* § 3.14, at 77). In other words, the plaintiff must argue the actions he or she took were the "*only available adequate means* " to promote the public policy. *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wash.2d 200, 222, 193 P.3d 128(2008).

¶ 11 Our Supreme Court first recognized the claim of wrongful discharge in violation of public policy in *Thompson,* 102 Wash.2d at 232, 685 P.2d 1081. There, a divisional controller sued his corporate employer, alleging the employer discharged him, as a warning to other controllers, for instituting accurate accounting procedures complying with the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78m, 78dd–1 to –2, 78ff. *Id.* at 223, 234, 685 P.2d 1081. The *Thompson* court held the divisional controller could recover under a private common law tort remedy if he could prove his allegations. *Id.* at 234, 685 P.2d 1081. The court reasoned the employer's action would contravene the public policy prohibiting bribery of foreign officials and requiring transparency in accounting by discouraging other controllers from complying with the FCPA. *Id.* at 234, 685 P.2d 1081.

¶ 12 Our Supreme Court first articulated and applied the jeopardy element in *Gardner,* 128 Wash.2d at 941, 945–46, 913 P.2d 377. There, an armored vehicle driver sued his employer for wrongful discharge in violation of public policy, alleging the employer discharged him for exiting the vehicle to disarm an attacker inside a bank. *Id.* at 933–35, 913 P.2d 377. The *Gardner* court concluded the threat of discharge would jeopardize the public policy of supporting altruism and protecting human life by discouraging an employee like the driver from rescuing a person from imminent life threatening harm. *Id.* at 945–46, 913 P.2d 377. The court reasoned the driver's conduct was both directly related to the public policy and necessary to effectively promote the public policy. *Id.* While the driver technically could have remained in the vehicle and summoned help through its radio, public address system, or siren, the court reasoned his conduct was the only available adequate means for serving the public policy because other people were not then prepared to help. *Id.* at 935, 945–46, 913 P.2d 377.

*4 ¶ 13 In *Korslund,* 156 Wash.2d at 182–83, 125 P.3d 119, our Supreme Court held the comprehensive remedies available under the Energy Reorganization Act of 1979(ERA),

42 U.S.C. § 5851, adequately promoted public health and safety, and prevented fraudulent use of public funds in the nuclear industry. Specifically, the ERA prohibits specific employers from taking adverse employment action against employees for, among other things, reporting violations of nuclear industry laws. 42 U.S.C. § 5851(a). If an employer takes adverse employment action, the employee may complain to an administrative agency with power to investigate the claim. *Id.* § 5851(b)(1)-(2)(A). If the agency decides the claim has merit, the ERA requires it to order the employer abate the violation; reinstate the employee to his or her former position with the same compensation and employment terms, conditions, and privileges; and pay the employee back pay, compensatory damages, as well as attorney and expert fees and costs. *Id.* § 5851(b)(2)(B). But if the agency does not decide within one year, the ERA allows the employee to sue the employer in federal district court. *Id.* § 5841(b)(4). Because these remedies adequately promoted the relevant public policy, the *Korslund* court was unwilling to provide a private common law tort remedy. *See* 156 Wash.2d at 182–83, 125 P.3d 119.

¶ 14 In *Cudney v. ALSCO, Inc.,* 172 Wash.2d 524, 531–33, 259 P.3d 244 (2011), our Supreme Court held the robust remedies available under the Washington Industrial Safety and Health Act of 1973 (WISHA), RCW 49.17.160, adequately promoted workplace safety. Specifically, WISHA prohibits general employers from taking adverse employment action against employees for, among other things, reporting violations of workplace safety laws. RCW 49.17.110, .160(1). If an employer takes adverse employment action, the employee may complain to an administrative agency with power to investigate the claim. RCW 49.17.160(2). If the agency decides the claim has merit, WISHA requires it to sue the employer in superior court on behalf of the employee. *Id.* But if the agency decides the opposite, WISHA allows the employee to sue the employer in superior court on his or her own behalf. *Id.* In either case, the court may order all appropriate relief, including requiring the employer to cease the violation as well as restore and compensate the employee. *Id.* Again, because these remedies adequately promoted the relevant public policy, the *Cudney* court was unwilling to recognize a provide common law tort remedy. *See* 172 Wash.2d at 536, 538, 259 P.3d 244.

¶ 15 In *Cudney,* our Supreme Court additionally held law enforcement action available under Washington statutes criminalizing drunk driving adequately protected the public from drunk driving. *Id.* at 536–38, 259 P.3d 244. There, the employee reported to his private employer that his supervisor drove a company vehicle while intoxicated. *Id.* at 527–28, 259 P.3d 244. But the employee did not inform law enforcement agencies, who theoretically could have stopped the supervisor. *Id.* at 537, 259 P.3d 244. In those circumstances, the *Cudney* court could not say the actions the employee took were the 'only available adequate means' to protect the public from drunk driving. *Id.* at 536–38, 259 P.3d 244.

***5** ¶ 16 Then, in *Piel v. City of Federal Way,* 177 Wash.2d 604, 609–17, 306 P.3d 879 (2013), our Supreme Court held the administrative remedies-available through the

Public Employment Relations Commission (PERC) under chapter 41.56 RCW were inadequate, on their own, to fully vindicate public policy when a public employer discharges a public employee for asserting collective bargaining rights. Unlike *Korslund* and *Cudney, Piel* involved a prior case holding PERC remedies failed to fully address the broader public interests involved because it protected personal contractual rights solely. *Id.* at 616–17, 306 P.3d 879 (quoting *Smith v. Bates Technical Coll.*, 139 Wash.2d 793, 805, 809, 991 P.2d 1135 (2000)). And unlike *Korslund* and *Cudney, Piel* involved a statute declaring PERC remedies supplement others and must be liberally construed to accomplish their purpose. *Id.* at 617, 306 P.3d 879 (quoting RCW 41.56.905). In those circumstances, the *Piel* court recognized a private common law tort remedy as necessary to fully vindicate public policy. *Id.* at 617, 306 P.3d 879.

¶ 17 Meanwhile, our Division of this court issued two opinions adhering to *Korslund* and *Cudney,* though our Supreme Court recently remanded one case for reconsideration in light of *Piel. See Worley v. Providence Physician Servs. Co.,* 175 Wash.App. 566, 574–76, 307 P.3d 759 (2013) (holding whistleblower protections available under the Washington health care act, RCW 43.70.075, adequately promoted workplace safety, ensured compliance with the accepted standard of care, and prevented fraudulent billing in the health care industry); *Rose v. Anderson Hay & Grain Co.,* 168 Wash.App. 474, 478–79, 276 P.3d 382 (2012) (holding the employee remedies available under the Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105, adequately protected truck drivers who refuse to violate commercial motor vehicle safety laws, even though a statute declared these remedies do not preclude others), *remanded,* 180 Wash.2d 1001, 327 P.3d 613, 2014 WL 1325569. Division One of this court issued another opinion applying *Korslund* and *Cudney,* and our Supreme Court denied review of that case despite *Piel. See Weiss v. Lonnquist,* 173 Wash.App. 344, 353–60, 293 P.3d 1264 (holding the misconduct reporting and disciplinary process prescribed by the Washington Rules of Professional Conduct, RPC 3.3 and 8.3, adequately promoted attorney candor toward the tribunal), *review denied,* 178 Wash.2d 1025, 312 P.3d 652 (2013).

¶ 18 Our recent cases faithfully analyzed the jeopardy element in a manner we thought the reasoning of *Korslund* and *Cudney* required. We now realize our jeopardy analysis overemphasized the abstract adequacy of statutes and regulations while forgetting the concrete public policy impact of chilling protected employee conduct. *See* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 7.06[A], at 7–82.1 to .4 (Supp.2013) [hereinafter PERRITT, EMPLOYEE DISMISSAL]. This approach tended to foreclose private common law tort remedies for employees any time statutes or regulations provided some means of promoting public policy. *See Cudney,* 172 Wash.2d at 548, 259 P.3d 244 (Stephens, J., dissenting). But doing so actually undermined public policy enforcement by chilling employee conduct advocating compliance with statutes and regulations. *See* PERRITT, EMPLOYEE DISMISSAL, *supra,* § 7.06[A], at 7–82.3 to.4–1; *id.* § 7.09[D], at 7–173 (5th ed.2006). Thus,

in Mr. Becker's case, we reform our jeopardy analysis under the reasoning of *Thompson, Gardner,* and *Piel.*

*6 ¶ 19 As the trial court concluded, Mr. Becker's amended complaint implicates the public policy of honesty in corporate financial reporting because he alleged he was constructively discharged after refusing to submit a false or misleading EBITDA projection. To establish the jeopardy element, Mr. Becker must show the threat of constructive discharge would jeopardize the public policy of honesty in corporate financial reporting by discouraging a CFO like him from refusing to submit a false or misleading EBITDA projection. Mr. Becker's refusal must have been either directly related to the public policy or necessary to effectively enforce the public policy. Thus, Mr. Becker's refusal must have been the only available adequate means for promoting the public policy. For the reasons discussed below, we think it undoubtedly was.

¶ 20 Initially, the parties dispute whether Mr. Becker's case concerns constructive discharge for refusing to commit an illegal act, engaging in whistleblower activity, or both. But Mr. Becker clearly elected his legal theory where he alleged, "Rockwood and CHS engaged in retaliation and in adverse employment action against [Mr. Becker] *for his refusal to* engage in improper accounting practices" involving "illegal and unethical acts." CP at 744 (emphasis added). Mr. Becker did not allege Rockwood and CHS constructively discharged him for engaging in whistleblower activity. However, any whistleblower options available to him are still relevant in determining whether his refusal was the only available adequate means for promoting the public policy.

¶ 21 The parties mainly dispute if other available means for promoting the public policy of honesty in corporate financial reporting are adequate in Mr. Becker's case. First, Rockwood and CHS cite section 806(a) of the Sarbanes–Oxley Act of 2002(SOX), 18 U .S.C. § 1514A, and section 922(a) of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 78u–6. These statutes provide comprehensive whistleblower protections. *See* 15 U.S.C. § 78u–6(h)(1)–(2); 18 U.S.C. § 1514A(a)-(c). These statutes apply even when an employee reports misconduct he or she reasonably believes is "about to" or " 'likely to' " occur. 12 C.F.R. § 240.21 F–2(b)(1)(i) (implementing 15 U.S.C. § 78u–6); *Wiest v. Lynch,* 710 F.3d 121, 133 (3d Cir.2013) (quoting *Sylvester v. Parexel Int'l LLC,* No. 07–123, 2011 WL 2165854, at *13 (U.S. Dep't of Labor Admin. Review Bd. May 25, 2011)) (construing 18 U.S.C. § 1514A). But because these statutes declare their remedies do not preclude others, *see* 15 U.S.C. § 78u–6(h)(3); 18 U.S.C. § 1514A(d), we have the "strongest possible evidence" these remedies are inadequate, on their own, to fully vindicate public policy, *Piel,* 177 Wash.2d at 617, 306 P.3d 879. Therefore, we do not reach the parties' remaining arguments on these statutes.

¶ 22 Second, Rockwood and CHS cite numerous statutes imposing criminal penalties on a person responsible for false or misleading statements related to corporate financial reporting. SOX section 302(a) requires both a

CEO and CFO to certify in periodic corporate financial reports that

> *7 (2) based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading;
>
> (3) based on such officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the [corporation] as of, and for, the periods presented in the report.

15 U.S.C. § 7241(a). SOX section 906(a) imposes criminal penalties on a CEO or CFO who willfully certifies the report knowing it contains a false or misleading statement. 18 U.S.C. § 1350(c)(1)-(2). Under long-standing criminal principles, a corporation is responsible for the crime of its CEO or CFO if the corporation "aids, abets, counsels, commands, induces or procures [the] commission [of that crime]." 18 U.S.C. § 2(a).

¶ 23 SOX section 903(a) and (b) enhance criminal penalties for mail fraud and wire fraud while section 807(a) separately criminalizes securities fraud. 18 U.S.C. §§ 1341, 1343, 1348. Under SOX section 902(a), attempting or conspiring to commit any of these crimes invokes "the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 18 U.S.C. § 1349.

¶ 24 Section 24 of the Securities Act of 1933, 15 U.S.C. § 77x, and section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff(a), impose criminal penalties on a person who willfully violates securities laws, including by knowingly making false or misleading statements related to corporate financial reporting or connected to the offer or sale of securities. *See also* Securities Act § 17(a), 15 U.S.C. §§ 77q(a); Securities Exchange Act § 10(b), 15 U.S.C. § 78j(b); SEC Rule 10b–5, 17 C.F.R. § 240.10b–5. Moreover, SOX section 1107(a) imposes criminal penalties on a person who "knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the ... possible commission of any Federal offense." 18 U.S.C. § 1513(e).

[8] ¶ 25 Even a state statute imposes criminal penalties on a corporate agent who "knowingly make[s] or publish[es] or concur[s] in making or publishing any written ... report ... or statement of [the corporation's] affairs or pecuniary condition, containing any material statement that is false or exaggerated." RCW 9.24.050. This statute exists to protect members of the public who may rely on such reports or statements but are not conversant with the corporation's finances. *State v. Swanson,* 16 Wash.App. 179, 185–86, 554 P.2d 364 (1976) (citing *State v. Pierce,* 175 Wash. 461, 467, 27 P.2d 1083 (1933); *State v. O'Brien,* 143 Wash. 636, 639, 255 P. 952 (1927)). Attempting, conspiring, or soliciting another person to commit this crime is also a crime. RCW 9A.28.020(1), .030(1), .040(1).

*8 ¶ 26 Third, Rockwood and CHS cite statutes and regulations providing an investor a private right of action against a person responsible for false or misleading statements connected to the offer or sale of securities.[2] *See* Securities Exchange Act § 10(b), 15 U.S.C. § 78j(b); SEC Rule 10b–5, 17 C.F.R. § 240.10b–5; Securities Act of Washington, RCW 21.20.010, .430(1); *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971); *Janus Capital Grp., Inc. v. First Derivative Traders*, —— U.S. ——, 131 S.Ct. 2296, 2301, 180 L.Ed.2d 166 (2011).

¶ 27 Finally, Rockwood and CHS cite statutes granting the SEC administrative powers against a person responsible for false or misleading statements connected to the offer or sale of securities. Specifically, the SEC may initiate an investigation upon complaint or its own initiative, and, if it determines a person has violated or is about to violate securities laws, it may issue a cease and desist order; impose civil monetary penalties; and sue in federal district court for injunctive relief, disgorgement of profits, prohibition from future service as a corporate director or officer, and additional civil monetary penalties. *See* Securities Act §§ 8A, 20, 15 U.S.C. §§ 77h–1, 77t; Securities Exchange Act §§ 21, 21B, 21C, 15 U.S.C. §§ 78u, 78u–2, 78u–3.

¶ 28 These statutes and regulations provide comprehensive criminal, civil, and administrative enforcement mechanisms promoting the important public policies they secure. But those means of promoting public policy do not foreclose private common law tort remedies for employees. *See Cudney*, 172 Wash.2d at 549–50, 259 P.3d 244 (Stephens, J., dissenting). "The central idea of the public policy tort is to create privately enforceable disincentives for ... employers to use their power in the workplace to undermine important public policies." PERRITT, EMPLOYEE DISMISSAL, *supra*, § 7.06[A], at 7–82.3 (Supp.2013). And the public policy tort may sometimes coexist with comprehensive criminal, civil, and administrative enforcement mechanisms. *See Piel*, 177 Wash.2d at 614–16, 306 P.3d 879. Such coexistence is essential where, as here, the threat of constructive discharge would jeopardize the public policy of honesty in corporate financial reporting by discouraging a CFO like Mr. Becker from refusing to submit a false or misleading EBITDA projection.

¶ 29 Mr. Becker claimed his EBITDA projection correctly showed a $12 million operating loss in 2012 but Rockwood and CHS demanded he recalculate his projection to show a target $4 million operating loss in 2012. Mr, Becker refused to submit the $4 million figure because he reasonably believed it would require overstating income and understating expenses, fraudulently misleading investors and creditors in violation of criminal laws. Rockwood and CHS rated his job performance as " 'unacceptable,' " placed him on a probationary " 'performance improvement plan,' " and gave him an ultimatum to either submit the $4 million figure or lose his job. CP at 735–36. Then, he told Rockwood's CEO and CHS's internal auditor he thought Rockwood and CHS were using the false $4 million figure to fraudulently mislead investors and creditors. Mr. Becker hypothesized that, upon acquiring

Rockwood, CHS procured investments and credits using the false $4 million figure. He reported his concerns to Rockwood and CHS but did not report the misconduct to law enforcement agencies. Soon, Mr. Becker saw signs that Rockwood and CHS were preparing to use his subordinate to submit the false $4 million figure under the auspices of his department. Mr. Becker detailed these matters in writing to Rockwood and CHS, advising them he would have no choice but to resign unless they responded appropriately to abate the misconduct. They sent him a one-line e-mail accepting his resignation the next day.

*9 ¶ 30 Mr. Becker's case is "[t]he most compelling case for protection" under a public policy tort because by instructing him to commit a crime for which he would be personally responsible, Rockwood and CHS forced him to choose between the consequences of disobeying his employer and the consequences of disobeying criminal laws. JANIE F. SCHULMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE ch. 5.II.A.1, at 101 (2d ed.2004). Recognizing this dilemma, "most courts have readily responded ... by recognizing a cause of action" in similar cases. *Id.* ch. 5.II.A.1a., at 102; *see also id.* ch. 5.II.A.1.a., at 5–7 (Supp.2013).

¶ 31 For example, in *McGarrity v. Berlin Metals, Inc.*, 774 N.E.2d 71, 75–79 (Ind.Ct.App.2002), a CFO sued his corporate employer for wrongful discharge in violation of public policy, alleging the employer discharged him for refusing to fraudulently under-report tax liability in violation of criminal laws. The trial court granted the employer judgment on the evidence and the Indiana Court of Appeals reversed, partly reasoning the common law would not countenance a scenario where the employer could abuse its workplace authority by giving the CFO an ultimatum to either commit an illegal act for which he would be personally responsible or lose his job. *Id.* at 76–78.

¶ 32 Similarly, in *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 779–80 (Tenn.2010), a CFO sued his corporate employer for wrongful discharge in violation of public policy, alleging the employer discharged him for refusing to make misleading account alterations that would have produced misleading SEC filings. The trial court granted the employer summary judgment and the Tennessee Supreme Court reversed, partly reasoning the common law did not require the CFO to show he reported the misconduct externally after he refused to participate in it. *Id.* at 787–89.

¶ 33 The jeopardy analysis in Mr. Becker's case "proceeds from the proposition that permitting such dismissals would encourage conduct in violation of [criminal laws], because employers could shield themselves from detection." PERRITT, EMPLOYEE DISMISSAL, *supra*, § 7.06, at 7–72 (Supp.2012). We recognize the jeopardy element is difficult to satisfy where, as here, statutes and regulations provide comprehensive criminal, civil, and administrative enforcement mechanisms promoting the important public policies they secure. *See id.* § 7.06, at 7–69 to –71. But the jeopardy analysis in Mr. Becker's case does not end there. The jeopardy element becomes easier to satisfy where, as here, the employee has special

responsibilities or expertise connected with the public policy and other enforcement mechanisms are less likely to succeed because they depend on the employee's individual pro-compliance efforts. *See id.* § 7.06, at 7–71; *id.* § 7.09[D], at 7–159 (5th ed.2006). In those circumstances, chilling employee conduct advocating compliance with statutes and regulations renders public policy enforcement uncertain, at best, or a matter of chance, at worst. *See Cudney,* 172 Wash.2d at 548–49, 259 P.3d 244 (Stephens, J., dissenting); PERRITT, EMPLOYEE DISMISSAL, *supra,* § 7.06[A], at 7–82.4–1 (Supp.2013).

***10** ¶ 34 In sum, we follow the reasoning of *Thompson, Gardner,* and *Piel* to conclude Mr. Becker's amended complaint establishes the jeopardy element. Accepting all factual allegations as true, the threat of constructive discharge would jeopardize the public policy of honesty in corporate financial reporting by discouraging a CFO like Mr. Becker from refusing to submit a false or misleading EBITDA projection. Mr. Becker's refusal was both directly related to the public policy and necessary to effectively enforce the public policy. And, Mr. Becker's refusal was the only available adequate means for promoting the public policy, given the uncertainty of other enforcement mechanisms and their dependence on his individual pro-compliance efforts. We must evaluate each public policy tort "in light of its particular context." *Piel,* 177 Wash.2d at 617, 306 P.3d 879. Because *Korslund* and *Cudney* addressed different enforcement mechanisms, they do not dictate the outcome in Mr. Becker's case. *See id.* Therefore, the trial court did not err under CR 12(b)(6) in declining to dismiss Mr. Becker's claim for wrongful discharge in violation of public policy.

¶ 35 Affirmed.

I CONCUR: LAWRENCE–BERREY, J.

FEARING, J. (concurring).

¶ 36 The author of the lead opinion admirably analyzes the tort of wrongful discharge in violation of public policy and the tort's jeopardy element, and I concur in the decision of the majority. I agree with the majority that the statutes and regulations, upon which Rockwood Clinic and its parent relies, are closer in nature to the statutes and regulations at issue in *Thompson v. St. Regis Paper Co.,* 102 Wash.2d 219, 685 P.2d 1081 (1984) and *Piel v. City of Federal Way,* 177 Wash.2d 604, 609–17, 306 P.3d 879 (2013) rather than at issue in *Korslund v. DynCorp Tri–Cities Servs., Inc.,* 156 Wash.2d 168, 125 P.3d 119 (2005) and *Cudney v. ALSCO, Inc.,* 172 Wash.2d 524, 531–33, 259 P.3d 244 (2011). More importantly, I accept the significance of the majority's observation that the Sarbanes–Oxley Act of 2002(SOX) and the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank), despite including comprehensive whistleblower protections, declare their remedies to be nonexclusive. *See* 15 U.S.C. § 78u–6(h)(3); 18 U.S.C. § 1514A(d).

¶ 37 I write separately, however, because I cannot reconcile the teachings of *Piel* and *Cudney.* Yes, one may find distinguishing features between the two decisions, but those differences pale in importance when

considering principles upon which the jeopardy element is based. The two decisions, combined with other high court opinions, create confusion amongst practitioners and lower court judges as to the nature and extent of the jeopardy element of a claim for wrongful discharge in violation of public policy. In addition to deciding disputes between parties, appellate decisions are meant to declare and explain law and to provide guidance to lawyers, litigants, and lower courts, particularly when a busy tort is the subject matter. Pronouncements on the subject of the jeopardy element offer puzzlement, not direction. I thought, upon reading the ruling in *Cudney,* that the tort languidly lay, on life support, in the intensive care unit. *Piel* revived the tort. But practitioners and trial courts must wonder if the next decision will return the tort to the sick bay.

***11** ¶ 38 As a cause of action matures, courts insist on promulgating a list of elements necessary to a successful suit. Therefore, in *Gardner v. Loomis Armored, Inc.,* 128 Wash.2d 931, 941, 913 P.2d 377 (1996), the state high court congealed a claim for wrongful discharge in violation of public policy into four elements by relying on the treatise, HENRY H. PERMIT JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES (1991). As one of the four elements, plaintiff must establish that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy. The purpose of the jeopardy element is to guarantee " 'an employer's personnel management decisions will not be challenged unless a public policy is genuinely threatened.' " *Ellis v. City of Seattle,* 142 Wash.2d 450, 460, 13 P.3d 1065 (2000) (quoting *Gardner,* 128 Wash.2d at 941–42, 913 P.2d 377). The jeopardy element was implicitly already part of a prima facie case since the plaintiff needed to prove his or her firing contravened a clear mandate of public policy. *Thompson,* 102 Wash.2d at 232, 685 P.2d 1081.

¶ 39 As elements emerge from the legal kiln, courts enamel each element with unnecessary gloss. *Gardner* went beyond listing jeopardy as one of the four elements of the tort of wrongful discharge. The landmark decision added a fluffy description of the element, fraught with ambiguity and nuance that created the puzzlement about which I write. A critical passage in *Gardner* lies on page 945:

> [1] Under the second element, the employee's discharge must jeopardize the public policy. [2] To establish jeopardy, plaintiffs must show they engaged in particular conduct, and the conduct *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy. [Henry H.] Perritt, [Jr., *Workplace Torts: Rights and Liabilities]* § 3.14, at 75–76.[3] This burden requires a plaintiff to "argue that other means for promoting the policy ... are inadequate." Perritt § 3.14, at 77.[4] Additionally, the plaintiff must show how the threat of dismissal will discourage others from engaging in the desirable conduct.

128 Wash.2d at 945, 913 P.2d 377. I numbered the sentences for ease of discussion. Unfortunately, the *Gardner* decision did not limit its description of the jeopardy element to the first sentence or initial statement that discouraging the plaintiff's conduct must jeopardize public policy.

¶ 40 The *Gardner* court wrote in the second sentence of the passage that, to establish the jeopardy element, plaintiff must also show the particular conduct, in which she engaged, *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy. 128 Wash.2d at 945, 913 P.2d 377 (citing PERRITT § 3.14, at 75–76). Note that this component of the jeopardy element is in the alternative. The sentence employs the word "or." This "language is a paraphrase of Perritt's treatise (1991), which clearly states the jeopardy analysis in the disjunctive, i.e., the conduct furthers public policy *either* because the policy directly promotes the conduct *or* because the conduct is necessary to effective enforcement of the policy. PERRITT, *supra* § 3.14, at 75–76." *Cudney,* 172 Wash.2d at 540, 259 P.3d 244 (Stephens, J., dissenting). If the plaintiff proves her conduct directly relates to a public policy, she should not need to prove her conduct was necessary to effectively enforce the policy. The tort of wrongful discharge in violation of public policy would be easier to apply if *Gardner* ended its discussion of the jeopardy element there.

***12** ¶ 41 *Gardner* added two more sentences. The third sentence reads, "This burden requires a plaintiff to 'argue that other means for promoting the policy ... are inadequate.' " 128 Wash.2d at 945, 913 P.2d 377 (quoting PERRITT § 3.14, at 77). This third sentence launched the many appellate decisions that give rise to the current unpredictability particularly because its relationship to the second or previous sentence in *Gardner* lacks exposition. Showing the lack of other means to enforce the public policy should not be a requirement if the plaintiff's conduct directly relates to the public policy. Showing the lack of another adequate means of enforcing the public policy should only be required if the plaintiff seeks to prove the tort by showing her conduct was necessary to effectively enforce the policy.

¶ 42 *Gardner* added even more language to the jeopardy element that now frequently introduces a case's discussion of the element. In the fourth sentence, the high court wrote, "Additionally, the plaintiff must show how the threat of dismissal will discourage others from engaging in the desirable conduct." *Gardner,* 128 Wash.2d at 945, 913 P.2d 377.

¶ 43 In later decisions, the state high court imposed more restrictions to the jeopardy element. For instance, in order to establish the jeopardy element, a plaintiff must show that the actions the plaintiff took were the " *'only available adequate means* ' " to promote the public policy. *Cudney,* 172 Wash.2d at 530, 259 P.3d 244 (quoting *Danny v. Laidlaw Transit Servs., Inc.,* 165 Wash.2d 200, 222, 193 P.3d 128 (2008)). The point of the jeopardy prong of the tort is to consider whether the statutory protections are adequate to protect the public policy, not whether the claimant could recover more through a tort claim. *Cudney,* 172 Wash.2d at 534, 259 P.3d 244. Going even further, the other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy. *Hubbard v. Spokane County,* 146 Wash.2d 699, 717, 50 P.3d 602 (2002) (citing PERRITT, *supra,* § 3.14, at 77). As can be seen, the jeopardy element is encumbered with many layers of rules beyond the employee simply

showing that her conduct directly related to the public policy.

¶ 44 Decision after decision has impliedly held that regardless of whether plaintiff's conduct directly relates to the public policy, plaintiff must prove that means other than her civil lawsuit for damages are inadequate to enforce the public policy. *Piel,* 177 Wash.2d 604, 306 P.3d 879; *Cudney,* 172 Wash.2d 524, 259 P.3d 244; *Danny,* 165 Wash.2d 200, 193 P.3d 128; *Korslund,* 156 Wash.2d 168, 125 P.3d 119; *Hubbard,* 146 Wash.2d 699, 50 P.3d 602; *Ellis,* 142 Wash.2d 450, 13 P.3d 1065; *Smith v. Bates Technical Coll.,* 139 Wash.2d 793, 991 P.2d 1135 (2000); *Wilmot v. Kaiser Aluminum & Chemical Corp.,* 118 Wash.2d 46, 821 P.2d 18 (1991); *Worley v. Providence Physician Servs. Co.,* 175 Wash.App. 566, 307 P.3d 759 (2013); *Weiss v. Lonnquist,* 173 Wash.App. 344, 359, 293 P.3d 1264, *review denied,* 178 Wash.2d 1025, 312 P.3d 652 (2013); *Rose v. Anderson Hay & Grain Co.,* 168 Wash.App. 474, 276 P.3d 382 (2012); *review granted,* 180 Wash.2d 1001, 327 P.3d 613 (2014); *Wilson v. City of Monroe,* 88 Wash.App. 113, 123–24, 943 P.2d 1134 (1997). Stated differently, if another "*available adequate means* " promotes the public policy, plaintiff loses even if her conduct directly impacts the public policy. *Danny,* 165 Wash.2d at 222, 193 P.3d 128. Nearly all, if not all, public policies have alternative means for enforcement.

***13** ¶ 45 Washington decisions often entail reviewing a statutory scheme to determine whether the other available remedies are adequate, and, more in particular, whether the remedies are adequate for the fired employee. Nevertheless, according to another inconsistent rule, whether remedies are adequate for the employee should be immaterial since the other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy. *Hubbard,* 146 Wash.2d at 717, 50 P.3d 602.

¶ 46 Cases irreconcilably examine whether the other means are "adequate." For example, some decisions stand for the proposition that statutory remedies are inadequate, for purposes of the jeopardy element, when the remedies may not allow recovery of emotional distress damages for the discharged employee. *Piel,* 177 Wash.2d 604, 306 P.3d 879; *Smith,* 139 Wash.2d 793, 991 P.2d 1135; *Wilmot,* 118 Wash.2d 46, 821 P.2d 18; *Wilson,* 88 Wash.App. 113, 943 P.2d 1134. Both *Piel* and *Smith* address RCW 41.56.160, a portion of the Public Employees Relations Act. The statute allows the Public Employees Relations Commission to award "payment of damages and the reinstatement of employees" if the employer engages in an unfair labor practice. RCW 41.56.160. Each plaintiff was permitted to proceed with his or her tort claim because whether emotional distress damages could be awarded under the statute was not clear.

¶ 47 *Wilmot,* 118 Wash.2d 46, 821 P.2d 18, examined RCW 51.48.025(4), which prohibits an employer from discharging an employee for filing a workers compensation claim. The statute authorizes the director of the Department of Labor & Industries (Department) to sue, on behalf of the employee, in superior court, and for the court "to order all appropriate relief including rehiring or reinstatement of the employee with back pay."

RCW 51.48.025(4). The *Wilmot* court also allowed the employee to proceed with a tort action because it was unclear whether the statute allowed for an award of emotional distress damages.

¶ 48 *Wilson,* 88 Wn.2d 113, explored RCW 49.17.160, a portion of the Washington Industrial Safety and Health Act, which prohibits an employer from discriminating against an employee who files a complaint about work safety with the Department of Labor & Industries. The statute allows an employee to file a complaint of discrimination with the Department, and, if the Department refuses to file suit against the employer, the employee may file suit on his own. The statute allows the superior court "for cause shown, ... restrain violations ... and order all appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay." RCW 49.17.160. The *Wilson* court allowed the employee to proceed with a private suit because it was unclear whether the statute allowed for an award of emotional distress damages.

¶ 49 But *Piel, Wilmot,* and *Wilson* conflict with *Cudney,* which teaches that whether the claimant could recover more through a tort claim is irrelevant to the jeopardy analysis. Therefore, whether plaintiff can recover emotional distress damages under an alternative remedy should be unimportant.

***14** ¶ 50 *Cudney* addresses the same statute, RCW 49.17.160, as *Wilson.* The two cases have conflicting outcomes. Although *Wilson* is a court of appeals decision, the majority decision in *Cudney* does not even mention *Wilson.* Nor does the majority decision in *Cudney* mention established precedence that, if the employee cannot recover emotional distress damages under the alternate remedy, the plaintiff satisfies the jeopardy element. *Cudney* ignores rather than overrules the contradictory decisions.

¶ 51 *Wilson* contradicts *Jones v. Industrial Electric–Seattle, Inc.,* 53 Wash.App. 536, 539, 768 P.2d 520 (1989). In *Jones,* a worker also complained he was fired for reporting unsafe working conditions. Michael Jones, however, did not file a complaint with the Department within the 90–day time period afforded under the statute. This court dismissed his suit for wrongful discharge on the ground that he did not timely complain to the Department. *Wilson* did not mention the decision in *Jones,*

¶ 52 *Piel, Smith, Wilmot,* and *Wilson* also conflict with *Hubbard,* which instructs that the other means of promoting the public policy need not be available to the plaintiff. So, whether the plaintiff can recover any damages should be unimportant. The Public Employees Relations Act, the workers compensation laws, and the Washington Industrial Safety and Health Act of 1973 (WISHA) all provide remedies to punish employers who violate their provisions. These statutory schemes even afford some recovery for the discharged employee.

¶ 53 A principal basis upon which we base our decision, in the pending appeal, is language in SOX and Dodd–Frank that mentions its respective remedies are not exclusive. A number of decisions rely upon similar language in the statute being examined.

Piel, 177 Wash.2d 604, 306 P.3d 879; *Rose,* 168 Wash.App. at 478, 276 P.3d 382. But such statutory terms should be irrelevant in a jeopardy analysis, since the tort is independent of the statute and the tort fails if there is another remedy to enforce the public policy, regardless of whether the remedy benefits the discharged employee. *Cudney,* 172 Wash.2d 524, 259 P.3d 244; *Danny,* 165 Wash.2d at 222, 193 P.3d 128; *Hubbard,* 146 Wn, 2d at 717. Also, decisions have allowed the employee to proceed with a private action even without such language in the pertinent statute. *Smith,* 139 Wash.2d 793, 991 P.2d 1135; *Bravo v. Dolsen Cos.,* 125 Wash.2d 745, 888 P.2d 147 (1995); *Wilmot,* 118 Wash.2d 46, 821 P.2d 18; *Wilson,* 88 Wash.App. 113, 943 P.2d 1134.

¶ 54 The majority in *Piel* distinguished between the statute at issue in its decision, RCW 41.56.905, and the statute at issue in *Cudney.* As previously mentioned, *Piel* involved the Public Employees Relations Act, which includes the language, " 'The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose.' " *Piel,* 177 Wash.2d at 617, 306 P.3d 879 (quoting RCW 41.56.905). No similar language was identified in WISHA, the statutory scheme at issue in *Cudney.* This distinction between the two decisions is unsatisfactory given the other conflicting language between the two decisions. Also, the test is not whether the alternate remedy declares itself exclusive, but rather whether the remedy is adequate.

***15** ¶ 55 In short, *Cudney* and *Piel* cannot be reasonably reconciled. The dissent in *Cudney* is correct that the "result departs from long-standing precedent in Washington." *Cudney,* 172 Wash.2d at 538, 259 P.3d 244 (Stephens, J., dissenting). The dissent in *Piel* is also correct that "in *Cudney,* we emphasized that whether the jeopardy element is met hinges on the adequacy of the alternative remedies available to protect the public policy, not on whether the remedies fully compensate the individual claimant." *Piel,* 177 Wash.2d at 632–33, 306 P.3d 879 (Johnson, J.M., J., dissenting). *Cudney* and *Piel* begin at different departure points and travel in opposite directions. They are two ships passing in the dark of night because they seek to advance different objectives.

¶ 56 I could discuss other examples of pertinent inconsistencies in the jeopardy element's body of law. Examples include: whether the employee fulfills the jeopardy element when his theory focuses on his individual rights rather than the good of the community; whether there is another available adequate remedy when, to obtain the remedy, the employee must file an administrative complaint within a short time period; and whether the alternate remedy is adequate if the employee is not afforded a jury trial. Suffice it to say that the law of wrongful discharge in violation of public policy may advance by turning back time to before *Gardner,* when the employee only needed to show his discharge implicated a clear mandate of public policy. At least, the law could be more consistent if the jeopardy element faithfully followed the language in *Gardner* that the plaintiff need not show her private suit necessary to effective enforcement of the identified public policy as long as her conduct directly related to the policy.

¶ 57 The tort of wrongful termination in violation of public policy is independent of any underlying contractual agreement or statute. Therefore, Washington courts have held that an employee need not exhaust her contractual or administrative remedies to proceed before suing in tort. *Piel,* 177 Wash.2d at 612, 306 P.3d 879; *Christensen v. Grant County Hosp. Dist. No., 1,* 152 Wash.2d 299, 311, 96 P.3d 957 (2004); *Smith,* 139 Wash.2d at 808, 991 P.2d 1135; *Allstot v. Edwards,* 116 Wash.App. 424, 431, 65 P.3d 696 (2003); *Young v. Ferrellgas, L.P.,* 106 Wash.App. 524, 530, 21 P.3d 334 (2001). For the same reason, other remedies that address the violation of public policy should not interfere with establishing the jeopardy element of the tort.

¶ 58 Jeopardy and the other three elements announced in *Gardner* come from a treatise about the tort, HENRY H. PERRITT JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES (1991). *Gardner,* 128 Wash.2d at 945, 913 P.2d 377. The four critical *Gardner* sentences concerning jeopardy also derive from the treatise. Although *Gardner* characterizes the Perritt treatise as "leading," one might question this characterization. Although we recognize Henry J. Perritt as an expert in employment law, Perritt fails to analyze the four sentences and the problems they create. The treatise is more a collection of decisions than it is a reasoned discussion of the tort of wrongful discharge.

***16** ¶ 59 *Gardner* lists *Collins v. Rizkana,* 73 Ohio St.3d 65, 69–70, 652 N.E.2d 653 (1995), as the only decision to parrot Henry H. Perritt, Jr.'s, four elements of the tort of wrongful discharge in violation of public policy and to have embraced the jeopardy element. A review of decisions across the United States suggests that only Iowa, Utah and Guam have since adopted Perritt's four elements of the tort. *Fitzgerald v. Salsbury Chem., Inc.,* 613 N.W.2d 275, 282 n. 2 (Iowa 2000); *Ryan v. Dan's Food Stores, Inc.,* 972 P.2d 395, 404 (Utah 1998); *Ramos v. Docomo Pacific, Inc.,* 2012 Guam 20, 2012 WL 6738152.

¶ 60 82 AM. Jur.2d *Wrongful Discharge* § 54 (2014) proclaims what may be the majority rule in the United States:

> To prevail, an employee asserting a discharge that undermines public policy must establish a number of key elements, including the following:
>
> (1) the existence of a clear public policy;
>
> (2) that he or she was engaged in conduct protected by public policy;
>
> (3) that the employer knew or believed that the employee was engaged in a protected activity;
>
> (4) that retaliation was a motivating factor in the dismissal decision; and
>
> (5) that the discharge would undermine an important public policy.

(footnotes omitted). Note that neither jeopardy nor the lack of another adequate remedy is an element.

¶ 61 Interests and goals clash when determining the breadth of the tort of wrongful discharge in violation of public policy. Society wishes employers to be free to discharge poor

performing employees and render management decisions that will not be challenged unless strong public policies interfere. Society does not wish employees to win money by ginning false reasons for termination from employment. Nor does society wish the discharged employee to recover against the employer if the conduct that led to the discharge advanced the employee's own interests, rather than the interests of others or society as a whole. At the same time, society wishes to protect a giraffe, who heroically sticks his or her neck out and does good no matter the cost. The employee's actions in *Gardner* wonderfully illustrate such a heroic deed. If a heroic deed benefits the community but leads to the giraffe's firing, society prefers the employer, not the employee, pay for the loss suffered by the employee. Under such circumstances, the employer has engaged in intentional misconduct and should pay for the loss caused by its conduct.

¶ 62 A description of the tort of wrongful discharge that simply requires the employee to prove a clear mandate of public policy and her conduct directly relates to the policy serves these competing interests. The requirement of a clear manifestation of public policy limits the suits to worthwhile suits. The requirement of causation also limits recovery to firings that intentionally flaunt a clear public policy. Requiring the discharged employee to prove more compounds, confounds, and contorts the tort.

I CONCUR: LAWRENCE–BERREY, J.

1 This claim is available regardless of whether the employer discharges the employee expressly or constructively. *Korslund*, 156 Wash.2d at 177, 125 P.3d 119 (citing *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wash.2d 233, 238, 35 P.3d 1158 (2001)).

2 Accepting all factual allegations as true, we assume, without deciding, the EBITDA projection Rockwood and CHS demanded would not have been protected by the safe harbor provisions of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u–5(c)(1). The projection certainly would have been a forward-looking statement. *See id.* § 78u–5(i)(1); *Prime Mover Capital Partners LP. v. Elixir Gaming Techns., Inc.*, 898 F.Supp.2d 673, 689 & n. 95 (S.D.N.Y.2012) (citing *Slayton v. Am. Express Co.*, 604 F.3d 758, 766–67 (2d Cir.2010)). But the complaint implies Rockwood and CHS knew the projection would have been false or misleading, and material to investors and creditors. *See* 15 U.S .C. § 78u–5(c)(1)(A)(ii), (B). Because the pleadings do not address the issue, we do not consider whether the projection would have contained any meaningful cautionary statement. *See id.* § 78u–5(c)(1)(A)(i).

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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JOETTA RUPERT, an individual, Appellant, v. KENNEWICK IRRIGATION DISTRICT, a public entity, Respondent.	)	No. 31950-4-III UNPUBLISHED OPINION

BROWN, J. – Joetta Rupert appeals the summary judgment dismissal of her claims against Kennewick Irrigation District (KID) for retaliatory discharge in violation of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, and wrongful termination in violation of public policy. She contends the trial court erred because it failed to find remaining genuine issues of material fact regarding retaliation, and failed to rule as a matter of law she had established the jeopardy and causation elements necessary for her wrongful termination claim. We disagree with Ms. Rupert, and affirm.

FACTS

KID hired Ms. Rupert in June 2003 as an administrative assistant in its real estate department and a few years later promoted her to department manager. She was an at-will employee reporting directly to the KID Board.

KID utilized an endowment fund for the proceeds from the sale of KID real property. KID had adopted a policy for the use of the endowment fund, which the board repealed in 2006. Then, the fund was called a reserve fund worth about $15 million. Ms. Rupert became uncomfortable with how the reserve fund was used. She believed the board was not meeting its fiduciary duties and became concerned about inconsistent investment report information prepared by KID's treasurer. Ms. Rupert brought her concerns to the board. She reported to Board President John Jaksch that certain investments were being cashed out instead of being reinvested and transferred to the operations account without board approval. During the relevant annual inspections, no discrepancies were found by the state auditor. Nevertheless, based on Ms. Rupert's concerns, the board hired an outside auditor to perform an independent audit for 2006-2009. Ms. Rupert conferred with the outside auditor. The audit results, confirming some of Ms. Rupert's concerns, were shared with the Board in May 2010. The outside auditor, however, did not find any missing funds.

In November 2009, KID hired a new district manager, Charles Freeman. Communication immediately broke down between Mr. Freeman and Ms. Rupert. She felt this breakdown was because she was a woman.

In March 2010, the board reassigned Ms. Rupert's supervisory responsibilities on the Red Mountain properties to Scott Revell, planning department manager. Ms. Rupert felt this was in response to her raising concerns about the legality of leasing properties on Red Mountain for longer than a one year period.

On March 6, 2010, Ms. Rupert presented the board her easement recommendations for certain KID-owned property. Board member, Patrick McGuire, disagreed and, according to Ms. Rupert, became angry and hostile towards her and successfully suggested to other board members that they vote against her proposal. The same day, board members and managers attended a retreat where Ms. Rupert claims both President Jaksch and board member, Gene Huffman, made comments about not wanting to sit next to her.

On June 17, 2010, Ms. Rupert informed Mr. Huffman she needed to speak to Mr. Freeman about work problems she was having with Mr. Revell. Mr. Huffman allegedly told Ms. Rupert not to contact Mr. Freeman because he had been "burned before" and "was not comfortable being alone with [a] woman." Clerk's Papers (CP) at 238.

In July 2010, Ms. Rupert notified the board that she would be attending a personal injury trial for a prior automobile accident she was involved in and would be out of the office. Ms. Rupert used sick leave for the week she was off. On July 15, 2010, Ms. Rupert met with Mr. Huffman for over two and a half hours to complain about what she perceived as the unprofessional practice of not having direct contact with Mr. Freeman. Ms. Rupert alleges when she offered her hand to say goodbye, Mr. Huffman immediately grabbed it and brought her close to him, hugging her tightly and rubbed his

chest against hers without her consent. At this same meeting, Mr. Huffman broached the topic of how Ms. Rupert was going to claim her time off from work for the personal injury trial. Ms. Rupert told Huffman she was going to use her accrued sick leave benefits and inquired as to whether this was an issue, offering to use personal or vacation time instead. According to Ms. Rupert, Mr. Huffman told her using sick leave was "acceptable and fine." CP at 194. Manager Freeman, however, notified her by e-mail that her request to use her sick leave was denied. According to Ms. Rupert she responded, "'No problem, go ahead and change it.'" CP at 285.

On July 20, 2010, the board notified Ms. Rupert it was placing her on paid administrative leave "pending an investigation of the charge that you attempted to use sick leave for time off to attend a personal injury trial." CP at 313.

On July 27, 2010, KID terminated Ms. Rupert's employment. President Jaksch later declared during 2009 and 2010, he "became increasingly concerned of [Ms. Rupert's] performance and of the costs associated with the Real Estate Assets Department that she managed." CP at 124. The board decided these concerns in addition to the recent inappropriate use of sick leave warranted termination.

Ms. Rupert sued KID for discrimination, hostile work environment, retaliation in violation of WLAD, wrongful termination in violation of public policy under the Local Government Whistleblower Protection Act (LGWPA), chapter 42.41 RCW, and failure to pay wages. Ms. Rupert was aware of KID's whistleblower policy, but she did not avail herself to it. The parties settled the wage claim before the trial court summarily

dismissed her remaining claims. Ms. Rupert appeals solely the dismissal of her WLAD retaliation and wrongful discharge in violation of public policy claims.

ANALYSIS

The issue is whether the trial court erred in summarily dismissing Ms. Rupert's claims for WLAD retaliation and wrongful termination in violation of public policy. She contends she met her prima facie burden on both causes of action.

We review summary judgment orders de novo, performing the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The superior court properly grants summary judgment when no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007) (citing CR 56(c)).

In a summary judgment motion, the moving party's burden is to demonstrate summary judgment is proper. *Atherton Condo. Apartment-Owners Assoc. Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). We consider all the facts submitted and the reasonable inferences from them in the light most favorable to the nonmoving party. *Id.* We resolve any doubts about the existence of a genuine issue of material fact against the party moving for summary judgment. *Id.* "Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion." *Lilly v. Lynch*, 88 Wn. App. 306, 312, 945 P.2d 727 (1997).

First, regarding retaliation in Washington, an employer generally may terminate at-will employees with or without cause. *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340, 27 P.3d 1172 (2001). The WLAD, however, prohibits retaliation against a party

asserting a claim based on a perceived violation of his civil rights or participating in an investigation into alleged workplace discrimination. RCW 49.60.210(1).

To establish a prima facie retaliation case, a plaintiff must show (1) he or she engaged in statutorily protected activity, (2) his or her employer took adverse employment action against him or her, and (3) a causal link between the activity and the adverse action. *Short v. Battle Ground Sch. Dist.*, 169 Wn. App. 188, 205, 279 P.3d 902 (2012). All three must be established to survive summary judgment. *Id.* Because Ms. Rupert's employment was terminated, we focus on whether Ms. Rupert engaged in statutorily protected activity and if so, whether that activity was causally linked to her termination.

An employee engages in WLAD-protected activity when he or she opposes employment practices forbidden by antidiscrimination law or other practices he or she reasonably believed to be discriminatory. *Short*, 169 Wn. App. at 205. It is not necessary the complained about activity be actually unlawful because "'[a]n employee who opposes employment practices reasonably believed to be discriminatory is protected by the 'opposition clause' whether or not the practice is actually discriminatory.'" *Graves v. Dep't of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994) (internal quotation marks omitted) (quoting *Gifford v. Atchison, Topeka & Sante Fe Ry.*, 685 F.2d 1149, 1157 (9th Cir.1982)). Absent some reference to the plaintiff's protected status, a general complaint about an employer's unfair conduct does not rise to the level of protected activity under WLAD. *Alonso v. Qwest Commc'ns Co.*, 178 Wn. App. 734, 753-54, 315 P.3d 610 (2013) (citing Graves, 76 Wn. App. at 712)). "'To determine

whether an employee was engaged in protected opposition activity, the court must balance the setting in which the activity arose and the interests and motives of the employer and employee.'" *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 798, 120 P.3d 579 (2005) (quoting *Kahn v. Salemo*, 90 Wn. App. 110, 130, 951 P.2d 321 (1998)).

Ms. Rupert's complaints were not specific or formally made. Moreover, she initially did not claim the actions were discriminatory. Instead, she complained solely about workplace issues, not harassment or discrimination. She expressed professional concern to Mr. Huffman about being unable to meet with Mr. Freeman because it interfered with her work, even though Mr. Huffman told her Mr. Freeman "had been burned before" by female employees and was not comfortable being alone with them. CP at 238. Ms. Rupert deposed she did not recall the entirety of the conversation but recalled her displeasure that business was being hampered because of two managers not being able to communicate. Ms. Rupert admitted she did not report this conversation to anyone in management. Ms. Rupert claims Mr. Huffman tried to give her a hug as she left a meeting and she thought that was sexual harassment. But, again, this was unreported.

Ms. Rupert fails to show she engaged in statutorily protected activity or persuade us genuine material fact issues remain. She did not complain to any supervisor or to the human resource department of activity that was forbidden by WLAD. Her complaints were centered on financial issues related to the reserve fund and unprofessional treatment, not gender based discrimination issues. Ms. Rupert did not

make complaints under *Alonso* or *Estevez* fairly considered as opposition to employment practices forbidden by anti-discrimination law or other practices she reasonably believed to be discriminatory. *Short*, 169 Wn. App. at 205.

Considering her failure to establish the first factor in a retaliation claim, Ms. Rupert's claim necessarily fails. Nevertheless we note Ms. Rupert fails to show prima facie causation. Ms. Rupert must demonstrate retaliation for her oppositional conduct was a "substantial factor" motivating KID's adverse employment action. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 482, 205 P.3d 145 (2009). Close proximity in time between the adverse employment action and the protected activity, along with evidence of satisfactory work performance, can suggest an improper motive. *Campbell v. State*, 129 Wn. App. 10, 23, 118 P.3d 888 (2005). The record shows KID had become dissatisfied for some time with Ms. Rupert's performance, her department was over budget, and she took sick leave contrary to KID's sick leave policy. Ms. Rupert does not show retaliation was a substantial factor motivating KID's adverse employment action.

In sum, we conclude the court properly granted summary judgment in favor of KID on her WLAD retaliation claim.

Second, wrongful discharge in violation of public policy is an intentional tort, a narrow exception to the termination-at-will employment relationship. *Worley v. Providence Physician Servs. Co.*, 175 Wn. App. 566, 573, 307 P.3d 759 (2013). This narrow claim is recognized in four areas: "'(1) where the discharge was a result of refusing to commit an illegal act, (2) where the discharge resulted due to the employee

performing a public duty or obligation, (3) where the [discharge] resulted because the employee exercised a legal right or privilege, and (4) where the discharge was premised on employee "whistleblowing" activity.'" *Piel v. City of Federal Way*, 177 Wn.2d 604, 609-10, 306 P.3d 879 (2013) (quoting *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989) (citations omitted)). Ms. Rupert relies on the fourth area, whistleblowing.

To establish a claim for wrongful discharge in violation of public policy, the plaintiff must prove an existing clear public policy (clarity element), discouraging the conduct in which the employee engaged would jeopardize the public policy (jeopardy element), and the policy-linked conduct caused the dismissal (causation element). *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119 (2005). At issue here is the jeopardy and causation elements.

In order to establish the jeopardy element, the plaintiff must show other means of promoting the public policy are inadequate. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 530, 259 P.3d 244 (2011). Protecting the public is the policy that must be promoted, not protecting the employee's individual interests. *Id.* at 538. In other words, the test of whether a tort claim for wrongful termination in violation of public policy is viable is if other means are inadequate to promote the public policy.

Here, the LGWPA provides an administrative process for adjudicating whistleblower complaints. Local governments are required to establish policies and procedures for reporting improper governmental action and for protecting employees who provide information in good faith from retaliation. RCW 42.41.030-.040. The law provides for a hearing before an independent administrative law judge, who may grant

relief including reinstatement, back pay, injunctive relief, and attorney fees and costs. RCW 42.41.040(5)-(7). The administrative law judge may also impose a civil penalty of up to $3,000 personally upon the retaliator and recommend that the person found to have retaliated be suspended with or without pay or dismissed. RCW 42.41.040(8). Our Supreme Court has provided guidance in determining whether these whistleblower protections are adequate to safeguard the public policy of protecting whistleblowers.

The plaintiffs in *Korslund* claimed they were wrongfully terminated for reporting safety violations, mismanagement, and fraud at the Hanford Nuclear Reservation. The court held that because the federal Energy Reorganization Act (ERA) provided an administrative process for adjudicating whistleblower claims and provided for reinstatement, back pay, and other compensatory damages, an adequate remedy existed protecting the public interest. *Korslund*, 156 Wn.2d at 182-83.

In *Cudney*, the plaintiff claimed he was discharged after reporting his supervisor was drinking on the job and had driven a company vehicle while intoxicated. The court held the Washington Industrial Safety and Health Act (WISHA) provided a sufficient administrative remedy, and state laws, on driving while intoxicated, adequately protected the public. *Cudney*, 172 Wn.2d at 527.

But, in *Piel*, the court held the administrative remedies available through the Public Employment Relations Commission (PERC) under chapter 41.56 RCW, were inadequate, on their own, to fully vindicate public policy when a public employer discharges a public employee for asserting collective bargaining rights.

Unlike *Korslund* and *Cudney*, *Piel* involved a prior case holding PERC remedies failed to fully address the broader public interests involved because it protected personal contractual rights solely. *Piel*, 177 Wn.2d at 616-17 (quoting *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 809, 991 P.2d 1135 (2000)). And unlike *Korslund* and *Cudney*, *Piel* involved a statute declaring PERC remedies supplement others and must be liberally construed to accomplish their purpose. *Piel*, 177 Wn.2d at 617 (quoting RCW 41.56.905). In those circumstances, the *Piel* court recognized a private common law tort remedy as necessary to fully vindicate public policy. *Id.* The *Piel* decision analyzed a single issue, "[a]re the remedies available to a public employee under chapter 41.56 RCW adequate as a matter of law, such that the employee may not assert a tort claim for wrongful discharge in violation of public policy?" 177 Wn.2d at 609. The *Piel* court found the "limited statutory remedies under chapter 41.56 RCW do not foreclose more complete tort remedies for wrongful discharge." *Id.* at 616.

Importantly, the *Piel* court specifically held its decision "does not require retreat from [*Korslund* or *Cudney*]." 177 Wn.2d at 616. The *Piel* court noted the administrative schemes at issue in *Korslund* and *Cudney* were not previously found to be inadequate to protect public policy and, unlike PERC, did not include a provision stating the "provisions of this chapter are intended to be additional to other remedies and shall be liberally construed." *Id.* at 617 (quoting RCW 41.56.905). The *Piel* court recognized *Korslund* found the ERA to have "comprehensive remedies," including back pay, compensatory damages, and attorney and expert witness fees. *Id.* at 613 (citing *Korslund*, 156 Wn.2d at 182). *Piel* further recognized that *Cudney* found the remedies

available under the WISHA to be "more comprehensive than the ERA and . . . more than adequate." *Id.* (citing *Cudney*, 172 Wn.2d at 533). Accordingly, if a statutory scheme has language and remedies analogous to those at issue in *Korslund* or *Cudney*, the scheme is distinguished from *Piel* and has comprehensive remedies to protect the public interest.

Here, the LGWPA provides remedies of reinstatement, back pay, injunctive relief, costs, reasonable attorneys' fees, and civil penalties and does not contain a provision providing "provisions of this chapter are intended to be additional to other remedies and shall be liberally construed" as was the case in *Piel*. 177 Wn.2d at 617 (quoting RCW 41.56.905). Ms. Rupert argues the LGWPA protections are inadequate because she cannot get compensatory damages. But, "[t]he other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy." *Hubbard v. Spokane County*, 146 Wn.2d 699, 717, 50 P.3d 602 (2002). Moreover, "the tort of wrongful discharge is not designed to protect an employee's purely private interest . . . rather, the tort operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy." *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000). The question here, as it was in *Korslund*, is "whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy." *Korslund*, 156 Wn.2d at 183. In this case, we conclude they are.

This case is like *Worley v. Providence Physician Servs. Co.*, 175 Wn. App. 566, 574-76, 307 P.3d 759 (2013) that was based on a similar whistleblower provision. This court held the employee's wrongful discharge in violation of public policy claim failed because whistleblower protections available under the Washington health care act, RCW 43.70.075, adequately promoted workplace safety, ensured compliance with the accepted standard of care, and prevented fraudulent billing in the health care industry.

In sum, because the LGWPA provides adequate remedies of reinstatement, back pay, injunctive relief, costs, reasonable attorneys' fees, and civil penalties, and because the statutory scheme in this case is different than the statutory scheme in *Piel*, Ms. Rupert cannot establish the jeopardy element of a wrongful discharge in violation of public policy claim. Without this element her claim fails. Nevertheless, we not for reasons similar to her retaliation claim, she also cannot establish the causation element. Given all, the trial court properly dismissed this claim in summary judgment.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, C.J.

Korsmo, J.