No. 78421-3

J.M. JOHNSON, J. (dissenting)—We have been asked to answer a single, legal question: whether a "clear mandate of public policy" establishes an exception to this state's employment law for the plaintiff. The fact that four opinions have been issued—and that we have decided to reformulate the question to avoid the issue entirely—dictates the answer that no such "clear" mandate exists.

A Washington employer generally has a common law right to terminate an employee "for no cause, good cause or even cause morally wrong without fear of liability." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226, 685 P.2d 1081 (1984). This doctrine, the at-will employment rule, is well supported in this court's employment decisions.

Here, plaintiff's claimed tort is wrongful discharge against public policy. This is a narrow exception to the at-will rule and so must be applied in an appropriately narrow manner. Plaintiffs without remedy due to an

insufficiently clear articulation of public policy must turn to the legislature.

## Nature of the Case

This case involves a certified federal question from the United States District Court for the Western District of Washington, arising from a claim by a discharged at-will employee who took time off from work because of domestic abuse.

## Certified Question

> Has the State of Washington established a clear mandate of public policy prohibiting an employer from discharging an at-will employee because she experienced domestic violence and took leave from work to take actions to protect herself, her family, and to hold her accuser accountable?

## Analysis

In Washington, the tort of wrongful discharge in violation of public policy is determined by a four part test: (1) a clear public policy exists, (2) discouraging the conduct in which one engaged would jeopardize the public policy, (3) the conduct caused the discharge, and (4) defendant did not have an overriding justification for the discharge. *Roberts v. Dudley,* 140 Wn.2d 58, 64-65, 993 P.2d 901 (2000).

The certified question concerns the first element of the tort, also called

the "clarity" element. An employee has a cause of action in tort for wrongful discharge only if the discharge of the employee contravenes a clear mandate of public policy. *Thompson*, 102 Wn.2d at 232. Both parties agree that the only issue before the court is the question of law regarding the clarity element. Br. of Appellant at 6; Br. of Resp't at 6.

This court must conduct its analysis within the boundaries of the specific federal inquiry, deciding if a clear public policy *currently exists* and not whether a clear public policy *should exist*. *See Warnek v. ABB Combustion Eng'g Servs.*, 137 Wn.2d 450, 462, 972 P.2d 453 (1999) (noting the court should consider only the issue contained within the certified question); *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 66, 124 P.3d 283 (2005) (observing that a certified federal question is answered on narrow grounds and need not address all arguments).

Here, our inquiry is not whether Washington has endorsed a general public policy against domestic violence. Or at least it was not. The lead opinion reformulates the question as: "Has the State of Washington established a clear mandate of public policy of protecting domestic violence survivors and their families and holding their abusers accountable?" Lead

opinion at 2. This reformulation does no good to the parties and to the district court trying to resolve the dispute before it.

*Of course* Washington has a clear policy protecting domestic violence abuse victims and punishing their abusers. If that were the only question the district court had, it would not have certified the question here.

The question actually presented is much narrower: whether we have a clear policy forbidding employers from firing employees for missing work due to domestic violence. The lead opinion does not answer this question, and now the federal district court must answer. This does nothing positive for Ramona Danny, an actual victim of domestic abuse, who filed suit three years ago and must now reargue the question presented but left unanswered. Since I believe we should actually answer the question the district court asked, and should answer it in the negative, I respectfully dissent.

1. <u>The Clarity Element in Washington</u>

Clear public policy can be established through the "'letter or purpose of a constitutional, statutory, or regulatory provision or scheme.'" *Thompson*, 102 Wn.2d at 232 (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (1982)). A

court must proceed cautiously where no prior legislative or judicial expressions are on point. *See also Green v. Ralee Eng'g Co.,* 19 Cal. 4th 66, 80, 960 P.2d 1046, 78 Cal. Rptr. 2d 16 (1998) ("one of the primary reasons for requiring the public policy that gives rise to a wrongful termination action to have 'a basis in either constitutional or statutory provisions,' is to limit 'judicial policymaking' 'lest [courts] mistake their own predilections for public policy which deserves recognition at law.'") (internal quotation marks omitted) (quoting *Gantt v. Sentry Ins*., 1 Cal. 4th 1083, 1095, 4 Cal. Rptr. 2d 874, 824 P.2d 680 (1992)).

In Washington, we are required to strictly limit exceptions to clear employment law rules. This analysis is illustrated by the decision in *Roe v. Quality Transportation Services,* 67 Wn. App. 604, 609, 838 P.2d 128 (1992). In *Roe*, the court differentiated between West Virginia's looser substantial public policy standard and Washington's more stringent clarity element. The court held that the latter is a higher standard, requiring a rigorous expression of public policy before a claim of wrongful discharge can proceed. *See id.* ("In West Virginia . . . the employee's termination must contravene a 'substantial public policy'. *The standard is less rigorous than*

*the clear mandate of public policy our courts require.*" (emphasis added) (quoting *Twigg v. Hercules Corp.*, 185 W. Va. 155, 157, 406 S.E. 2d 52 (1992))).

In *Roe* the court could not find a clear expression of Washington public policy against drug testing of private employees, even though Ms. Roe cited a variety of tangentially related statutes to support her claim. *Roe*, 67 Wn. App. at 609. Despite the cited statutes' general intent to protect privacy, the court held that these related privacy protections were not sufficient to establish the exception:

> None of these statutes suggest a legislative intent to announce public policy in the area of drug testing. In fact, their existence suggests to us a legislative desire to articulate public policy in the area of privacy. The Legislature has enacted many statutes specifically regulating employer-employee relationships. *See* RCW Title 49, "Labor Regulations". *The fact that the Legislature has not enacted a statute regulating drug testing by private employers is significant. The legislative process of hearings and debates is uniquely suited to this task of defining and balancing the employee's privacy interests and employer's interests in drug testing*.

*Id.* at 609-10 (emphasis added).

The above language from *Roe* defines our role in the present case. Here, the legislature has enacted a similar web of protections in the domestic

violence arena, *infra*, yet none evinces a clear articulation of public policy that changes the legal relationship between employer and employees. In sum, the lead opinion's citation of tangentially related statutes, pronouncements, case law, and executive orders does not constitute clear public policy nor meet the rigorous clarity standard employed in *Roe*.

2. Washington At-Will Employment and the Public Policy Exception

There are only four categories of clear public policy preventing an employer from firing an employee: when the employee (1) refuses to commit an illegal act, (2) performs a public duty or obligation, (3) exercises a legal right or privilege, or (4) reports employer misconduct. *See Dicomes*, 113 Wn.2d at 618. Danny's claim here invokes the second and third exceptions because she accessed domestic violence services and helped police to prosecute her abuser. *See* order at 3-4. She also asserts there is a legislatively and judicially recognized clear public policy to combat domestic violence in Washington. Br. of Appellant at 14. Absent specific public policy language, a court cannot expand the limited holdings of prior public policy exception

cases to create a new exception in the present case.

Danny argues that accessing social services and moving her family were lifesaving acts, which this court has held to constitute an appropriate exception to the at-will employment rule. *See Gardner*, 128 Wn.2d at 913.[1] In *Gardner* this court held that firing an armored car driver who rescued a woman from a bank robbery contravened public policy. *Id.* at 933-35. The fact that the driver violated company regulations to save the life of the hostage was excused due to these clear public policy concerns. *Id.* at 943.

*Gardner* carved a narrow exception in the at-will employment doctrine by protecting lifesaving behavior "where a citizen's life is in *imminent* danger." *Id.* at 940 (emphasis added). Here, the nexus that connects Danny's potential danger from her abuser is not the same imminent danger exhibited by the hostage situation. This court has rejected the argument that broad statutory language[2] was sufficient to find an exception. *Id.* at 942-43. *Gardner* did not justify its conclusion

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[1] *Gardner*'s reasoning is particularly germane because it involved a certified question from the United States District Court for the Eastern District of Washington regarding a "clear public policy." *Id.* at 935.

[2] *See*, *e.g.,* RCW 7.69.010, RCW 9.01.055, RCW 9A.76.020, .030.

based on a broad public policy of respect for human life; the exception was satisfied only by a "limited class of good samaritans who render emergency care or transportation." *Id.* at 943-44. Under *Gardner*, one is protected from firing only if she assists "'a citizen held hostage . . . and/or who is in danger of serious physical injury and/or death.'" *Id.* (alteration in original) (quoting certified question). Danny's case does not present the court with the split-second, lifesaving behavior like that in *Gardner.* Danny's efforts to secure housing and access to domestic violence services are commendable, but they do not fit within the narrow, good-samaritan exception in *Gardner*.

Another case, *Roberts v. Dudley*, demonstrates that rigorous application of the public policy exception is required even in the analogous, heavily regulated area of gender equality. 140 Wn.2d at 58. *Roberts* held that Washington had articulated a clear public policy with regard to gender discrimination by employers. *Id.* at 77 ("This clearly articulated public policy is based on RCW 49.12.200 and RCW 49.60.010 and has been previously recognized in *Marquis v. City of Spokane*."). Danny's claimed public policy support is very

different from *Roberts'.* In *Roberts*, the court correctly relied upon a specific statute,[3] a constitutional amendment,[4] and a clear judicial precedent[5] to satisfy the clarity element of the gender discrimination exception. *Id.* In the current case, none of those critical elements are present.

Finally, this court correctly exercised judicial restraint in another wrongful discharge case. *Sedlacek v. Hillis*, 145 Wn.2d 379, 389, 36 P.3d 1014 (2001). In that decision, this court declined to find

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[3] There is no specific statutory authority in effect when the actions here took place that Danny can cite for an employment remedy in the domestic violence arena. Instead, Danny cites a litany of general domestic violence statutes, none of which articulates clear policy in the all-important employment context. Contrast this with *Roberts*, where RCW 49.12.200 is clearly titled "Women may pursue any calling open to men." *Roberts,* 140 Wn.2d at 67 (boldface omitted). This clear articulation of public policy against sexual discrimination in the employment context is unlike Ms. Danny's attempt to extrapolate unrelated domestic violence statutes, *infra.*

[4] In his concurring opinion, Chief Justice Alexander found that Washington's Equal Rights Amendment, Wash. Const. art. XXXI (amend. 61), also embodied a "powerful source of public policy." *Roberts*, 140 Wn.2d at 77 (Alexander, J., concurring). There is no similar constitutional provision in Washington that specifically protects victims of domestic violence from adverse employment actions. The victims rights amendment applies to the victims' rights against their assailants, not third party employers.

[5] *Robert*'s reliance on clearly applicable language from *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996) is different from Danny's reliance on sparsely analogous cases. *Marquis* clearly stood for "[t]his state's strong policy against sex discrimination." *Id.* at 109. The employer in *Roberts* refused to rehire the employee because she was pregnant, which resulted in direct gender discrimination.

protection for an able-bodied employee through relationship to a disabled co-worker. *Id.* The clarity element was not satisfied because Washington had not adopted a clearly articulated discrimination policy regarding this exception. *See id.* at 392. Moreover, the legislature had chosen not to amend the Washington Law Against Discrimination, chapter 49.60 RCW, to adopt the sought-after ADA (federal Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213) protection for associates. *Id.* at 391. The court correctly held that "the adoption of a previously unrecognized public policy under Washington law is better addressed to the Legislature." *Id.* at 390. Here, Danny is simply asking for the adoption of an exception that had not been recognized in Washington's statutes or case law.

In sum, heavily regulated areas, such as disability protection, should be strictly interpreted by courts when the legislature has not granted a specific right. Clearly, "we cannot conclude that a clear mandate of public policy exists merely because the plaintiff can point to a potential source of public policy that addresses the relevant issue." *Id.* at 389. Here, the legislature had not amended existing domestic violence laws to

provide the sought-after employment protection.

3. Washington Statutory Authority

The lead opinion does not find one statute that expressly articulates a clear public policy exception. Rather, it assembles citations to many statutes related to domestic violence, none of which articulates the claimed exception. Thus, the lead opinion can argue only by implication that statutory protection exists for victims of domestic violence in the employment context. *See*, *e.g.*, lead opinion at 12.

The lead opinion cites RCW 70.123.010, which funds public housing assistance for victims of domestic abuse. Lead opinion at 11-12. This statute supports protection of domestic violence victims generally and specifically within the public housing[6] context. It does not, however, promote a clear public policy or answer the original certified question within the employment context.

Danny cites RCW 26.50.030, the Domestic Violence Prevention

[6] Danny also cites RCW 59.18.570 and 59.18.580 to support her position. The statutes, which are part of the Washington Residential Landlord-Tenant Act, chapter 59.18 RCW, prohibit housing discrimination against victims of domestic abuse. They also allow victims to terminate leases early, without penalty, if necessary for safety reasons. However, there is no mention of the employer/employee relationship within the statutes.

Act, which created the civil protective order for victims. The statute addresses domestic violence as a societal problem and is geared toward courts and professionals who frequently deal with victims of abuse. *Id.* (Laws of 1992, ch. 111, § 1). The statute does not provide protection for victims of abuse in the employment context.

Danny also cites RCW 10.99.010, which improves the criminal justice system's response to domestic violence. This statute deals with law enforcement personnel and the consistent enforcement of criminal penalties against all offenders. *Id.* The statute does not address domestic abuse in the employment context. Danny further relies on RCW 43.70.610, which notes that domestic violence is the leading cause of injury among women and is linked to numerous health problems.[7] *Id.* Neither of these statutes deals with employers

[7] Danny argues that employment protection should be extrapolated from the long list of statutes where the legislature has conferred certain protections and benefits to victims of domestic abuse. These include: RCW 40.24.030 (address confidentiality program); RCW 4.24.130(5) (name of domestic violence victim can be sealed); RCW 26.09.191, RCW 26.09.050(1), RCW 26.10.040(1)(d), RCW 26.26.130(9), RCW 26.50.060(1)(b) (protects children from contact with violent parents); RCW 10.99.090 (officer-involved domestic violence); and Laws of 2006, ch. 259, §§ 1, 2(8), 5(1)(c) (protecting communication between victims and their advocates). Detrimental to Danny's assertion, none of the preceding statutes mention the employee or employment relationship as it pertains to a victim of domestic abuse.

or employee discharge.

RCW 50.20.050 is tangentially related to employment because it allows victims of domestic abuse to retain unemployment benefits if they leave work to protect themselves or families. However, the statute is concerned with benefits *after leaving employment* (with good cause), rather than the right of an employer to terminate employment. RCW 50.20.050. The legislature decided that retention of unemployment benefits is appropriate for an abuse victim who leaves work to protect his or her family. *Id.* This is the exclusive remedy provided by the legislature in the employment context.

Finally, the legislature specifically considered a bill that would have given domestic abuse victims protection in the employment context, but it failed to pass before the events here took place. *See* S.B. 5329, 57th Leg., Reg. Sess. (Wash. 2001-02); Engrossed Substitute S.B. 5329, 57th Leg., Reg. Sess. (Wash. 2001-02). Justice Owens correctly states that we cannot speculate on reasons for the nonpassage of a particular bill. Lead opinion at 14 n.3. While the bill is not dispositive, it is helpful to our analysis. This bill would have

specifically amended chapter 7.68 RCW *to provide mandated employment leave for victims of domestic abuse*. Br. of Resp't at 14. Further, the bill would have given both employers and employees multiple safeguards, including administrative due process rights. *See* S.B. 5329, *supra*. Both the House[8] and Senate[9] Bill Reports of S.B. 5329 note that currently *there was no law on the books* that provided employment leave to victims of crime, domestic or otherwise. In light of employee/employer interests at stake, we cannot expand the wrongful discharge tort through judicial decree.[10]

The legislature has acted to expressly protect certain rights of domestic violence victims. *See* lead opinion at 9 n.2. However, in light of the

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[8] "Neither federal law nor Washington Law specifically require an employer to allow a crime victim to take leave from work to obtain medical, legal, or other services." House Comm. on Commerce & Labor, H.B. Rep. on Engrossed Substitute S.B. 5329 (Feb. 20, 2002).

[9] "Neither the crime victim compensation law nor the state's labor standards related to leave, provide for a grant of leave from work for crime victims." Senate Comm. on Commerce, Labor & Financial Institutions, S.B. Rep. on Engrossed Substitute S.B. 5329 (Feb. 19, 2002).

[10] Surely, this certified question is not the appropriate arena for broadening the exception. The lead opinion tacitly acknowledged the wide-ranging implication of its own argument when it limited its own holding. Lead opinion at 22. We must take seriously *Gardner*'s admonition to narrowly construe the exception and thereby "guard against frivolous lawsuits." 128 Wn.2d at 936.

extensive protections already on the books, the absence of this exception to the at-will employment rule supports the conclusion there was not a "clear mandate of public policy."

4. Other Interpretations of Public Policy

Finally, we briefly consider Executive Order 96-05 (Domestic Violence in the Workplace) (Oct. 1, 1996). An amicus brief (filed by the Washington State Coalition Against Domestic Violence) argues that Executive Order 96-05 requires state agencies to make "every reasonable effort . . . to adjust work schedules and/or grant accrued or unpaid leave to allow employees who are victim[s] of domestic violence" to obtain access to the appropriate services. Exec. Order 96-05. Executive Order 96-05 may not be treated as a source of clear public policy for those not employed by the State. Such general policy must be found in the constitution, statutes and regulatory schemes, or judicial holdings. *See Thompson,* 102 Wn.2d at 232. The executive order would not have been required, of course, if Washington policy already established such a rule for all employees as argued here. The order applies only to state employment and further evidenced executive knowledge of an issue generally resolvable through legislation (the governor

may request legislation in Washington, but did not).

## Conclusion

We do not have a clear mandate of public policy. We should answer the certified question in the negative and return this case to the district court for further proceedings consistent with this decision.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Richard B. Sanders