

74200-1

74200-1 RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 02, 2015, 1:12 pm
BY RONALD R. CARPENTER
CLERK

E

74200-1
No. 91896-1

RECEIVED BY E-MAIL

SUPREME COURT
OF THE STATE OF WASHINGTON

GEORGE E. ENGSTROM and JOHN E. STOCKWELL,

Plaintiffs/Appellants,

v.

MICROSOFT CORPORATION,

Defendant/Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Sean O'Donnell)

Case No. 15-2-04785-0

REPLY BRIEF OF APPELLANTS

John P. Sheridan, WSBA #21473
Mark W. Rose, WSBA #41916
The Sheridan Law Firm, P.S.
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
(206) 381-5949

Attorneys for Plaintiffs/Appellants

amm
10-6-15



ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. REPLY RE STATEMENT OF THE CASE..... 2

III. REPLY ARGUMENT 4

 A. *Rose, Becker, and Rickman* Require that the Trial Court’s
 Dismissal Be Vacated and the Case Remanded..... 4

 B. The Burden-Shifting Analysis Should Require the
 Employer to Prove that the Employee’s Action In
 Support of the Policy Was Not A Substantial Factor In
 the Decision to Terminate..... 8

VI. CONCLUSION..... 12

TABLE OF AUTHORITIES

Washington State Cases

<i>Becker v. Community Health Sys., Inc.</i> , No. 90946-6 (Sep. 17, 2015).....	<i>passim</i>
<i>Dicomes v. State</i> , 113 Wn.2d 612, 782 P.2d 1002 (1989).....	7
<i>Gardner v. Loomis Armored Inc.</i> , 128 Wn.2d 931, 913 P.2d 377 (1996).....	1, 7, 8, 11
<i>Rickman v. Premera Blue Cross</i> , No. 91040-5 (Sept. 17, 2015).....	<i>passim</i>
<i>Rose v. Anderson Hay & Grain Co.</i> , No. 90975-0 (Sep. 17, 2015).....	<i>passim</i>
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	1, 8, 9
<i>Wilmot v. Kaiser Aluminum & Chem. Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	1, 2, 9, 10

Federal and Other State Cases

<i>Davis v. D.C.</i> , 503 F. Supp. 2d 104 (D.D.C. 2007).....	10
<i>Wise v. Pennsylvania Dep't of Transp.</i> , No. CIV.A. 07-1701, 2010 WL 3809858 (W.D. Pa. Sept. 23, 2010).....	10

Statutes

15 U.S.C. § 78m(b)(2)(A).....	5, 6
15 U.S.C. § 78m(b)(2)(B)(i)-(iii).....	2
18 U.S.C. § 1514A(d).....	6
49 U.S.C. § 31105.....	6

49 U.S.C. § 31105(f).....	6
Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010	5, 7
Foreign Corrupt Practices Act	2
Foreign Corrupt Practices Act of 1977	4, 6
RCW 42.40.020	10
RCW 42.40.050	2, 10, 11
Sarbanes–Oxley Act of 2002	5, 7
Surface Transportation Assistance Act of 1982.....	6
Other Authorities	
Kim, Ji Hye. <i>Korea’s New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature’s Intent to Protect Prostitutes from Abuse</i> , 16 Pac. Rim L. & Pol’y J. 493 (2007).....	2
Rules	
CR 12(b)(6).....	8

I. INTRODUCTION

The recent decisions by this Court in *Rose v. Anderson Hay & Grain Co.*, No. 90975-0 (Sep. 17, 2015), *Becker v. Community Health Sys., Inc.*, No. 90946-6 (Sep. 17, 2015), and *Rickman v. Premera Blue Cross*, No. 91040-5 (Sept. 17, 2015), lead to only one conclusion—Engstrom and Stockwell have stated valid wrongful discharge claims. Thus, the decision of the trial court should be reversed and their case remanded.

Yet, there is an opportunity here, which should be considered. Since this Court has clarified the law of wrongful discharge as it pertains to “jeopardy” by explaining that, “the ‘adequacy of alternative remedies’ analysis must be discarded,” while reembracing “the analytical framework established in *Thompson, Wilmot, and Gardner*,” the appellants respectfully invite the Court to go a step further, and bring Washington’s common law of wrongful discharge into line with modern whistleblower statutes, which recognize the difficulties in proving these cases, and which shift the burden to the defendant to prove by a preponderance that an improper motive was not a substantial factor in the termination. *See RCW*

42.40.050; compare *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 76, 821 P.2d 18 (1991).¹

II. REPLY RE STATEMENT OF THE CASE

The appellants in this case jointly reported to H.R. that John Doe was “expensing hostess bars” and potentially prostitution, material facts they allege Doe failed to disclose in his expense reports. CP 5-6. If prostitution services were being invoiced as Engstrom and Stockwell suggested to Microsoft’s H.R., the description of expenses as simply “entertainment” raised concern about more than just the “level of detail in expense reports.” See Resp.’s Brief (“Br.”), at 10. Shareholders, company auditors, and regulators would all want to know if Microsoft used corporate funds to purchase illegal services.² Microsoft has “internal controls” to comply with the Foreign Corrupt Practices Act (“FCPA”), which required Engstrom and Stockwell to report such concerns and suspected violations of the law related to Doe’s expense reports. See CP 84, citing 15 U.S.C. § 78m(b)(2)(B)(i)-(iii).

As support for their concerns, Stockwell sent H.R. a spreadsheet showing over \$22,000 that Doe billed as “entertainment” expenses since

¹ Appellants recognize that further briefing on this issue may be appropriate.

² For a discussion on the illegality of prostitution in “hostess bars” and elsewhere in Korea, see Kim, Ji Hye. *Korea’s New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature’s Intent to Protect Prostitutes from Abuse*, 16 Pac. Rim L. & Pol’y J. 493, 494, 497 (2007).

being assigned to Stockwell's team in Korea. CP 116, ¶ 2.26. The H.R. Manager later called Stockwell at home and asked him to "drop" the complaint. *Id.* Stockwell refused, absent written instructions to that effect from Engstrom's manager, Corporate Vice President Jorgenson. CP 117, ¶ 2.31. The H.R. Manager replied, "Oh, wow" and dropped the request. *Id.*

Stockwell was subsequently told that Corporate Vice President Harry Shum stepped in to have the charges against Doe dismissed. *Id.*, ¶ 2.32. Microsoft raised Doe's performance rating without Stockwell or Engstrom's involvement, a significant departure from company practice, permitting Doe to transfer out of the division. CP 117, ¶ 2.32. After they reported on Doe, Plaintiffs began to receive negative ratings that were unwarranted in light of their success in developing Microsoft's "universal platform" (Bing as a Platform) and other achievements during the review period. CP 117-18, ¶ 2.33-.34. They were unassigned from the potent Bing as a Platform initiative, which the pair had developed, and were given a significantly smaller team than before, down from approximately 100 to roughly five. CP 118, ¶ 2.36.

Engstrom and Stockwell allege that after their managers decided to retaliate against them, they did so patiently, canceling projects right before review periods and then giving bad reviews based on such discretionary acts, as precursors used to justify the later terminations of the pair. CP

106. Microsoft states that Plaintiffs were terminated “along with the termination of their entire team as part of a reduction in force.” Resp.’s Brief, 1. It fails to acknowledge, however, that when Engstrom started in Microsoft Advertising, the team included just one person. CP 89. Engstrom grew that team to nearly ninety (90) employees, but by July 2013, Microsoft had whittled away almost all of the 90-person team back to just four (4) members: Engstrom, Stockwell, and Stockwell’s two remaining subordinates. *Id.*; CP 121, ¶ 2.49. Only those four were notified of termination as part of a reduction in force (“RIF”). *See id.*, ¶ 2.50. One of the four was given a paid internal job search benefit not offered to Engstrom or Stockwell; and he successfully found continued employment at Microsoft. CP 89. The dozens of others who worked on Engstrom and Stockwell’s team were not subject to the RIF, as they were moved off the team *en masse* shortly before the RIF. *Id.*

III. REPLY ARGUMENT

A. ***Rose, Becker, and Rickman* Require that the Trial Court’s Dismissal Be Vacated and the Case Remanded.**

The appellants bring claims of wrongful discharge based on the policies contained in the accounting provisions of the Foreign Corrupt Practices Act of 1977 (“FCPA”), which requires that all records of publicly-traded companies, including employee expense reports, “fairly”

and “accurately” reflect the use of corporate funds to protect investors and the integrity of the capital market. *See* 15 U.S.C. § 78m(b)(2)(A); *see also* CP 92-95 (Pls.’ Opp’n to Mot. to Dismiss).

The trial court found that the Plaintiffs’ wrongful discharge claims failed under the “jeopardy” element, ruling that adequate alternative means for promoting the public policy exist, because the “FCPA provides for comprehensive enforcement coupled with stiff penalties and robust remedies” available to whistleblowers under the Sarbanes–Oxley Act of 2002 (“SOX”) and the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010. *See* CP 218-19, ¶ 5. *See also* RP 29-30 (stating that Plaintiffs’ allegations “would not warrant dismissal” absent the trial court’s finding that Engstrom and Stockwell failed to meet jeopardy prong).

The trial court’s reasoning has been supplanted by this Court’s decisions in *Rose*, *Becker*, and *Rickman*. Today, to prove wrongful discharge when the plaintiff relies on a statute for the underlying policy, one should first “consider whether [the] statutory remedy is intended to be exclusive.” *Rose* Slip. Op. at 18. Under *Rose*, if the legislature or Congress intended a particular policy to be vindicated only through exclusive remedies, “they are in the best position to determine when such remedies should be restricted in favor of employers.” *Rose* Slip. Op. at 19.

This Court noted that “[c]ommon law remedies should be preempted by statutory law only where the legislature either implicitly or explicitly expresses an intent to do so.” *Rose Slip. Op.* at 17.

In *Rose*, the case was brought pursuant to policies set forth in the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105. The “STAA contains a nonpreemption clause, explicitly providing that ‘[n]othing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.’ *Rose Slip. Op.* at 3, *quoting* 49 U.S.C. § 31105(f). Thus, this Court found that the policies underlying the STAA could support a wrongful discharge claim.

Here, as in *Thompson*, Engstrom and Stockwell brought their claims of wrongful discharge pursuant to the policies set forth in the Foreign Corrupt Practices Act of 1977 (“FCPA”). *See* 15 U.S.C. § 78m(b)(2)(A); *see also* CP 92-95 (Pls.’ Opp’n to Mot. to Dismiss). The FCPA does not mention exclusivity. To the contrary, the enforcement mechanism seized on by the trial court, which was characterized as “robust,” permits other claims. Congress specified its intent that remedies already available under state law be “retained” by employees, and that SOX not “diminish” those rights in any way. 18 U.S.C. § 1514A(d);

Becker at 9 (SOX and Dodd-Frank supplement rather than preclude state or federal remedies). Thus, Engstrom and Stockwell have properly alleged and relied on a statutory policy that is not exclusive.

Next, under *Rose*, *Becker*, and *Rickman*, one should look to the behavior leading to the termination to determine whether it falls into one of the four *Gardner* categories. In *Rose*, this Court outlined a method for proving wrongful discharge when employer retaliation focused on four situations:

- (1) where employees are fired for refusing to commit an illegal act;
- (2) where employees are fired for performing a public duty or obligation, such as serving jury duty;
- (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and
- (4) where employees are fired in retaliation for reporting employer misconduct, *i.e.*, whistleblowing.

Rose Slip. Op. at 6-7, citing *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996) (citing *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989)).

In *Rose*, this Court found:

The first scenario applies squarely to the case before us: Anderson Hay allegedly terminated Rose because he refused to falsify his drive log and drive in excess of the federally mandated limit. Rose has met his burden in establishing his termination for refusing to break the law contravenes a legislatively recognized public policy'. The

burden now shifts to Anderson to establish that Rose's dismissal was for other reasons.”

Rose Slip. Op. at 21. No further analysis is required. “Because the STAA does not prevent Rose from recovery under the tort and Rose can make out a prima facie case, his wrongful discharge against public policy claim survives summary judgment.” *Rose Slip. Op.* at 23.

Here, Engstrom and Stockwell refused to approve a subordinate’s expense reports, because they were concerned that the reports masked payments for prostitution. *See, e.g.*, CP 6, ¶ 2.27. They reported their concerns up their chain of command, refused to drop their complaint when requested by H.R., and then their career paths plummeted—culminating in their terminations. *See id.*, ¶¶ 2.24, 2.26. Their claims fit under *Gardner* scenarios one and four, since they were opposing what they reasonably believed to be an illegal act and for whistleblowing. No further analysis is needed. They make out a prima facie case, and their wrongful discharge against public policy claims survive Microsoft’s CR 12(b)(6) motion to dismiss.

B. The Burden-Shifting Analysis Should Require the Employer to Prove that the Employee’s Action In Support of the Policy Was Not A Substantial Factor In the Decision to Terminate.

Rose, Becker, and Rickman reembraced *Thompson*:

[T]o state a cause of action [for wrongful discharge], the employee must plead and prove that a stated public policy,

either legislatively or judicially recognized, may have been contravened. . . . However, once the employee has demonstrated that his discharge may have been motivated by reasons that contravene a clear mandate of public policy, the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee. Thus, employee job security is protected against employer actions that contravene a clear public policy.

Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232-33, 685 P.2d 1081 (1984); *Rose Slip. Op.* at 5-6; *Becker Slip. Op.* at 6; *Rickman Slip. Op.* at 14.

In 1991, this Court adopted the substantial factor test as the basis for proving wrongful discharge. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 73, 821 P.2d 18 (1991) (substantial factor test is appropriate test for proving wrongful discharge). *Rose* and *Becker* do not discuss “substantial factor.” *Rickman*, in discussing the trial court’s conflation of causation with overriding justification, quotes *Wilmot*:

We recognize that causation in a wrongful discharge claim is not an all or nothing proposition. The employee ‘need not attempt to prove the employer’s sole motivation was retaliation.’ *Wilmot*, 118 Wn.2d at 70. Instead, the employee must produce evidence that the actions in furtherance of public policy were ‘a cause of the firing, and [the employee] may do so by circumstantial evidence.’ *Id.* This test asks whether the employee’s conduct in furthering a public policy was a ‘substantial’ factor motivating the employer to discharge the employee. *Id.* at 71.

Rickman Slip. Op. at 14. But *Wilmot* is an old case that fails to address our modern understanding of the difficulties inherent in proving whistleblower retaliation.

Modern statutes place the burden on the employer, which is where the burden belongs.³ For example, under the Washington State whistleblower statute, which protects state employees, burden-shifting is utilized. The legislative intent is to provide a framework for state employee whistleblowers, which is realistic. The legislative intent should be integrated into Washington's common law wrongful discharge jurisprudence. The statute sets out the elements of the claim:

(1)(a) Any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW.

....

(2) The agency presumed to have taken retaliatory action under subsection (1) of this section may rebut that presumption by proving by a preponderance of the evidence that there have been a series of documented personnel problems or a single, egregious event, or that the agency action or actions were justified by reasons unrelated

³ See, for example, RCW 42.40.050; *Wise v. Pennsylvania Dep't of Transp.*, No. CIV.A. 07-1701, 2010 WL 3809858, at *16 (W.D. Pa. Sept. 23, 2010) (once the employee presents prima facie case, "burden shifts to the employer to prove 'by a preponderance of the evidence that the action by the employer occurred for separate and legitimate reasons, which [were] not merely pretextual'"); *Davis v. D.C.*, 503 F. Supp. 2d 104, 128 (D.D.C. 2007) (after employee presents prima facie case, burden "shifts to the defendant to show by clear and convincing evidence that the plaintiff's dismissal would have occurred for 'legitimate, independent reasons' even if he had not engaged in [protected] activities").

to the employee's status as a whistleblower and that improper motive was not a substantial factor.

RCW 42.40.050. The Washington legislature has decreed the use of a shifting burden analysis that requires the agency to prove by a preponderance of the evidence that there are other reasons for the adverse action and that improper motive was not a substantial factor in the adverse action. The Court should adopt the Washington State legislature's approach, at least for the *Rose/Becker*-types of cases.⁴ A wrongful discharge jury instruction under this framework would be:

To establish his claim of wrongful discharge, the employee must prove by a preponderance of the evidence that:

1. The employee engaged in an act [one of the four *Gardner* scenarios] which may implicate the following public policy: _____ [either legislatively or judicially recognized]; and
2. The employee was terminated.

If the employee fails to prove either of these elements, you must find for the employer. If the employee proves both of these elements, you must find for the employee on the employee's claim of wrongful discharge unless the employer proves by a preponderance of the evidence that:

⁴ *Rickman*-type cases are not addressed in this brief, because that fact pattern is beyond the facts of this case.

1. That the termination was justified by reasons unrelated to the employee's act; and
2. That improper motive was not a substantial factor in the decision to terminate the employee.

VI. CONCLUSION

The decision of the trial court was error and should be reversed. Engstrom and Stockwell's common law claims for wrongful discharge in violation of public policy should be reinstated and this matter remanded for trial. The Court should recreate the shifting burden analysis to bring it in line with Washington whistleblower law.

RESPECTFULLY SUBMITTED this 2nd day of October, 2015.

THE SHERIDAN LAW FIRM, P.S.

By: s/ John P. Sheridan
John P. Sheridan, WSBA # 21473
Mark Rose, WSBA # 41916
Attorneys for Appellants

DECLARATION OF SERVICE

Jodie Branaman states and declares as follows:

1. I am over the age of 18. I am competent to testify in this matter, and am a legal assistant for the Appellants' attorney of record. I make this declaration based on my personal knowledge and belief.

2. On October 2, 2015, I emailed and had copies hand delivered to the following attorneys:

Robert J. Maguire
Email: robmaguire@dwt.com
Taylor S. Ball
Email: taylorball@dwt.com
John A. Goldmark
Email: johngoldmark@dwt.com
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
Phone: (206) 757-8094

a copy of the REPLY BRIEF OF APPELLANTS.

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

DATED this 2nd day of October, 2015, at Seattle, King County, Washington.

s/Jodie Branaman
Jodie Branaman, Legal Assistant