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SUPREME COURT
STATE OF WASHINGTON

No. 80735-3

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES,
CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND
RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID
FAUBION, and CHARLES CABLE,

Plaintiffs-Respondents

v.

FLUOR FEDERAL SERVICES, INC.,
A Washington corporation,

Defendant-Appellant

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Carrie L. Runge)

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Amici WELA and WSTLA ask this Court to repudiate or dilute this Court's decisions in Korslund v. DynCorp Tri-Cities Services, Inc., 156 Wn.2d 168, 125 P.3d 119 (2005) and Hubbard v. Spokane County, 146 Wn.2d 699, 50 P.3d 602 (2002), which set forth the rule that the jeopardy-adequacy element of the public policy tort is decided as a matter of law when alternative means to protect public policy are provided by a statutory or legal framework.

The public policy tort is an exception to the long-established rule that employment in Washington is at will. The tort's purpose is not remedial. Rather, the purpose of the public policy tort is to ensure that public policy is protected. Since adopting the tort in the 1984 decision of Thompson v. St. Regis Paper Co., the Court has endeavored to define its contours. It was not until 1996 that this Court first adopted the four-part test (including the jeopardy element) at issue in this case. And, by way of cases like Hubbard and Korslund, this Court has carefully framed the jeopardy requirement -- which goes to heart of whether a public policy tort is necessary to promote public policy -- so as to further the public policy tort's purpose. By requiring that the adequacy of statutory or other legal alternative means be decided facially and as a matter of law, as set forth in

Hubbard and Korslund, the Court's methodology correctly focuses on the public policy and what steps, if any, are necessary to protect it.

The Court should reject amici's efforts to make the jeopardy element less certain and to turn the public policy tort into a remedial tort. Contrary to WELA's assertion, Korslund's approach does not eviscerate the public policy tort action; it stays true to the reason that the tort was recognized in this state -- to protect public policy. See Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 231, 685 P.2d 1081 (1984) ("The policy underlying the exception is that the common law doctrine cannot be used to shield an employer's action which otherwise frustrates a clear manifestation of public policy"); Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 941-42, 913 P.2d 377 (1996) ("The jeopardy element guarantees that an employer's personnel management decisions will not be challenged unless a public policy is genuinely threatened"). Simply put, where adequate alternative means to protect society's interests already exist, there is no need for the court to allow a public policy tort for wrongful discharge.

Alternative means, in this case the administrative remedies provided by the ERA, are more than adequate to preserve the public policy at issue here -- the health and safety of workers and the public in the operation of the nuclear industry. Indeed, Congress specifically designed

the whistleblower protections in the ERA for the purpose of furthering that very public policy. The adequacy of the ERA's administrative remedies as an alternative to the public policy tort to protect public policy is the precise legal issue decided by this Court in Korslund. 156 Wn.2d at 182. This case falls squarely within the four corners of Korslund: a claim of retaliation for raising safety concerns, and the same legal remedies provided by Congress under the ERA to protect workers and public safety. Amici offer no good reason to depart from this Court's precedent -- and make no effort to show why this Court should disregard long established principles of stare decisis, which would be required to repudiate or dilute so recent a common law precedent. Nor is there a good basis for their proposal that the legal standard for the adequacy-jeopardy assessment fluctuate based on the procedural status of a case. In short, Korslund was correctly decided. Korslund should now be applied to vacate the judgments entered in Plaintiffs' favor and mandates the dismissal of their actions with prejudice.

II. ARGUMENT

A. The adequacy of alternative means under the jeopardy element is generally determined as a matter of law based on a facial assessment of the alternative means.

The general rule is that adequacy of an alternative means of promoting the public policy is determined as a matter of law. See Henry

H. Perritt, Employee Dismissal Law and Practice, § 7.04 at 7-24 (5th ed. 2007) (“The clarity and jeopardy elements primarily involve questions of law and policy”); Henry H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?, 58 U. Cin. L. Rev. 397, 401 (1989) (“The judge ought to decide the clarity and jeopardy elements, both of which involve relatively pure law and policy questions in the abstract”).¹

In keeping with this general principle, this Court in Korslund stated that “the question whether adequate alternative means for promoting the public policy exist may present a question of law.” 156 Wn.2d at 182 (citing Hubbard v. Spokane County, 146 Wn.2d 699, 716-17, 50 P.3d 602 (2002)). As this Court went on to explain, adequacy of alternative means is decided as a matter of law where existing laws (such as statutes and administrative regulations) provide the alternative means of promoting the public policy. See id. The courts look at the legal framework of the alternative means and assess whether it protects the public policy at issue such that no public policy tort needs to be recognized. That is what the Court did in Korslund in assessing the ERA.

¹ This Court has held that the other part of the jeopardy element -- whether the public policy at issue was violated -- is a question of fact. See Hubbard v. Spokane County, 146 Wn.2d 699, 716, 50 P.3d 602 (2002); Ellis v. City of Seattle, 142 Wn.2d 450, 463, 13 P.3d 1065 (2000).

The Court looked to the statutory characteristics of the administrative process for adjudication of whistleblower complaints under the ERA and no further.

This Court's approach to adequacy in Korslund built on its prior decision in Hubbard. There, the question was whether administrative appeals from a zoning decision provided an adequate alternative means to safeguard the public policy embodied in the zoning code. 146 Wn.2d at 716. The Court looked at the statutory framework of the administrative appeal system -- facially. Id. at 713 ("in determining whether the public policy has been contravened or jeopardized, a court must look to the 'letter or purpose of a statute'"). After assessing the administrative appeal statute, and the statute alone, this Court concluded that the short timeframe available for such appeals might leave to chance whether the public policy was enforced. Id. at 717. As such, the Court decided as a matter of law, and without resort to any facts extrinsic to the statutory structure, that the alternative means was insufficient to adequately protect the public policy found in the zoning code. Id.²

² Notably, the dissent in Hubbard agreed that the statutory framework for administrative appeals should be examined as a matter of law, but disagreed with the majority regarding whether the short time to appeal made the administrative

Hubbard also explicitly confirmed that the adequacy issue is not reviewed as applied to any particular plaintiff: “The other means of promoting the public policy need not be available to a particular individual so long as other means are adequate to safeguard the public policy.” Id. Thus, even before Korslund, this Court in Hubbard made clear that no “as applied” factual analysis is allowed.³ Rather, the focus of the tort is upon preservation of the public policy -- not on the individual employee. Because the focus is on the public policy and what will protect the public policy, no individualized analysis focusing on the plaintiff is required. Instead, where the public policy is protected by existing laws, statute or other sources of law, Washington courts examine the adequacy of those

appeal inadequate to protect the public policy, noting that the majority’s assessment conflicted with the legislature’s assessment that the time for appeal was sufficient to address the policy concerns at issue. See 146 Wn.2d at 729-30 (Madsen, J., dissenting, joined by Sanders, J.).

³ Because the Court examines the alternative means in this case as a matter of law, WSTLA’s argument (echoing plaintiffs) that there were no facts entered into evidence at trial, concerning the adequacy of the ERA as applied to the plaintiffs or any other individual, is irrelevant. WSTLA Br. at 8. That said, contrary to WSTLA and plaintiffs’ allegations, plaintiffs were able to place evidence in the record concerning the efficacy of the ERA remedies. In fact, during the trial plaintiffs successfully sought to make much of the first ERA administrative process (wherein the original pipefitters successfully obtained reinstatement to their positions) to demonstrate that Fluor was a serial retaliator. See Ex. 21 (redacted 1997 OSHA investigative report); CP 2113-18 (unredacted 1997 OSHA investigative report); Fluor’s Op. Br. at 41-56 (discussing the impact of this evidence). Then, in opposition to Fluor’s CR 60 Motion, plaintiffs reversed course and argued that the same process was inadequate -- even though the original pipefitters group was (again) winning in the administrative forum when they pulled the plug to pursue remedies in state court under the public policy tort. See Response to CR 60 Motion at 10 (CP 9685).

alternative means of protection facially and as a matter of law.

B. Adequacy of alternative means under the jeopardy element is examined factually in limited circumstances when existing law, statutes or administrative regulations do not provide the alternative means.

Fluor agrees with WSTLA that not every assessment of the adequacy of alternative means will be made as a matter of law -- but for reasons different from those set forth in WSTLA's brief. The only circumstance when facts are at issue in the jeopardy-adequacy assessment is when the alternative means to promote public policy do not involve existing law, statutes or administrative regulations. See Korslund, 156 Wn.2d at 182. This exception is narrow, arises in only a few circumstances, and does not apply in this case.

The most notable example of when the jeopardy-adequacy assessment was not conducted as a matter of law is found in Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 913 P.2d 377 (1996). There, an armored car driver was fired for leaving his truck to stop a man holding a woman at knife-point. The public policy at issue was to save persons from life threatening situations. With respect to the jeopardy element, the question was whether the other means to promote the public policy -- summoning help via radio, using the car's public address system and sirens, or other sources of help -- provided an adequate alternative means

to safeguard the public policy of saving lives. 128 Wn.2d at 935, 946, 959. No statutory framework set forth either the public policy or the alternative means. Thus, (unlike in Korslund and in Hubbard) the adequacy issues in Gardner were not concerned with statutory remedies that are available to protect the public policy. As a result, the decision regarding whether the alternative means were adequate was one of fact -- not law.⁴

Public policy tort cases like Gardner⁵ are few and far between. See

⁴ Gardner came to the Court as a certified question. As such, there was no opportunity for the Court to expressly consider the issue of whether the judge or jury would normally assess the jeopardy-adequacy element where the alternative means at issue did not arise from statute or other law. Other courts have addressed the issue and hold that the jeopardy-adequacy assessment should be decided by the judge not a jury. See, e.g., Collins v. Rizkana, 652 N.E.2d 653, 658 (Oh. 1995) (“The clarity and jeopardy elements, ‘both of which involve relatively pure law and policy questions,’ are questions of law to be determined by the court. ‘The jury decides factual issues relating to causation and overriding justification’”) (quoting Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie? 58 U. Cin. L. Rev. 397, 401 (1989)).

⁵ Ellis v. City of Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2000), is another example of a Gardner-like factual inquiry case. The discussion of the jeopardy element in Ellis focused on the first part of the jeopardy element -- whether there had to be an actual violation of the public policy or whether the employee could satisfy that part by having an objective reasonable belief that the public policy was being violated. In either case, the answer to that question is one of fact and, on the grounds it examined, the Court in Ellis held that there were questions of fact that required reversal of the trial court’s grant of summary judgment. 142 Wn.2d at 463-64.

But Ellis did not expressly reach the adequacy of alternative means portion of the jeopardy element. If it had, this Court might also have conducted a factual assessment of the adequacy of alternative means, as it does not appear that the fire code at issue or any other statutory framework set forth alternative means to protect the policy in the fire code. Like Gardner, Ellis is very different from the case at hand where the ERA provides express alternative means of

Gardner, 128 Wn.2d at 938, 940 (“Prior cases have not demanded such a delicate balancing of interests as is required for proper resolution of this case. . . . Because this situation does not involve the common retaliatory discharge scenario, it demands a more refined analysis than has been conducted in previous cases”). The case at hand is not a Gardner case. Because there are statutory alternative means to protect the public policy found in the ERA, the assessment of whether the alternative means are adequate is one of law. Just as this Court held in Korslund, as a matter of law, the ERA provides adequate protection for the public policy at issue here.

Contrary to WSTLA’s assertion, the jeopardy holding in Korslund -- that the ERA was an adequate alternate means -- did not depend on the procedural status of the case. See WSTLA Br. at 7-9. WSTLA fails to cite any case, nor is there any support in the law, for its suggestion that the standard for the jeopardy element (or any legal standard for that matter) can vary over the course of a case or depend on whether a party brings a motion for summary judgment. Legal issues do not transform into factual

protecting the public policy at issue, and thus must be decided as a matter of law. (This case is also distinguishable from Ellis because here Fluor immediately responded to the employees concerns. The employees objected to the pressure test and suggested a different way to conduct it. Fluor then conducted the test using the methodology that the employees advocated. Ex. 21. As such, if there were any imminence issues in this case -- which there were not -- they were extinguished by Fluor’s responsiveness to the employee’s suggestion.)

ones merely because they are brought to trial. Indeed, WSTLA acknowledges that there is “no clearly analogous template” for its proposed approach, and that its proposed approach is “*sui generis*.” See WSTLA Br. at 8. WSTLA’s position ignores the entire purpose of a summary judgment proceeding, which is to determine whether there are material questions of fact to be tried. A party opposing summary judgment puts forth all of the relevant facts that might exist using documents, declarations, or deposition testimony; nothing about the summary judgment process prevents a party from presenting evidence relevant to a legal standard at issue. But when the issue to be decided is one of law by examination of a statutory scheme, as-applied facts are irrelevant, and the legal standard at summary judgment or trial is the same. In sum, where laws, statutes or administrative regulations are the source of the alternative means to support the public policy, the jeopardy-adequacy determination is a legal, facial assessment regardless of the procedural posture of a case.

WELA’s approach, under which the courts would treat every jeopardy-adequacy analysis as a question of fact, as applied to each individual employee, is not supported by this Court’s precedents. See

WELA Br. at 7-10.⁶ Contrary to WELA's suggestion, there was no occasion for Thompson v. St. Regis Paper, 102 Wn.2d 219, 685 P.2d 1081 (1984), Hume v. American Disposal Co., 124 Wn.2d 656, 880 P.2d 988 (1994), or Shaw v. Housing Authority of City of Walla Walla, 75 Wn. App. 755, 880 P.2d 1006 (Div. 3 1994), to address the jeopardy element, much less whether the adequacy of other means should be decided as a matter of law. The jeopardy element, as it is known today, was not adopted by this Court until its decision in Gardner in 1996, when this Court first employed the four-part test proposed by scholar Henry Perritt. Gardner, 128 Wn.2d at 940-41. Moreover, nothing in these earlier cases is substantively inconsistent with this Court's position in Korslund.⁷ In

⁶ In support of its assertion that a facial assessment is contrary to the public policy tort, WELA ironically latches onto footnote 2 of Korslund, arguing that it is "central to the interpretation" of the case. WELA Br. at 5-6 & n.2. But footnote 2 is actually this Court's recognition that Washington law focuses only on whether the alternative means are "adequate to protect the public policy on which the plaintiffs rely" and that Washington law diverges from some courts in other jurisdictions that look at whether the alternative provides all of the same remedies that a plaintiff would have in a tort action. As Korslund's footnote 2 makes clear, this Court has already declined to follow the path of the cases that examine the adequacy of remedies from the plaintiff's perspective.

⁷ WELA also relies on cases already rejected by this Court as irrelevant. Instead of focusing on the issue at hand -- whether alternative means are adequate to protect the public policy -- WELA looks to cases involving the question of whether a public policy tort is preempted or precluded because a statute provides a mandatory and exclusive remedy. See WELA Br. at 11-12 (relying upon Wilmot v. Kaiser Alum. & Chem. Corp., 118 Wn.2d 46, 821 P.2d 18 (1991) and Wilson v. City of Monroe, 88 Wn. App. 113, 943 P.2d 1134 (Div. 1 1997)). In doing so, WELA makes the very same analytical errors as the Court of Appeals did in Korslund case. But, as this Court recognized in Korslund, the

Thompson, this Court first recognized the broad outlines of the public policy tort and reversed the trial court's summary judgment to the employer sending the case back for trial of the public policy tort. See 102 Wn.2d at 232-35. Hume only cites to Thompson for the broad proposition that a public policy tort might exist for wrongful dismissal for wage claims; the actual case concerned the question of whether the statute that provided the policy basis was preempted by federal law. See 124 Wn.2d at 662-65. Similarly, in Shaw, the Court of Appeals had no occasion to consider the jeopardy element because it had yet to be articulated by this Court. Thus, contrary to WELA's supposition, re-affirmance of Korslund in this case will not conflict with this Court's prior cases.

C. **In this case, alternative means are statutory and administrative and their adequacy has already been recognized by this Court's decision in Korslund.**

1. **Korslund held that the ERA provides an adequate alternative means to protect public policy.**

As noted earlier, Korslund has already examined the alternative means at issue in this case -- the ERA -- and determined that as a matter of law that the ERA provides adequate alternative means to protect public

question of exclusive remedy is different from whether there are alternative means adequate to protect the policy. Korslund, 156 Wn.2d at 183. The ERA need not be an exclusive remedy, or the only remedy, or even a remedy available to the plaintiffs in this case to be deemed adequate to protect the policy interests at stake.

policy. In Korslund, as here, the public policy at issue was the protection of worker safety and public health in operations of the nuclear industry. Korslund, 156 Wn.2d at 126. To determine whether the jeopardy element was satisfied, the Court examined the adequacy of the administrative process provided by the ERA itself:

The ERA provides an administrative process for adjudicating whistleblower complaints and provides for orders to the violator to “take affirmative action to abate the violation;” reinstatement of the complainant to his or her former position with the same compensation; terms and conditions of employment; back pay; compensatory damages; and attorney and expert witness fees. 42 U.S.C. § 5851(b)(2)(B).

156 Wn.2d at 182. After assessing the statutory framework, and only the statutory framework, this Court concluded: “The ERA thus provides comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs.” Id.

Korslund and this case are strikingly similar: the employees are persons who worked at Hanford, they assert that they lost their jobs as a result of raising worker safety and public health concerns, the public policy at issue is the protection of the public health and safety in the operation of the nuclear industry, and the ERA provides statutory alternative means to protect the public policy. Thus, the Korslund legal analysis of the jeopardy element applies with equal force here. As

Korslund holds, the ERA provides comprehensive remedies that protect the public policy of health and safety concerns in the nuclear industry.⁸

⁸ Apparently as part of their argument for shifting to a fact-based approach to determining adequacy, Amici recount Plaintiffs' allegations that Fluor has waived the right to challenge the jeopardy element based on certain statements in the 2005 Trial Management Plan. WSTLA Br. at 1-2; WELA Br. at 2-3. This recounting is factually incomplete and legally deficient.

Fluor's 2001 Trial Plan appropriately did not state that the jeopardy element was undisputed because the courts had yet to rule on the issue. CP 6895. In 2002, this Court decided Hubbard, which resolved the adequacy of alternative means provided by an administrative appeals process as a matter of law. In April 2004, among its many other holdings, Division 3 decided in Korslund I that the statutory framework of the ERA was irrelevant as a matter of law because it was not an exclusive remedy. 121 Wn.App. 295, 321, 88P.3d 966 (2004). In February 2005, this Court granted the petition for review of Korslund I with respect to a host of issues, but Fluor could not know at that time what issues this Court would focus on, much less know how it might rule at some point in the future. Thus, when this case was prepared for trial in 2005, Fluor amended its Trial Management Plan to acknowledge (as it was required to do) that Division 3 had already held that as a matter of law the ERA was an inadequate alternative means. CP 10276-77. Under the then-existing precedent of Hubbard and Korslund, which both decided the jeopardy-adequacy issue as a matter of law, there was nothing for the jury to consider as to this element. When Korslund II reversed Korslund I (upon which Fluor's 2005 Trial Management Plan had been based) and announced that the ERA was an adequate means to protect the public policy as a matter of law, Fluor immediately sought relief from judgment under CR 60.

Under these circumstances, there clearly can be no waiver. See, e.g., Brown v. M&M/Mars, 883 F.2d 505, 512-13 (7th Cir. 1989) (party did not waive right to relief based on intervening Supreme Court decision that abrogated the controlling rule of law in the circuit even though that party proposed a jury instruction consistent with that rule, because "[g]iven the clear law in th[e] circuit at the time of trial, it would have been pointless to submit a different instruction")(emphasis added); United States v. Novey, 922 F.2d 624, 629 (10th Cir. 1991) (party did not waive right to seek relief based on intervening Supreme Court decision even though the party did not request relief from the ruling affected by the intervening decision, because "[a]n exception to the rule precluding review exists where an intervening Supreme Court decision changes the law while an appeal is pending. This exception is a corollary to the principle that an appellate court should apply the law in existence at the time of appeal")(citing Brown)(overruled on other grounds); see also Richardson v. United States, 841 F.2d 993 (9th Cir. 1988) (reversing for new trial because trial

2. There is no good basis for overturning or diluting the decision in Korslund because it correctly held that the ERA provides an adequate alternative means to protect public policy.

WELA and WSTLA's amici submissions amount to an argument for overturning or substantially diluting this Court's decision in Korslund.⁹ In doing so, WELA and WSTLA ignore this Court's precedents concerning the stare decisis doctrine. Stare decisis exists to promote core judicial values of consistency, clarity, stability, and predictability; it also serves to assure the public of the integrity of the judiciary. In re Stranger Creek & Tributaries, 77 Wn.2d 649, 653, 466 P.2d 508 (1970); see Joy v. Penn-Harris-Hadison Sch., 212 F.3d 1052, 1065 (7th Cir. 2000) (rejecting request to overturn precedent established two years earlier because "stare decisis is the preferred course because it promotes the even handed, predictable, and consistent development of legal principles, fosters

court failed to reconsider state law in light of intervening decision of a state appellate court). As Amicus WDTL correctly points out, the contrary rule would compel counsel to waste the time of the court in making legally futile arguments, and for no good purpose. See WDTL Br. at 15-16.

Moreover, as this Court has recently re-affirmed, waiver requires "unequivocal acts of conduct evidencing an intent to waive." American Safety Casualty Ins. Co. v. City of Olympia, No. 79001-9, 2007 WL 4532121 (Wash. Dec. 27, 2007) (quoting Mike M. Johnson, Inc. v. Spokane County, 150 Wn.2d 375, 391, 78 P.3d 161 (2003)). Here, even taken in the light most favorable to plaintiffs, Fluor's conduct was not unequivocal, as required for waiver. See VRP (Aug. 11, 2005) 2673, ll. 13-25 (counsel for Fluor cautioning that Korslund I might not be good law in a matter of months in light of the arguments made before the Supreme Court).

⁹ Both WELA and WSTLA were unsuccessful amici in Korslund.

reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”). Thus, before a court will abandon established precedent, the doctrine of stare decisis requires that a party make a “clear showing that an established rule is incorrect and harmful.” In re Stranger Creek & Tributaries, 77 Wn.2d at 653; accord Reihl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004). Neither WELA nor WSTLA have demonstrated that Korslund is harmful, much less incorrect.

There is no doubt that the Korslund furthers the true purpose of the public policy tort and is correct. Its straightforward rule – that adequacy is examined as a matter of law when a statute or other law provides the alternative means – is logical, practical and consistent with the Court’s prior precedent.¹⁰ See Hubbard, 146 Wn.2d at 716-17 (examining administrative appeal alternative as a matter of law); Gardner, 128 Wn.2d at 946 (examining fact-based alternatives as a matter of fact). Conducting a facial legal analysis of adequacy provides a clear rule regarding the applicability of a particular statutory framework as an alternative means to

¹⁰ Korslund is also consistent with the treatment of the public policy tort by leading scholars. See Perritt, Employee Dismissal Law and Practice, § 7.04 at 7-24 (“The clarity and jeopardy elements primarily involve questions of law and policy.”)

protect public policy. As a result, courts and litigants will have certainty when addressing an alternative means set by law, increasing the efficiency of litigation for an entire class of potential litigants. Case-by-case, as applied assessments of the same statutory framework -- an approach rejected by both Korslund and Hubbard -- would lead to conflicting assessments of the adequacy of the alternative means (especially at the lower court levels). Korslund's methodology is preferable because it furthers the public policy tort by ensuring that there is uniformity and that the public policy at issue is the focus of the jeopardy-adequacy assessment.

Moreover, Korslund's specific conclusion -- that the ERA provides an adequate alternative to tort-based whistleblower lawsuits to protect health and safety in the nuclear industry -- is sound and correct. The ERA and its whistle-blower protections were specifically designed by Congress for that very purpose. H.R. Rep. No. 102-474 (VIII), at 79 (1992), reprinted in 1992 U.S.C.C.A.N.1954, 2297 (ERA "is a key component of our system of assuring adequate protection of public health and safety from the inherent risks of nuclear power"). With this intent, after committee hearings and debate, Congress devised a process to provide for abatement of any violations reported so as to ensure that any health or

safety concerns are swiftly addressed.¹¹ 42 U.S.C. § 5851(b)(2). The process was also expressly designed by Congress to protect employees by providing for reinstatement of the employee along with compensation for past wages, compensatory damages and attorneys' fees and costs. Id.; see also WDTL Br. at 8-14.¹²

Notably, in the ERA process the burdens of proof are designed to protect the employee. An employee need only make out a prima facie case that his or her activity was a "contributing factor" to the unfavorable personnel decision. 42 U.S.C. § 5851(b)(3)(B). The burden can be

¹¹ "Supervisors should review all complaints to determine whether occupational safety or health or nuclear safety or health ramifications are involved and refer such potential hazards to the appropriate agency." See U.S. Department of Labor, OSHA Instruction, Whistleblower Investigations Manual, 12-2, Aug. 22, 2003, ("2003 Manual") available at http://www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf.

The 2003 Manual further illuminates the process used by the Department of Labor & Industries to handle complaints under the ERA; it is both comprehensive and designed to effectuate the expansive remedies available under the ERA. See Fluor Op. Br. at 7-10. Contrary to plaintiffs' assertions, the 2003 Manual did not change the procedural requirements for handling complaints filed under the ERA, which were established in 1992. See 2003 Manual at 1 (noting that the 2003 Manual only adds sections for two new statutes); 29 CFR pt. 24; 63 Fed. Reg. 6614 (Feb. 9, 1998). Moreover, plaintiffs' argument that this Court should not consider the 2003 Manual because it was not submitted as evidence in the trial court is also wholly unavailing because the 2003 Manual is law not "evidence." See Ellis, 142 Wn.2d at 459 n.3 (holding that fire code sections were not evidence, but law and that it was error for the Court of Appeals not to consider the fire code, even if not previously cited in the trial court).

¹² Because the ERA is meant to be a systemic remedy to protect the public policy of safety and health concerns relating to the nuclear industry, ongoing Congressional interest in this area and other whistleblower protection statutes provides additional assurance that the means for protecting it are adequate.

satisfied “if it is shown that the adverse personnel action took place shortly after the protected activity.” 29 CFR pt. 24.5. Congress intended “this lower burden in order to facilitate relief for employees who have been retaliated against for exercising their rights under the [ERA].” 63 Fed. Reg. 6615 (Feb. 9, 1998). In telling contrast, an employer must prove by “clear and convincing evidence” that it would have taken the same action notwithstanding the employee’s activity. 42 U.S.C. § 5851(b)(3)(B). Thus, the ERA is in many ways more protective of employees than Washington’s Law Against Discrimination. See Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 311, 898 P.2d 284 (1995); 63 Fed. Reg. 6615. Accordingly, the Korslund Court was correct to conclude that the ERA provides adequate alternative means to protect the public policy of health and safety in operations of the nuclear industry. In short, when adequate alternatives to protect the public policy at issue exist, there is no need for this Court to recognize the public policy tort. Amici have provided no basis for this Court to depart from the rule of Korslund.

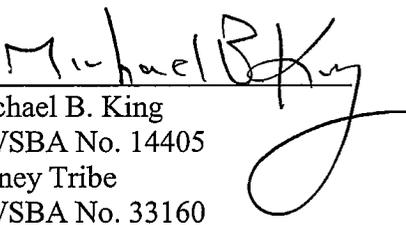
III. CONCLUSION

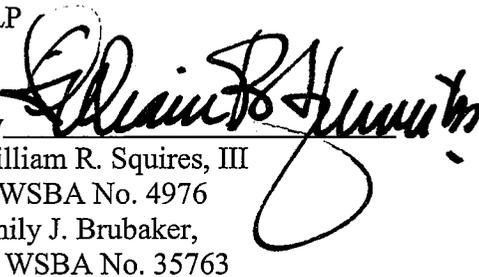
This Court should re-affirm its opinion in Korslund and reverse for dismissal of plaintiffs’ claims for wrongful discharge under the public policy tort.

RESPECTFULLY SUBMITTED this 11th day of January 2008.

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SUBSCRIBED AND SWORN TO before me this 11th day of
January, 2008, by Loida Gallegos.



Loida Gallegos

Print Name: LOIDA GALLEGOS

NOTARY PUBLIC in and for the State of
Washington, residing at ALGONA

My commission expires: 8/2/08