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No. 91040-5

NO. 70766-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ERICKA RICKMAN,

Appellant,

vs.

PREMERA BLUE CROSS

Respondent.

APPELLANT'S AMENDED REPLY BRIEF

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STATE OF WASHINGTON
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A. ARGUMENT:

1. Ericka Produced Sufficient Evidence to Establish the "Jeopardy" Element of her Wrongful Discharge Claim.

> 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. This burden requires a plaintiff to "argue that other means for promoting the policy ... are inadequate." Additionally, the plaintiff must show how the threat of dismissal will discourage others from engaging in the desirable conduct.

Piel v. City of Federal Way, 177 Wn.2d 604, 611, 306 P.3d 879 (2013), quoting *Gardner v. Loomis Armored, Inc.,* 128 Wash.2d 931, 945, (1996) (internal citations omitted).[1]

a. Discouraging Ericka's Conduct Would Jeopardize the Public Policy.

In arguing that discouraging Ericka's conduct would not jeopardize the public policy of protecting private health care information, Respondent characterizes Ericka's analysis of *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989) as mechanistic and myopic.[2] It is Respondent's reading of this case, however, that lacks understanding. Respondent is asking the court to broaden the reach of *Cudney v. ALSCO,* 172 Wn.2d 524 (2011), to bar even prophylactic employee acts that have the desired effect, i.e., acts that curb the very employer wrongdoing the

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[1] Ericka mistakenly cited this case as *117* Wn.2d 604 instead of *177* Wn.2d 604 in her opening brief at page 9, and apologizes for any confusion this may have caused.

[2] Respondent's Brief at 18.

law was designed to prevent - or, put another way, acts that promote the public policy.

In determining whether termination of an employee contravenes the public policy of protecting employees who report employer[3] wrongdoing, the *Dicomes* court concluded it would

> consider whether the employer's conduct constituted either a violation of the letter or policy of the law, so long as the employee sought to further the public good, and not merely private or proprietary interests, in reporting the alleged wrongdoing.

Id. at 620, 782 P.2d at 1008. In reaching this conclusion, the *Dicomes* court reasoned that restricting public policy wrongful discharge claims to reports of clear statutory violations

> [...] is unduly restrictive and does not comport with our examination of the public policy exception in *Thompson,* or with the definition of what constitutes "improper governmental action" in our state's whistleblower statute.

Dicomes v. State, 113 Wn.2d 612, 620, 782 P.2d 1002, 1007 (1989).

Viewed in context, Ericka's analysis of *Dicomes* is sound. The *Dicomes* Plaintiff publicly released information about allegedly illegal action that already occurred, as distinguished from raising concerns to her supervisor about planned but abandoned action that, if implemented, would be illegal, as in the present case. See *Id.* at 615-16. *Cudney*

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[3] Respondent makes a typographical error in stating "courts generally examine the degree of alleged *employee* wrongdoing[.]" Respondent's Brief at 18. The correct quote is "[...] alleged *employer* wrongdoing[.]" *Dicomes, supra,* 113 Wn.2d at 619.

supports the survival of the tort of wrongful discharge in violation of public policy in the latter scenario. *Cudney*, *supra*, 172 Wn.2d at 537, citing *Hubbard v. City of Spokane*, 146 Wn.2d 699 (2002).

Ericka's actions were more than 'fleeting',[4] and can hardly be characterized as casual.[5] Ericka's multiple conversations with Mr. Grover about the "risk bucketing" plan proved justified and successful when Respondent abandoned it after determining it was unlawful.[6] In addition to Ericka's testimony, Respondent admits Ericka discussed "risk bucketing" with Mr. Grover,[7] and the court properly accepted as factual, for purposes of summary judgment, Ericka's testimony that she told Mr. Grover the "risk-bucketing" plan "had HIPAA written all over it." CP at 16-17. To characterize this as anything less than Ericka raising a serious concern about privacy issues is disingenuous.[8]

b. The Court Below Properly Resolved in Ericka's Favor Respondent's Conflicting Testimony Regarding the Legality of the Risk Bucketing Proposal.

Contrary to Respondent's assertion in its brief,[9] Respondent

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[4] *See* Appellant's Brief at 12.

[5] *See* Respondent's Brief at 19.

[6] *See* Appellant's Brief at 12, *and see* § A.1.b., *infra*.

[7] *See* Appellant's Brief at 12, *and see* § A.1.b., *infra*.

[8] *See* Respondent's Brief at 20.

[9] *See* Respondent's Brief at 22.

provided conflicting testimony regarding the legality of the "risk bucketing" proposal, and the court below properly resolved this conflict in Ericka's favor. CP at 16-17.[10] In Plaintiff's First Interrogatories and Requests for Production of Documents to Defendant, Interrogatory No. 12 asked:

> Identify and describe the date, subject matter and Premera executive, including, but not limited to, Rick Grover, involved in any and all conversations with, and/or complaints by plaintiff, regarding risk bucketing and/or the potential for violations of Health Insurance Portability and Accountability Act.

CP at 67.

This interrogatory answer was unambiguously specific to conversations with, and/or complaints by, Ericka. Despite Respondent's present assertion that the question was "clumsily worded,"[11] Respondent did not object to this interrogatory when it was propounded, and answered it as follows:

> Mr. Grover recalls one meeting in which risk bucketing was briefly discussed. The group quickly determined that risk bucketing was not a lawful option for that particular situation, and ended the discussion. Mr. Grover does not recall the date of this meeting.

CP at 67.

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[10] "[B]ecause this is a Motion for Summary Judgment, the Court accepts [...] Ms. Rickman's deposition testimony that, in the middle of September 2009, she learned [of the risk bucketing plan, then discussed it with Mr. Grover]. Within the month, the concept was abandoned. This is documented in an email string that Mr. Grover sent to Ms. Rickman and others."

[11] See Respondent's Brief at 22.

Respondent (Nancy Ferrara) declared, under penalty of perjury, that this answer was true and correct. CP at 68. Although Mr. Grover attempted to distance himself from this answer in his deposition testimony (CP at 77:24 - 78:8, 79:23 - 80:5), for purposes of summary judgment, the court below properly accepted Ericka's testimony that she discussed her "risk-bucketing" concern and its potential health insurance privacy implications with Mr. Grover in mid-September 2009. CP at 16-17. Further, by Respondent's own sworn interrogatory answer, in relation to a conversation with, or a complaint by, Ericka, it discussed risk bucketing and "[...] quickly determined that risk bucketing was not a lawful option for that particular situation, and ended the discussion."

Contrary to Respondent's assertion,[12] a material fact precluding summary judgment is created by the fact that Respondent terminated Ericka after she complained of a proposed plan that implicated health insurance privacy law violations, especially in light of Respondent's acknowledgement that the plan was, indeed, unlawful, and in light of the fact that Rick Grover was the person who terminated Ericka.

2. UHCIA and HIPAA Provide Inadequate Means for Promoting the Public Policy of Encouraging Employees to Take Action to Prevent Disclosure of Private Health Care Information.

[12] *See* Respondent's Brief at 22.

Respondent cites the statutory private right of action under UHCIA and the administrative process under HIPAA as providing other 'adequate' means of promoting the public policy.[13] However, these means are only available for actual *violations* and suspected *noncompliance* with those laws, as Respondent even acknowledges: "UHICA provides a private right of action against providers or facilities *that have not complied with* the statute[;]" "HIPAA provides retaliation protection for those who report suspected *violations*[;]" "HIPAA allows any person who believes there has been a HIPAA *violation* to file a complaint[;]" "Anyone can file a complaint alleging a *violation* of the Privacy or Security rule[;]" and "[A] complaint must allege an activity that, if proven true, *would violate* the Privacy or Security Rule."[14]

Respondent's position is akin to arguing that the DUI laws at issue in *Cudney, supra,* would have provided adequate means of promoting the public policy if the plaintiff had reported to the police his boss had discussed the *possibility* of driving after drinking. In the present case, the "risk bucketing" *discussion* did not, itself, violate health insurance privacy laws. However, if implemented, the proposed "risk bucketing" practice *would* violate those laws. This was Ericka's concern. She raised it to her

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[13] *See* Respondent's Brief at 23.

[14] *See* Respondent's Brief at 23-24.

boss, and the plan was abandoned. Ericka's actions promoted the public policy of protecting private health care information where health insurance privacy laws themselves would not.

Further, UHCIA's remedies are limited to actual damages and prevailing party attorney's fees, meaning if Ericka were to file a complaint under UHCIA and lose because there were no actual law violation, she would be responsible for paying Respondent's attorney's fees and costs.[15] No consequential or emotional distress damages are available. *See* RCW 70.02.170. Additionally, HIPAA's monetary sanctions are available only for actual violations of the law:

> Subject to § 160.410 [affirmative defenses], the Secretary will impose a civil money penalty upon a covered entity or business associate if the Secretary determines that the covered entity or business associate has violated an administrative simplification provision.

45 C.F.R § 160.402. Civil monetary penalties imposed by the Secretary of DHHS for HIPAA violations are limited to $50,000 per violation (*see* 45 C.F.R. §160.400, 45 C.F.R. §160.404, and 42 U.S.C. § 1320d-5).

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[15] The UHCIA civil remedy statute, RCW 70.02.170, provides as follows:

(1) A person who has complied with this chapter may maintain an action for the relief provided in this section against a health care provider or facility *who has not complied with this chapter* [emphasis supplied].

(2) The court may order the health care provider or other person to comply with this chapter. Such relief may include actual damages, but shall not include consequential or incidental damages. The court shall award reasonable attorneys' fees and all other expenses reasonably incurred to the prevailing party.

Filing a lawsuit that would likely be dismissed because no law violation occurred can hardly be said to promote the public policy, especially with a "loser pays" attorney fee provision. Similarly, although the Office of Civil Rights (OCR) may consider a complaint regarding *potential* law violations, as Respondent suggests,[16] OCR's consideration of a complaint on which it would likely take no action can hardly be said to promote the public policy.

Even if the statutory and administrative schemes under UHCIA and HIPAA were available for *potential* rather than *perceived* violations, the Washington Supreme Court recently clarified that the tort of wrongful discharge in violation of public policy can survive despite the existence of other statutory and administrative remedies. *Piel*, *supra,* 177 Wn.2d at 616. In reversing the trial and appellate court's dismissal of the plaintiff's case under the jeopardy prong of the tort of wrongful discharge in violation of public policy, the *Piel* court reasoned that, if the tort could not survive alongside other comprehensive statutory and administrative schemes,

> other cases which have recognized the need for a public policy tort despite the existence of statutory remedies would be called into question. *See, e.g., Thompson,* 102 Wash.2d 219, 685 P.2d 1081 (allowing claim for reporting violation of federal Foreign Corrupt Practices Act of 1977); *Ellis v. City of Seattle,* 142 Wash.2d 450,

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[16] *See* Respondent's Brief at 25.

> 13 P.3d 1065 (2000) (recognizing claim for retaliation for making safety complaints); *Roberts v. Dudley,* 140 Wash.2d 58, 993 P.2d 901 (2000) (allowing tort claim under RCW 49.12.200 and Washington's Law Against Discrimination (WLAD), chapter 49.60 RCW); *Bennett v. Hardy,* 113 Wash.2d 912, 784 P.2d 1258 (1990) (recognizing claim under WLAD). An overbroad reading of *Korslund* and *Cudney* would fail to account for this long line of precedent allowing wrongful discharge tort claims to exist alongside sometimes comprehensive administrative ***615** remedies. Importantly, neither case purported to overrule anything.

Piel, *supra,* 177 Wn.2d at 614-615.

Respondent attempts to distinguish *Piel* from the present case by noting the Court had already held in another case that the regulatory structure at issue in *Piel* was inadequate to promote the public policy.[17] This fact is not dispositive, and ignores the *Piel* Court's admonition that "Each public policy tort claim must be evaluated in light of its particular context." *Piel, supra*, 177 Wn.2d at 617.

In fact, *Piel* distinguishes *Korslund* and *Cudney* from cases involving statutory schemes announcing that their administrative remedies are not exclusive to other remedies:

> Moreover, we should not reach to expand the jeopardy analysis *of Korslund* or *Cudney* when the very statutory scheme that announces the public policy at issue also cautions that its administrative remedies are intended to be additional to other remedies. PERC contains such a provision, RCW 41.56.905, which states, "The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose." No similar language was identified under the

[17] *See* Respondent's Brief at 25-26.

> statutory schemes at issue in *Korslund* or *Cudney.* This language is significant because it respects the legislative choice to allow a wrongfully discharged employee to pursue additional remedies beyond those provided by statute. It is the strongest possible evidence that the statutory remedies are not adequate to vindicate a violation of public policy.

Piel, supra, 177 Wn.2d at 617. Respondent erroneously states the HIPAA provides no comparable language[18]:

> Except as otherwise provided by 42 U.S.C. 1320d - 5(b)(1) and 42 U.S.C. 299b - 22(f)(3), a penalty imposed under this part is in addition to any other penalty prescribed by law.

45 C.F.R. § 160.418.

3. Respondent's Internal Processes Do Not Defeat the Jeopardy Element.

That Respondent had internal processes for raising health insurance privacy concerns does not mean those processes adequately promote the public policy. In fact, this author was unable to find any Washington authority holding an employer's own internal complaint processes adequate such that they would defeat the jeopardy prong of the tort of wrongful discharge in violation of public policy. Indeed, if such a proposition were true, an employer could simply escape liability by creating a complaint mechanism, regardless of whether it subsequently terminated an employee for taking action that promoted the public policy by preventing a law violation, as happened in the present case.

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[18] *See* Respondent's Brief at 26.

Ericka complained to her direct supervisor who was in a position to prevent the law violation. What better way of addressing compliance concerns than going to the top? And, her complaint *did* prevent the law violation. Allowing her termination to stand discourages such brave action, and alternate means of promoting the public policy of encouraging employees to take preventative measures to protect private health care information are inadequate, as outlined *infra.* Taking the facts in the light most favorable to Ericka, she established the jeopardy element.

4. Genuine Issues of Material Fact Exist on Causation.

Ericka did not address the causation element in her opening brief because the trial court did not do so. However, because Respondent addresses the issue in its brief, so does Ericka now.[19] Contrary to Respondent's assertion,[20] Ericka did not show 'poor judgment' and 'lack of integrity', and presented ample evidence raising material factual issues on the real cause of her termination. For purposes of summary judgment, the court below properly accepted Ericka's testimony that that she first raised her "risk bucketing" concern in mid-September 2009, not around September 28, 2009, as implied by Respondent.[21] CP at 16, last

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[19] *See* Respondent's Brief at 27 - 33.

[20] *See* Respondent's Brief at 28 - 33.

[21] *See* Respondent's brief at 13.

paragraph. Bolstering Ericka's claim that Respondent terminated her for raising concerns about potential law violations are the following facts: 1) the proximity of her raising such concerns (mid-September 2009, CP at 16, last paragraph, and at 187, ¶34) and her termination (November 3, 2009, CP at 178:16-17) (see *Hubbard v. Spokane Cnty.*, 146 Wn.2d 699, 718, 50 P.3d 602, 612 (2002)[22], 2) the specious nature of Mr. Lopez's 'conflict of interest' complaint (see pp. §§A.1. - 4., *supra*), 3) Respondent's inconsistent reasons for terminating Ericka (CP at 83:17-19, 115:2-5, 117:4-11), 4) Respondent's admission, then denial, regarding the legality of the "risk bucketing" practice of which Ericka complained (CP at 67, 77:11 - 80:5), and 5) Mr. Grover's suspect "concerns" about Ericka's business capabilities. *See* pp. 22-26, *supra.*

The proximity between Ericka's protected activity and her termination can, by itself, constitute sufficient circumstantial evidence of wrongful termination. *See Bell v. Clackamas Cnty.*, 341 F.3d 858, 865-66

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[22] Contrary to the assertion in Respondent's Brief at page 21, the *Hubbard* court considered the timing of the complaint for more than the limited purpose of whether specific code enforcement protections adequately protected public policy:

> The Court of Appeals concluded that given the timing of Hubbard's discharge, a material fact existed "as to whether the County discharged ... Hubbard for his objection to the airport motel issue." This conclusion does not appear to be challenged by either party. This holding is accepted.

Hubbard, supra, 146 Wn.2d at 718, 50 P.3d at 612 (internal citation omitted).

(9th Cir. 2003) and the cases cited therein:

> *Villiarimo v. Aloha Island Air, Inc.,* 281 F.3d 1054, 1065(9th Cir.2002) ("[C]ausation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity."); *see also Winarto v. Toshiba Am. Elecs. Components, Inc.,* 274 F.3d 1276, 1287 n. 10 (9th Cir.2001) (concluding that plaintiff's complaints, which closely preceded reduction in her performance review scores, supported a reasonable inference that defendant acted with a retaliatory motive); *Yartzoff v. Thomas,* 809 F.2d 1371, 1376 (9th Cir.1987) (sufficient evidence of causation existed where adverse actions occurred less than three months after complaint was filed, two weeks after charge first investigated, and less than two months after investigation ended)[.]

Washington's Supreme Court has also decided that proximity in time between the adverse action and the protected activity suggests an improper motive. *Wilmot v. Kaiser Aluminum & Chem. Corp.,* 118 Wn.2d 46, 69, 821 P.2d 18 (1991). The *Wilmot* Court further recognized that causation, i.e., proof of the employer's motivation, must be shown by circumstantial evidence because "the employer is not apt to announce retaliation as his motive." *Id.* 118 Wn.2d at 69, *quoting* 1 L. Larson, *Unjust Dismissal* § 6.05[5], at 6–51 (1988).

a. Ericka Rickman ("Ericka") Showed No Favoritism to Her Son, Taylor Vidor.

Although Ericka did engage her son, Taylor Vidor, as an independent contracted "captive" agent, she cleared this action with her direct supervisor, Steve Melton, before doing so. CP at 259 - 260. Further, Ericka had no direct supervision over Captive Agents. CP

128:22-25. Regardless, it is not an uncommon for family members to work at Premera, either as employees or independent contractors. CP at 186.

Respondent grossly distorts the facts in claiming Ericka promoted her son and gave him a raise. In truth, Mr. Vidor and Mr. Lopez initially received identical 5% overrides for being Subject Matter Experts (SMEs). CP at 167, ¶8, 183, ¶17. It was Ucentris Sales Manager Laura Stryker and Operations Manager Ann Farrison's decision to give Mr. Vidor a 10% override for mentoring 14 agents after Steven Lopez stepped down as an SME. CP at 168-169, ¶13, and at 183, ¶18. Ericka concurred with these decisions after reviewing supporting documentation provided by Ms. Stryker and Ms. Farrison. CP at 183, ¶18. Mr. Vidor did not discuss the increase of his override with Ericka. CP at 169, ¶13.

Ultimately, it was Ms. Stryker's decision to make Mr. Vidor an SME:

> 5 Q And do you recall telling her that Taylor Vidor's selection as
> 6 an SME was based on his expertise?
> 7 A Yes.
> 8 Q Do you recall telling her that you consulted with Ericka, but,
> 9 ultimately, it was your decision?
> 10 A I don't recall saying that.
> 11 Q Okay. Is that true, was it ultimately your decision?
> 12 A Yes.

CP at 94:5-12.

Mr. Vidor's SME override increased to 10% because he took over Mr. Lopez's SME workload:

> 24 Steven Lopez and Taylor were each compensated five percent.
> 25 And at one point in time Steven decided he no longer wanted to
> 1 be a SME. Taylor assumed full responsibility and his override
> 2 increased to ten percent.
> 3 Q Who made that decision?
> 4 A I don't know.
> 5 Q So Taylor assumed full responsibility for Steven Lopez's SME
> 6 position. Is that what you're saying?
> 7 A And can I clarify?
> 8 Q Sure.
> 9 A Both Steven and Taylor were SMEs for the same line of coverage.
> 10 I don't know if I made that clear.
> 11 Q What line of coverage was that?
> 12 A Medical.
> 13 Q Just so I understand your testimony, Steven Lopez --
> 14 Steven Lopez decided he didn't want to be an SME any longer and
> 15 so Taylor Vidor took over his SME workload. Is that what
> 16 you're saying?
> 17 MS. SHERWOOD: Objection. Mischaracterizes.
> 18 A Yes.
> 19 Q (By Mr. Nichols) Did I mischaracterize that?
> 20 A No.

CP at 89:24 - 90:20.

Mr. Lopez decided to step down as an SME because he missed his personal production goal and consequently missed out on a bonus trip. CP at 168, ¶12. Also, Mr. Lopez never complained to Ms. Stryker about Mr. Vidor receiving an increased override after Mr. Lopez quit being an SME:

17 Q Did Steven Lopez ever complain to you about Taylor receiving
18 more of an override than him?
19 A No.
20 Q Did he ever complain to you about Taylor receiving more of an
21 override than other SMEs?
22 A No.

CP at 96:17-22.

On October 6, 2009, and in relation to Ericka's relationship with Mr. Vidor, Ms. Ferrara asked Ms. Stryker to give her the procedures for lead distribution to Captive Agents, as well as the percentages of overrides for each agent. CP at 109. In response, Ms. Stryker broke them down in detail. CP at 108 - 109. Then, on October 8, 2009, Ms. Ferrara asked Ms. Stryker to tell her how SME's were selected. CP at 107. Ms. Stryker responded that SMEs were recommended by her to the Management team based on her criteria of 1) product knowledge, 2) leadership abilities, 3) strong work ethic, 4) tenure, and 5) proper certification. *Id.* Nothing in Ms. Stryker's responses to Ms. Ferrara indicated any favoritism to Mr. Vidor by Ericka. Ericka gave no special treatment to Mr. Vidor, and there was no substantive difference in the way Premera treated Mr. Vidor after Ericka was gone. CP at 176, ¶4.

b. Ericka Disclosed Her Relationship With Vidor.

Contrary to Respondent's assertions, Ericka disclosed her

relationship with her son to at least two of her supervisors; namely, Kevin Roddy and Steve Melton. CP at 258:14-24, and at 259:7 - 260:22. Further, based on her conversation with Steve Melton, Ericka reasonably believed she did not need to disclose her relationship with her son on Premera's conflict of interest form because he was a contractor and not a Premera employee. CP at 260:8-18. She also disclosed her relationship with her son to Premera's Human Resources Department. CP at 186:1-2.

c. Ericka's Relationship with Vidor was Common Knowledge, and She Did Not Try to Hide It.

Ericka did not hide the fact that Mr. Vidor was her son, even keeping a picture of Mr. Vidor on her desk:

> 16 Q Did you talk to Ericka Rickman about it [Mr. Vidor being her son]?
> 17 A I didn't talk to Ericka about it. I do recall going into her
> 18 office and then seeing pictures of her kids in her office and
> 19 making the connection, Oh, that's him.
> 20 Q So Ericka didn't try to hide the fact that he was her son?
> 21 A Correct.
> [...]
> 21 Q Do you recall telling Ms. Ferrara that it was not a secret that
> 22 Taylor was Ericka's son?
> 23 A I don't recall saying that to Nancy. It's a true statement.
> 24 Q And why do you say that's a true statement; it wasn't a secret?
> 25 A Because everybody within the organization, within our agency,
> 1 was aware.

CP at 88:16-21, 93:21-94:1 (Stryker Dep.); *and see* CP at 166 ¶4, and 176 ¶4.

d. Steven Lopez Complaint is Unfounded.

Mr. Lopez's 'conflict of interest' complaint was unfounded. In fact, Respondent's investigator, Nancy Ferrara, concluded several of his claims were unsubstantiated. CP at 302:18-19. Contrary to Mr. Lopez's complaint, Ericka did not place Mr. Vidor in an 'elevated' position as an SME (see §A.4.a., *supra*), nor did Ericka sit in on productivity reviews of captive agents. In fact, Laura Stryker, Ucentris' Sales Manager, confirmed it was appropriate for SMEs, including Mr. Vidor, to attend meetings with Captive Agents, and Ms. Rickman did not attend "two-on-one" meetings in which their productivity was discussed:

> 22 Q Okay. Did you have SMEs present in meetings with other captive
> 23 agents?
> 24 A Yes.
> 25 Q And why would you have SMEs present in meetings with other
> 1 Captive Agents?
> 2 A Largely the meetings that we would have with other captive
> 3 agents were considered two-on-ones where we would talk about
> 4 production, any training needs. And it was appropriate to have
> 5 the SME or SMEs in attendance to support the producer in, you
> 6 know, developing their book of business
> 7 Were you ever in a meeting with other Captive Agents where
> 8 Taylor Vidor was present and you thought it was inappropriate
> 9 for Mr. Vidor to be there?
> 10 A No.
> 11 Q Did Ericka Rickman attend these meetings?

12 A The two-on-ones, no. The production meetings with independent
13 producers, no.

CP at 91:22 - 92:13. Ms. Stryker managed the agents, and their productivity numbers were her responsibility:

8 Q Okay. And when he [Mr. Lopez] asks the first question there at the bottom
9 of the first page of Exhibit 4 to your deposition, This is not
10 a management position. This is a subject matter expert
11 position, correct?
12 And then following that it says, Correct. You manage the
13 business. I manage the agents.
14 Do you agree with that statement?
15 A Yes.
16 Q And when you said you manage the business, what did you mean by
17 that?
18 A The sale of medical business.
19 Q You didn't use the term manage in relation to other agents?
20 A No. Manage the business.
21 Q And then it says -- it goes on to say, One of my main goals
22 would be to help agents bolster their sales and exceed sales
23 expectations for '08.
24 Yes. If an agent -- and that says, If an agent does not
25 meet a sales goal, slash, expectation, does this position hold
1 me accountable? Meaning: At the end of the year, if goals
2 aren't met, will either you or Ericka be looking to Taylor or I
3 as being the responsible party?
4 Following that it says, Nope, hyphen, agents and their
5 productivity numbers are my responsibility.
6 Do you agree with that response to that question?
7 A Yes.

CP at 98:8-99:7.

Clearly Ms. Stryker managed SMEs, not Ericka. Additionally, Mr. Lopez frequently used the term 'Boss' as an informal greeting, not

exclusively in relation to Ericka. CP 168, ¶11. Contrary to Mr. Lopez's complaint, there was no 'general feeling' in the office that Ms. Rickman favored Mr. Vidor. CP 176, ¶4. There was no substance to Mr. Lopez's conflict of interest allegation against Ericka.

e. Ericka Complied With, and was Forthcoming During, the Investigation.

On September 18, 2009, Nancy Ferrara called Ericka into her office to discuss the Lopez[23] complaint. CP at 189, ¶39. The conversation was light-hearted. *Id.* Ms. Ferrara told Ericka the call must have been made by someone who really did not like her or hated Mr. Vidor. *Id.* She then asked Ericka who she thought the caller might be. *Id.* It would not have occurred to Ericka the caller might be Mr. Lopez had Ms. Ferrara not suggested the person must have really hated Mr. Vidor. *Id.* Ms. Ferrara also suggested it could have been a woman, so Ericka suggested certain names of women that had recently been terminated for low production. *Id.* Ericka also told Ms. Ferrara it could have been any number of people, not just Mr. Lopez. *Id.* Ms. Ferrara ended the conversation by thanking Ericka for her honesty and telling her it would not be her recommendation to terminate Ericka's employment. *Id.* She did not tell Ericka not to discuss the investigation with others. *Id.*

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[23] Mr. Lopez's identity as the compliance caller was not known at the time.

Contrary to Ms. Ferrara's claim, during the investigatory interview, Ericka did not deny accountability for captive agents. Rather, Ericka told Ms. Ferrara she had no direct supervision over the agents. CP at 128:22-25. Further, the termination of Captive Agent Vanessa Lopez's contract was not retaliatory. Laura Stryker had concerns Ms. Lopez was not engaged enough in selling. CP at 101:9-25. On August 21, 2009, Ms. Stryker emailed Ms. Lopez an Excel spreadsheet to track her Medicare sales activity, and asked her to send it back every Friday. CP at 102:21 - 103:3. Then, on October 1, 2009, Ms. Stryker emailed Ms. Lopez informing her that, because she had not contacted Ms. Stryker in response to her August 21, 2009 email, she (Ms. Stryker) was pulling her access to Ucentris' "SalesForce". CP at 103:11-25. Ms. Lopez never provided Ms. Stryker with any copies of the Excel spreadsheet she requested. CP at 104:1-4. Ms. Rickman expressed reservations to Ms. Stryker about terminating Ms. Lopez's contract because it may seem retaliatory in relation to Mr. Lopez's complaint. CP at 123:8 - 124:20. Ms. Stryker nonetheless terminated Ms. Lopez's contract for "lack of production" and "disregard" for her instructions to track sales on the Excel spreadsheet. CP at 104:23 - 105:5.

5. Genuine Issues of Material Fact Exist on the Absence of Justification Element.

Contrary to Respondent's assertions,[24] Ericka disputes she showed 'poor judgment' and 'lack of integrity'. *See* pp. 11-21, *infra*.

a. The Lopez Complaint Accelerated Grover's Decision-Making in Terminating Ericka.[25]

Although Mr. Grover may not have immediately terminated Ericka absent the Lopez investigation, he testified the 'conflict of interest' issue accelerated his decision:

> 11 Q. So I guess what I'm getting at is you relied on
> 12 Nancy's investigation, in making the decision to
> 13 terminate Ms. Rickman; correct?
> 14 A. So what I would say is that I already had concerns, as
> 15 we discussed before, about Ericka's business
> 16 capabilities to run Ucentris, so those were concerns
> 17 that I had that were continuing to be consistent that
> 18 was then further exasperated (sic) by her lack of
> 19 disclosure. But the immediacy of the termination was
> 20 the conflict of interest that I discovered through
> 21 that investigation process by Nancy, and I believe
> 22 there were others involved in that process.
> 23 Q. When you say the immediacy of the termination, do you
> 24 mean that that was the reason she was terminated?
> 25 What do you mean by immediacy?
> 1 A. That based upon the results of the investigation that
> 2 we moved to immediate termination.
> 3 Q. Regarding the conflict-of-interest issue?
> 4 A. Correct.
> 5 Q. If the only issue were your concerns about Ms. Rickman
> 6 implementing a business plan, would you have

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[24] *See* Respondent's Brief at 28-34.

[25] In Appellant's Opening Brief, counsel states Mr. Grover would have made the decision to terminate Ericka on his own. *See* Appellant's Opening Brief at 18. Upon reflection, counsel believes such a characterization overstates Mr. Grover's testimony, and apologizes to counsel and the court for any perceived mischaracterization of said testimony.

7 terminated her employment?
8 A. At that point?
9 Q. What do you mean, at that point?
10 A. Would I have terminated her in, whatever the date was,
11 late 2009?
12 Q. Correct.
13 A. No.

CP at 83:11 - 84:13.

But, Grover's criticism of Ericka's business capabilities was itself suspect. Mr. Grover's main criticism of Ericka was his perception that she could not formulate a clear and consistent business plan. CP at 71:17 - 72:1. However, Mr. Grover could not articulate when, if ever, he had asked Ericka to prepare a business plan. CP at 74:7-10. Further, Mr. Grover could not identify names of people, internally or externally, with whom he spoke, or dates when he spoke with them, regarding Ericka's ability to formulate a business plan. CP at 74:12-75:13. In fact, Ucentris had no business plan prior to hiring Ericka, and she formulated a three- to five- year business plan, and executed it to great success. CP at 181:7-182:7. In truth, Ericka's job performance and integrity was unquestioned, save one substandard mark by Mr. Grover in 2009 after he had only been her supervisor for one or two months. CP at 70:2-11.

Mr. Grover was also the only manager who had any input on Ericka's June 2009 Performance Evaluation. CP at 73:7-16. In truth, Ericka met or exceeded expectations in performance evaluations for

several years running, and received no verbal or written warnings prior to Mr. Lopez's compliance call in September 2009. CP at 111:23 - 112:15, 112:24-25, 113:1, and 114:2-4.

In fact, in Ericka's most recent performance evaluation, her peers, direct reports (people she supervised), and even her direct manager, Mr. Grover, gave her high praise for her integrity, saying "Ericka has significantly improved the perception of Ucentris by maintaining/ modeling high Integrity." CP at 134.

And, one of Ericka's direct reports, Ucentris Sales Manager, Laura Stryker, said, "Ericka demonstrates that sometimes one has to walk away from business in order to do the right thing." *Id.* At her July 26, 2012 deposition, Ms. Stryker confirmed that her opinion of Ericka's integrity did not change after she made this statement in June 2009. CP at 106:5-11.

Grover's suspect criticism of Ericka's business capabilities, coupled with the specious nature of the Lopez complaint, provides sufficient material factual questions precluding summary judgment on the 'absence of justification' element.

b. Respondent's Reasons for Terminating Ericka Raise a Genuine Issue of Material Fact on the Absence of Justification Element.

Contrary to Respondent's assertion,[26] it provided inconsistent reasons for Ericka's termination in its deposition testimony. Mr. Grover claims the 'conflict of interest' was the reason for Ericka's immediate termination, yet Ms. Ferrara says it was not; rather, Ms. Ferrara says Ericka was terminated for 'judgment' and 'lack of integrity'. CP at 83:17-19, 115:2-5, 117:4-11. In addition to the employer's inconsistent testimony about the reasons for Ericka's termination, Mr. Grover's stated concerns about Ericka's business capabilities were unfounded. This raises another genuine issue of material fact on the justification for Ericka's termination.

c. Respondent's Reasons for Terminating Ericka are False.

Contrary to Respondent's assertions,[27] Ericka showed no favoritism to her son, disclosed her relationship with her son to at least two of her prior supervisors and to Human Resources,[28] did not try to hide the relationship from others, and the relationship was well known within Premera. *See* pp. 11-21, *supra.* Further, the decisions to make her son an SME and "double" his override were made by Ms. Stryker and Ms. Farrison, not by Ericka. *See* pp. 2-4, *supra.* Finally, the decision to

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[26] *See* Respondent's Brief at 36.

[27] *See* Respondent's Brief at 12, 13, 33 and 34.

[28] *See* §A.4.b., *supra.*

terminate Vanessa Lopez's contract was made by Ms. Stryker based on sound business reasons. *See* pp. 20-21, *supra*.

B. <u>CONCLUSION</u>:

Discouraging Ericka's conduct of raising concerns about potential breaches of private patient information jeopardizes the clear public policy in favor of maintaining and protecting patient privacy interests articulated in both HIPAA and WUHCIA. Other means of promoting the public policy are inadequate. Finally, genuine issues of material fact exist on the 'causation' and 'absence of justification' elements. Therefore, the trial court erred in granting Respondent's summary judgment motion, and this matter should be remanded for trial.

DATED this 27 day of February, 2014.

DENO MILLIKAN LAW FIRM, PLLC

JOEL P. NICHOLS, WSBA #23353
Attorney for Appellant, Ericka Rickman

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF SNOHOMISH)

Kristine E. Allen, being first duly sworn on oath, deposes and states: On the 28th day of February, 2013, I emailed the preceding document to *ssherwood@riddellwilliams.com,* and deposited it in the United States mail, regular first class at Everett, Washington, postage prepaid, addressed to:

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SIGNED AND SWORN to before me this 28th day of February, 2014.

DENECIA R. EVANS
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