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NO. 91040-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ERICKA M. RICKMAN,

Petitioner,

v.

PREMERA BLUE CROSS,

Respondents.

AMICUS CURIAE BRIEF
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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION AND INTEREST OF AMICUS CURIAE	1
II. SUMMARY OF ARGUMENT	2
III. ARGUMENT	7
A. The Court Should Return the Public Policy Tort to its Origins	7
B. If the Court Retains the Perritt Test, It Should Rule that a Plaintiff Can Satisfy Her Burden of Proof on the Jeopardy Element by Showing that Her Conduct "Directly Relates" to Public Policy.....	11
C. If Alternate Means of Enforcement Remains Part of the Test, the Court Should Confirm that the Remedies Made Available to an Employee Are Central to the Public Policy Tort.....	13
1. <i>Cudney</i> is Incorrect and Harmful and Cannot be Harmonized with Numerous Important Supreme Court Decisions.....	15
2. <i>Hume v. American Disposal Co.</i> is incompatible with <i>Cudney</i> and its progeny <i>Weiss</i>	19
3. <i>Ellis v. City of Seattle</i> is incompatible with <i>Cudney</i> and <i>Weiss</i>	20
4. <i>Cudney</i> and <i>Weiss</i> are incompatible with <i>Wilson v.</i> <i>City of Monroe</i>	21
D. If it Retains the Current Formulation of the Jeopardy Element, the Court Should Conclude that Alternate Means for Promoting Public Policy are Inadequate Unless the Remedies are Exclusive.....	22
1. An Administrative Remedy that is Not Exclusive is Inadequate.....	23

2. Washington law provides standards for determining exclusivity in the face of statutory silence.....	26
E. <i>Becker</i> should be Affirmed. <i>Rose</i> and <i>Rickman</i> Should be Reversed.....	29
1. <i>Becker</i> - the statutes relied upon as a source of public policy are not exclusive and are not adequate.....	29
2. <i>Rose</i> - the statutes relied upon as a source of public policy are not exclusive and are not adequate.....	30
3. <i>Rickman</i> - the statute relied upon as a source of public policy is not exclusive. The internal hotline as a matter of law is an inadequate means to vindicate public policy.....	32
IV. CONCLUSION.....	34

TABLE OF AUTHORITIES

STATE OF WASHINGTON

<i>Becker v. Community Health Systems</i> , 182 Wn.App. 935, 332 P.3d 1085 (2014).....	Passim
<i>Cudney v. AlSCO, Inc.</i> , 172 Wn.2d at 524, 548, 549-550, 259 P.3d 244 (2011).....	Passim
<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 459, 13 P.3d 1065 (2000).....	20, 21
<i>Gardner v. Loomis Armored Inc.</i> , 128 Wn. 2d 931, 913 P. 2d 377 (1996).....	Passim
<i>Hayes v. Trulock</i> , 51 Wn.App. 795, 755 P.2d 830.....	20
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 707-08, 50 P.3d 602 (2002).....	13, 17, 25
<i>Hume v. American Disposal Co.</i> , 124 Wn.2d 656, 880 P.2d 998 (1994).....	19
<i>In re Stranger Creek & Tributaries in Stevens Cnty.</i> , 77 Wn.2d 649, 653, 466 P.2d 508, 511 (1970).....	16
<i>Johnson v. Department of Social & Health Servs.</i> , 80 Wn. App. 212, 230, 907 P.2d 1223 (1996).....	12
<i>Korslund v. DynCorp Tri-Cities Services</i> , 156 Wn.2d 168, 182, 125 P.3d 119 (2005).....	Passim
<i>Piel v. City of Federal Way</i> , 177 Wn.2d at 604, 614-16, 306 P.3d 879 (2013).....	3, 6, 16, 23, 25, 26, 30, 31
<i>Port of Seattle v. Lexington Ins. Co.</i> , 111 Wn.App. 901, 919, 48 P.3d 334, 343 (2002).....	12

<i>Rickman v. Blue Cross,</i> No. 70766-3-I (2014) (unpublished).....	1, 7, 32
<i>Riehl v. Foodmaker, Inc.,</i> 152 Wn.2d 138, 147, 94 P.3d 930 (2004).....	16
<i>Roberts v. Dudley,</i> 140 Wn.2d 58, 72-73, 993 P. 2d 901 (2000).....	24
<i>Rose v Anderson Hay and Grain,</i> 183 Wn.App. 785, 335 P. 3d 440 (2014).....	1, 7, 16, 30, 31
<i>Sedlacek v. Hillis,</i> 145 Wn.2d 379, 36 P.3d 1014 (2001).....	11
<i>Smith v. Bates Technical College,</i> 139 Wn.2d 793, 991 P.2d 1135 (2000).....	25
<i>Thompson v. St. Regis Paper Company,</i> 102 Wn. 2d 219, 685 P. 2d 1018 (1984).....	Passim
<i>Weiss v. Lonquist,</i> 173 Wn.App. 344, 359, 293 P.3d 1264 (2013).....	4, 18, 31, 33
<i>Wilmot v. Kaiser Aluminum & Chemical Corporation,</i> 118 Wn.2d 46, 821 P.2d 18 (1991).....	6, 23, 24, 26, 27
<i>Wilson v. City of Monroe,</i> 88 Wn.App. 113, 943 P.2d 1134 (1997).....	18, 21, 22

OTHER STATES

<i>Dahl v. Combined Ins. Co.,</i> 621 N.W.2d 163, 2001 SD 12 (S.D. 2001).....	15
<i>Hysten v. Burlington Northern Santa Fe Railway Co.,</i> 85 P.3d 1183, 277 Kan.551, 563-64 (Kan. 2004).....	28
<i>McClanahan v. Remington Freight Lines, Inc.,</i> 517 N.E.2d 390, 393 (Ind. 1988).....	17

<i>Palmateer v. International Harvester Co.</i> , 421 N.E.2d 876, 85 Ill.2d 124, 132-33 (Ill. 1981).....	15
<i>Tameny v. Atlantic Richfield Co.</i> , 27 Cal.3d 167, 176, 164 Cal.Rptr. 839, 844, 610 P.2d 1330, 1335 (1980).....	15
<i>Townsend v. L.W.I.M. Management, Inc.</i> , 496 A.2d 239, 244, 64 Md.App.55 (1985).....	17

FEDERAL COURTS

<i>O'Brien v. ABM Industries, Inc.</i> , No. C13-2023-JCC (W.D. Wa. Feb. 2015).....	19
--	----

OTHER AUTHORITIES

15 U.S.C. § 78u-6 (Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010).....	13, 29
18 U.S.C. 1514A (Sarbanes-Oxley Act of 2002).....	13, 29
22 Am. Jur. 2d <i>Damages</i> § 40.....	12
49 U.S.C. (Commercial Motor Vehicle Safety Act).....	13, 31
82 Am. Jur. 20 <i>Wrongful Discharge</i> § 54 (2014).....	4
Henry H. Perritt, Jr., <i>Workplace Torts: Rights and Liabilities</i> § 3.14, at 77 (1991).....	9, 14, 17, 30
Washington Administrative Code 296-360-030(4).....	28
Washington Civil Rule 8(e)(2).....	12

I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 150 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life.

The Court has granted review in three companion cases: *Becker v. Community Health Systems, Inc.*, 182 Wn.App. 935, 332 P.3d 1085 (2014), *Rose v. Anderson Hay and Grain Co.*, 183 Wn.App. 785, 335 P.3d 440 (2014), and *Rickman v. Premera Blue Cross*, No. 70766-3-I (2014) (unpublished). With the permission of the Chief Justice, the same amicus brief is being submitted in each of the three cases. All three cases turn on the plaintiff's burden to satisfy the jeopardy element of the public policy tort. But the current formulation of the tort is unworkable. As Judges Fearing and Lawrence-Berrey lamented in their *Becker* concurrence, confusion, incoherence, and uncertainty warrant a change.

In this brief, WELA recommends three alternatives to the Court: (1) return the tort to its origins as set forth by this Court in *Thompson v. St. Regis*—the cleanest and simplest approach, as suggested by the Washington State Association of Justice; or (2) interpret the jeopardy element as properly read by Judge Fearing in *Becker*: it is satisfied whenever the Plaintiff's conduct "directly relates" to enforcement of the

public policy, without having to show the absence of an alternative adequate mechanism; or (3) if the Court maintains the current formulation, rule that as a matter of law an alternative mechanism is inadequate unless the legislature has declared it is exclusive (or preempted by federal law).

II. SUMMARY OF ARGUMENT

The exposure of violations of public policy in the workplace is frequently dependent upon employees of conscience who are willing to provide the necessary information to management, government agencies, or the media. Retaliation against employees willing to expose the truth is far more real than theoretical. Legal protection from retaliation is required to protect employees willing to risk their livelihood to protect public policy. Without it, public policy is genuinely threatened as employees have a disincentive to expose illegal behavior; they understand that there exists no obstacle to retaliation, so they will remain silent.

Thirty years ago, in *Thompson v. St. Regis*, 102 Wn.2d 219, 685 P.2d 1081 (1984), this Court created a common law tort claim to promote public policy clearly stated in our case law, statutes, regulations, and state and federal constitutions. Although the purpose of the claim is ultimately to protect public policy, the protection of employees who expose the violation of public policy is the vehicle relied upon to achieve that end. The promotion of public policy and the protection of employees exposing violations of public policy are thus inextricably tied. This principle is the basis for the public policy tort.

The evolution of the law since *Thompson* has, unfortunately, created significant confusion for lower courts and practitioners. See *Becker*, 182 Wn.App. at 954 (Fearing, J., concurring) (“I write separately...because I cannot reconcile the teachings of *Piel* and *Cudney*”). Regrettably, this confusion cannot be resolved without overruling prior case law. The Court must now choose between a viable wrongful discharge claim that protects public policy and the employees who expose violations of public policy, and a claim that is inapplicable in the overwhelming majority of cases. A public policy tort created to protect employees as a vehicle to promote public policy is incompatible with a public policy tort where the remedies made available to employees are irrelevant.

The Court adopted the current elements for the tort to address the unique facts in *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 940, 913 P.2d 377 (1996) (adopting Henry Perritt’s formulation for the public policy tort “[b]ecause this situation does not involve the common retaliatory discharge scenario [and] demands a more refined analysis than has been conducted in previous cases.”). Still, the Court emphasized that the new formulation of elements (clarity, jeopardy, and causation) were already a part of the common law that the Perritt test did not change. *Id.* at 941-42.¹

¹ The “overriding justification” element was the only change to common law, and no Washington case since *Gardner* has substantively addressed that issue.

In its amicus submission, WSAJ convincingly explains that the Court should return the elements of this tort to reflect those of a simple retaliation claim that this Court originally envisioned, as set forth in *Thompson*, just twelve years prior. Indeed, as Judge Fearing points out, the Perritt formulation does not appear to be the “majority rule” articulated at 82 AM. JUR. 20 *Wrongful Discharge* § 54 (2014). *Becker*, 332 P.3d at 1099 (J., Fearing concurring). Inquiry into alternative means of enforcement is not part of this proof paradigm.

While adopting the Perritt test was useful in addressing the unique facts presented in *Gardner* it has created unnecessary complexity and confusion since then—primarily in applying the jeopardy prong. The Court has repeatedly ruled that “[t]he other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy,” *Cudney v. ALSOCO, Inc.*, 172 Wn.2d 524, 538, 259 P.3d 244 (2011), so lower courts held accordingly. *See, e.g., Weiss v. Lonquist*, 173 Wn.App. 344, 359, 293 P.3d 1264 (2013) (“The Supreme Court has repeatedly emphasized that *it does not matter* whether or not the alternative means of enforcing the public policy grants a particular aggrieved employee any private remedy”) (emphasis original). As explained, the Court should not reach the issue of adequacy of remedies in these cases, but if it does then it should first confirm that the adequacy of the remedies made available to the employee matter, that they are not irrelevant.

As Judge Fearing articulates in *Becker*, if the Court retains the “jeopardy” element of the public policy tort, the tort can and should exist independent of whether a plaintiff can theoretically enforce public policy by some other means. In *Gardner*, the Court ruled that “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.” *Id.* at 945 (emphasis added). This is a question of fact for the jury. *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 182, 125 P.3d 119 (2005). If the employee’s conduct “directly relates” to the public policy, then the adequacy of remedies made available by an alternative source of public policy need not be considered. *See Becker*, 182 Wn.App at 954 (J., Fearing concurring); *Korlund*, 156 Wn.2d at 193-94 (J. Chambers, dissenting) (“Proof of jeopardy to public policy is an either/or test: that is, the employee must show that her conduct furthers a clear mandate of public policy either because that policy directly promotes the conduct or because the conduct is necessary to the effective enforcement of the policy”). Only where the plaintiff must establish that the conduct is necessary for the effective enforcement of the public policy must the court determine whether remedies provided by the alternative source are adequate. This is a question of law. *Korlund*, 156 Wn.2d. at 182.

If alternate means of enforcement remain the plaintiff’s burden, the Court should confirm that such alternate means are, by definition,

“inadequate” unless the legislature intends those means to be the *exclusive* method for vindicating the public policy. See *Piel v. City of Federal Way*, 177 Wn.2d 604, 617, 306 P.3d 879, 884 (2013) (“[W]hen 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. . . . It is the strongest possible evidence that the statutory remedies are not adequate to vindicate a violation of public policy”); *Wilmot v. Kaiser Aluminum & Chemical Corporation*, 118 Wn.2d 46, 821 P.2d 18 (1991) (discussing the factors to be considered to determine exclusivity). This rationale is consistent with this Court’s most recent ruling, in *Piel*, but cannot be harmonized with the teachings of *Cudney* and *Korslund*.

A case-by-case determination of the adequacy of the administrative process and remedies for each statute or regulation regardless of exclusivity is possible, but will require judicial review by Washington appellate courts until the adequacy of each statute or regulation is finally adjudicated. That process will require a very substantial expenditure of judicial resources. Absent a judicial determination about each statute or regulation, the legal and business communities are left to guess which sources of public policy are inadequate.

In resolving the three cases before it, the Court should discard the Perritt elements and hold that the Plaintiffs have satisfied the basic elements of the tort under *Thompson*. In the alternative, the Court should

adopt Judge Fearing's analysis and rule that the conduct of each Plaintiff "directly relates" to protecting public policy so they need not show the absence of an alternative adequate mechanism for enforcement. Finally, if the Court is not inclined to adopt either approach, the Court should hold that the sources of public policy relied upon in *Becker*, *Rose*, and *Rickman* are non-exclusive and thus, not an adequate alternative means to vindicate public policy. In *Becker* and *Rose*, the legislature declared that the statutory remedies are not exclusive; in *Rickman*, the employer hotline provides no remedies for the employee at all.

If the jeopardy element remains unchanged, WELA respectfully submits that *Cudney* and *Korshund* must give way to *Piel* because remedies available to an employee are central to the public policy tort. The Court should affirm the lower court in *Becker*, and reverse in *Rose* and *Rickman*.

III. ARGUMENT

A. The Court Should Return the Public Policy Tort to its Origins.

With the Court's decision in *Thompson v. St. Regis*, Washington joined a "growing number of jurisdictions" to recognize the common law tort of wrongful discharge as an exception to the at-will employment doctrine. 102 Wn.2d at 232-33. Simply stated, the tort protects an individual's job security against employer actions that offend clear civic mandates. *See id.* at 233. In *Thompson*, a divisional controller had instituted an accurate accounting program required by the Foreign Corrupt

Practices Act of 1977. The employee claimed he was terminated in retaliation for complying with the law, and his discharge was intended to serve as a warning to other divisional controllers. The Court ruled that a plaintiff could satisfy the elements of a wrongful discharge claim by showing the discharge contravened a clearly stated public policy. *Id.* at 232. The Court announced a straight-forward burden of proof.

Thus, to state a cause of action, 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.

Id. at 232-33.

Twelve years after *Thompson*, in *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996), the Court considered whether an armored car driver who left his truck to save the life of a crime victim could state a claim for wrongful discharge in violation of public policy. The employer terminated the driver for violating an absolute company rule prohibiting drivers from leaving the truck. This rule was intended for the safety of both the driver and his partner. *Id.* at 995.

The Court acknowledged that these facts presented a rare exception to the common retaliatory discharge scenario because “[b]oth parties in this case have offered legitimate and valid reasons in defense of

their actions.” *Id.* at 938; *see also id.* at 940 (“Because this situation does not involve the common retaliatory discharge scenario, it demands a more refined analysis than has been conducted in previous cases.”). To address this unique conflict of policies, the Court adopted the Henry Perritt formulation as a “guide” for the wrongful discharge claim:

(1) The plaintiffs must prove the existence of a clear public policy (the clarity element). Henry H. Perritt Jr., *Workplace Torts: Rights and Liabilities* § 3.7 (1991) (hereinafter Perritt).

(2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element). Perritt § 3.14.

(3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element). Perritt § 3.19.

(4) The defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element). Perritt § 3.21.

Id. at 941.² Going further, the *Gardner* Court penned a three-sentence description of the jeopardy element:

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. Perritt § 3.14 at 75-76. This burden requires a plaintiff to “argue that other means for promoting the policy . . . are inadequate.” Perritt § 3.14 at 77. Additionally, the plaintiff must show how the threat

² The Court in *Gardner* explained that the “[c]ommon law already contains the clarity and jeopardy elements. . . [and] [t]he causation element is also firmly established in Washington common law.” *Id.*, 128 Wn.2d at 941-42. The overriding justification element, which was new, was applied to resolve the conflicting policies presented in that case. Significantly, *Gardner* is the only published decision addressing the substance of the overriding justification element, and is not an issue in any of the three cases before this Court.

of dismissal will discourage others from engaging in the desirable conduct.

Id. at 945 (emphasis in original). In other words, the plaintiff can show *either*: (a) that her conduct *directly relates* to the public policy *or* (b) that her conduct was *necessary* to enforce it. *See id.*; *see also Becker*, 192 Wn. App. at 956-57 (“The sentence employs the word ‘or.’”); *accord Korslund*, 156 Wn.2d at 193-94 (2005) (Chambers J., dissenting) (“Proof of jeopardy to public policy is an either/or test....”). On largely undisputed facts, the *Gardner* Court had little trouble determining the plaintiff could satisfy both alternatives. *Id.* at 945-46. Notably, the *Gardner* Court does not mention whether alternate means of enforcing the public policy *exist*, let alone whether they are inadequate. Yet, the *Gardner* Court’s single reference to alternate remedies “launched the many appellate decisions that give rise to the current unpredictability....” *Becker*, 182 Wn.App at 957.

The *Gardner* Court did not intend to part ways with *Thompson*. Quite to the contrary. *Id.* at 941 (“[T]he adoption of this test does not change the existing common law in this state.”). Even so, there can be no doubt that the *Gardner* Court’s adoption of the four-part Perritt test, and in particular, its description of the jeopardy element, changed the trajectory of the tort. Indeed, if Mr. Thompson presented the exact same record to the Court today as he had done in 1984, his wrongful discharge claim would likely fail as a matter of law because he would be unable to show

that the United States Attorneys' Office is unable to enforce the Foreign Corrupt Practices Act (i.e., the jeopardy element).

The most promising solution to the current, confused state of the law is to return the tort to its origins – as a retaliatory discharge claim focused on whether the employer's termination offends clear public policy by asking whether the employee's policy-linked conduct is a "substantial factor" in the decision to discharge.³ There exists an abundance of Washington law applying this simple standard. WSAJ has submitted a reasoned, compelling basis for such a change in the rule of law, and WELA supports it.⁴

B. If the Court Retains the Perritt Test, It Should Rule that a Plaintiff Can Satisfy Her Burden of Proof on the Jeopardy Element by Showing that Her Conduct "Directly Relates" to Public Policy.

If the Court retains the Perritt-test (and with it, the jeopardy element), the Court should adopt Judge Fearing's analysis and conclude that, to prove jeopardy, it is sufficient for plaintiff to show that her

³ A return to *Thompson* is consistent with this Court's principles of stare decisis. Section C below describes other seminal Washington precedent that the Court's recent rulings have placed in serious doubt.

⁴ Defendants may argue that re-adopting a simplified approach will result in a broadening of the tort. Such arguments are misplaced. There is no evidence that, prior to *Gardner*, Washington Courts were over-burdened with common law wrongful discharge claims. Moreover, the plaintiff's burden to prove the existence of a *clear* public policy has long-served as the gatekeeper to unwarranted expansion of the tort. In order to prevent frivolous lawsuits "the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened." *Thompson*, at 232. See also *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996)(recognizing the clarity element as the filter to assure a narrow exception and prevent frivolous lawsuits); *Sedlacek v. Hillis*, 145 Wn.2d 379, 36 P.3d 1014 (2001) (recognizing that the clarity element satisfied the need to proceed cautiously); *Korslund v. DynCorp Tri-Cities Services*, 156 Wn.2d 168,180, 125 P. 3d 119 (2005) ("The rule of narrow construction announced in *Thompson* is primarily concerned, however, with the need to identify an existing clear mandate of public policy").

conduct “directly relates” to the public policy at issue. *Becker*, 182 Wn.App at 962 (Fearing J., concurring). Such a showing is independent of any inquiry as to whether other means exist to enforce the public policy. *Id.* at 957.

As an initial matter, construing “directly relates” in isolation from the rest of the *Gardner* description of jeopardy is consistent with the Court’s use of the “or” disjunctive. *Gardner*, 128 Wn.2d at 945; *see Becker* 192 Wn. App. at 956-57 (“The sentence employs the word ‘or.’”); *accord Korshund*, 156 Wn.2d at 193-94 (Chambers J., dissenting) (“Proof of jeopardy to public policy is an either/or test.....”).

Adopting Judge Fearing’s rule is also consistent with fundamental principles of pleading in the alternative, embodied in our court rules. Civil Rule 8(e)(2) (“A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both.”); *see also Port of Seattle v. Lexington Ins. Co.*, 111 Wn.App. 901, 919, 48 P.3d 334, 343 (2002).⁵ A determination that a common law tort claim rises and falls based on the existence of *other* claims and *other* remedies is a detour and departure from this fundamental principle of notice pleading. Indeed, in no other instance of which WELA is aware, does a plaintiff have to detail what *other* claims or

⁵ Thus, for example, “when there are alternative remedies, statutory or common law, a plaintiff in an employment discrimination case is not required to elect between, or among, such remedies” 22 Am. Jur. 2d Damages § 40. Of course, to the extent that multiple claims arise from a single act, double *recovery* for the same injury is prohibited. *Id.*; *see also Johnson v. Department of Social & Health Servs.*, 80 Wn. App. 212, 230, 907 P.2d 1223 (1996).

causes of action exist (or rather, do not exist) in order to seek redress for her harm.

On the cases pending before it, the Court need not reach the question of alternate remedies because there is little doubt that the employees' conduct "directly relates" to the public policy to be enforced. Mr. Becker complained to management and his employer's parent company about financial fraud, which directly related to the public policy reflected in the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. 1514A, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 78u-6. Mr. Rose complained to his employer about driving an excessive number of hours, which directly related to the public policy reflected in the Commercial Motor Vehicle Safety Act. Lastly, Ms. Rickman complained to her employer about business practices that directly related to public policy in HIPAA and Washington's Uniform Health Care Information Act. To the extent this Court has any doubt about whether the employee's act (or refusal to act) directly relates to the public policy at issue, the question is one for the jury. *See Hubbard*, 126 Wn.2d at 715 (reasoning that the question of jeopardy is a "generally a question of fact" save for inquiry into other means of enforcement).

C. If Alternate Means of Enforcement Remains Part of the Test, the Court Should Confirm that the Remedies Made Available to an Employee Are Central to the Public Policy Tort.

Law enforcement authorities are powerless to enforce public policy unless they become aware that it is being violated. In the absence of

employees willing to expose violations of public policy, law enforcement often has no opportunity to discover or prevent public policy violations, so the enforcement of public policy is *genuinely threatened*. Because the threat of retaliation is more real than theoretical, employees will be unwilling to expose violations of law without sufficient protection. Although public prosecutors, for example, are responsible for protecting the public policy reflected in criminal statutes, criminal enforcement is dependent upon the uncertainty of apprehending the offender, the discretion of the prosecutor, and the resources currently available.⁶ In *Thompson*, the Court recognized the common law claim because despite the enactment of civil rights legislation “the employee is still left largely unprotected.” *Id.* at 226. The public policy tort was created to provide sufficient protection to employees exposing violations of public policy.

This Court’s opinion in *Cudney* appears to rule that criminal statutes are an adequate alternative means of vindicating public policy even where the reporting employee is retaliated against by the employer with impunity. That ruling is inconsistent with the public policy tort’s central purpose, which is to prevent the employer from abusing its power

⁶ Implicitly, *Gardner* recognizes that prosecuting the man wielding the knife after he murders the bank manager would not be an adequate alternative to affording Gardner protection under the public policy tort. See also *Perritt*, Fourth edition, Section 7.17 (“[I]t is fair to conclude that the exigencies of the situation were satisfied better by Mr. Gardner’s immediate intervention than by sitting and waiting for help to arrive in response to a radio call, the public address system, or the siren. It was reasonable to conclude, as the majority did, that under the particular circumstances, the other available remedies were inadequate”); *Perritt*, 2008 Supplement, Section 7.06, page 7-73 (same).

to subvert public policy.⁷ Professor Perritt has stated that Washington State is the only state in the country to hold that “[t]he other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy.” See Perritt/WELA Memorandum in Support of Reconsideration in *Cudney* at 3. Because “[n]early all, if not all, public policies have an alternative means for enforcement,” *Becker*, 182 Wn.App. at 954 (Fearing, J. concurring), applying *Cudney*, no criminal statute could be a source of public policy sufficient to satisfy the jeopardy element, and the wrongful discharge claim would be eviscerated.

1. *Cudney* is Incorrect and Harmful and Cannot be Harmonized with Numerous Important Supreme Court Decisions.

“The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *Riehl v.*

⁷ Numerous courts have recognized the public policy tort to enforce the public policy reflected in criminal statutes. E.g., *Dahl v. Combined Ins. Co.*, 621 N.W.2d 163, 2001 SD 12 (S.D. 2001) (recognizing a public policy tort for reporting criminal conduct, “the reporting of unlawful or criminal conduct to a supervisor or outside agency plays an invaluable role in society. . . . Indeed, there is no public policy that can be said to be more basic or necessary than the enforcement of the state’s criminal code or the protection of the life and property of its citizens”); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 85 Ill.2d 124, 132-33 (Ill. 1981) (“No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters. . . . The law is feeble indeed if it permits [employers] to take matters into its own hands by retaliating against its employees who cooperate in enforcing the law”) (cited in numerous Washington cases); *Tamery v. Atlantic Richfield Co.*, 27 Cal.3d 167, 176, 164 Cal.Rptr. 839, 844, 610 P.2d 1330, 1335 (1980) (“an employer’s obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied ‘promises set forth in the [employment] contract,’ but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state’s penal statutes”).

Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004).⁸ In this case the rule established by *Cudney* is both incorrect and harmful. The case stands for the proposition that to be adequate an alternative source of public policy need not provide any remedy to the employee. As explained above, this ruling defeats the very purpose for which the public policy tort was first recognized and is therefore incorrect. It is exceedingly harmful because without protection employees won't expose violations of public policy and the enforcement of public policy will be *genuinely threatened*. Moreover, *Cudney* is internally inconsistent and cannot be harmonized with numerous Supreme Court cases resulting in an incoherent jurisprudence; the legal community is left to guess under what circumstances the public policy tort will apply.

The Court's opinion in *Cudney* was divided in two distinct parts: Part I addressed whether the administrative remedies made available by WISHA were an adequate alternative means to vindicate public policy, and Part II addressed whether the criminal statute Driving Under the Influence ("DUI") was an adequate alternative means to vindicate of public policy as basis for a wrongful discharge claim. The Court's blanket conclusion in Part II made Part I superfluous.

⁸ As the Court is aware, the doctrine of stare decisis is "not an absolute impediment to change." *In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508, 511 (1970). Rather, courts possess and exert changes in the rule of law when reason requires it. *Id.* (holding that state may establish riparian water rights in trust lands, and overturning inconsistent prior case law, in part due to "enlightened understanding" of benefits associated with trust land grants). Although this Court has attempted to harmonize its prior rulings on what constitutes an "adequate" alternate means of enforcement, see *Piel*, 177 Wn.2d at 616, confusion reigns. Compare *Becker with Rose*. Change in the rule of law is required to provide coherence, certainty, and predictability -- the very qualities stare decisis is designed to ensure.

In rejecting the DUI statute as a source of public policy (Part II), the court concluded: "Under a strict adequacy analysis, Cudney simply cannot show that having law enforcement do its job and enforce DUI laws is an inadequate means of promoting the public policy." *Id.* at 537. The Court in *Cudney* made it explicitly clear that whether an alternative source of public policy provided remedies for the employee was irrelevant: "Finally, we must remember that it is the public policy that must be promoted, not Cudney's individual interests. 'The other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy.'" *Id.* (citing *Hubbard*, 146 Wn.2d at 717, 50 P.3d 602).⁹ The Court ruled that to satisfy the jeopardy element a complaint to company management about driving under the influence must be the "only available adequate means" to promote the public policy of protecting the public from drunk driving." *Id.* at 537 (emphasis original).

⁹ In support of this proposition, the Court in *Hubbard* cited Henry H. Perritt, Jr., *Workplace Torts: Rights and Liabilities* § 3.14, at 77 (1991). *Id.* at 717. But the *Perritt* treatise states no such thing. Indeed, it states exactly the opposite. As an example, *Perritt* cites case law "in which the Court approved a common law tort claim for a dismissal associated with a polygraph examination, reasoning that criminal prosecution under the polygraph statute giving rise to the public policy tort is discretionary with the prosecutor, and therefore less than a complete remedy for the employee dismissed in violation of the statutory policy." *Id.* (citing *Townsend v. L.W.M. Management, Inc.*, 496 A.2d 239, 244, 64 Md.App.55 (1985)). "When employers fire employees for refusing to violate specific statutory prohibitions the jeopardy analysis proceeds from the proposition that permitting such dismissals would encourage conduct in violation of the statute." *Perritt*, at 77-78 (citing *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 393 (Ind. 1988) ("recognizing a public policy tort claim for an employee fired for refusing to drive an overweight truck in violation of state law"))).

In Part I of *Cudney*, the Court concluded that "[i]n light of *Korslund* and our other post-*Gardner* cases outlining the adequacy standard of the jeopardy element, we do not find that the robust statutory remedies available in WISHA are inadequate to protect the underlying public policies of worker safety and protection of workers from retaliation for raising safety concerns." *Id.* at 536; *but see Wilson v. City of Monroe*, 88 Wn.App. 113, 943 P.2d 1134 (1997) (holding that WISHA remedies did not foreclose a public policy tort). The two parts of *Cudney* are internally inconsistent: if "[t]he other means of promoting the public policy need not be available to a particular individual," as the Court ruled in Part I, then whether the WISHA remedies were "robust" made no difference.

Weiss v. Lonquist, demonstrates the harmful impact of *Cudney*. In *Weiss*, Division I rejected a claim for wrongful discharge based upon the Rules of Professional Conduct as a source of public policy. 173 Wn. App. at 348. The Court ruled that the disciplinary process of the WSBA was an adequate alternative means to vindicate public policy even though that process provided *no* remedies to the employee. *Id.* at 359. "But we do not read *Cudney* as holding that alternative remedies, to be adequate, must provide relief personal to the employee. The Supreme Court has repeatedly emphasized that *it does not matter* whether or not the alternative means of enforcing the public policy grants a particular aggrieved employee any private remedy." *Id.* at 359 (emphasis original).

The Rules of Professional Conduct require that lawyers refuse to engage in clear ethical violations, even when their employer insists to the contrary. If a managing lawyer can terminate a subordinate lawyer with impunity for refusing to commit a clear violation of an ethical rule, subordinate lawyers will be less likely to refuse. The Rules of Professional Conduct will be violated more often, to the detriment of society. While the WSBA has the authority to enforce the Rules of Professional Conduct, its process can sometimes take years, and doesn't prevent the ethical violation from occurring in the first place, or from continuing. The failure to protect an employee complaining about a violation of the Rules of Professional Conduct *genuinely threatens* that public policy.¹⁰

2. *Hume v. American Disposal Co.* is incompatible with *Cudney* and its progeny *Weiss*.

In *Hume v. American Disposal Co.*, 124 Wn.2d 656, 880 P.2d 998 (1994), the Court considered a claim by wage earners who alleged wrongful discharge (constructive discharge) in retaliation for having demanded overtime pay. The jury returned a verdict in favor of the employees and the employer appealed. The Supreme Court affirmed.

¹⁰ Another recent case demonstrating the harmful effect of *Cudney* is *O'Brien v. ABM Industries, Inc.*, No. C13-2023-JCC (W.D. Wa. Feb. 2015). In *O'Brien*, the Plaintiff alleged *inter alia* "that she can establish wrongful discharge in violation of public policy because she was 'terminated in retaliation for her discovery and reporting of financial irregularities in ABM's Accounts Receivables at the Pacific Place Garage.' Plaintiff argued that her actions were intended to protect the public interest and promote the public policy of taxing local parking businesses, as enunciated in Seattle Municipal Code, Chapter 5.35, and in RCW 82.80.070." Dkt. 87 at 5. The Court dismissed the claim despite the lack of any administrative scheme or remedy "because the Seattle Municipal Code includes a robust scheme for enforcement of parking revenue taxation requirements." *Id.* at 6-7. "Because Plaintiff cannot establish that the existing enforcement scheme was inadequate, she cannot prove that her actions were necessary to promote the public policy at issue." *Id.* at 7 (*citing Cudney*). See attached, Appendix A.

"The Plaintiffs' claims are based upon a statute which reflects a legitimate local concern rooted in a strong and clearly articulated public policy." *Id.* at 665. "RCW 49.46.100 prohibits employer retaliation against employees who assert wage claims, and we have held employers who engage in such retaliation liable in tort for violation of public policy under this provision." *Id.* at 662. But applying *Cudney*, the public policy reflected in this statute can be vindicated by criminal prosecution.¹¹ If criminal prosecution is a sufficient alternative means of vindicating public policy, then the availability of a public policy tort recognized by the Court in *Hume* is in doubt. See also *Hayes v. Trulock*, 51 Wn.App. 795, 755 P.2d 830 (employees fired in retaliation for complaining to officials about the employer's refusal to pay overtime), review denied, 111 Wn.2d 1015 (1988).

3. *Ellis v. City of Seattle* is incompatible with *Cudney* and *Weiss*.

In *Ellis v. City of Seattle*, 142 Wn.2d 450, 459, 13 P.3d 1065 (2000), the Plaintiff was employed as a sound technician at Key Arena. He refused to bypass the emergency fire microphone sound relay as requested by a supervisor because he knew that proper authorization had

¹¹ RCW 49.46.090 creates employer liability in favor of any employee who receives less than the minimum wages authorized by law. RCW 49.46.100(2) penalizes as a gross misdemeanor retaliation against any employee who "has made any complaint to his employer, to the director, or his authorized representatives that he has not been paid wages in accordance with the provisions of this chapter, or that the employer has violated any provision of this chapter, . . ." The statute, however, provides no direct remedy to the individual who complains about the employer's failure to pay. Instead, Washington courts recognize RCW 49.46.100 as a source of public policy sufficient to state a claim under the public policy tort.

not been received from the Seattle Fire Department. *Id.* at 457. Thereafter, Plaintiff complained to the Washington State Department of Labor & Industries about what he considered an unlawful request. Plaintiff was fired for "refusal to comply with a directive from [his] supervisor." Mr. Ellis brought suit for wrongful discharge and relied upon the Seattle Fire Code as source of public policy. *Id.* He also claimed a retaliatory discharge in violation of RCW 49.17.160(1) stemming from his L & I complaint. *Id.* The Supreme Court overruled the Court of Appeals and remanded for a trial on the merits.

The Court in *Ellis* did not discuss whether the Seattle Fire Code provided an adequate alternative means to enforce public policy. But when ordered to bypass the fire system without authorization, Mr. Ellis could have complained to the Seattle Fire Department, and it could have enforced, or declined to enforce, the Seattle Fire Code. Applying the rule of *Cudney*, if Mr. Ellis presented the same facts today then he would likely lose. *Ellis* and *Cudney* are incompatible.¹²

4. *Cudney* and *Weiss* are incompatible with *Wilson v. City of Monroe*.

In *Wilson v. City of Monroe*, 88 Wn.App. 113, 943 P.2d 1134 (1997), the Plaintiff was employed by the City as a plant operator at its waste water treatment facility. "According to Wilson, throughout his

¹² The Court of Appeals in *Ellis* reversed the trial's court dismissal of the retaliation claim under WISHA; the City did not seek review on that issue. 142 Wn.2d at 458. Although the Supreme Court does not explicitly address WISHA, the remedies made available by that administrative scheme did not foreclose satisfying the jeopardy element. If Mr. Ellis presented the same facts, he would likely lose in light of *Korshund*.

employment with the City he was instructed to recirculate sewage sludge through the plant, resulting in illegal discharges into the Skykomish River. Wilson complained to the Washington State Department of Ecology and the United States Environmental Protection Agency. Wilson also claims that requests to his employer for standard safety equipment were denied.” *Id.* at 116. After Wilson was terminated he filed a wrongful discharge lawsuit that was dismissed at summary judgment. *Id.* at 116-17.

The Court of Appeals explicitly considered “whether Wilson may bring the common law cause of action notwithstanding the existence of other remedies available to him.” *Id.* at 121. The Court ruled that the wrongful discharge claim was independent of any collective bargaining agreement with the City, it was not preempted by federal law, and that “Wilson was not required to exhaust the remedies provided him under the CBA before bringing his claims.” *Id.* at 119.

A wrongful discharge claim was not the *only* available means to enforce public policy. Moreover, *Wilson* explicitly recognizes that the WISHA administrative mechanism does not foreclose a wrongful discharge claim. *Cudney* overruled *Wilson* without mentioning it.

D. If It Retains the Current Formulation of the Jeopardy Element, the Court Should Conclude that Alternate Means for Promoting Public Policy are Inadequate Unless the Remedies are Exclusive.

If inquiry into alternate means of enforcement remains a burden that the plaintiff must meet, the Court should confirm that such alternate means are, by definition, “inadequate” unless the legislature has clearly

stated those means are the *exclusive* method for vindicating the public policy.

Only exclusive (or federally preemptive) alternative sources of public policy are adequate. *See Piel*, 177 Wn.2d at 617 (“[W]hen 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. . . . It is the strongest possible evidence that the statutory remedies are not adequate to vindicate a violation of public policy”); *Wilmot*, 118 Wn.2d at 54-65 (discussing the factors to be considered to determine exclusivity); *but see Korshund*, 156 Wn.2d at 183 (“Here, however, the question is not whether the legislature intended to foreclose a tort claim, but whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy”). In the three cases before the Court, the alternate means for enforcement of the public policy at issue are all non-exclusive and thus, are an inadequate means to vindicate public policy.

1. An Administrative Remedy that is Not Exclusive is Inadequate.

In *Wilmot*, plaintiffs alleged that they were discharged in violation of public policy established by RCW 51.48.025, which prohibits an employer from discharging employees in retaliation for filing a workers' compensation claim. None of the plaintiffs filed complaints alleging retaliatory discharges with the Department of Labor and Industries as

provided for in the statute, 118 Wn.2d at 51-52. Instead they filed a lawsuit alleging wrongful discharge in violation of a clear mandate of public policy. Responding to the certified question from federal court, the Supreme Court relied upon the legislative intent to conclude that: "RCW 51.48.025 is not mandatory and exclusive; a worker may file a tort claim for wrongful discharge based upon allegations that the employer discharged the worker in retaliation for having filed or expressed an intent to file a workers' compensation claim, independent of the statute." *Id.* at 53. See also *Roberts v. Dudley*, 140 Wn.2d 58, 72-73, 993 P. 2d 901 (2000)(relying upon the non-exclusivity provision of the WLAD to recognize a wrongful discharge claim for discrimination against employers with less than eight employees).

In *Korstlund*, the Court appears to have overruled *Wilmot sub silentio*. The Plaintiffs claimed wrongful constructive discharge and relied on the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851(a)(1)(A) as the source of public policy. The Court acknowledged that the ERA was neither mandatory nor exclusive and did not bar common law tort remedies. *Id.* at 182. Nevertheless, the Court ruled that as a matter of law Plaintiff had not satisfied the jeopardy element because "[t]he ERA thus provides comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs." *Id.*

The Court distinguished *Wilmot* on the grounds that it had considered only whether the statutory remedy provided by RCW

51.48.025 was exclusive, not whether it was adequate. *Id.* at 183. The Court in *Korslund* concluded that “[m]oreover, the Court of Appeals’ analysis conflicts with *Hubbard*, where we said that the ‘other means of promoting the public policy need not be available’ to the person seeking to bringing the tort claim ‘so long as the other means are adequate to safeguard the public policy.’” *Id.* at 183.

In *Piel*, the Court considered whether a tort claim for wrongful termination is viable based on RCW 41.56, involving the Public Employees Relations Commission (PERC). The Court declined to distinguish *Smith v. Bates Technical College*, 139 Wn.2d 793, 991 P.2d 1135 (2000), on the grounds that *Smith* did not directly address the jeopardy analysis, which *Korslund* and *Cudney* did. *Id.* Yet this was the exact same basis that *Korslund* relied upon to distinguish *Wilmot* to rule that the jeopardy element had not been satisfied. *See Korslund*, 156 Wn.2d at 183.

The Court in *Piel* recognized that when the remedies made available by the alternative source are not exclusive that is the “strongest possible evidence” that they are not adequate to vindicate the public policy tort.

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. . . . 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.

Id. at 617. The reasoning of *Piel* and *Korshund* cannot be reconciled.

The existence of explicit language declaring remedies non-exclusive should be dispositive on the issue of adequacy.

2. Washington law provides standards for determining exclusivity in the face of statutory silence.

In *Wilmot*, the Court considered the standard for determining whether a statutory remedy is exclusive. The Court explained "there is no automatic yes or no answer applicable to all cases where the statute setting forth public policy also contains a remedy. Instead, the answer depends upon the particular statute's language and provisions, and may, under appropriate circumstances, depend in part upon other manifestations of legislative intent." *Id.* at 54. After examining the language and purpose of RCW 51.48.025, the Court concluded that the statute was not exclusive. *Id.* at 55-58. The comprehensiveness of the remedies provided by the statute was only one such important consideration.

However, it is not simply the presence or absence of a remedy which is significant; rather, the comprehensiveness, or adequacy, of the remedy provided is a factor which courts and commentators have considered in deciding whether a statute provides the exclusive remedies for retaliatory discharge in violation of public policy. See 1 L. Larson, *Unjust Dismissal* § 9.03[1], at 9-34 to 9-35 (1988). Further, it is one factor to consider, along with others relating to legislative intent.

Id. at 60-61. Although RCW 51.48.025 did set forth some remedies for retaliatory discharge, "it does not clearly authorize *all* damages which

would be available in a tort action.” *Id.* at 61 (emphasis added).

“Another factor often addressed by courts in deciding whether a statutory remedy for wrongful discharge is exclusive is whether the right embodied in the statute preexisted at common law or is a right created by the statute.” *Id.* at 62. When the wrongful discharge claim predates the statute, the wrongful discharge claim is allowed. *Id.* An additional factor to consider is whether the employee or administrative agency controls the lawsuit. *Id.* at 61.

The Court must remain mindful that the purpose of the public policy tort is the protection of employees’ interests as the vehicle for protecting public policy. Seen from that perspective, an administrative mechanism that does not fully protect those interests is inadequate. A legislative declaration on the issue of exclusivity or preemption should control the issue of adequacy. When the legislature has not clearly stated whether a statutory remedy is exclusive, then a court should consider the following factors: 1) the comprehensiveness of the remedies; 2) the statute of limitation made available by the administrative process; 3) whether the administrative agency controls the lawsuit; 4) whether there exists a right to appeal *de novo* to a judicial forum; and 5) whether the wrongful discharge claim predates the statute.

Only where *all* of the remedies and processes available under the public policy tort are expressly made available to the employee by the

statute or regulation is it adequate. Criminal statutes are virtually never adequate.

Some administrative processes contain only a 30-day statute of limitations. See WAC 296-360-030(4). Insofar as the public policy tort was created to protect the rights of the employee as a vehicle for the vindication of public policy, a 30-day statute of limitations is extremely unrealistic; many employees will not be able to timely file a claim. Likewise, although agency control of litigation might suffice to vindicate public policy in some circumstances, agencies often don't seek to recover emotional distress damages even when they are available, *i.e.*, WISHA. See *Cudney*, Amicus Brief by Labor & Industries at 10-11 ("The Department controls the litigation and brings the action to seek remedies that benefit the complainant, but the Department does not represent the complainant. The Department does not plead compensatory damages or front pay, only back pay"). The public policy tort was created to protect employees in recognition that public policy will often not otherwise be exposed and vindicated. To fully protect the employee it is imperative that the employee be allowed to control her own litigation. Most employees are extremely skeptical about the ability of an administrative agency to vindicate their rights. Absent a right to a *de novo* appeal from a negative administrative judgment, few employees will risk their livelihood to expose the violations of public policy.¹⁴

¹⁴ See, *e.g.*, *Hysten v. Burlington Northern Santa Fe Railway Co.*, 85 P.3d 1183, 277 Kan.551, 563-64 (Kan. 2004)("We conclude that the remedy afforded Hysten by the

E. *Becker* should be Affirmed. *Rose* and *Rickman* Should be Reversed.

1. *Becker* - the statutes relied upon as a source of public policy are not exclusive and are not adequate.

In *Becker*, the Plaintiff was employed by the Defendant as a CFO. As part of his job duties he discovered that his employer was misrepresenting the anticipated loss of a recent acquisition, by approximately \$8 million. Despite the insistence of his employer, he refused to report the falsely projected loss and he told an internal auditor that he suspected fraud against investors and creditors. He did not report his findings and suspicions to law enforcement. After discovering that the employer was attempting to use his subordinate to perpetuate the fraud, he threatened to resign unless the employer “responded appropriately to abate the misconduct.” The employer thereafter notified Plaintiff that his resignation had been accepted. 332 P.3d at 1087.

Becker filed suit alleging wrongful discharge, and the defendant's motion to dismiss for failure to state a claim was denied. On discretionary review, his employer argued that Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. 1514A, and section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 78u-6 were adequate alternative means to enforce public policy. *Becker*, 332 P.3d at 1091. Both of these statutes provide that the remedies made available are non-

RLA is not an adequate alternative to a retaliatory discharge action under Kansas tort law. We are influenced by differences in process, differences in claimant control, and differences in the damages available. It may be that additional factors will also be influential in a future case”).

exclusive. 182 Wn.App. at 948 (citing 15 U.S.C. § 78u-6(h)(3); 18 U.S.C. §1514A(d)). For that reason the court concluded that the comprehensiveness of the remedies didn't matter. *Id.* (citing *Piel*, 177 Wn.2d 617). Becker's conduct "directly relates" to the public policy to be enforced, so the adequacy of the alternative remedies need not be considered. But if this Court reaches the adequacy of the alternative means, then the non-exclusivity of these statutes is dispositive.

The Court of Appeals also rejected the employer's argument that numerous other federal criminal statutes and regulations were available to enforce public policy. *Id.* at 1091-93. The court did not address the exclusivity of those sources of public policy, but correctly concluded that "[t]he central idea of the public policy tort is to create privately enforceable disincentives for ... employers to use their power in the workplace to undermine important public policies." *Id.* at 951 (citing *PERRITT, EMPLOYEE DISMISSAL*, *supra*, § 7.06[A], at 7-82.3 (Supp. 2013)). "The public policy tort may sometimes coexist with comprehensive criminal, civil, and administrative enforcement mechanisms." *Piel*, 177 Wn.2d at 614-16. The Court of Appeals' ruling should be affirmed.

2. *Rose* - the statutes relied upon as a source of public policy are not exclusive and are not adequate.

In *Rose*, the Plaintiff alleged his employer terminated him for refusing to exceed the maximum allowed hours-of-service under federal regulations as a commercial truck driver, which would have further

required him to violate federal regulations by falsifying time sheets. His previous suit in federal court alleging a violation of the Commercial Motor Vehicle Safety Act (CMVSA) (49 U.S.C. ch. 311) was dismissed for failure to exhaust administrative remedies.

The employer filed a motion for summary judgment arguing that the CMVSA provides comprehensive remedies even including punitive damages. The employer argued that these remedies, as a matter of law, foreclosed Mr. Rose's public policy cause of action. The trial court agreed and the Court of Appeals affirmed the dismissal. The Supreme Court remanded to the Court of Appeals in light of its decision in *Piel*, 180 Wn.App. at 1001.

On remand, the court in *Rose* relied upon *Cudney* and *Weiss*: “[p]rotecting the public is the policy that must be promoted, not protecting the employee's individual interests.” 183 Wn.App. at 785. The Court of Appeals did not consider whether Mr. Rose's conduct “directly related” to the public policy to be enforced, which would have obviated the need to consider the adequacy of the remedies. The Court did, however, acknowledge that “[b]y its terms nothing in the statute 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.” *Id.* at 789-90 (citing 49 U.S.C. § 311 05 (f)). This declaration of non-exclusivity

should as a matter of law forecloses a ruling that the alternative means are adequate.

3. *Rickman* - the statute relied upon as a source of public policy is not exclusive. The internal hotline as a matter of law is an inadequate means to vindicate public policy.

In *Rickman*, the Plaintiff, employed as director of a subsidiary of Premera Blue Cross, complained that a proposed change in Premera's business practice could violate health insurance privacy laws and would constitute an illegal form of "risk bucketing." Slip Opinion at 6-7. Rickman claimed that the practice violated HIPAA and Washington's Uniform Health Care Information Act, RCW 70.02. *Id.*, at 7-8. As a consequence of Rickman's complaint, Premera did not adopt the business practice. *Id.* at 8.

At approximately the same time as Rickman's complaint, a complaint was lodged against her alleging that she was violating Premera's conflict of interest policy. After an investigation, the complaint against Rickman was confirmed and she was terminated from employment for allegedly violating the conflict of interest policy. *Id.* at 4-6. Rickman filed suit alleging wrongful discharge, which was dismissed at summary judgment, and Rickman appealed. *Id.* at 8.

The Court of Appeals declined to address the overriding justification element and decided the case on the issue of jeopardy, holding in relevant part that Premera's internal reporting mechanism

provided an adequate alternative means to vindicate public policy.

Relying on *Cudney* and *Weiss*, the Court of Appeals reiterated that:

‘[T]he Supreme Court has repeatedly emphasized that it **does not matter** whether or not the alternative means of enforcing the public policy grants a particular aggrieved employee any private remedy.’ *Weiss*, 173 Wn. App. at 359. The effect of the Supreme Court’s unswerving approach is that the question of whether an alternative means is adequate is answered not by reference to the terminated employee’s potential recourse against the employer, but by determining whether the alternative means promotes the public policy at issue.

Id. at 12 (emphasis original). The Court of Appeals reasoned that Rickman had to present evidence that the anonymous electronic or telephonic reporting was an inadequate alternative means of promoting the public policy. *Id.* at 14. Because the court concluded that the internal mechanism was an adequate means to vindicate public policy, it declined to address whether HIPAA or UHCIA provided an adequate alternative means to vindicate public policy. *Id.* at 15.

But the internal reporting system provided no remedies for the employee, so it cannot have been an adequate alternative means to vindicate public policy. Moreover, many employers have, or purport to have, an internal mechanism to report illegal behavior. Treating internal employer mechanisms as an adequate means of protecting public policy is unprecedented. It would create an unrealistic burden on a plaintiff to force her to participate in and exhaust an internal complaint system operated by the very employer who is threatening the public policy just to establish that it is an inadequate means of protecting public policy. In order to

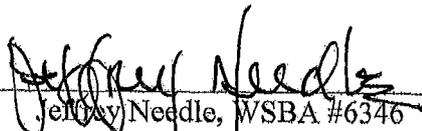
prove that the internal mechanism is inadequate, the Plaintiff would have to discover all of the complaints lodged with the internal reporting mechanism, determine the result of each complaint, and then analyze whether the complaint was adequately addressed -- an impossible burden. Corporations, as a matter of law, cannot be trusted to determine whether their own behavior is illegal.

IV. CONCLUSION

The Court should affirm *Becker* and reverse *Rose* and *Rickman*.

Dated this 28th day of April, 2015.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By, 
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APPENDIX A

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEBI O'BRIEN,

Plaintiff,

v.

ABM INDUSTRIES, INC., et al.,

Defendants.

CASE NO. C13-2023-JCC

ORDER GRANTING MOTION FOR
JUDGMENT ON THE PLEADINGS

This matter comes before the Court on Defendants' motion for judgment on the pleadings (Dkt. No. 79). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

Plaintiff Debi O'Brien sues Defendants for actions stemming from her employment with and termination from ABM Parking. Defendants, who anticipate bringing a motion for summary judgment, now move for judgment on the pleadings pursuant to Rule 12(c) for three of Plaintiff's claims. Specifically, Defendants ask the Court to dismiss the following claims: (1) that Defendants retaliated against Plaintiff in violation of the anti-retaliation provisions of the Washington Law Against Discrimination ("WLAD," RCW 49.60.210) and the Washington

1 Family Leave Act (“WFLA,” RCW 49.78.300)¹; (2) that Defendants engaged in associational
2 discrimination under the WLAD; and (3) that Defendants terminated Plaintiff from her job in
3 violation of public policy.

4 **II. DISCUSSION**

5 **A. Legal standard**

6 Federal Rule 12(c) “faces the same test as a motion under Rule 12(b)(6).” *McGlinchy v.*
7 *Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Therefore, “a motion for judgment on the
8 pleadings may be granted only if the moving party clearly establishes that no material issue of
9 fact remains to be resolved and that he or she is entitled to judgment as a matter of law.” *Nat. l*
10 *Fid. Life Ins. Co. v. Karaganis*, 811 F.2d 357, 358 (7th Cir. 1987) (citing *Flora v. Home Fed.*
11 *Sav. & Loan Ass’n*, 685 F.2d 209, 211 (7th Cir. 1982). Where the complaint fails to plead
12 sufficient facts “to state a claim of relief that is plausible on its face,” the complaint must be
13 dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550
14 U.S. 544, 570 (2007). “The court may consider only matters presented in the pleadings and must
15 view the facts in the light most favorable to the nonmoving party.” *Karaganis*, 811 F.2d at 358.
16 (citing *Republic Steel Corp. v. Pa. Eng’g Corp.*, 785 F.2d 174, 178 (7th Cir. 1986)). Because
17 12(b)(6) and 12(c) “motions are analyzed under the same standard, a court considering a motion
18 for judgment on the pleadings may give leave to amend and ‘may dismiss causes of action rather
19 than grant judgment.’” *Sprint Tel. PCS, L.P. v. Cnty. of San Diego*, 311 F.Supp 2d 898, 903
20 (S.D. CA. Jan 5, 2004) (citation omitted). Regarding partial judgment, Rule 12(c) “does not
21 expressly authorize ‘partial’ judgment[s], neither does it bar them, and it is common practice to
22
23
24

25
26 ¹ Plaintiff did not address the Washington Family Leave Act in the Complaint. Instead, this Act is addressed for the first time in Plaintiff’s Response to the instant motion.

1 apply Rule 12(c) to individual causes of action.” *Moran v. Peralta Cmty. Coll. Dist.*, 825 F.Supp
2 891, 893 (N.D. Cal. Jan. 22, 1993).

3 **B. Choice of Law**

4 “In diversity cases, a federal court must conform to state law to the extent mandated by
5 the principles” of *Erie R.R. Co. v. Tompkins* and apply “state substantive law and federal
6 procedural law.” *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 667 (9th Cir. 2003) (citing
7 generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). “[P]rimary rights and obligations of
8 parties in a diversity suit arising from state law, including the elements of a plaintiff’s cause of
9 action,” are matters of substantive law. *Neely v. St. Paul Fire and Marine Ins. Co.*, 584 F.2d 341,
10 345 (9th Cir. 1978) (citing *Erie*, 304 U.S. at 64). However, “Federal Rules of Civil Procedure
11 apply irrespective of the source of subject matter jurisdiction, and irrespective of whether the
12 substantive law at issue is state or federal.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102
13 (9th Cir. 2003).

14
15 **C. Retaliation**

16 Plaintiff alleges “that she was subject to unlawful retaliation for her co-worker’s
17 protected activity under RCW 49.60 (WLAD) and under RCW 49.78 (WFLA).” (Dkt. No. 80 at
18 7.) The co-worker at issue is Plaintiff’s daughter, Bernadette Stickle, whose protected activity
19 involved opposition to ABM’s violations of the WLAD and the WFLA. (*Id.*) Defendants move
20 to dismiss because “Washington law does not recognize a cause of action for unlawful retaliation
21 based on the allegedly protected actions of a person other than the plaintiff” and because
22 Plaintiff’s retaliation claim “rests solely on alleged actions by her daughter.” (Dkt. No. 83 at 3.)
23 Defendant’s analysis of Washington law is correct.
24
25

26 The anti-retaliation provision of the WLAD states that

1 It is an unfair practice for any employer, employment agency, labor union, or other
2 person to discharge, expel, or otherwise discriminate against any person because *he or*
3 *she* has opposed any practices forbidden by this chapter, or because *he or she* has filed a
4 charge, testified, or assisted in any proceeding under this chapter.

5 RCW 49.60.210(1) (emphasis added). The clear language of the statute indicates that a
6 plaintiff claiming retaliation under the WLAD must establish that he or she *personally* engaged
7 in protected activity. There is no provision under the WLAD allowing for a retaliation claim
8 based on the protected activities of a co-worker. *See Ellorin v. Applied Finishing, Inc.*, 996 F.
9 Supp. 2d 1070, 1089 (W.D. Wash. 2014) (plaintiff claiming retaliation under Title VII and the
10 WLAD must show that she engaged in protected activity). Similarly, the WFLA provides that
11 “[i]t is unlawful for any person to discharge or in any other manner discriminate against any
12 individual because *the individual* has” engaged in protected activity. RCW 49.78.300(2)
13 (emphasis added). Plaintiff makes no allegation that she was retaliated against because of her
14 own protected activities. Her allegations are therefore distinguishable from those in the cases
15 cited in Plaintiff’s response, where there were allegations that plaintiffs were retaliated against
16 for their own participation or cooperation with internal or police investigations. *See Blinka v.*
17 *Washington State Bar Ass’n*, 109 Wash. App. 575, 583, 36 P.3d 1094, 1098 (2001); *Gaspar v.*
18 *Peshastin Hi-Up Growers*, 131 Wash. App. 630, 128 P.3d 627 (2006). Plaintiff is therefore
19 unable to state a claim for retaliation under the WLAD or the WFLA.
20

21 **D. Associational Discrimination**

22 Plaintiff’s Complaint includes a claim of “associational discrimination in violation of
23 RCW 49.60.” (Dkt. No. 44 at 12, ¶ 5.5.) A claim for associational discrimination is not
24 recognized under the WLAD. RCW 49.60.180; *see Sedlacek v. Hillis*, 145 Wn.2d 379, 390-91,
25 36 P.3d 1014 (2001). In her response to the instant motion, Plaintiff says she “is not alleging
26

1 associational *discrimination*.” (Dkt. No. 80 at 7, emphasis in original.) Plaintiff therefore appears
2 to concede that she has no associational discrimination claim.

3 **E. Wrongful Discharge Tort**

4 Plaintiff alleges that she can establish wrongful discharge in violation of public policy
5 because she was “terminated in retaliation for her discovery and reporting of financial
6 irregularities in ABM’s Accounts Receivables at the Pacific Place Garage.” (Dkt. No. 44 at 10, ¶
7 4.28.) Plaintiff argues that her actions were intended to protect the public interest and promote
8 the public policy of taxing local parking businesses, as enunciated in Seattle Municipal Code,
9 Chapter 5.35, and in RCW 82.80.070. (*Id.*)

11 In order to prevail on a claim of wrongful discharge in violation of public policy, Plaintiff
12 must “prove (1) the existence of a clear public policy (clarity element); (2) that discouraging the
13 conduct in which [she] engaged would jeopardize the public policy (jeopardy element); and (3)
14 that the public-policy-linked conduct caused the dismissal (causation element).” *Korslund v.*
15 *DynCorp Tri-Cities Servs., Inc.*, 156 Wash. 2d 168, 178, 125 P.3d 119, 125 (2005) (citations and
16 internal quotation marks omitted). Defendants argue that, even assuming that Plaintiff can
17 establish the existence of clarity and causation, she cannot establish the jeopardy element of the
18 claim.
19

21 Proving the jeopardy element requires a plaintiff to show that “he or she engaged in
22 particular conduct, and the conduct directly relates to the public policy, or was necessary for the
23 effective enforcement of the public policy.” *Id.* at 181 (citations and internal quotation marks
24 omitted). In order to establish this, a plaintiff must “show that other means of promoting the
25 policy are inadequate.” *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wash. 2d 200, 222, 193 P.3d
26 128, 139 (2008). Here, Plaintiff would need to show that her actions were “the only available

1 adequate means” to protect the public interest and promote the public policy of taxing local
2 parking businesses. *Id.* In order for this to be true, “the criminal laws, enforcement mechanism,
3 and penalties all have to be inadequate to protect the public.” *Cudney v. ALSCO, Inc.*, 172 Wash.
4 2d 524, 537, 259 P.3d 244, 250 (2011).

5
6 In *Cudney*, the Plaintiff alleged retaliatory termination based, in part, on having reported
7 that a managerial employee had driven a company vehicle while intoxicated. *Id.* at 527. The
8 Supreme Court of Washington found that there was “a huge legal and police machinery . . .
9 designed to address” the problem of drunk driving. *Id.* at 537. The court found that reporting the
10 problem to an employment supervisor with no law enforcement capability was “a roundabout
11 remedy that [was] highly unlikely to protect the public from the immediate problem of a drunk
12 driver on its roads.” *Id.* Thus, the court found both that reporting the problem to the plaintiff’s
13 employer was not likely to solve the problem, and that the plaintiff could not establish that
14 simply allowing “law enforcement do its job and enforce DUI laws [was] an inadequate means
15 of promoting the public policy.” *Id.*

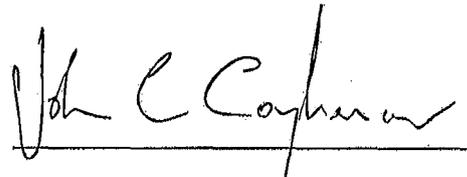
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17
18 Defendants argue that Ms. O’Brien, like the plaintiff in *Cudney*, is unable to “show that
19 having law enforcement do its job . . . is not an adequate way to protect the public from the
20 impact of” the alleged unlawful activity. (Dkt. No. 79 at 12.) Plaintiff counters by noting that
21 “Defendants point to no administrative scheme or remedy pursuant to which Plaintiff could have
22 acted differently than she did, to promote the clear public policy mandated by the municipal code
23 and the statute.” (Dkt. No. 80 at 12.) It is, however, Plaintiff who bears the burden of
24 demonstrating that there were no other adequate means of promoting the public policy that she
25 was concerned with. Because the Seattle Municipal Code includes a robust scheme for
26

1 enforcement of parking revenue taxation requirements, Plaintiff must demonstrate that this
2 scheme was in some manner incapable of providing necessary protection for the taxation policies
3 at issue. *See* SEATTLE, WA Municipal Code §§ 5.55.220, .230, .260. Plaintiff alleges no facts
4 indicating this is the case, or even that it might be. Because Plaintiff cannot establish that the
5 existing enforcement scheme was inadequate, she cannot prove that her actions were necessary
6 to promote the public policy at issue. She therefore cannot establish the jeopardy element, and
7 cannot state a claim for wrongful discharge in violation of public policy.
8

9 **III. CONCLUSION**

10 For the foregoing reasons, Defendants' motion for judgment on the pleadings (Dkt. No.
11 79) is GRANTED. It is hereby ORDERED that Plaintiff's claims of retaliation under RCW
12 49.60.210 and RCW 49.78.300, associational discrimination under RCW 49.60, and wrongful
13 termination in violation of public policy, are DISMISSED with prejudice.
14

15 DATED this 18th day of February 2015.
16
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20 

21 John C. Coughenour
22 UNITED STATES DISTRICT JUDGE
23
24
25
26

CERTIFICATE OF SERVICE

I certify that on the 28th day of April, 2015, I caused a true and correct copy of the Amicus Curiae Brief of the Washington Employment Lawyers Association to be filed electronically via email with the Clerk of the Court, and served on the following via legal messenger or U.S. Mail:

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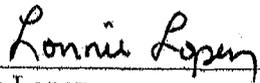
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DATED THIS 28th day of April, 2015.



Lonnie Lopez

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Dear Clerk:

Attached hereto please the amicus curiae brief by the Washington Employment Lawyers Association in Rickman v. Premera Blue Cross, No. 91040-5. All parties and amicus have been served electronically by prior agreement.

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