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NO. 91040-5

WASHINGTON STATE SUPREME COURT

ERICKA RICKMAN,

Petitioner

vs.

PREMERA BLUE CROSS,

Respondent

Answer of Petitioner to Brief of Amici Curiae Pacific Law Foundation

DENO MILLIKAN LAW FIRM, PLLC
By: Joel P. Nichols, WSBA #23353
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A. The Tort of Wrongful Discharge in Violation of Public Policy Applies to All Employment Relationships.

Amicus Pacific Legal Foundation's (PLF's) emphasis on at-will employment is misplaced. The tort of wrongful discharge in violation of public policy applies to all employment relationships, whether terminable for cause or at-will. See Brief of Washington State Association for Justice Foundation (WSAJF) at p. 8. Termination of employment in violation of public policy determines existence of the tort, not the contractual nature of the employment relationship. See Smith v. Bates Technical College, 139 Wn.2d 793, 809, 991 P.2d 1135 (2000).

B. Premera's Admission to the Illegality of the "Risk Bucketing" Plan Defeats PLF's Argument That Ericka's Concerns Were Vague.

PLF characterizes Ericka's actions as too speculative to warrant legal protection from retaliation. However, Ericka's concerns about the legality of Premera's proposed "risk bucketing" plan were more than mere "internal dissatisfaction" with management, as PLF suggests. PLF's argument oversimplifies Ericka's legitimate concern, and ignores the fact that she was right.

In mid-September 2009, Ericka learned that Pacific Benefits Trust (PBT), a large association underwritten by Premera, was likely merging with another association, Washington Grocers Trust (WGT), underwritten

by Providence. (CP 187, ¶134). Premera would lose PBT membership if the merger happened. Id. Ericka confirmed this information with Premera's Director of "Small Business Group", Robin Hilleary. Id. Ericka also told Ms. Hilleary that a Ucentris Captive Agent (independent insurance broker) had a client who wanted the agent to look for other non-Premera insurance for his business due to this merger. Id. Ericka asked Ms. Hilleary if it was okay for her Captive Agent to do so. Id. In response, Ms. Hilleary told Ericka that Premera was strategizing to retain the membership rather than have agents look outside Premera for insurance for their clients. Id. Ms. Hilleary also told Ericka that Premera planned to use Ucentris agents to move the membership of preferred groups of the merged associations into associations that were underwritten by Premera. Id. Ericka believed this would be an illegal form of "risk bucketing" because it would require disclosure of private policyholder information. Id.

When an employee has ethical concerns, Premera's Code of Conduct encourages her to "do the right thing" and to review the circumstances with her "supervisor, the Compliance and Ethics Department, Human Resources, *or* the Legal and Regulatory Affairs Department" without fear of retaliation. (CP 313, 314, 315). Specifically, Premera's Code of Conduct provides:

Reporting Violations and Seeking Guidance

To promote reporting of legal and Code violations, Premera supports an environment of open communications. [...] You may report the matter to your supervisor, the Compliance and Ethics Department or to a member of either the Legal and Regulatory Affairs Department or Human Resources Department.

(CP 314-315). Contacting Premera's Compliance and Ethics Hotline is an option only for those wishing to remain anonymous:

If, for whatever reason, an associate wishes to remain anonymous, Premera has established a Compliance and Ethics Hotline (EthicsLine)[.]

(CP 315).

Following Premera's Code of Conduct, Ericka informed her boss, Rick Grover¹, of her conversation with Ms. Hilleary and of her concern with the "risk bucketing" strategy, saying that using Ucentris agents to move non-Premera membership into associations underwritten by Premera "had HIPAA written all over it." (CP 187-188, ¶35). Ericka told Mr. Grover she thought he should take her HIPAA concerns up the chain of command to make sure everything was legal. *Id.* Mr. Grover dismissed this suggestion, telling Ericka, "There's a new Sheriff in town." *Id.* at 188, ¶35).

On September 28, 2009, Mr. Grover forwarded an email trail to Ericka confirming her concern that Premera leadership planned on

¹ Mr. Grover is Premera's Vice President and General Manager for Ancillary Business and Distribution Strategy at Ucentris Insured Solutions.

engaging in a form of "risk bucketing" that would potentially violate health insurance privacy laws. (CP 188, ¶36). Ericka told Mr. Grover she appreciated him sending the email, and reiterated her concern that the "risk bucketing" plan was inappropriate and possibly illegal. (CP 189, ¶38). Mr. Grover simply replied he was more concerned about "stepping on the toes" of the agent, Drew Butler. (CP 189, ¶36).

For purposes of summary judgment, the trial court resolved Premera's conflicting testimony regarding the legality of the "risk bucketing" proposal in Ericka's favor. (CP at 16-17).² In written discovery, Premera admitted the risk bucketing plan Ericka discussed with Mr. Grover was, in fact, illegal:

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 (emphasis supplied)).

Without objection, Premera answered 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**

² "[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."

the discussion. Mr. Grover does not recall the date of this meeting. (CP at 67, (emphasis supplied)).

On or about November 3, 2009, less than two months after Ericka raised her her health insurance privacy concerns to Mr. Grover, he terminated her employment. CP 34:8-11, Although Premera's stated "legitimate" reason for terminating Ericka's employment was her "judgment" and "lack of integrity" (CP 115:2-5),³ Ericka avers Premera terminated her employment because she expressed concerns that Premera's intended "risk bucketing" would violate health insurance privacy laws. (CP 190-191). The reason for Ericka's termination is a factual dispute for a jury.

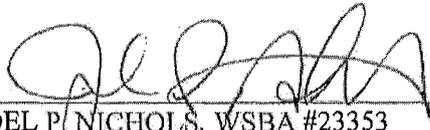
For purposes of summary judgment, the facts remain that Premera abandoned its "risk bucketing" plan as unlawful after Ericka raised concerns about its legality to her direct supervisor, Rick Grover (CP at 16-17, 67, 187-189), and Mr. Grover terminated her less than two months later. CP 34:8-11, 187-189. These facts distinguish the present case from those involving no legally culpable acts. But for Ericka's brave action, the risk of Premera's illegal disclosure of private health care information was

³ Even Defendant's own management team provided conflicting testimony as to the reason for Ms. Rickman's termination. *See Rick Grover Deposition Transcript at 127:19-15 to 128:1-13 (CP 83-84) and see Nancy Ferrara Deposition Transcript at 51:2-5 (CP 115), 53:4-11 (CP 117).*

real. Therefore, PLF's argument that application of the tort of wrongful discharge in violation of public policy to this case would be an "impermissible expansion" of the tort fails.

DATED this 27 day of May, 2015.

DENO MILLIKAN LAW FIRM, PLLC



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

DECLARATION OF SERVICE

I, Joan L. Brown, declare as follows: On May 21, 2015 I sent via e-mail (by agreement of the parties) and by regular U.S. Mail, Postage prepaid, a true and correct copy of the Answer of Petitioner to Brief of Amici Curiae Pacific Law Foundation to:

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

Executed at Everett, Washington this 27th day of May, 2015



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Erika Rickman v. Premera Blue Cross, Inc.
Supreme Court Case No. 91040-5

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Dear Clerk:

Attached for filing is the Answer of Petitioner to Brief of Amici Curiae Pacific Law Foundation.
Petitioner's Attorney is copied on this email.

Mr. Nichols may be reached at the email above or (425) 259-2222.

Thank you,

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