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Court of Appeals, Division I, No. 70766-3-I

SUPREME COURT OF THE STATE OF WASHINGTON

ERICKA M. RICKMAN,

Petitioner,

v.

PREMERA BLUE CROSS,

Respondent.

**SUPPLEMENTAL BRIEF OF
RESPONDENT PREMERA BLUE CROSS**

RIDDELL WILLIAMS P.S.

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I. INTRODUCTION

Respondent Premera Blue Cross (“Premera”) respectfully submits this supplemental brief in support of its Answer to Petitioner Ericka Rickman’s (“Rickman”) Petition for Review.

Rickman is a former Director of one of Premera’s subsidiary insurance agencies (Ucentris), who Premera dismissed after an independent, unbiased ethics investigation revealed she had exhibited poor judgment and a lack of integrity by, among other things, repeatedly failing to disclose that she had engaged her son as an insurance agent for the organization she oversaw; approving her son’s promotion to a role as a “subject matter expert” and a corollary increase in his pay to double what other subject matter experts received; misrepresenting her involvement in the day-to-day management of the insurance agents, like her son; approving the dismissal of the wife of the agent who had made the ethics complaint against Rickman, who was also a Ucentris insurance agent, a decision that seemed suspicious and possibly retaliatory; and generally engaging in conduct that led to at least a perceived conflict of interest.

Rickman subsequently filed this lawsuit alleging she was wrongfully discharged in violation of public policy for purportedly raising concerns to her supervisor about a Premera business plan that may have

involved a practice called “risk bucketing.” Though Rickman had a “gut feeling” the plan had “HIPAA¹ written all over it” and therefore was not appropriate (CP at 271-27), she made no effort to learn the details of the plan or whether it would involve unlawful disclosures of protected health information, and made no effort to report her alleged concerns to Premera’s internal compliance hotline, Premera’s Privacy Program, or to the government agency that oversees HIPAA compliance.

The trial court dismissed Rickman’s claim at summary judgment, and the Court of Appeals affirmed. Both lower courts concluded that Rickman could not establish the jeopardy element of her claim under the standard set forth in *Dicomes v. State*. Specifically, Rickman failed to show that the public policy of protecting the confidentiality of patient health information would be jeopardized if her conduct—amounting to casual and fleeting remarks about a plan she knew little to nothing about—were discouraged, and failed to show that other means of promoting that public policy were inadequate given the existence of Premera’s robust internal reporting program. The trial court also found that Rickman could not establish the absence of justification element of her claim because there was no evidence of a connection between her alleged risk bucketing

¹ Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

concern and her dismissal from Premera in light of the fact that Premera's investigation of her, and the investigator's recommendation to dismiss her, were made without knowledge of her alleged risk bucketing concerns. The Court of Appeals, having upheld the dismissal of Rickman's claim for her failure to establish the jeopardy element, declined to address the absence of justification element. This Court subsequently accepted review.

II. ISSUES PRESENTED FOR REVIEW

1. Did the lower courts properly apply *Dicomes v. State* to the facts of this case and affirm summary judgment in favor of Premera on Rickman's wrongful discharge in violation of public policy claim?

2. In evaluating the jeopardy element of the wrongful discharge in violation of public policy tort, may courts consider an employer's internal reporting and protection systems in determining whether adequate alternative means of promoting the public policy exist?

3. Do the federal and state statutory and administrative schemes under HIPAA and the Uniform Health Care Information Act ("UHCIA"), Chapter 70.02 RCW, adequately promote the public policy of protecting the confidentiality of patient health information alone, or in combination with Premera's internal reporting systems?

III. STATEMENT OF THE CASE

Premera incorporates herein its Counterstatement of the Case in its Answer to Rickman's Petition for Review ("Answer").

IV. ARGUMENT

A. The Lower Courts Correctly Determined that *Dicomes v. State* Applies and Warrants Dismissal of Rickman's Claim.

When this Court first recognized the tort of wrongful discharge in violation of public policy in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), it characterized the tort as a "narrow" exception to the at will employment doctrine, intended to "properly balance[] the interest of both the employer and employee" by protecting employee job security against employer actions that contravene a clear public policy, while at the same time warding against frivolous lawsuits and allowing employers to make personnel decisions without fear of incurring civil liability. *Id.* at 232-33. The jeopardy element of the tort fulfills that objective by "guarantee[ing] that an employer's personnel management decisions will not be challenged unless a public policy is *genuinely* threatened." *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941-42, 913 P.2d 377 (1996) (emphasis added) (citing and ultimately adopting a four part test for the wrongful discharge tort proposed by leading employment law scholar, Henry Perritt Jr.).

Meeting this high bar requires a plaintiff to prove that she “engaged in particular conduct, and the conduct *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy.” *Piel v. City of Federal Way*, 177 Wn.2d 604, 611, 306 P.3d 879 (2013) (emphasis in original). In meeting this burden, a plaintiff must show that other means of promoting the public policy are inadequate, and how the threat of discharge, if the tort is not recognized, will discourage others from engaging in the desirable conduct. *Id.* Courts hold plaintiffs to a “strict adequacy standard” under which a plaintiff must show that the actions she took were the “only available adequate means” to promote the public policy. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 530, 259 P.3d 244 (2011). The jeopardy element will defeat employer liability “unless the terminated employee’s conduct is sufficiently linked to realization of the public policy.” Henry H. Perritt, Jr., *EMPLOYEE DISMISSAL LAW AND PRACTICE* §7.06[A], p. 7-82.2 (5th ed. 2006).

Following *Dicomes v. State*, the lower courts considered Rickman’s conduct and the various reporting options she could have engaged instead through Premera’s privacy program in order to report her alleged concerns about the proposed risk bucketing plan, as well as the degree of Premera’s alleged misconduct. CP 18-19; Answer Appx.-11-15;

see *Dicomes v. State*, 113 Wn.2d 612, 619, 782 P.2d 1002 (1989) (instructing courts to “examine the degree of employer wrongdoing, together with the reasonableness of the manner in which the employee reported, or attempted to remedy the alleged misconduct.”). *Dicomes* held that courts should assess whether the employer's conduct constituted either a violation of the letter or policy of the law, and whether the employee sought to further the public good—and not merely private interests—in reporting the alleged wrongdoing. *Id.* at 620.

1. *Dicomes* Is Valid Law That Coexists With *Piel v. City of Federal Way* and *Hubbard v. Spokane County*

At the outset, *Dicomes* is still good law. In adopting the current four-part test used to evaluate the public policy tort, this Court confirmed that it did not intend to change the existing common law that had already developed for the tort, which specifically included *Dicomes*. *Gardner*, 128 Wn.2d at 941 (“[O]ur adoption of this test does not change the existing common law in this state. Common law already contains the clarity and jeopardy elements.”) (citing *Dicomes*). Since then, this Court has repeatedly applied *Dicomes*’ standard that courts must consider the degree of alleged employer wrongdoing in combination with the reasonableness of the way in which the employee reported that alleged wrongdoing, to determine whether an actionable public policy claim exists. See *Bennett v.*

Hardy, 113 Wn.2d 912, 924, 784 P.2d 1258 (1990); *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 672, 807 P.2d 830 (1991). In *Bennett* this Court considered whether an employee stated a cause of action for the wrongful discharge tort based on allegations that she was discharged for hiring an attorney to protect herself from her employer's discriminatory practices. *Bennett*, 113 Wn.2d at 924. Applying *Dicomes*, this Court recognized the employee's claim because hiring an attorney was a reasonable way of responding to her concerns. *Id.* In *Farnam*, this Court denied an employee's cause of action for wrongful discharge after the employee was dismissed after she publicly expressed disagreement with her employer's practice of removing feeding tubes from certain nursing home patients. *Farnam*, 116 Wn.2d at 670-72. Under *Dicomes*, this Court concluded that the employee failed to state a claim because the employer had a legal right to withdraw the feeding tubes and the employee's alleged whistleblowing activity was not reasonable under the circumstances. *See id.* at 972.

The Court of Appeals did not err in applying *Dicomes* instead of *Piel* or *Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 602 (2002) as Rickman contends. Taking a cue from *Bennett* and *Farnam*, *Dicomes'* analysis coexists with *Piel* and *Hubbard* arguably as a threshold

assessment of whether the asserted public policy is genuinely threatened and a viable wrongful discharge claim has been implicated. As the Court of Appeals noted, where an employee raises a concern about potential employer misconduct, as was the case here, the court may, under *Dicomes*, assess the record as to the degree of wrongdoing, if any, that the employer would have engaged in, and assess the reasonableness of the way in which the employee raised the concerns or attempted to remedy the alleged wrongdoing. Appx.-12. If this assessment indicates potential employer wrongdoing and reasonable conduct on the part of the employee, courts can proceed with review under *Piel* and other more recent cases of the adequacy of the various existing protections of the public policy.

Rickman thus far fails to identify a basis for departing from *Dicomes*, and advances no argument as to why the lower courts' reliance on *Dicomes* was in error. Contrary to Rickman's suggestion, *Dicomes* is still good law and exists alongside, rather than conflicts with, with *Piel*, *Hubbard*, and other more recent public policy case law.

2. The Lower Courts Properly Applied *Dicomes* to the Facts

The lower courts also correctly applied *Dicomes* to the facts here. Rickman failed to adduce evidence that the alleged risk bucketing plan would have been illegal in the first place and the undisputed evidence

showed that Premera did not implement the plan in any event. Both courts therefore concluded that Premera would not have engaged in any degree of wrongdoing even if it had pursued the plan. CP 10; Answer Appx.-12. Likewise, it was undisputed that Rickman knew little to nothing about the plan's details and legality, and she failed to apprise herself of, or make meaningful inquiry to ascertain, such information. Rather, she relied only on her "gut feeling" that the plan "had HIPAA written all over it." CP at 271-72.² Based on this undisputed evidence, the lower courts correctly concluded that Rickman did not raise her concerns in a reasonable way. Stated differently, her conduct was not "necessary for the effective enforcement of the public policy." *Piel*, 177 Wn.2d at 611.

² Rickman's comment—to the extent she made it—also lacked any real meaning because HIPAA's extensive regulatory scheme permeates almost every aspect of Premera's business as a health insurer. HIPAA subjects "covered entities" like Premera to a complex series of statutes and regulations that govern everything from the portability of health care insurance (such as when an insured moves from one employer to another), to patient privacy and confidentiality rights. *See* Pub. L. No. 104-191, 110 Stat. 1936 (1996), codified at 42 U.S.C. § 300gg; 29 U.S.C § 1181 et seq.; 42 U.S.C. § 1320d et seq.; *see also* 45 C.F.R. Parts 160, 162, and 164. HIPAA's breadth is perhaps more easily seen by the fact that the act and its corresponding regulations, if taken together, span over 300 pages. *See* Pub. L. No. 104-191, 110 Stat. 1936 (1996). available at <http://www.gpo.gov/fdsys/pkg/PLAW-104publ191/pdf/PLAW-104publ191.pdf>; *see also* U.S. Dept. of Health & Human Svcs., Office of Civil Rights, *HIPAA Administrative Simplification - Regulation Text*, available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/combined/hipaasimplification-201303.pdf>. Although the particular business plan Rickman allegedly objected to would not have involved disclosure of protected health information, given the nature of Premera's business and HIPAA's scope, a statement that a business plan had "HIPAA written all over it" was in many ways akin to simply stating the obvious.

As the Court of Appeals noted, Rickman’s “[g]uesswork and intuition do not meet the high bar set by the ‘jeopardy’ element.” Appx.-12 to Premera’s Answer. There is no genuine issue of material fact as to whether discouraging the type of conduct Rickman engaged here—guesswork; intuition; casual, off-hand remarks of purported concerns; and failure to inquire about key facts—would threaten the public policy of maintaining the confidentiality of patient health information. *See Gardner*, 128 Wn.2d at 941-42 (“[J]eopardy element guarantees an employer’s personnel management decisions will not be challenged unless a public policy is genuinely threatened.”).

This is particularly true given that employees with concerns about patient privacy have various avenues for reporting concerns, including Premera’s internal reporting systems and statutory and regulatory reporting mechanisms—avenues Rickman never availed herself of. The lower courts properly dismissed Rickman’s claim under *Dicomes*.

B. The Statutory and Administrative Schemes Under HIPAA and UHCIA Adequately Protect Health Information Privacy.

Rickman contends the existing statutory and administrative protections under HIPAA and UHCIA are inadequate. Given the depth and breadth of HIPAA’s and UHCIA’s statutory and administrative structures,

it is difficult to conclude that they do not adequately protect the public policy of maintaining the privacy of patient health information.

UHCIA provides a private right of action against health care providers or facilities that have not complied with the statute. RCW 70.02.170(1). As remedies, Courts may order compliance with the law and award actual damages. RCW 70.02.170(2). And attorney's fees and costs are provided to the prevailing party. *Id.*

HIPAA provides an extensive administrative process for fielding, investigating, and adjudicating complaints. The Department of Health and Human Services, Office for Civil Rights ("OCR") is responsible for administering and enforcing HIPAA's privacy standards and may conduct complaint investigations and compliance reviews.³ Concerned individuals may make complaints directly to OCR. 45 C.F.R. § 160.306. Robust civil penalties and criminal penalties may be imposed in appropriate cases. *See* 45 C.F.R. § 160.400-160.424; 42 U.S.C. § 1320d-6. HIPAA also provides retaliation protection for those who report suspected violations. *See* 45 C.F.R. §§ 160.316, 164.530(g); *see also*

<http://www.hhs.gov/ocr/privacy/hipaa/complaints/> (stating "HIPAA PROHIBITS RETALIATION" and encouraging individuals to notify OCR

³ *See* Health Information Privacy: How to File a Complaint, <http://www.hhs.gov/ocr/privacy/hipaa/complaints/index.html>.

in the event of retaliatory action). And, as Rickman acknowledges, OCR considers all concerns, whether raised before a potential violation or after a violation has occurred. 45 C.F.R. § 160.306(a); Petition for Review at 11.⁴

HIPAA's protections of health information privacy are not inadequate because, as Rickman contends, there is a risk OCR would not have taken up Rickman's concern had she made a complaint (Petition at 11-12). At the outset, that is pure speculation. More importantly, however, the existing protections are not inadequate if the agency charged with implementing HIPAA's protections and staffed with people knowledgeable about those protections determines Rickman's concerns are not valid. On the contrary, one can imagine that is exactly what was envisioned under HIPAA: provide a central place for people to lodge concerns about a complex statute, which can then be vetted by people most qualified to do so. Nor are UHCIA's protections inadequate because that statute provides a cause of action for actual violations, has a prevailing party fee provision, and does not allow for consequential or incidental damages. *See* RCW 70.02.170.

⁴ *See* Health Information Privacy: How to File a Complaint, <http://www.hhs.gov/ocr/privacy/hipaa/complaints/> ("ANYONE CAN FILE! – Anyone can file a complaint alleging a violation of the Privacy or Security rule.")

Rickman's contentions that HIPAA and UHCIA inadequately protect health information privacy amount to disappointment over the fact that those statutes may not afford *her* a private right of action or damages, a proposition this Court has rejected as determinative of the adequacy of alternative protections. *See Hubbard v. Spokane County*, 146 Wn.2d 699, 717, 50 P.3d 602 (2002) ("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.").

C. The Lower Courts Properly Considered Premera's Internal Reporting System and Determined It Adequately Protects the Confidentiality of Patient Health Information.

Rickman contends that the Court of Appeals erred by holding that Premera's internal reporting mechanisms were sufficient protection, instead of determining whether HIPAA's and UHCIA's existing statutory and administrative processes adequately protect the public policy.

The comprehensive structures available under HIPAA and UHCIA are discussed above. However, Rickman's view that an employer's internal reporting mechanisms for ensuring compliance should be ignored in the jeopardy analysis is misguided and would undermine the objectives of the wrongful discharge tort. It also overly focuses on the alternative

statutory and administrative remedies at the expense of the broader employment relationship. As Perritt explains:

The question [in public policy claims] is not whether the traditional governmental and bureaucratic tools are adequate, compared with other governmental and bureaucratic enforcement regimes; the question is focused on the employer relationship: whether, as matter of employment law, an employer should be able to use its power over employees to subvert public policy.

Perritt, § 7.06[A], p. 7-82.2 (5th ed. 2006). *Dicomes*, which did not analyze a particular statutory or governmental regime, but instead instructs courts to consider both the degree of alleged employer wrongdoing as well as the reasonableness of the employee's conduct in raising the concerns, appears to be duly focused on the employment relationship. Accordingly, applicable statutory or regulatory protections are not necessarily the exclusive gauges of the adequacy of the existing protections of the public policy. Internal reporting systems may be relevant in evaluating the reasonableness of the employee's conduct and may also protect the public policy, and thus are properly considered in evaluating the jeopardy element. In other words, considering whether an employer's internal reporting mechanisms provide an adequate remedy closely aligns with a focus on the employment relationship. It also makes sense to consider

internal reporting systems given that the determinative question for purposes of the jeopardy element is whether the alternative means—arguably in whatever form they may be—adequately promote the public policy at issue. *See Gardner*, 128 Wn.2d at 945.

Premera's reporting system for privacy and ethics concerns is particularly robust. As the trial court observed, Premera has established a variety of employment-related business processes through which it attempts to identify and to prevent actual or perceived misconduct. CP 7. The company's efforts include establishing multiple pathways through which employees may lodge concerns or complaints. *Id.* These pathways are identified the company's Code of Conduct (the "Code"), which emphasizes Premera's core values of integrity and legal and ethical business conduct. CP 7, 313. The Code also provides employees a means by which they may make reports anonymously, including an ethics hotline with a toll-free number and an Internet link. CP 315.

The Code further expressly sets forth the names of the departments to which HIPAA compliance concerns may be addressed:

Premera is also committed to complying with applicable federal and state privacy laws including the HIPAA privacy regulations that protect the financial and health information of our members. Premera routinely collects and uses such protected personal information in order to serve our members.

Premera has established policies and procedures that are designed to comply with federal and state privacy laws that govern the collection, use and disclosure of our members' protected personal information. Premera has designated the Deputy General Counsel in Legal and Regulatory Affairs as the Privacy Official to oversee Premera's policies, procedures and practices regarding privacy.

CP 321. The Code goes on to direct employees to discuss their questions about privacy matters with those knowledgeable about compliance with the privacy laws, including representatives of Premera's Privacy Program within the Legal and Regulatory Affairs Department by emailing the "Privacy Program" email box. *Id.*

Permitting consideration of internal protections also has the desired effect of encouraging employers to develop, as Premera has done, thorough and responsive reporting systems through which employees can raise concerns. Premera's compliance hotline and other reporting processes, for example, provide a mechanism by which employees may address their concerns directly to those most qualified to vet them to ensure concerns are addressed appropriately. The system also enables employees who have privacy concerns to come forward early on, allowing Premera to identify actual or potential deficiencies before they escalate.

Ignoring internal controls for purposes of the jeopardy element would de-incentivize employers to develop such systems. This in turn

would force employees to resolve concerns by filing complaints with government agencies or by filing lawsuits—thus placing administrative agencies and the courts in the untenable position of potentially adjudicating day to day business and management decisions.

D. Additional Ramifications Counsel Against Recognizing the Wrongful Discharge Tort Under the Facts Here.

There are other potential ramifications of applying the public policy tort to Rickman's conduct. The undisputed evidence showed that Rickman's purported HIPAA concerns were based on pure speculation and guesswork and that Premera, ultimately, did not pursue the risk bucketing plan, which would not have violated HIPAA or UHCIA in any event. If reports of conjecture guised as a public policy concern suffice to establish the jeopardy element, the wrongful discharge in violation of public policy tort will cease to be a narrowly construed exception to the doctrine of at-will employment as it was originally conceived. *Gardner*, 128 Wn.2d at 936.

Instead, employers would face potential litigation for their management decisions by employees who would be empowered to claim legal protection for any number of off-hand, ill-informed expressions of concern that might relate to a public policy, despite lacking knowledge of key facts or having no responsibility for compliance with applicable laws.

This is not the intention of the wrongful discharge tort. *See Thompson*, 102 Wn.2d at 232 (tort is designed to balance “interest of both employer and employee by protecting against frivolous lawsuits and allowing employers to make personnel decisions without fear of incurring civil liability, while at the same time protecting employee job security against employer actions that frustrate a clear public policy.”). The tort of wrongful discharge in violation of public policy should not be expanded in this way.

V. CONCLUSION

For the reasons discussed above and in Premera’s Answer to Petition for Review, Premera respectfully requests that the Court affirm summary judgment in favor of Premera.

DATED this 20th day of April, 2015.

RIDDELL WILLIAMS P.S.

By 

Robert M. Howie, WSBA #23092
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CERTIFICATE OF SERVICE

I, Jazmine Matautia, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Appellant Potelco, Inc. in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On April 20, 2015, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via hand delivery, and addressed as follows:

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

SIGNED at Seattle, Washington, this 20th day of April, 2015.



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Dear Clerk:

Attached for filing is the Supplemental Brief of Respondent Premera Blue Cross. Petitioner's Attorney is also copied on this email.

Ms. Sherwood may be reached at the email above or (206) 624-3600.

Thank you,

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