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No. 95269-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID MARTIN,

Plaintiff-Petitioner,

vs.

GONZAGA UNIVERSITY,

Defendant-Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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Washington State Association
for Justice Foundation

TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUES PRESENTED	5
IV. SUMMARY OF ARGUMENT	5
V. ARGUMENT	6
A. Overview Of The Tort Of Wrongful Discharge In Violation Of Public Policy.	7
B. The Court of Appeals Erred By Improperly Applying The Perritt Test To Whistleblower Activity And By Misinterpreting The Overriding Justification Prong Of The Perritt Test.	12
1. The Perritt test is inapplicable to cases falling within the four categories recognized in <i>Dicomes</i> .	12
2. In the rare cases in which the Perritt test applies, its overriding justification prong should be interpreted as a narrow defense permitting an employer to concede causation but offer a competing interest it asserts trumps the public policy advanced by the employee.	13
C. A Claim For Wrongful Discharge Falling Into One Of The Four Recognized Categories In <i>Dicomes</i> Should Be Analyzed Under The <i>Thompson</i> Formulation, Which Would Apply Traditional Tort Principles Similar To WLAD Retaliation Claims Under RCW 49.60.210.	16
VI. CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
<i>Allison v. Housing Authority</i> , 118 Wn.2d 79, 821 P.2d 34 (1991)	9, 16
<i>Baldwin v. Sisters of Providence in Washington, Inc.</i> , 112 Wn.2d 127, 769 P.2d 298 (1989)	9
<i>Becker v. Community Health Systems, Inc.</i> , 184 Wn.2d 252, 359 P.3d 746 (2015)	7, 8, 12, 13
<i>Cagle v. Burns & Roe, Inc.</i> , 106 Wn.2d 911, 726 P.2d 434 (1986)	17
<i>Christensen v. Grant County Hosp. Dist. No. 1</i> , 152 Wn.2d 299, 96 P.3d 957 (2004)	9
<i>Dicomes v. State</i> , 113 Wn.2d 612, 782 P.2d 1002 (1989)	8, 10, 12, 13
<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2000)	14
<i>Farnam v. Crista Ministries</i> , 116 Wn.2d 659, 807 P.2d 830 (1991)	13
<i>Gardner v. Loomis Armored Inc.</i> , 128 Wn.2d 931, 913 P.2d 377 (1996)	10, 11, 12, 14
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002)	8
<i>Kastanis v. Education Employees Credit Union</i> , 122 Wn.2d 483, 859 P.2d 26, 865 P.2d 507 (1993)	15
<i>Martin v. Gonzaga University</i> , 200 Wn. App. 332, 402 P.3d 294 (2017), review granted, 190 Wn.2d 1002 (2018)	1, 4, 7, 15
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	9
<i>Mohr v. Grantham</i> , 172 Wn.2d 844, 262 P.3d 490 (2011)	17

<i>Rickman v. Premera Blue Cross</i> , 184 Wn.2d 300, 358 P.3d 1153 (2015)	passim
<i>Rose v. Anderson Hay and Grain Co.</i> , 184 Wn.2d 268, 358 P.3d 1139 (2015)	passim
<i>Scrivener v. Clark College</i> , 181 Wn.2d 439, 334 P.3d 541 (2014)	9, 10
<i>Smith v. Bates Technical College</i> , 139 Wn.2d 793, 991 P.2d 1135 (2000)	14, 15, 17
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984)	passim
<i>Wilmot v. Kaiser Alum. & Chem. Corp.</i> , 118 Wn.2d 46, 21 P.2d 18 (1991)	passim
Statutes and Rules	
RCW 49.12.240-.250	4
RCW 49.60.210	6, 16
WAC Title 162, ch. 162-16	15
WAC 162-16-150	15
WPI 330.05	19
WPI 330.51	19
WPI 330.81	19
WPI 330.82	19
WPI 330.83	19
Other Authorities	
<i>Restatement (Second) of Torts</i> § 870 (1965)	12
<i>Restatement (Second) of Torts</i> § 870 comment c (1965)	12

Restatement (Second) of Torts § 870 comment d (1965)	12
Henry H. Perritt, Jr., <i>Workplace Torts: Rights and Liabilities</i> (1991)	11
Henry H. Perritt, Jr., <i>Employee Dismissal Law and Practice</i> (6 th ed. 2017)	12, 13, 14, 15

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the proof requirements for claims of wrongful discharge in violation of public policy under Washington common law.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents the Court with an opportunity to clarify uncertainty surrounding proper application and interpretation of the “Perritt test,” and in particular its overriding justification element, for common law claims of wrongful discharge in violation of public policy. Martin brings this wrongful discharge action against Gonzaga University, arising out of events during his employment with Gonzaga that ultimately led to his discharge. The facts are drawn from the Court of Appeals’ opinion and the briefing of the parties. *See Martin v. Gonzaga University*, 200 Wn. App. 332, 402 P.3d 294 (2017), *review granted*, 190 Wn.2d 1002 (2018); Martin Pet. for Rev. at 2-7; Gonzaga Ans. to Pet. for Rev. at 2-10.

On January 2, 2008, Gonzaga hired Martin to serve as an assistant director of its Rudolf Fitness Center (RFC). RFC houses a basketball court and swimming pool for students, faculty and staff. While other Gonzaga facilities have padding affixed to their gym walls, RFC’s court was

constructed with bare concrete walls. On many occasions, those using the court collided with the walls and sustained significant injuries. Gonzaga considered affixing padding in RFC prior to Martin's hire, but determined the safety measure was cost-prohibitive.

Soon after he was hired, Martin became concerned about the safety issue at RFC. He expressed his concerns to his immediate supervisor, Assistant Athletic Director Jose Hernandez, urging that the unsafe condition be remedied. Martin was told that Gonzaga could not justify the expense of the investment, and that Martin could reiterate his request for padding no more than once per year.

Martin's employment package included free tuition, and he utilized this benefit to enroll in Gonzaga's master's degree program for sports administration. As part of his master's thesis, Martin drafted a proposal for improving the RFC facility. Martin's proposal included a plan to generate revenue by expanding activities at RFC's pool. This revenue would enable the University to keep the pool open, as well as to fund a variety of needed improvements, including installation of padding in RFC's gym.

Martin showed the proposal to Hernandez in early 2012. He then asked Hernandez if he could give the proposal directly to Senior Associate Athletics Director Chris Standiford, who managed the budget. There is some question as to whether permission was granted, but it is undisputed Martin thereafter emailed Standiford, seeking a private audience to present his proposal. Standiford informed Martin that it was more appropriate for him

to communicate directly with Hernandez. Martin replied with an email reiterating his request to present the proposal directly to Standiford. Martin states his efforts to contact Standiford directly stemmed from concern that Hernandez would fail to act and his proposal would not be implemented. However, Standiford apparently viewed Martin's email as an effort to bypass the chain of command, and instructed Hernandez to contact Human Resources about Martin.

On March 1, Hernandez met with Martin and Assistant Athletic Director Joel Morgan, and directed Martin to give the proposal to Hernandez and Morgan. Martin refused. Hernandez then told Martin he would be receiving a "letter of expectation" and would be subject to performance evaluations. Martin left the meeting in distress and did not feel he could complete his shift. While the normal protocol would be for Martin to obtain permission to leave from Hernandez, Martin instead asked Associate Director Shelly Radtke if he could ask someone to cover his shift. She agreed. Martin found an associate to work for him, and he left. Thereafter, Martin was placed on administrative leave. Martin was instructed to not contact anyone at Gonzaga except Hernandez or human resources staff.

On March 5, Martin contacted the executive assistant to Gonzaga's president and requested a meeting to present his proposal. He was told to follow the chain of command through the athletics department. On March 7, a student using RFC struck the concrete wall and suffered a serious head

injury. On March 8, Martin was terminated. The termination letter indicated Martin was being terminated for insubordination and for failing to correct performance issues. Following Martin's termination, Gonzaga installed padding on RFC's concrete walls at a cost of \$18,000.

As these events transpired, The Gonzaga Bulletin began investigating the safety issues in RFC. On May 10, 2012, the Bulletin published an article entitled "Gym safety questioned as employee fired." *See Martin*, 200 Wn. App. at 343. Martin stated that Standiford told him that he was being terminated, in part, because he shared information with The Gonzaga Bulletin about unsafe conditions at RFC. *Id.* at 346. Martin denied leaking information regarding the safety issues in RFC to the Bulletin. *Id.* at 348.

Martin filed suit against Gonzaga in Spokane Superior Court, asserting a common law claim for wrongful discharge in violation of public policy and a statutory claim under RCW 49.12.240-.250 for failing to make available Martin's complete personnel file. Gonzaga filed a motion for summary judgment, which the trial court granted.

Martin appealed to the Court of Appeals, Division III, which affirmed the superior court's grant of summary judgment as to the common law claim. The lead opinion applied the Perritt test, and concluded that while Martin had created a genuine issue of material fact with respect to its first three elements, he failed to satisfy the fourth element, the overriding justification prong. Regarding Martin's statutory claim, the court reversed and

remanded.¹ Martin petitioned for review as to the common law wrongful discharge claim, and Gonzaga cross-petitioned as to the statutory claim. This Court granted review on March 7, 2018.

III. ISSUES PRESENTED

1. What is the nature of the Perritt test, and in particular its “overriding justification” prong, and when should it be applied?
2. Under the *Thompson* formulation, which should apply to the majority of claims for wrongful discharge in violation of public policy, what are the elements of proof?

IV. SUMMARY OF ARGUMENT

This Court recognized a claim for wrongful discharge in violation of public policy in order to protect clearly recognized public policies by preventing employers from discharging employees for engaging in conduct in furtherance of those policies. The claim is generally recognized in four circumstances: when the employee is discharged for refusing to commit an illegal act, for complying with a public duty, for exercising a legal right, or for reporting employer misconduct, *i.e.*, whistleblowing. Under its traditional framework, an employee can sustain a claim for wrongful discharge by demonstrating he or she took action in furtherance of a clear

¹ The court penned three separate opinions. Judge Fearing’s lead opinion affirmed the trial court as to the common law claim, but reversed as to the statutory claim. The opinion applied the Perritt test to the common law claim. It held there were genuine issues of material fact as to the first three elements, but that there was no genuine issue of material fact as to the fourth element, overriding justification. Judge Pennell’s concurring opinion agreed summary judgment as to the common law claim was proper, but on the basis that there was no genuine issue of material fact as to causation. Judge Pennell agreed with the lead opinion as to the statutory claim. In dissent, Judge Korsmo agreed that summary judgment was proper as to the common law claim but would have granted summary judgment as to the statutory claim as well.

mandate of public policy, that he or she was discharged, and that a substantial factor motivating the employer's decision to discharge was the public-policy-linked conduct.

In the rare cases that do not fall into one of the four well-recognized categories, a claim may be examined under the more refined analysis provided by the Perritt test. That test contains four elements: clarity, jeopardy, causation and overriding justification. The fourth element, overriding justification, constitutes a narrow type of "business necessity" defense. In the unusual cases when it is applicable, the employer admits causation but asserts a competing interest trumps the public policy advanced by the employee.

In the majority of cases, a claim for wrongful discharge should reflect traditional tort principles, with its elements modeled after a claim under the retaliation provision of the Washington Law Against Discrimination (WLAD), RCW 49.60.210.

V. ARGUMENT

Introduction:

Since the adoption of the wrongful discharge tort in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), the focus of litigation has related to confusion surrounding the jeopardy prong of the Perritt test and the legal requirement that a litigant establish the absence of alternative legal remedies to sustain a claim. This Court abandoned that legal requirement in its recent opinions in *Rose v. Anderson Hay and Grain Co.*,

184 Wn.2d 268, 358 P.3d 1139 (2015); *Becker v. Community Health Systems, Inc.*, 184 Wn.2d 252, 359 P.3d 746 (2015); and *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015).

Yet as the Court of Appeals' opinion in *Martin* illustrates, confusion surrounding this cause of action persists. Questions now center around the applicability of the Perritt test in general and its overriding justification prong in particular. This brief examines the tort of wrongful discharge in violation of public policy, including both the *Thompson* formulation and the Perritt test. It urges the Court to clarify that the overriding justification prong of the Perritt test at most provides a narrow "business necessity" defense to employers who admit causation but argue a competing interest warrants the discharge. In the vast majority of cases, the Perritt test should be unnecessary and inapplicable, and a wrongful discharge claim can be analyzed under traditional tort principles modeled after a claim of retaliation under the WLAD.

A. Overview Of The Tort Of Wrongful Discharge In Violation Of Public Policy.

Re: The Thompson Formulation

The Court created a cause of action for wrongful discharge in violation of public policy in *Thompson*. Acknowledging the default rule of at-will employment, the Court observed that a "growing majority of jurisdictions" recognizes a common law claim for wrongful discharge where an employer's termination of an employee contravenes a clear public policy. It described the tort as a "narrow public policy exception" that "properly

balances the interest of both the employer and the employee.” *Thompson*, 102 Wn.2d at 232. The Court held:

[T]o 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. . . . [O]nce 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.

Id., 102 Wn.2d at 232-33 (brackets added). Early wrongful discharge cases applied the *Thompson* framework. *See, e.g., Dicomés v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989); *Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991). The Court in *Dicomés* recognized four categories in which discharge is generally found to violate a clear public policy: (1) it is prompted by an employee’s refusal to commit an illegal act; (2) it results from the employee performing a public duty or obligation (*e.g.* jury duty); (3) it relates to the employee exercising a legal right or privilege (*e.g.* workers’ compensation benefits); or (4) it involves “whistleblowing.” *See Dicomés*, 113 Wn.2d at 618; *see also Hubbard v. Spokane County*, 146 Wn.2d 699, 707-08, 50 P.3d 602 (2002), *overruled on other grounds by Rose v. Anderson Hay and Grain Co., supra*.

Explaining the parties’ respective burdens in *Thompson*, the Court described the defendant’s burden as one “to prove that the dismissal was for reasons other than those alleged by the employee.” 102 Wn.2d at 232-33. This Court recently reiterated this language from *Thompson*. *See Becker*, 184 Wn.2d at 258 (stating that once the plaintiff meets the initial burden, “the

burden shifts to the employer to plead and prove the employee's termination was motivated by other, legitimate, reasons"). Decisions following *Thompson* clarify that its language does not actually contemplate a burden of persuasion, but instead involves a burden shifting scheme similar to the framework for establishing causation in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 134-36, 769 P.2d 298 (1989); *Wilmot*, 118 Wn.2d at 68. In a wrongful discharge claim, the plaintiff must prove intent, i.e., that a substantial factor motivating the discharge was the public-policy-linked conduct.² Because direct evidence of intent is often lacking, the burden shifting scheme is used as a mechanism for plaintiffs to meet the burden of proof with circumstantial evidence. See *Scrivener v. Clark College*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014) (age discrimination case under the WLAD clarifying the interplay between substantial factor causation and *McDonnell Douglas* burden shifting). Thus, if a plaintiff meets the elements of a prima facie case, the burden shifts to the employer to produce evidence of a legitimate reason for the discharge. See *Wilmot*, 118 Wn.2d at 70. The plaintiff then has the burden to either show that the employee's reason is pretextual, or to show that although the employer's reason for the discharge

² This Court has consistently adhered to the substantial factor causation standard in statutory and common law employment claims. See *Wilmot*, 118 Wn.2d at 71-73 (substantial factor proper standard for common law and statutory claims of retaliation for pursuing worker's compensation benefits); *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 308 n.5, 96 P.3d 957 (2004) (substantial factor applied to common law termination claims); *Allison v. Housing Authority*, 118 Wn.2d 79, 85, 95-96, 821 P.2d 34 (1991) (substantial factor test applied to WLAD retaliation claims under RCW 49.60.210).

is legitimate, the employee's public-policy-related conduct is nevertheless a substantial factor motivating the employer's decision to discharge. *See Wilmot*, 118 Wn.2d at 73; *Scrivener*, 181 Wn.2d at 446-47. These shifting "burdens" all bear on the question of causation, for which the plaintiff retains the burden of persuasion.

Re: The Perritt Test

In 1996, the Court was presented with a unique set of facts that did not fall squarely into one of the categories recognized in *Dicomes*. *See Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996). In *Gardner*, the plaintiff worked as an armored car driver for the defendant Loomis. To protect both its property and its employees, Loomis had a strict policy prohibiting its drivers from leaving their vehicle. While making a scheduled stop, the plaintiff witnessed a man chasing a woman and wielding a knife. Believing there was no one else to aid the woman, the plaintiff left the vehicle, locked the door, and assisted in subduing the attacker. Loomis terminated the plaintiff for violating its policy, and the plaintiff sued, asserting a common law claim for wrongful discharge.

The Court identified two unusual aspects of the facts before it, setting it apart from those cases that preceded it. First, the case did not fall into one of the four categories recognized in *Dicomes*. *See Gardner*, 128 Wn.2d at 938. Second, the employer claimed it had a legitimate competing interest warranting the discharge. The Court concluded that "[b]ecause this situation does not involve the common retaliatory discharge scenario, it demands a

more refined analysis than has been conducted in previous cases.” *Id.*, 128 Wn.2d at 940 (brackets added).

The “more refined analysis” was found in a test developed by Professor Henry Perritt. *See Gardner*, 128 Wn.2d at 941 (citing Henry H. Perritt, Jr., *Workplace Torts: Rights and Liabilities* § 3.7 (1991)). The Perritt test identifies four factors for analyzing wrongful discharge claims:

- (1) The plaintiffs must prove the existence of a clear public policy (the clarity element);
- (2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element);
- (3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element); and
- (4) The defendant must not be able to offer an overriding justification for the dismissal (the justification element).

Gardner, 128 Wn.2d at 941 (citing Perritt). To establish clarity, an employee must identify a clear mandate of public policy, generally one recognized in a constitutional, statutory or regulatory provision, or in a judicial opinion. *See Gardner*, 128 Wn.2d at 936. Jeopardy requires proof that the employee’s conduct was either directly related to the public policy or necessary for effective enforcement. *See Rose*, 184 Wn.2d at 284. The third requirement, causation, requires proof by the plaintiff that a substantial factor motivating the employer’s decision to terminate was the employee’s public-policy-linked conduct. *See Wilmot*, 118 Wn.2d at 73. Finally, overriding justification inquires whether, assuming the employer admits a substantial factor motivating the termination was the employee’s public-policy-linked conduct, the employer has identified a competing interest that trumps the

public policy advanced by the employee's conduct. *See Rickman*, 184 Wn.2d at 314.

B. The Court of Appeals Erred Both By Improperly Applying The Perritt Test To Whistleblower Activity And By Misinterpreting The Overriding Justification Prong Of The Perritt Test.

1. The Perritt test is inapplicable to cases falling within the four categories recognized in *Dicomes*.

When the Court adopted the Perritt test in *Gardner*, it was faced with a specific problem presented by the unique facts of that case. The Court noted the adequacy of the *Thompson* formulation for cases falling into any of the four categories recognized in *Dicomes*, but concluded it needed a “more refined analysis” to resolve the issues there.³ *See Gardner*, 128 Wn.2d at 940. This Court recently reaffirmed that the Perritt test is inapplicable when the public policy at issue falls into one of the four categories. *See Rose*, 184 Wn.2d at 287 (stating that “when the facts do not fit neatly into one of the four . . . categories, a more refined analysis may be necessary. *In those circumstances, the courts should look to the four-part Perritt framework for guidance*” (italics added)); *see also Becker*, 184 Wn.2d at 259 (acknowledging the use of the Perritt factors in *Gardner*, but stating that

³ In examining the elements of his test and the balancing of interests in determining the contours of liability, Perritt relies on *Restatement (Second) of Torts* § 870. *See* Henry H. Perritt, Jr., *Employee Dismissal Law and Practice* § 7.09 at 7-168-169 (6th ed. 2017). The Restatement explores general principles underlying the creation of doctrines recognizing tort liability for intentional acts. Comments c and d to the Restatement suggest that balancing should occur in the process of developing the rules for liability under a particular tort theory, but that once that has been accomplished, “neither court nor jury engages afresh in balancing the conflicting interests of the parties. That has already been done in the creation of the legal rules of liability and privilege and all that is needed is to determine the facts and apply these rules to them.” § 870 cmt d.

“such detailed analysis is unnecessary here”).⁴ Based on the foregoing, the *Thompson* formulation should apply here, as Martin was engaged in whistleblower activity, the fourth category recognized in *Dicomes*. See 113 Wn.2d at 618.⁵

2. **In the rare cases in which the Perritt test applies, its overriding justification prong should be interpreted as a narrow defense permitting an employer to concede causation but offer a competing interest it asserts trumps the public policy advanced by the employee.**

Professor Perritt describes the overriding justification prong as a narrow defense analogous to the “business necessity” defense recognized in statutory discrimination and retaliation claims:

Circumstances may arise . . . in which the employer does not deny that the . . . reason for the dismissal was the employee’s public-policy-linked conduct but asserts that legitimate business reasons nevertheless outweigh the public policy and justify the dismissal. This is the *overriding justification or business necessity defense*.

Henry H. Perritt, Jr., *Employee Dismissal Law and Practice*, § 7.09 at 7-167-168 (6th ed. 2017) (italics in original). This interpretation of the defense would permit an employer to admit it terminated the employee for public-

⁴ On the same day *Rose* and *Becker* were released, this Court also issued its opinion in *Rickman*, which applied the Perritt test to facts that appeared to involve an employee’s discharge allegedly due to her opposition to illegal activity. See *Rickman*, 184 Wn.2d at 311-14. The Court in *Rickman* did not indicate whether it considered the facts before it to fall into one of the four recognized categories. Notably, the Court did not disavow the rule announced in both *Rose* and *Becker* that the Perritt test is inapplicable to cases falling into any of the four categories recognized in *Dicomes*.

⁵ Under Washington law, one who is “discharged in retaliation for reporting employer misconduct” qualifies as a whistleblower. *Farnam v. Crista Ministries*, 116 Wn.2d 659, 668, 807 P.2d 830 (1991). While Gonzaga disputes Martin’s status as a whistleblower, see Gonzaga Supp. Br. at 2-4, it does not deny the Perritt test is inapplicable in this case. See Gonzaga Supp. Br. at 1 n.1.

policy-related conduct, but argue a competing interest should trump the public policy advanced by the employee's conduct. The explanation of overriding justification in *Gardner* is consistent with this view:

Loomis has defended its work rule as a part of a fundamental policy designed to guarantee the safety of its employees. This court must balance the public policies raised by Plaintiff against Loomis' legitimate interest in maintaining a safe workplace and determine whether those public policies outweigh Loomis' concerns.

Gardner, 128 Wn.2d at 948-49.

Overriding justification will often present mixed questions of law and fact. As Perritt notes “[i]f circumstances under which the employee was terminated present questions of business necessity, fact issues should be resolved by the jury, and the judge should retain control over balancing the interests of employee, employer and public policy.” Perritt, *Employee Dismissal Law and Practice* § 7.09, at 7-168 (brackets added); see also *Gardner*, 128 Wn.2d at 942 (describing the court's role in balancing the competing public policies at stake); *Ellis v. City of Seattle*, 142 Wn.2d 450, 466, 13 P.3d 1065 (2000) (finding questions of fact predominated where the employer conceded the employee's safety-related conduct triggered the discharge, but argued it was motivated primarily by competing safety issues).⁶ Importantly, the analysis in *Ellis* indicates that a necessary element

⁶ The Court of Appeals did not reach the issue of which party bears the burden of proof. Professor Perritt concludes that the employee should carry the burden of persuasion as to the first three elements, but that the burden to prove overriding justification should rest with the employer. See Perritt, *Employee Dismissal Law and Practice* § 7.09, at 7-173. Washington law recognizes that the “underlying purpose” of the wrongful discharge tort is to prevent employers from intentionally “frustrating important public policies of this state.” *Smith v. Bates Technical*

of overriding justification is proof by the employer that it was actually motivated by its asserted competing interest. 142 Wn.2d at 465-66.⁷

Perritt contrasts the overriding justification inquiry to the “mixed motive” situation, where the employer asserts a motivation for discharge unrelated to the public-policy-related conduct, raising an issue of causation. See Perritt, *Employee Dismissal Law and Practice* § 7.09, at 7-168. This Court has recognized the distinction between overriding justification and questions of causation that may be at issue in a mixed motive situation. See *Rickman*, 184 Wn.2d at 314 (recognizing that an employer’s assertion of an unrelated, independent justification for termination raises an issue of causation, and the Court should not “blend the separate issues of causation and overriding justification”). When an employer offers a legitimate alternative explanation for termination unrelated to the public policy, the issue is simply whether the employee can meet his burden of proving that a

College, 139 Wn.2d 793, 807, 991 P.2d 1135 (2000). Where an employer concedes it terminated an employee for public policy related conduct, imposing on the employer the burden of proving that a competing interest supersedes the policy advanced by the employee appears to comport with this principle. In *Kastanis v. Education Employees Credit Union*, 122 Wn.2d 483, 488-94, 859 P.2d 26, 865 P.2d 507 (1993), the Court interpreted WAC 162-16-150, which implemented rules regarding business necessity for employment discrimination claims based on marital status under the WLAD, and held that the burden of proving business necessity should rest with the employee. However, the Court noted that it assumed, but did not decide, that WAC 162-16-150 properly states the law. *Id.* at 492, n.4. That regulation was subsequently repealed. Title 162, ch. 162-16, Disp. Table, repealed by 99-15-025, filed 7/12/99, effective 8/12/99.

⁷ This is contrary to the Court of Appeals’ opinion below, which concludes that overriding justification requires no proof that the employer’s decision to terminate was actually motivated by the competing interest it offers. See *Martin*, 200 Wn. App. at 362-63.

substantial motivating factor in the decision to discharge was the public-policy-linked conduct. This is a question of causation for the trier of fact.

C. A Claim For Wrongful Discharge Falling Into One Of The Four Categories Recognized in *Dicomes* Should Be Analyzed Under The *Thompson* Formulation, Which Would Apply Traditional Tort Principles Similar To WLAD Retaliation Claims Under RCW 49.60.210.

The same day this Court issued its opinion in *Wilmot* adopting the substantial factor test for causation in wrongful discharge cases, the Court issued *Allison v. Housing Authority*, 118 Wn.2d 79, 85, 95-96, 821 P.2d 34 (1991), adopting the same standard for WLAD retaliation claims under RCW 49.60.210. *Wilmot* noted that *Allison* involved “[a] question regarding similar tests and the respective burdens of proof in the context of age discrimination.” *Wilmot*, 118 Wn.2d at 71 n.2 (brackets added).

In *Wilmot*, employees filed a wrongful discharge claim, alleging they were discharged for filing worker’s compensation claims. The Court listed the elements of their wrongful discharge claim as follows:

[P]laintiff must show (1) that he or she exercised the statutory right to pursue workers' benefits under RCW Title 51 or communicated to the employer an intent to do so or exercised any other right under RCW Title 51; (2) that he or she was discharged; and (3) that there is a causal connection between the exercise of the legal right and the discharge, *i.e.*, that the employer's motivation for the discharge was the employee's exercise of or intent to exercise the statutory rights.

Wilmot, 118 Wn.2d at 68-69 (brackets added). To meet the causation element, a plaintiff must prove by a preponderance of the evidence that

retaliation (or other improper motive) “was a substantial or important factor motivating the discharge.” *Wilmot*, 118 Wn.2d at 71.

The elements of wrongful termination in violation of public policy set forth in *Thompson* and refined by *Wilmot*, combined with evidence of injury, reflect the traditional framework for evaluating tort liability: whether the defendant owed the plaintiff a duty, whether the duty was breached, and whether the breach caused the plaintiff injury. *See, e.g., Mohr v. Grantham*, 172 Wn.2d 844, 850, 262 P.3d 490 (2011) (noting traditional tort elements of proof are duty, breach, injury and proximate cause). Wrongful discharge claims recognize an employer’s duty to not impose as a condition of employment a requirement that an employee act in a manner contrary to public policy. *See Smith v. Bates Technical College*, 139 Wn.2d 793, 804, 991 P.2d 1135 (2000). An employer breaches that duty when a substantial factor motivating its decision to discharge an employee is the employee’s activity in furtherance of public policy. *Wilmot*, 118 Wn.2d at 71. An employee suffering harm as a result is entitled to recover damages. *See Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 919, 726 P.2d 434 (1986).

Wrongful discharge is an intentional tort, similar to claims of discrimination or retaliation under the WLAD. *See Cagle*, 106 Wn.2d at 917-18 (permitting emotional distress damages for intentional tort of wrongful discharge, in part based on “analogous” WLAD law). Consistent with the intentional nature of the tort and the case law refining its application, the elements of a claim for wrongful discharge should employ traditional tort

principles and draw from the analogous claim for retaliation under the WLAD, as follows:

The public policy of the State of Washington is [stated by Court].

To establish a claim of wrongful discharge in violation of public policy, plaintiff has the burden of proving each of the following propositions:

1. That plaintiff acted in furtherance of the public policy defined above, including conduct by plaintiff based upon [his/her] reasonable belief that [he/she] was acting in furtherance of the public policy; and
2. That defendant discharged plaintiff; and
3. That a substantial factor in defendant's decision to discharge plaintiff was plaintiff's action in furtherance of the public policy.

If you find from your consideration of the evidence that each of these propositions has been proved, then your verdict should be for plaintiff on the claim. On the other hand, if any of these propositions has not been proved, then your verdict should be for defendant on this claim.

Plaintiff does not have to prove that [his/her] action in furtherance of public policy was the only factor or the main factor in defendant's decision to discharge plaintiff, nor does plaintiff have to prove that he/she would have been discharged but for [his/her] action in furtherance of public policy.⁸

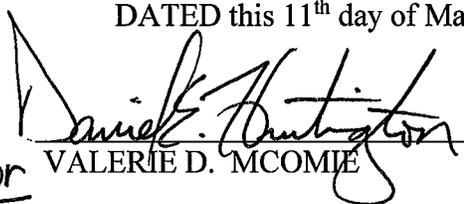
⁸ For the first time in its Supplemental Brief, Gonzaga argues Martin's conduct was motivated out of private interest and this precludes a finding that he acted in furtherance of public policy. *See* Gonzaga Supp. Br. at 2-5. Citing selectively from the record, Gonzaga asserts Martin's motivation was solely to propose a way to keep Gonzaga's pool open, which implicated no clear mandate of public policy. Gonzaga does not deny, however, that Martin repeatedly expressed concerns about the unsafe condition in RFC, and his plan to generate pool revenue was designed in part to address Gonzaga's stated financial reasons for not previously purchasing padding. The relevant inquiry regarding an employee's good faith belief is not whether he or she may have been motivated in part by personal interests, but whether he or she had a good faith belief that the conduct would further a clear mandate of public policy. *See Rickman*, 184 Wn.2d at 313 (clarifying

This formulation of the jury instruction for wrongful discharge is modeled after the WPI pattern instruction for WLAD retaliation claims. *See* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.05 (6th ed.).⁹ This proposed instruction captures the requirements of a wrongful discharge claim as articulated in *Thompson* and *Wilmot*, and should be used in the majority of wrongful discharge cases.¹⁰

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

DATED this 11th day of May, 2018.


for VALERIE D. MCOMIE


DANIEL E. HUNTINGTON

On Behalf of WSAJ Foundation

“reasonableness of the plaintiff’s conduct relates to whether the plaintiff’s conduct furthers public policy goals”).

⁹ WPI 330.05 and its Comment are reproduced in the Appendix to this brief. For all common law wrongful discharge cases not subject to the Perritt test, the proposed instruction should replace WPI 330.51, which includes an overriding justification element.

¹⁰ These instructions should be supplemented with instructions regarding damages. *See, e.g.*, WPI 330.81, 330.82 and 330.83.

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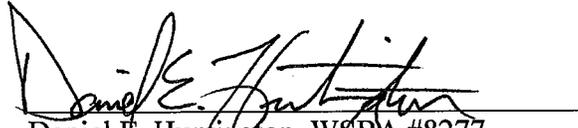
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APPENDIX

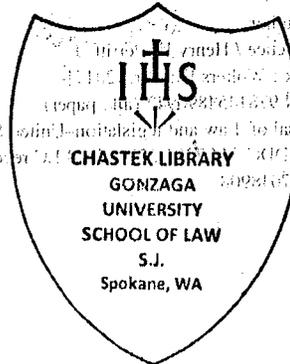
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Sixth Edition

Henry H. Perritt, Jr.



not have deteriorated in 12 days to the point that it had to consider extreme cost-saving measures at that particular time.

In addition, the fact that the same entity that made the decision to eliminate plaintiff's position, the board, was also the direct recipient of plaintiff's complaints strengthens the causal link between plaintiff's protected activity and defendants' adverse action because it is reasonable to infer that the more knowledge the employer has of the plaintiff's protected activity, the greater the possibility of an impermissible motivation. Similarly, it is reasonable to conclude that the more an employer is affected by the plaintiff's whistleblowing activity, the stronger the causal link becomes between the protected activity and the employer's adverse employment action. In this case, the board heeded plaintiff's advice and returned the transferred funds back into the ambulance fund. The fact that the board remedied its prior and potentially unlawful action lends support to plaintiff's position that defendants, because of plaintiff's complaints, were forced to do something that they would not have otherwise done and, thus, a reasonable inference may be drawn that the board was motivated to eliminate plaintiff's position because of her complaints.

When viewed in a light most favorable to plaintiff, the foregoing facts support a reasonable inference that plaintiff was the victim of unlawful retaliation, which establishes her prima facie case and gives rise to a rebuttable presumption that defendants unlawfully retaliated against plaintiff by eliminating her position. The next step in the analysis requires that we consider the extent to which plaintiff may rebut defendants' facially legitimate reason for its adverse action—that the board eliminated plaintiff's position because of the county's impending financial crisis.

§ 7.09 PROVING OVERRIDING JUSTIFICATION

Circumstances may arise, especially in the internal public policy category defined in §§ 7.10[C] through 7.10[D][7], in which the employer does not deny that the determining factor or dominant reason for the dismissal was the employee's public-policy-linked conduct, but asserts that legitimate business reasons nevertheless outweigh the public policy and justify the dismissal.⁷¹⁵ This is the *overriding justification* or *business*

⁷¹⁴ 828 N.W.2d at 639-40 (internal quotations and citations omitted).

⁷¹⁵ See *Rivera v. Woodward Resource Center*, 865 N.W.2d 887, 893, 895, 897 (Iowa 2015) (extensively discussing this book's framework for overriding business justification); *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1035 (5th Cir. 1984) (pointing out the

necessity defense. The justification issue presents this fact question: was there a business necessity for discharging the plaintiff, even if protected conduct was the reason for the dismissal.⁷¹⁶ *Protected conduct* is involved only if both the clarity and jeopardy elements of the public policy tort have been resolved in the plaintiff's favor.

This defense differs from the mixed motive problem addressed in § 7.08[B]. In the mixed motive case, the employer asserts that the real motive for the dismissal had nothing to do with public policy. In the business necessity case, the employer admits that the dismissal related to conduct protected by public policy but asserts that the employer's interests in the circumstances should override the jeopardy to public policy. As Judge Easterbrook explained in *Reeder-Baker v. Lincoln National Corp.*,⁷¹⁷ an employee is entitled statutorily to protest discrimination, but not by punching a supervisor.

If circumstances under which the employee was terminated present questions of business necessity, fact issues should be resolved by the jury, and the judge should retain control over balancing the interests of employee, employer, and public policy. The employee should retain the burden of persuasion in convincing the jury that her conduct was not unreasonably disruptive to the employer's legitimate business needs.⁷¹⁸ Litigating overriding business justification in public policy tort cases presents the same issues as litigating bona fide occupational qualification (BFOQ), business necessity, or Reasonable Factors other than Age in the discrimination cases considered in Chapters 2 and 3.

The comments to § 870 of the Restatement (Second) of Torts, the section that provides the doctrine for the public policy tort, state that it is

difference in impact on employment policies between protecting whistleblowing to government agencies as opposed to internal quarrels over employer policies); *Zoerb v. Chugach Elec. Ass'n*, 798 P.2d 1258, 1262 (Alaska, 1990) (citing earlier edition of this text for proposition that legitimate interests may justify discharge partially motivated by improper reason; jury adequately informed as to determining true reason for dismissal; affirming jury verdict for employer in breach of contract/just cause case); *Alexander v. Kay Finlay Jewelers, Inc.*, 208 N.J. Super. 503, 506 A.2d 379 (1986) (dismissal of employee for filing suit in salary dispute did not offend public policy; employer had legitimate interest in being free of harassment from employee suits).

⁷¹⁶ Quoted in *Gardner v. Loomis Armored, Inc.*, 913 P.2d 377 (Wash. 1996) (extensively using framework suggested by this book to conclude that armored car driver fired for assisting holdup victim stated public policy tort claim).

⁷¹⁷ 834 F.2d 1373, 1380-81 (7th Cir. 1987) (dissenting from affirmation of judgment in favor of employee).

⁷¹⁸ Restatement (Second) of Torts § 870, cmt. j (1979).

the plaintiff's burden to plead and prove the elements of the prima facie case⁷¹⁹ and the defendant's burden to plead and prove the existence of any privilege that may be applicable.⁷²⁰ These two propositions potentially conflict respecting proof of justification. Because lack of justification is an element of the prima facie case under § 870, the comments suggest that the plaintiff has the burden of producing evidence to show lack of justification. Yet, conceptually, justification is a privilege, and the comments also say that the defendant has the burden with respect to privileges.⁷²¹

Consideration of the allocation of responsibility between judge and jury helps explicate the order of proof respecting justification, although the public policy tort cases vary somewhat in the faithfulness with which they honor this allocation.⁷²² Comment k requires the judge to engage in the interest-balancing process to determine whether tort liability exists for a dismissal in the circumstances alleged by the plaintiff and to decide what privileges apply.⁷²³ Justification is a privilege. The jury is limited by comment k to applying the rules and standards articulated by the judge to the facts that it finds to exist. If the impact of the plaintiff's conduct on the defendant's business is a factual issue, the jury decides that as a matter of fact. The judge decides, as a part of her balancing responsibility, whether the employer had legal justification. The approach that limits the jury to factual questions, suggested in this and following sections, is most consistent with the underlying philosophy of Restatement (Second) § 870 and the nature of wrongful dismissal disputes.

It is desirable for the judge to retain control over the balancing process. Only in this way can the appellate courts retain adequate control over the direction in which the public policy balance is struck. If juries are allowed to strike the balance in individual cases, the constraints on an

⁷¹⁹ Restatement (Second) of Torts § 870, cmts. j, ii.

⁷²⁰ Restatement (Second) of Torts § 870, cmts. e, j. See also *Stern v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989) (reversing intermediate court; defendant has burden to prove justification for interference with contract; acknowledging authority to contrary).

⁷²¹ Restatement (Second) of Torts § 870, cmts. e, j. See also *Stern v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989) (reversing intermediate court; defendant has burden to prove justification for interference with contract; acknowledging authority to contrary).

⁷²² See *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981) (jury decides not only factual reason for dismissal but also question of whether it contravened public policy). Accord *Cilley v. New Hampshire Ball Bearings, Inc.*, 514 A.2d 818 (N.H. 1986).

⁷²³ Restatement (Second) of Torts § 870, cmt. k.

In retaliation cases under Title VII (*see* Chapter 3), the burden of proof to show that the form of the protest was inappropriate is on the employer.⁷³⁶

In public policy tort cases, the burden of persuasion remains with the plaintiff employee on all three elements, including when mixed motive is involved. But if the employer admits protected conduct was the determining factor in the dismissal but defends on business necessity grounds, the employer should have the burden of persuasion on that defense. In effect, the employer is saying that something special about its business gives it an interest strong enough to override public policy, even though the plaintiff met her burden on all three elements of the public policy tort. The evidence of the special circumstances of the employer's business would be within the employer's control. Therefore, it is fair to put the burden of production on the employer. The burden of persuasion also should be placed on the employer because the proposition advanced by the employer is disfavored as contrary to public policy and is counterintuitive.⁷³⁷

The types of factual inquiry in a public policy tort business necessity case are similar to those in statutory bona fide occupational qualification or business necessity cases. In both, the strength of the employer's asserted business necessity⁷³⁸ defense turns on facts such as the disruption to the employer's business that would result from permitting the plaintiff employee's conduct to continue⁷³⁹ and the availability of measures other than dismissal, such as transferring the employee to another part of the employer's business to reduce the business impact of the employee's conduct. As the Wisconsin intermediate court of appeals put it, "There are good and bad ways to oppose illegal orders. Reilly (the plaintiff) could not have shot Turner (her boss) in order to protest the order."⁷⁴⁰

In cases in which the employee refuses to follow orders (*see* § 7.10[D][7]), after a reasonable investigation by the employer of claims

⁷³⁶ *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), *cert. denied* 455 U.S. 1000 (1982).

⁷³⁷ C. McCormick, *McCormick on Evidence* § 336, at 948-49 (E. Cleary ed., 3d ed. 1984) (discussing factors leading to placing burden of proof on one party or the other).

⁷³⁸ The term "business necessity" is used as a term of art in disparate impact race, sex, and religion cases. *See* § 2.03. It is used here in a more general sense because the term is more evocative than "bona fide occupational qualification."

⁷³⁹ *See Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 901 (3d Cir. 1983) (trial court should consider effect of public-policy-protected conduct on employer's efficient operations).

⁷⁴⁰ *Reilly v. Waukesha County*, 535 N.W.2d 51, 55 (Wis. Ct. App. 1995) (affirming summary judgment for defendants) (split opinion).

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.05 (6th ed.)

Washington Practice Series TM December 2017 Update
Washington Pattern Jury Instructions--Civil
Washington State Supreme Court Committee on Jury Instructions

Part XVI. Employment
Chapter 330. Employment Discrimination

WPI 330.05 Employment Discrimination—Retaliation

It is unlawful for an employer to retaliate against a person for

[opposing what the person reasonably believed to be discrimination on the basis of [age] [creed] [disability] [religion] [sexual orientation] [honorably discharged veteran status] [military status] [marital status] [national origin] [race] [gender]] [and] [or] [providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred].

To establish a claim of unlawful retaliation by (name of employer), (name of plaintiff) has the burden of proving both of the following propositions:

- (1) That (name of plaintiff) [was opposing what [he] [she] reasonably believed to be discrimination on the basis of [age] [creed] [disability] [religion] [marital status] [national origin] [race] [gender] [honorably discharged veteran status] [military status]] [or] [was [providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred]; and
- (2) That a substantial factor in the decision to [discipline] [demote] [deny the promotion] [terminate] was (name of plaintiff's) [opposing what [he] [she] reasonably believed to be discrimination or retaliation] [or] [[providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred].

If you find from your consideration of all of the evidence that both of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any one of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

(Name of plaintiff) does not have to prove that [his] [her] [opposition] [participation in the proceeding] [was] [were] the only factor or the main factor in (name of defendant's) decision, nor does (name of plaintiff) have to prove that [he] [she] would not have been [disciplined] [demoted] [denied the promotion] [terminated] but for [his] [her] [opposition] [participation].

NOTE ON USE

Use the bracketed phrases as appropriate. It may be appropriate to substitute other allegedly retaliatory acts in proposition (2).

Use this instruction instead of WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof) or WPI 330.02 (Employment Discrimination—Disparate Impact—Business Necessity—Definition).

This instruction is not designed for use in a statutory “whistleblower” case pursuant to RCW Chapter 42.40.

For a discussion of honorably discharged veteran status and military status, see the Comment to WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof).

COMMENT

The elements of a retaliation claim are based upon RCW 49.60.210(1); *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 821 P.2d 34 (1991); *Lodis v. Corbis Holdings, Inc.*, 192 Wn.App. 30, 366 P.3d 1246 (2015), review denied, 185 Wn.2d 1038 (2016) (“*Lodis II*”); *Boyd v. State*, 187 Wn.App. 1, 349 P.3d 864 (2015); *Lodis v. Corbis Holdings, Inc.*, 172 Wn.App. 835, 292 P.3d 779 (2013) (“*Lodis I*”); *Milligan v. Thompson*, 110 Wn.App. 628, 42 P.3d 418 (2002); *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 991 P.2d 1182 (2000).

An adverse employment action will support an award of damages when “(1) [the employee] engaged in a statutorily protected activity, (2) the employer took an adverse employment action against the employee, and (3) there is a causal connection between the employee's activity and the employer's adverse action.” *Boyd v. State*, 187 Wn.App. 1, 11–12, 349 P.3d 864 (2015) (citing *Estevez v. Faculty Club of Univ. of Washington*, 129 Wn.App. 774, 120 P.3d 579 (2005)). See also *Coville v. Cobarc Services, Inc.*, 73 Wn.App. 433, 869 P.2d 1103 (1994) (adding the term “opposition”); *Davis v. West One Automotive Group*, 140 Wn.App. 449, 166 P.3d 807 (2007).

In *Lodis v. Corbis Holdings, Inc.*, 172 Wn.App. 835, 292 P.3d 779 (*Lodis I*), the court held that a human resource director did not need to “step outside” his ordinary job duties in order to oppose alleged discrimination by the company's CEO. The court declined to follow federal precedent holding that human resource professionals doing their jobs were not engaged in protected oppositional activity. The Washington Law Against Discrimination's (WLAD) protections against retaliation extend beyond employees to independent contractors. *Currier v. Northland Services, Inc.*, 182 Wn.App. 733, 332 P.3d 1006 (2014), review denied, 182 Wn.2d 1006 (2015).

Protected activity. The employee must oppose “practices forbidden by this chapter,” i.e., the law against discrimination, and opposition to a practice not forbidden by the statute is not protected activity. *Coville v. Cobarc Servs., Inc.*, 73 Wn.App. 433, 440, 869 P.2d 1103 (1994). RCW 49.60.210(2) makes it unlawful for a government agency or government manager or supervisor to retaliate against a “whistleblower” as defined in RCW Chapter 42.40, however, unless the retaliation is for complaining of discrimination. The elements of a statutory “whistleblower” claim differ from those under RCW 49.60.210(1), and a different instruction should be used.

In *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000), the court held that to establish a RCW Chapter 49.60 claim of retaliation, the employee need only show he/she reasonably believed there was discrimination and complained about it, and need not prove actual discrimination.

Adverse employment action. Adverse employment actions involve a change in employment that is more than an inconvenience or alteration of one's job responsibilities. *Boyd v. State*, 187 Wn.App. 1. The distinction between an adverse employment action and a mere “inconvenience” or “alterations of one's job responsibilities” is not a bright line. See *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn.App. 734, 747, 315 P.3d 610 (2013) (whether loss of certain van and cellular phone benefits constituted adverse employment action is an issue of fact for the jury). Adverse employment actions may include: failure to promote, *Davis v. Department of Labor and Industries*, 94 Wn.2d 119, 615 P.2d 1279 (1980), reduction of pay, *Kirby v. City of Tacoma*, 124 Wn.App. 454, 98 P.3d 827 (2004), and demotion or transfer, *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002). An adverse employment action is one that would “dissuad[e] a reasonable worker from making or supporting a charge of discrimination.” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed. 2d 345 (2006). See the Note on Use for WPI 330.06 (Retaliation—Adverse Employment Action—Definition).

One federal district court applying WLAD concluded Washington appellate courts would likely recognize a retaliatory hostile work environment claim. *Trizuto v. Bellevue Police Department*, 983 F.Supp.2d 1277 (W.D. Wash. 2013).

Substantial factor. An individual asserting a claim under this provision must prove a retaliatory motive was a “substantial factor” in the challenged decision, but need not prove it was the only factor or a “determining factor.” *Allison v. Housing Auth.*, 118 Wn.2d 79, 821 P.2d 34 (1991). Complaints about the conduct of a supervisor that do not allege discrimination are insufficient to impute knowledge of protected opposition to employer. *Graves v. Dep't of Game*, 76 Wn.App. 705, 712, 887 P.2d 424 (1994) (citing *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991)).

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Washington Practice Series TM December 2017 Update
Washington Pattern Jury Instructions--Civil
Washington State Supreme Court Committee on Jury Instructions

Part XVI. Employment
Chapter 330. Employment Discrimination

WPI 330.51 Wrongful Termination in Violation of Public Policy—Burden of Proof

To recover on [his] [her] claim of wrongful termination in violation of public policy, (name of plaintiff) has the burden of proving that a substantial factor motivating the employer to terminate [his] [her] employment was [his] [her] [refusing to commit an unlawful act] [performing a public duty] [exercising a legal right or privilege] [reporting what [he] [she] reasonably believed to be employer misconduct].

If you find from your consideration of all of the evidence that (name of plaintiff) has not met this burden, then you must find for the defendant (name of employer) [on this claim].

If you find from your consideration of all of the evidence that (name of plaintiff) has met this burden, then you must find for plaintiff (name of plaintiff) [on this claim].

[If you find from your consideration of all of the evidence that (name of plaintiff) has met this burden, then you must determine whether (name of employer) has met its burden of proving that it had a legitimate, overriding consideration for terminating (name of plaintiff). If you find that (name of employer) has met its burden of proving it had an overriding consideration for its actions, then you must find for (name of employer). If (name of employer) has not met this burden, then you must find for (name of plaintiff) [on this claim].]

NOTE ON USE

Use this instruction when the plaintiff alleges a termination in violation of public policy.

This instruction sets out the elements of a common law wrongful termination in violation of public policy tort. Use bracketed language when the employer asserts an affirmative defense that it had a legitimate overriding justification for terminating its employee. That affirmative defense would not be applicable to a constructive discharge claim when the former employee resigned.

Give the substantial factor instruction, WPI 330.01.01 (Employment Discrimination—Disparate Treatment—Burden of Proof—Substantial Factor), with this instruction.

COMMENT

This instruction is new for this edition.

The employer's affirmative defense if it terminated the employee is that the termination was justified by an overriding consideration. *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015) (citing *Gardner v. Loomis*

Armored, Inc., 128 Wn.2d 931, 947–950, 913 P.2d 377 (1996)). Thus, there could be a mixed motive situation if the employer terminates for an allegedly proper reason yet a substantial factor in the decision involved a violation of public policy. The employer must prove not only a proper motive but that this motive was the “overriding consideration” in the termination.

What constitutes an “overriding consideration” is not defined in the case law.

The three decisions in *Becker v. Community Health Systems*, 184 Wn.2d 252, 359 P.3d 746 (2015), *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 358 P.3d 1159 (2015), and *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015), effectively overruled *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011). The three decisions focused on whether there were alternatives to bringing a tort action. The “substantial factor” test applies to wrongful termination in violation of public policy. See RCW Chapter 49.60, WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof), and WPI 330.01.01 (Employment Discrimination—Disparate Treatment—Burden of Proof—Substantial Factor).

To support a claim, the termination may be direct, by an employer, or it may be constructive, when the employee believes it necessary to resign. *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 177 n.1, 125 P.3d 119 (2005).

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