FILED

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JAMES R. KEYES, Appellant, v. ALEX KIEFER, LIZ JOHNSON, and SCOTT ARMSTRONG, individually, as representatives of their respective marital communities, and as representatives of GROUP HEALTH COOPERATIVE; and GROUP HEALTH COOPERATIVE, a Washington non-profit Corporation, Respondents.	)	No. 30656-9-III UNPUBLISHED OPINION

Siddoway, J. — James Keyes appeals the dismissal of his claim for wrongful termination in violation of public policy, for failure to state a claim. While he presents a novel issue of whether the employee of a temporary staffing agency has standing to assert such a claim against the client company for which he works (his de facto employer, in Mr. Keyes' view), we need not reach that issue because Mr. Keyes failed to plead a public policy violated by Group Health that satisfies the clarity and jeopardy elements

necessary to his claim.

On the only other issue raised by Mr. Keyes, he argues, unnecessarily, that his late-asserted replevin claim was wrongly dismissed. The claim was never effectively asserted. As a result, it was not dismissed by the court's judgment.

We affirm.

FACTS AND PROCEDURAL BACKGROUND

Dismissal under CR 12(b)(6), as occurred here, is appropriate only when it appears beyond doubt that the claimant can prove no set of facts consistent with the complaint that would justify recovery. In reviewing the order of dismissal, then, we presume that the facts as alleged by James Keyes in his complaint and proposed amended complaint (on which he was granted leave to rely for purposes of the motion) are true.

Mr. Keyes was recruited by a temporary staffing agency, Provisional Staffing Services, and in November 2010 was interviewed for a customer service position by Group Health Cooperative, a Provisional Staffing client. Mr. Keyes was selected for the position by Group Health employee Alex Keiffer,[1] who coached and supervised him during the four months he worked for Group Health.

Mr. Keyes was treated by both companies as an employee of Provisional Staffing,

[1] Defendants pointed out in their answer that Mr. Keiffer was misidentified in the caption as Alex Kiefer.

even though he worked under the direction of his Group Health supervisor and submitted his hours to the supervisor for approval. He submitted his work hours for payment to Provisional Staffing, which paid him.

Mr. Keyes' work responsibilities consisted of responding to Group Health members' questions and concerns about insurance coverage and billings that were phoned into the call center to which he was assigned. He received excellent performance reviews and was even encouraged by Mr. Keiffer to apply for a permanent position that would be opening at Group Health.

During the months he worked for Group Health, Mr. Keyes noticed several billing practices that he believed were unethical and even unlawful. He believed the practices could expose Group Health to civil liability or state sanctions. On one occasion, Mr. Keyes notified the claims department that an item had been billed twice and should be corrected. When it was not, he returned the billing to the claims department again, this time requesting that a service credit be given to the member. In returning the item for credit, he warned the claims department that its billing practice could subject Group Health to liability because it violated the company's internal cost share policy and laws of the state of Washington.

Shortly thereafter, an employee of Provisional Staffing called Mr. Keyes at home to notify him that Group Health had terminated his employment "because he had left a

written note that something Group Health . . . was doing violated the law." Clerk's Papers (CP) at 119. Mr. Keyes commenced this action against Group Health and three of its employees a couple of days later, asserting claims for wrongful termination in violation of public policy and intentional and negligent infliction of emotional distress.

The defendants filed a joint answer to Mr. Keyes' complaint and at the same time filed a motion to dismiss his claims pursuant to CR 12(b)(6). When Mr. Keyes responded to the motion to dismiss, he filed a contemporaneous motion to amend his complaint. He relied on the amended complaint in resisting the motion to dismiss.

At the hearing on the motions in June 2011, the trial court first addressed Mr. Keyes' motion to amend. Group Health's[2] lawyer informed the court that her client did not object to the proposed amended complaint "because it will not cure the deficits that we have addressed in our motion." Report of Proceedings (RP) at 4. Upon hearing this, the trial court stated, "Okay. I'm going to grant the motion to amend the Complaint." *Id.*

Argument then turned to the motion to dismiss. In the course of an argument that Group Health's lawyer addressed almost entirely to Mr. Keyes' wrongful termination and intentional and negligent infliction of emotional distress claims, she briefly mentioned a new claim for replevin that Mr. Keyes had included in his amended complaint, seeking

[2] In light of their united defense, we will refer to the defendants collectively as "Group Health" in addressing their positions taken in proceedings below and on appeal.

Group Health's return of a headset left at his workstation. She stated,

> There's a kind of minor new issue I suppose I should address. Based on the amended Complaint, Mr. Keyes has added a claim for replevin regarding a headset he claims he left at Group Health when he was asked not to return. I don't know the value of that headset, but I doubt seriously that it is of any significant import and is probably more properly before a small claims court.

Id. at 5.

After hearing argument of the parties, the trial court granted the motion to dismiss from the bench and signed the order presented by Group Health. Group Health's order did not address Mr. Keyes' motion to amend his complaint. Mr. Keyes did not present his own order addressing amendment at that time or thereafter. His motion for reconsideration was denied.

After final judgment was entered, Mr. Keyes timely appealed. At the same time he filed his notice of appeal, he filed his amended complaint. It had not been filed before judgment other than in its proposed form, as an exhibit to his motion to amend.

ANALYSIS

Mr. Keyes appeals the dismissal of only his wrongful termination of employment and replevin claims. We address them in turn.

I

The trial court dismissed Mr. Keyes' wrongful termination of employment claim

on two bases: first, that his complaint and proposed amended complaint revealed that he was not an employee of Group Health, and second, that he failed in either complaint to plead a public policy whose violation would support such a claim. Mr. Keyes argues that the trial court erred on both grounds. We need not reach Mr. Keyes' argument that he adequately pleaded standing as a borrowed servant or de facto employee of Group Health. Mr. Keyes' failure to plead the necessary public policy is dispositive.

Mr. Keyes' initial complaint did not identify any public policy on which he relied, a shortcoming argued by Group Health as a basis for its motion to dismiss. In his proposed amended complaint, he sought to correct the shortcoming by alleging that representatives of Group Health terminated his employment in retaliation for his raising concerns that Group Health was

> acting unethically, violating its own internal policies and the consumer protection and product liability laws (including but not limited to RCW 19.86 et seq. and RCW 62A.2-315) of the State of Washington while taking actions which harmed consumers and unjustly enriched Group Health Cooperative, and that Group Health was undertaking those actions even though they might result in civil liability for Group Heath.

CP at 119 (Amended Complaint ¶ 4.1).

The tort of wrongful discharge provides a cause of action "when an employer discharges an employee for reasons that contravene a clear mandate of public policy." *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119 (2005).

The action has generally arisen in the following four situations:

> (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.

Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 936, 913 P.2d 377 (1996).

Mr. Keyes bases his wrongful termination claim on retaliation for his alleged whistleblowing. To prevail on a claim of wrongful discharge in violation of public policy, a plaintiff must establish: (1) the existence of a clear public policy (the *clarity* element), (2) that discouraging the conduct would jeopardize the public policy (the *jeopardy* element), (3) that this conduct caused the discharge (the *causation* element), and—if the first three elements are met—that the defendant is not able to offer an overriding justification for the dismissal (*absence of justification* element). *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 207, 193 P.3d 128 (2008) (quoting *Gardner*, 128 Wn.2d at 941); *Briggs v. Nova Servs.*, 166 Wn.2d 794, 802, 213 P.3d 910 (2009); *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002).

In moving to dismiss Mr. Keyes' complaint, Group Health did not dispute that it terminated use of Mr. Keyes' services because he chided his co-workers for the company's acting unethically, illegally, or violating its internal policies. It relied only on

his asserted failure to adequately plead the public policies he was discharged for promoting.

Whether dismissal under CR 12(b)(6) was appropriate is a question of law that is reviewed de novo. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). We presume the plaintiff's facts are true and may consider hypothetical facts not included in the record. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). "CR 12(b)(6) motions should be granted 'sparingly and with care' and 'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" *Id.* (quoting *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

To satisfy the requirement of a clear public policy, Mr. Keyes pleads, first, that his services were terminated in retaliation for his raising concerns that "Group Health was acting unethically." CP at 119. This falls far short of satisfying the clarity element.

To determine whether a clear public policy has been violated, the court "'inquire[s] whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.'" *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 668, 807 P.2d 830 (1991) (quoting *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)). Public policy may also be established by prior judicial decisions. *Briggs*, 166 Wn.2d at 802. "'However, courts

should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.'" *Thompson*, 102 Wn.2d at 232 (emphasis omitted) (quoting *Parnar v. Americana Hotels, Inc*., 65 Haw. 370, 380, 652 P.2d 625 (1982)). If the party fails to assert a recognized public policy, he or she has failed to state a claim for which relief can be granted. *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 239, 35 P.3d 1158 (2001).

Acting unethically does not contravene any constitutional, statutory, or regulatory provision and cannot be relied upon for a wrongful termination claim.

Mr. Keyes pleads, next, that he was terminated in retaliation for expressing concerns that "Group Health was . . . violating its own internal policies." CP at 119. Internal policies, as such, are not public policies.

Finally, Mr. Keyes pleads that he was terminated in retaliation for expressing concerns that "Group Health Cooperative was . . . violating . . . the consumer protection and product liability laws (including but not limited to RCW 19.86 et seq. and RCW 62A.2-315)." *Id.*

Whether a statute contains a clear mandate of public policy is a question of law. *Hubbard*, 146 Wn.2d at 708. A clear mandate of public policy "does not exist merely because the plaintiff can point to legislation . . . that addresses the relevant issue." *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 757, 257 P.3d 586 (2011).

Turning first to RCW 62A.2-315, it provides—in a transaction for goods falling within the scope of the statute—that there is an implied warranty that a good will be fit for its particular purpose. Notably, the implied warranty can be modified or waived. RCW 62A.2-316. "A clear mandate of public policy sufficient to meet the clarity element must be clear and truly public." *Roe*, 171 Wn.2d at 757. An implied warranty that a statute provides will exist by default does not reflect a policy that is clear or public: there is no mandate, and it applies only to those private transactions in goods in which the seller elects not to exclude or modify it. Moreover, Mr. Keyes does not sufficiently plead the relevance of the statute to Group Health, which he alleges is a provider of services, not a seller of goods. Mr. Keyes' allegation that RCW 62A.2-315 was violated does not satisfy the requirement that he precisely identify a clear public policy.

The last source of public policy pleaded by Mr. Keyes is chapter 19.86 RCW: the Consumer Protection Act (CPA). The CPA declares unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. Its declared purpose is "to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920. Washington cases hold that an employer can be liable for discharging an employee who attempts to make his employer comply with consumer

protection laws because the discharge "would otherwise frustrate a clear public policy to protect consumers." *Hubbard*, 146 Wn.2d at 715 (citing *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978)).

Having adequately pleaded this single source of clear public policy, Mr. Keyes was still required to adequately plead the jeopardy element. In order to establish the jeopardy element, a plaintiff must show that he or she "'engaged in particular conduct [that] . . . directly relates to the public policy, or was necessary for the effective enforcement of the public policy.'" *Id.* at 729 (Madsen, J., dissenting) (alterations in original) (quoting *Gardner*, 128 Wn.2d at 945). "[A] plaintiff must show that other means of promoting the public policy are inadequate, and that the actions the plaintiff 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) (citation omitted) (quoting *Danny*, 165 Wn.2d at 222; citing *Hubbard*, 146 Wn.2d at 713).

Whether the jeopardy element is satisfied generally presents a question of fact, but whether adequate alternative means for promoting the public policy exist may present a question of law. *Korslund*, 156 Wn.2d at 182. In *Cudney*, our Supreme Court—responding to certified questions from a federal court—analyzed whether a plaintiff failed to satisfy the jeopardy element as a matter of law in light of adequate alternate means for promoting the public policy. The case involved a former service

manager allegedly discharged by his employer in retaliation for reporting, to his manager, that one of his superiors had been drinking and driving. The federal court inquired whether WISHA[3] and state driving while under the influence (DUI) laws adequately promote public policy in support of workplace safety and against drunk driving, "'so as to preclude a separate claim by a terminated employee for wrongful discharge in violation of public policy.'" 172 Wn.2d at 527.

The court's analysis of the adequacy of WISHA to address the workplace safety policy relied upon by Cudney is not helpful here, because the court's finding of adequate alternate means was based on WISHA's own extensive protection of employees claiming retaliation for raising workplace safety concerns. The CPA does not include similar protections for employees who complain about violations of consumer protection laws.

But the court's analysis of the adequacy of the DUI laws to promote the policy against drunk driving does guide our analysis. The court reasoned that for Cudney to establish the jeopardy element, "the criminal laws, enforcement mechanism, and penalties all have to be inadequate to protect the public from drunk driving." *Id*. at 537. Yet in light of the "legal and police machinery around our state designed to address this very problem," the court found it "hard to believe that the '*only available adequate means*' to protect the public . . . was for Cudney to tell his manager about [his superior's] drunk

[3] The Washington Industrial Safety and Health Act of 1973, chapter 49.17 RCW.

driving." *Id*. And importantly, the court reiterated that "'[t]he other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy.'" *Id.* at 538 (quoting *Hubbard*, 146 Wn.2d at 717).

The foregoing analysis compels the conclusion that the CPA, like the DUI laws, is an adequate means of promoting the public policies it serves. The CPA may be enforced by the attorney general or by private citizens. "The attorney general may bring an action . . . as parens patriae on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may . . . recover the costs of said action including a reasonable attorney's fee." RCW 19.86.080(1). The attorney general's website solicits complaints of consumer protection violations from the public and offers a direct method to file a consumer complaint via its website. *See* Washington State Office of the Attorney General, http://www.atg.wa.gov.

In addition, the CPA provides for a private right of action to recover actual damages or enjoin further violations. RCW 19.86.090. While a plaintiff must prove five elements to recover under the CPA, several elements may be established automatically where the legislature has identified a business practice as unfair or deceptive, or as having a public interest impact. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*,

105 Wn.2d 778, 786-87, 719 P.2d 531 (1986) (per se unfair trade practices), 791 (public interest element). In addition to actual damages or injunctive relief, a successful plaintiff may recover costs of the suit and reasonable attorney fees, and the court may award treble damages up to $25,000. RCW 19.86.090.

The court in *Cudney* recognized one exceptional circumstance, demonstrated by the facts of its earlier decision in *Hubbard*, in which the tort of wrongful discharge is available even where there are alternate means of enforcement: where necessary to protect employees who speak up *before* any violation of public policy occurs, "so that the violations can be prevented altogether." *Cudney*, 172 Wn.2d at 537. But Mr. Keyes' position clearly does not qualify for this exception. It was inherent in his customer service position that problems were brought to his attention not only after they occurred, but also after the customer had recognized the issue, and even after the customer had taken the initiative to question or challenge Group Health's conduct.

The trial court properly dismissed Mr. Keyes' complaint for its (and his proposed amended complaint's) failure to plead that he was discharged in retaliation for actions that were the only available means to promote a clear public policy.

II

Mr. Keyes also challenges the dismissal of his claim for replevin. His argument that dismissal was error presumes that the trial court dismissed the replevin claim that he

added with his amended complaint, and that it did so for the reason suggested by Group Health's lawyer at the time of hearing: that the replevin claim, being a very small claim, should be asserted in a different venue. He argues that the superior court is a court of general jurisdiction, that he should not have been required to split his claims for the legally insufficient reason offered at the hearing by Group Health, and finally, that an argument that a claim might be too small is not a basis for dismissal under CR 12(b)(6).

Mr. Keyes' argument fails to consider that he never presented an order granting his motion to amend. For that matter, he did not file his amended complaint until after entry of final judgment. *Cf.* CR 15(a) (providing that "[i]f a motion to amend is granted, the moving party *shall* thereafter file the amended pleading and . . . serve a copy thereof on all other parties" (emphasis added)). He mistakenly assumes that the trial court's clear statement, "I'm going to grant the motion to amend," means that his amended complaint (including the replevin claim) was clearly the operative complaint in the trial court and is the complaint before us for appeal. That is not clear, however.

"'[A] trial judge's oral decision is no more than a verbal expression of his informal opinion at that time. It . . . may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment.'" *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 441, 262 P.3d 837 (2011) (alterations in original) (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383

P.2d 900 (1963)).

The trial court orally granted Mr. Keyes' motion to amend at the outset of a hearing, based on the representation of Group Health's lawyer that it had no objection to the amendment. A bit later, during the same hearing, the lawyer recalled that Group Health *did* have an objection: to the replevin claim. By the end of the hearing, the trial court had determined that, even as alleged in the amended complaint, dismissal of all of Mr. Keyes' original claims was warranted.

Once the trial court determined that the wrongful termination and intentional and negligent infliction of emotional distress claims would fail even with amendment, and Group Health had belatedly raised its objection to permitting amendment to assert the replevin claim, the trial court was presented with a different amendment issue. Because Mr. Keyes failed to present an order, we cannot know whether the court would have modified its originally announced decision to grant the motion—particularly as it would relate to the new replevin claim.

More importantly, because Mr. Keyes neither presented an order nor filed his amended complaint, the technically proper way for Group Health and the court to proceed was on the basis of the original complaint, which was the only complaint in the record. We recognize that the trial court considered the allegations of Mr. Keyes' proposed amended complaint in deciding the motion to dismiss, just as we have in

considering his appeal. But the trial court's oral ruling that it would grant leave to amend is otherwise a nullity. Mr. Keyes' replevin claim was therefore not presented or dismissed in the action below.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, C.J.

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Kulik, J.