No. 83124-6

STEPHENS, J. (dissenting)—The majority would close the door on a common law cause of action for wrongful discharge in violation of public policy whenever the statute that announces a clear mandate of public policy also provides some means to protect that public policy. This result departs from long-standing precedent in Washington. Moreover, it transforms the jeopardy prong of the public policy tort analysis from its proper role as a tool to evaluate the close relationship between a tort claim and the furtherance of public policy into an automatic rule of exclusion. I respectfully dissent.

ANALYSIS

This court first recognized a cause of action under the common law for wrongful discharge in violation of a clear mandate of public policy in the landmark case of *Thompson v. St. Regis Paper Co*., 102 Wn.2d 219, 685 P.2d 1081 (1984). In cases following *Thompson* we acknowledged public policy tort claims generally arise in four areas: "(1) where the discharge was a result of refusing to commit an

illegal act, (2) where the discharge resulted due to the employee performing a public duty or obligation, (3) where the [discharge] resulted because the employee exercised a legal right or privilege, and (4) where the discharge was premised on employee 'whistleblowing' activity." *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989) (citations omitted).

In *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996), the court adopted the analytical framework set forth in a leading treatise to assess when an employee may recover for wrongful discharge in violation of public policy. *See* Henry H. Perritt Jr., Workplace Torts: Rights and Liabilities § 3.1 (1991). This test examines (1) the existence of a "clear public policy" ("clarity" element), (2) whether "discouraging the conduct in which [the employee] engaged would jeopardize the public policy" ("jeopardy" element), (3) whether the "public-policy-linked conduct caused the [discharge]" ("causation" element), and (4) whether the employer is "able to offer an overriding justification for the [discharge]" ("absence of justification" element). *Gardner*, 128 Wn.2d at 941. Here, only the jeopardy element is at issue.

Before we adopted Perritt's four-part test, our decisions tended to "lump[] the clarity and jeopardy elements together . . . ." *Id.*; *see also Dicomes*, 113 Wn.2d at 617 ("[T]he employee has the burden to show that the discharge contravened a clear mandate of public policy."). By parsing out these two related but conceptually distinct concepts, this court in *Gardner* sought to achieve "a more consistent

analysis." *Gardner*, 128 Wn.2d at 941. And in doing so, we made clear that "our adoption of this test does not change the existing common law in this state." *Id*.

Describing the jeopardy element, we explained it serves to "guarantee[] an employer's personnel management decisions will not be challenged unless a public policy is *genuinely* threatened." *Id*. at 941-42 (emphasis added). Also, we articulated the requisite showing a plaintiff must make in order to establish jeopardy:

> To establish jeopardy, plaintiffs must show they engaged in particular conduct, and the conduct *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy. This burden requires a plaintiff to "argue that other means for promoting the policy . . . are inadequate." Perritt[, *supra*] § 3.14, at 77. Additionally, the plaintiff must show how the threat of dismissal will discourage others from engaging in the desirable conduct.

Id. at 945 (first alteration in original) (internal citation omitted).

This language is a paraphrase of Perritt's treatise (1991), which clearly states the jeopardy analysis in the disjunctive, i.e., the conduct furthers public policy *either* because the policy directly promotes the conduct *or* because the conduct is necessary to effective enforcement of the policy. Perritt, *supra* § 3.14, at 75-76. The certified questions in this case present a direct relationship claim under the public policy of the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, and a necessity-type claim under the public policy of the laws on driving while under the influence of alcohol (DUI).

WISHA

The Washington legislature enacted WISHA in 1973. It was designed to complement the federal Occupational Safety and Health Act of 1970 (OSHA), and shares with OSHA the purpose of promoting workplace safety. 29 U.S.C. §§ 667(c), 651(b); RCW 49.17.010. WISHA requires every employer to (1) "furnish each of his or her employees employment and a place of employment free from recognized hazards that are causing or [are] likely to cause death or serious physical harm" and (2) "comply with industrial safety and health standards promulgated under WISHA." WAC 296-360-010(1). WISHA also contains an antidiscrimination provision which, inter alia, provides:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or herself or others of any right afforded by this chapter.

RCW 49.17.160(1).

This statute sets forth procedures by which an employee who believes that he or she has been discharged in violation of WISHA may file a complaint. RCW 49.17.160(2). The complaint must be filed with the director of the Washington State Department of Labor and Industries (L&I) within 30 days. *Id*. Upon receipt of the complaint, the director must cause an investigation to be conducted. *Id*. If the director determines that the investigation supports the employee's claim, the

director is required to bring suit against the employer who violated the statute. *Id*. If the director does not believe that a violation has occurred, the employee must bring suit on his or her own behalf within 30 days. *Id*. The director must notify the employee of the decision within 90 days of the initial filing of the complaint. RCW 49.17.160(3).

Cudney alleges his employment was terminated for reporting workplace safety concerns under WISHA and that allowing an employee to be fired in such instances directly discourages the very conduct that WISHA promotes. I would hold that this claim satisfies the jeopardy prong of the wrongful termination analysis.

Washington has long recognized claims for wrongful discharge in violation of public policy premised on state workplace protection laws, including WISHA. *See Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991) (recognizing claim for retaliation for filing workers' compensation claim and disapproving contrary WISHA case); *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000) (recognizing claim for retaliation for making WISHA complaint); *Wilson v. City of Monroe*, 88 Wn. App. 113, 943 P.2d 1134 (1997) (same; holding RCW 49.17.160 does not provide adequate, exclusive remedy); *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000) (recognizing claim under RCW 49.12.200 and Washington's Law Against Discrimination (WLAD), chapter 49.60 RCW); *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990) (recognizing claim under WLAD). The majority does not overrule these cases, which build on *Thompson*'s recognition

that the public policy tort claim is an important, though narrow, exception to the terminable at will doctrine. *See Thompson*, 102 Wn.2d at 231-33. Washington adopted this exception "because it properly balances the interest of both employer and employee," as well as advances public policy. *Id.* at 232.

Notably, in some cases involving public policy tort claims, the question was whether a plaintiff who *had no statutory cause of action* could nonetheless bring a wrongful discharge claim premised on the public policy of the statute. *See Roberts*, 140 Wn.2d at 77; *Bennett*, 113 Wn.2d at 929; *cf. Ellis*, 142 Wn.2d at 461 (noting, "Ellis is not required to prove an actual WISHA violation. All he has to do is prove the City terminated him for making a WISHA complaint." (citing *Wilson*, 88 Wn. App. 113)). The starting premise of these cases is that there can be no doubt about the existence of a public policy tort claim when the plaintiff is in fact protected by the statutory remedies. It would turn this premise on its head to suggest that the existence of statutory remedies instead *precludes* a public policy tort claim.

Wilmot is particularly instructive. That case involved a discrimination provision of the Industrial Insurance Act, chapter 51 RCW, virtually identical to the WISHA provision implicated in this case. *Wilmot*, 118 Wn.2d at 55. In describing the issue before the court, we said:

> In enacting RCW 51.48.025, the Legislature expressly set out the clear mandate of public policy giving rise to the exception to the employment at will doctrine. We must decide whether that public policy supports an independent tort action even though the statute sets out a remedy for violation of the statute. We have referred to this type of question twice before, that is, "whether a cause of action exists for wrongful discharge in violation of public policy when the declaration of

public policy is declared in a statute already providing a remedy."

Id. at 54 (quoting *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 367, 753 P.2d 517 (1988) and citing *Bennett*, 113 Wn.2d at 925). Given this language, I fail to understand how the majority can accept ALSCO's position, based solely on language in *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 183, 125 P.3d 119 (2005), that this case and *Wilmot* involve two entirely separate issues. ALSCO's Resp. Br. at 31-32.[1]

Wilmot in fact considered the adequacy of the relevant statutory remedies in its analysis, noting, "it is not simply the presence or absence of a remedy which is significant; rather, the comprehensiveness, or adequacy, of the remedy provided is a factor which courts and commentators have considered in deciding whether a statute provides the exclusive remedies for retaliatory discharge in violation of public policy." 118 Wn.2d at 61. Moreover, the court in *Wilmot* recognized that its holding implicated WISHA because it expressly disapproved of *Jones v. Industrial Electric-Seattle, Inc.*, 53 Wn. App. 536, 768 P.2d 520 (1989) (holding that statutory remedy under WISHA, RCW 49.17.160, precludes wrongful discharge public policy claim). *See Wilmot*, 118 Wn.2d at 66.

The majority seems to suggest that *Wilmot* is outdated given our subsequent refinement of the public policy tort analysis into the four-part Perritt test in *Gardner*.

[1] The issue in *Korslund* was whether to expand the tort of wrongful termination in violation of public policy where no such tort had previously been recognized under the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. In that context, the court applied the four-part test from *Gardner* to the particular facts before it. Significantly, the court did not suggest it was retreating from established precedent recognizing a public policy tort claim premised on state workplace protection statutes.

ALSCO's Resp. Br. at 30 n.3; Majority at 11-12. But this characterization of *Wilmot* fails to account for *Ellis*, which confirmed the same reasoning several years after *Gardner*. The plaintiff in *Ellis* alleged that he was terminated in retaliation for filing a WISHA complaint against his employer. He "sued the City alleging two causes of action, wrongful termination based on public policy, relying on *Gardner*, and retaliatory discharge in violation of RCW 49.17.160(1) stemming from his L&I complaint." *Ellis*, 142 Wn.2d at 457 (citation omitted). We held that both claims could go forward. In the course of our analysis we expressly addressed the jeopardy prong and held that the Court of Appeals erred by concluding as a matter of law that Ellis's conduct was not necessary to enforce the public policy at issue. *Id*. at 462-64. Our analysis echoed the view of Professor Perritt that "public policy tort cases involving employee reports of employer misconduct to outside agencies present relatively strong arguments on the jeopardy element, because of the likelihood that agencies charged with public policy enforcement depend on such reports." Perritt, *supra* § 3.34, at 117. Thus, had we intended to reject a public policy tort claim premised on WISHA because we viewed the test from *Thompson* somewhat differently in the intervening years between *Wilmot* and *Gardner*, *Ellis* gave us that opportunity. Instead of rejecting this claim under the jeopardy prong, we solidified its existence. This court in *Ellis* cited with approval the leading Court of Appeals case recognizing RCW 49.17.160 as the basis for a public policy tort claim notwithstanding the availability of remedies under the statute. 142 Wn.2d at

461 (citing *Wilson*, 88 Wn. App. 113). Notably, the agency charged with implementing WISHA does not believe that it precludes a public policy tort claim. L&I filed an amicus brief in this case in support of Cudney. This brief cautions that, because we have consistently recognized a tort claim based on the WISHA antidiscrimination statute, we should not revisit that issue absent a change in statute. Br. of Amicus Curiae Dep't of L&I (Amicus Br.) at 5-8.[2]

Even assuming it remains an open question whether the administrative remedies under WISHA preclude a public policy tort claim, I would conclude that WISHA remedies are inadequate to promote the public policy at issue. L&I explains that when it brings a discrimination action under RCW 49.17.160, it does so to carry out its statutory purpose and duty—to investigate complaints of discrimination against employees who voice safety and health concerns in the workplace and to seek limited relief on their behalf. WAC 296-360-020. L&I controls the litigation and brings the action to seek remedies that benefit the complainant, but L&I does not represent the complainant. Further, L&I can seek only those limited remedies the statute authorizes it to pursue, such as back pay and reinstatement. *See* WAC 296-360-020; -160. It does not plead compensatory damages, including emotional distress damages, or front pay. *See* Amicus Br. at 10-12. In contrast, the Energy Reorganization Act at issue in *Korslund* provided an administrative process for actually *adjudicating* whistleblower complaints,

[2] As L&I observes: "Complainants and [L&I] have relied on *Wilmot* for more th[a]n 18 years to conduct their affairs." Amicus Br. at 7 n.4.

providing tort-like remedies, including reinstatement, back pay, and compensatory damages, as well as attorney fees and expert witness fees. 42 U.S.C. § 5851(b)(2)(B); *see* Amicus Br. at 19. Given this distinction, reliance on *Korslund* is misplaced.

Perhaps the most striking feature of the WISHA administrative scheme that renders the statutory remedy inadequate is the 30-day limitation period. The majority asserts that 30 days is ample time for an employee to bring a claim, but fails to consider what we have said about the "adequacy" of shortened filing periods in other contexts involving employee claims. In the context of employer-employee arbitration contracts, we held that claim filing periods of up to 180 days are substantively unconscionable. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 356-57, 103 P.3d 773 (2004) (citing federal cases recognizing that a 30-day filing period was unconscionably short and holding that the 180-day filing deadline at issue was unconscionable). We observed in *Adler* that employees who are *constructively* terminated through adverse employment action or hostile work environments may lose the opportunity to recover under a shortened filing period. If instead of firing an employee directly, a company merely offers progressively fewer or worse-quality assignments, a 30-day deadline will quickly lapse before the "last straw" that encourages the employee to file a complaint.

Furthermore, even an unequivocally fired employee may not learn the reason for his or her termination straight away if the reason is retaliation for making

workplace-safety complaints. *Cf. Hubbard v. Spokane County*, 146 Wn.2d 699, 703-06, 50 P.3d 602 (2002) (describing how an employee fired for insisting that his superiors follow the law was ostensibly terminated for a nondiscriminatory reason, as part of a "'reorganization'"). WISHA allows for an extension of time if the employer "concealed, or misled the employee regarding the grounds for, discharge," WAC 296-360-030(4), but it does not relax the filing deadline if the employer gives no reason at all. The employees who will be affected by our ruling are often at-will employees who may be fired at any time for any reason or no reason. *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 152, 43 P.3d 1223 (2002). Therefore, the employer is within its rights to terminate the employee without explanation, leaving the employee to investigate and discover the wrong on his or her own.

Of course, none of this even addresses how unrealistic it is to expect that within 30 days of getting a pink slip an employee will be able to find and hire a lawyer, investigate the real reason for his or her termination, and file suit. Employees in this situation are likely thinking more about finding a new job and paying their bills within the first month of being fired.

The inadequacy of the WISHA remedy, including the extremely short period for bringing a claim, is strong evidence that the legislature recognized the existence of a private cause of action and meant RCW 49.17.160 to provide a supplemental investigative process. The statute has remained unchanged since its enactment in 1973, and we have consistently interpreted it to be coextensive with common law

remedies. *See* RCW 49.17.160. We should be very cautious of changing our view under a newfound "jeopardy" analysis at this late juncture.

Instead, we should reaffirm that the jeopardy prong of our public policy tort analysis is but one aspect of a four-part test designed to identify a common law cause of action where this is necessary to encourage employees to act in a way that furthers public policy. In this regard, the public policy tort claim is aptly described as resting on a private attorney general concept. The jeopardy prong must be understood in this context. It does not require that a tort claim be the only possible way to enforce the public policy. Rather, consideration of the "adequacy" of means other than the tort claim to enforce the public policy involves the same type of inquiry that this court undertook in *Wilmot* and *Ellis*. These cases provide the most direct answer to the first certified question before the court. The answer is no.

DUI Laws

Cudney and ALSCO agree the DUI laws do not require or expressly encourage the reporting of criminal violations. Even so, Cudney contends that reporting violations is necessary for the effective enforcement of the public policy. Accordingly, the second certified question asks whether the DUI laws adequately promote the public policy so as to preclude a wrongful discharge claim. Both parties agree we can examine the adequacy of the DUI laws and determine this issue as a matter of law. Certification at 2.

The Washington legislature has adopted a number of statutes criminalizing

driving under the influence of alcohol and imposing penalties for violations. *See* RCW 9.91.020; RCW 46.61.502, .504, .5055. ALSCO concludes that the existence of these statutes precludes a wrongful discharge claim as a matter of law because "Cudney cannot show that reporting a drunk driver to his employer is the '*only available adequate means*' to prevent drunk driving." ALSCO's Resp. Br. at 37 (quoting *Danny v. Laidlaw Transit Servs. Inc.*, 165 Wn.2d 200, 222, 193 P.3d 128 (2008)).

This argument misapprehends the focus of the jeopardy analysis in determining whether a public policy tort claim will lie. Echoing ALSCO's argument, the majority reads our precedent as suggesting that jeopardy cannot be shown if any other avenue exists to address the public policy at issue. Majority at 13-14. If this were the case then we would never allow a tort claim to vindicate a public policy expressed in a criminal statute. Yet, this court has not held that the existence of a criminal or regulatory enforcement mechanism necessarily precludes a *Thompson* tort claim. Rather, in the context of whistleblower-type claims we have examined the adequacy of the enforcement mechanism at issue with a view toward determining whether public policy would be jeopardized if an employee could be fired for reporting violations. *See, e.g.*, *Ellis*, 142 Wn.2d at 461-62; *Hubbard*, 146 Wn.2d at 717; *see generally Gardner*, 128 Wn.2d at 941 ("plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy").

Relevant to this analysis is consideration of whether, by relying solely on criminal regulatory or administrative enforcement schemes, "it would often be left up to chance whether the public policy was enforced." *Hubbard*, 146 Wn.2d at 717. In *Hubbard*, for example, the court noted that, even though the zoning decision questioned by the plaintiff could have been challenged administratively, several factors made it uncertain whether the administrative process would be pursued in every case. *Id.* Encouraging employees to speak up against zoning decisions without fear of termination "would be more efficient . . . to prevent these types of violations before they occurred." *Id*.

Similarly here, it is uncertain whether a violation of the DUI laws will be pursued in a criminal prosecution. For this to occur law enforcement must first locate the drunk driver and probable cause must exist to make an arrest. Following an arrest, the prosecutor then has discretion whether to charge a crime. Assuming that charges are filed, a judge or jury must find evidence beyond a reasonable doubt to convict. And it is unfortunately a consequence of limited public resources that many instances of drunk driving go undetected until public safety has been jeopardized. Relying solely upon the criminal law mechanism for enforcement of the DUI laws thus leaves the enforcement of the public policy uncertain. *Cf. id.* It would be more efficient to encourage employee actions that reinforce the DUI laws and prevent life-threatening violations before they occur.[3] Accordingly, I would

[3] The majority suggests that, as a question of fact, Cudney might have a better case had he reported the drunk driving to law enforcement rather than to his employer. Majority at 14 n.4. It is unclear how this conclusion follows from the majority's analysis

answer the second certified question no.

CONCLUSION

Both WISHA and Washington's DUI laws provide avenues to promote the important public policies they reflect. The statutory remedies, however, do not as a matter of law foreclose the possibility of a common law tort claim by a wrongfully terminated employee. Considering the jeopardy prong of our four-part public policy tort analysis, we should answer no to the certified questions. Accordingly, I dissent.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Charles W. Johnson

Justice Tom Chambers

because under that analysis Cudney's actions would never be the only available adequate means to enforce drunk driving laws.

Richard B. Sanders, Justice Pro Tem.