IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON IN MATTHEW CUDNEY, Plaintiff, v. ALSCO, INC., a Nevada corporation, Defendant.	)	No. 83124-6 En Banc Filed September 1, 2011

Owens, J. -- This case allows us to consider whether the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, and Washington's laws prohibiting driving while under the influence (DUI) are inadequate to promote the public policies underlying them. Matthew Cudney, whose employment was terminated by ALSCO Inc., asserted a claim in federal court for wrongful discharge in violation of public policy. Cudney alleges that he was

terminated in retaliation for reporting that a managerial employee drove a company vehicle during business hours while that employee was intoxicated. The United States District Court for the Eastern District of Washington certified to us the following questions:

> QUESTION NO. 1: Does the Washington Industrial Safety and Health Act (WISHA), in particular RCW 49.17.160, and accompanying Washington Administrative Code (WAC) regulations (WAC 296-360-005 et seq. and WAC 296-800-100 et seq.), adequately promote the public policy of insuring workplace safety and protecting workers who report safety violations so as to preclude a separate claim by a terminated employee for wrongful discharge in violation of public policy?
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> QUESTION NO. 2: Do the DUI laws of the State of Washington, in particular RCW 9.91.020, RCW 46.61.504, and RCW 4[6].61.502, adequately promote the public policy of protecting the public from drunken drivers so as to preclude a separate claim by a terminated employee for wrongful discharge in violation of public policy?

Certification to Wash. State Supreme Court at 3-4 (Certified R. Doc. 30). In response, we hold that both WISHA and our state's DUI laws adequately promote the stated public policies.

FACTS

In April 2004, ALSCO hired Cudney as the service manager of its Spokane branch. During his tenure at ALSCO, Cudney made numerous complaints to his supervisor about the alcohol use of John Bartich, the Spokane branch's general manager. On June 10, 2008, Cudney observed that Bartich appeared to be intoxicated

at work. He noted that Bartich was weaving back and forth, had slurred speech and glazed eyes, and smelled of alcohol. Cudney then observed Bartich drive away in a company vehicle. Cudney reported his observations to the assistant general manager and to the human resources manager. On August 5, 2008, Cudney was terminated from his job.

Cudney brought an action in the Spokane County Superior Court for wrongful discharge in violation of public policy, claiming that he was terminated in retaliation for reporting Bartich's drinking and driving. Cudney asserts that WISHA and Washington's DUI laws are two sources of public policy that prohibit the termination of his employment.

ALSCO removed the case to federal district court and filed a motion for partial summary judgment. The United States District Court for the Eastern District of Washington found that this court has not clearly determined whether these two sets of laws constitute inadequate means of promoting Washington's public policies. Accordingly, it certified the questions above, asking whether WISHA and the DUI laws adequately promote their respective public policies. For purposes of this certification, Cudney and ALSCO agree that WISHA and its accompanying regulations establish a clear public policy of ensuring worker safety and protecting workers who report safety violations from retaliation. Cudney and ALSCO also agree that

Washington's DUI laws embody a clear public policy of protecting the public from drunk drivers.

STANDARD OF REVIEW

"RAP 16.16 allows this court to determine questions of law certified by a federal court if the question is one of state law that has 'not been clearly determined and does not involve a question determined by reference to the United States Constitution.'" *United States v. Hoffman*, 154 Wn.2d 730, 736, 116 P.3d 999 (2005) (quoting RAP 16.16(a)). The question of whether adequate alternative means for promoting a public policy exist presents a question of law as long as "the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy." *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 182, 125 P.3d 119 (2005).

ANALYSIS

Absent a definite contract, employment relationships are generally terminable at will. *Sedlacek v. Hillis*, 145 Wn.2d 379, 385, 36 P.3d 1014 (2001). This court has recognized, however, "that the tort of wrongful discharge in violation of public policy is a narrow exception to the employment at-will doctrine." *Id*.

To prevail on a wrongful discharge claim, a plaintiff must satisfy a four-factor test. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996)

(citing Henry H. Perritt, Jr., Workplace Torts: Rights and Liabilities § 3.1 (1991)). Specifically, the plaintiff must show: (1) "the existence of a clear public policy (the *clarity* element)"; (2) "that discouraging the conduct in which [he] engaged would jeopardize the public policy (the *jeopardy* element)"; (3) "that the public-policy-linked conduct caused the dismissal (the *causation* element)"; and, finally, (4) that "[t]he defendant [has not] offer[ed] an overriding justification for the dismissal (the *absence of justification* element)." *Id*. These elements are conjunctive, meaning that all four elements must be proved. *Ellis v. City of Seattle*, 142 Wn.2d 450, 459, 13 P.3d 1065 (2000).

From this court's first recognition of the tort of wrongful discharge in *Thompson v. St. Regis Paper Co.*, we emphasized that "'*courts should proceed cautiously*.'" 102 Wn.2d 219, 232, 685 P.2d 1081 (1984) (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 380, 652 P.2d 625 (1982)). In *Thompson*, the court was specifically referencing the importance of exercising caution in identifying public policy. Our admonishment to "proceed cautiously" applies with as much force to the jeopardy element as it does to the clarity element because when *Thompson* was decided this court treated the two elements together. *See Gardner*, 128 Wn.2d at 941. We have since confirmed that "[t]his court has always been mindful that the wrongful discharge tort is narrow and should be 'applied cautiously.'" *Danny v. Laidlaw*

Transit Servs., Inc., 165 Wn.2d 200, 208, 193 P.3d 128 (2008) (quoting *Sedlacek*, 145 Wn.2d at 390).

The only element we must decide now is the "jeopardy" element;[1] that is, whether current laws and regulations provide an adequate means of promoting the public policies of ensuring workplace safety, protecting against retaliation for reporting safety violations, and protecting the public from the dangers of drinking and driving. In order to establish the jeopardy element, a plaintiff must show that other means of promoting the public policy are inadequate, *Hubbard v. Spokane County*, 146 Wn.2d 699, 713, 50 P.3d 602 (2002), and that the actions the plaintiff took were the "*only available adequate means*" to promote the public policy. *Danny*, 165 Wn.2d at 222. Since *Gardner*, this court has repeatedly applied this strict adequacy standard, holding that a tort of wrongful discharge in violation of public policy should be precluded unless the public policy is inadequately promoted through other means and thereby maintaining only a narrow exception to the underlying doctrine of at-will employment. *See Gardner*, 128 Wn.2d at 945; *Hubbard*, 146 Wn.2d at 713; *Korslund*, 156 Wn.2d at 181-82; *Danny*, 165 Wn.2d at 222.

[1] The parties do not dispute the clarity element of the analysis; they agree that WISHA and its accompanying regulations establish a clear public policy of ensuring worker safety and protecting workers who report safety violations and that the DUI laws establish a clear public policy of protecting the public from drunk drivers. The "causation" element and "absence of justification" element are fact-specific inquiries that we are not asked to decide here.

In effect Cudney argues for the expansion of the "wrongful discharge against public policy" tort when he asks to proceed despite the existence of hardy statutory remedies that protect the relevant public policies. We decline to do this because we find that, applying the adequacy analysis of the jeopardy element, Cudney cannot show that WISHA or the DUI laws are inadequate to protect public policy.

I. WISHA

The protections provided by WISHA are adequate to promote the public policies of ensuring workplace safety and protecting workers who report safety violations. The purpose of WISHA is to make workplace conditions as safe and healthful as possible. RCW 49.17.010. WISHA requires every person who has employees 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). In support of these objectives, WISHA also provides a remedy for employees who believe they have been discharged for reporting workplace safety concerns. RCW 49.17.160.

WISHA's retaliation statute provides extensive protections to employees who claim that they suffered retaliation for filing complaints related to workplace safety. *See id*. First, the statute provides that an employee may *not* be discharged for filing a

complaint, testifying in any proceeding, or exercising *any* right discussed in WISHA. RCW 49.17.160(1). Next, the statute sets out a procedure by which any employee who believes that he or she has been terminated in violation of WISHA can file a complaint within 30 days to the director of the Department of Labor and Industries (L&I). RCW 49.17.160(2). The statute then requires the director to investigate any appropriate claim, and, if the investigation supports the employee's claim, the director is *required* to bring suit against the person who violated the statute. *Id.* If the director does not believe that a violation has occurred, the employee is allowed to bring a suit himself or herself within 30 days of the director's determination. *Id.* The statute requires superior courts to order *all* appropriate relief for cause shown. *Id.* Finally, the available relief is not limited to rehiring or reinstatement with back pay; these are merely examples of what types of relief could be granted. *Id.*

The controlling case, governing whether statutory remedies are adequate to promote a given public policy, is *Korslund*, where two plaintiffs claimed they were wrongly terminated by DynCorp for reporting safety violations, fraud, and mismanagement at the Hanford Nuclear Reservation. 156 Wn.2d at 172-73. We found that the federal Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851, was a clear mandate of public policy that was "intended to protect the health and safety of the public and to protect against waste and fraud in nuclear industry

operations." 156 Wn.2d at 181. We also found that "[t]he ERA provides an administrative process for adjudicating whistleblower complaints and provides for orders to the violator to 'take affirmative action to abate the violation'; reinstatement of the complainant to his or her former position with the same compensation, terms, conditions of employment; back pay; compensatory damages; and attorney and expert witness fees." *Id*. at 182 (quoting 42 U.S.C. § 5851(b)(2)(B)). We therefore concluded that the ERA provided comprehensive remedies that served to protect public policy and that the plaintiffs' claims for wrongful discharge in violation of public policy failed as a matter of law. *Id*. at 182-83. The ERA serves as a guidepost by which we can measure WISHA to see if it is adequate to protect the public policy of workplace safety and protection of workers who report safety violations.

Both WISHA and the ERA allow an administrative agency to perform investigations and determine whether a valid claim has been filed. RCW 49.17.160(2); 42 U.S.C. § 5851(b)(2)(A), (B), (b)(3)(A). Both WISHA and the ERA allow plaintiffs to bring claims of their own if the administrative agency does not take action. RCW 49.17.160(2); 42 U.S.C. § 5851(b)(4). Finally, under the ERA, if the secretary determines that a violation has occurred, "the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation

(including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant." 42 U.S.C. § 5851(b)(2)(B). Under WISHA, in contrast, the superior court has the power to order *all* appropriate relief, including rehiring or reinstatement of the employee with back pay. RCW 49.17.160(2). While it is true that WISHA does not spell out the possible relief in as much detail as the ERA does, the ERA also limits relief to certain specific categories, while WISHA simply orders the superior court to grant all relief that is appropriate, whatever that may be. In that sense, WISHA is actually *more* comprehensive than the ERA and is more than adequate.

Cudney particularly argues that the 30-day deadline in WISHA for filing a complaint with the director renders the WISHA remedy inadequate to protect public policy. *Cf. Hubbard*, 146 Wn.2d at 717.[2] In *Hubbard*, we held that an administrative procedure was inadequate to promote the public policies of uniform planning and general safety and welfare where aggrieved citizens had to receive notice of a zoning decision *and* make an appeal to a board of adjustment within 20 days. *Id*. We stated

[2] The dissent also cites *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004), regarding the 30-day filing deadline. Dissent at 10. *Adler*, however, does not stand for the proposition that any specific time limitation, especially one considered and imposed by the legislature, is inadequate. Rather, *Adler* held that the specific terms of a privately negotiated arbitration agreement that cut short the statute of limitations for filing a claim were unconscionable because they foreclosed the opportunity for state or federal agency investigation and mediation and did not provide for tolling. 153 Wn.2d at 355, 357. These egregious facts do not characterize the terms of WISHA, which involves L&I and allows for extension of the time to file a complaint.

that this would mean it was "up to chance whether the public policy was enforced." *Id*. *Hubbard* is easily distinguished from the case at hand. Unlike in zoning actions, where aggrieved citizens very well might not receive notice within 20 days, employees will almost always receive *immediate* notice of their own termination. And in a case of retaliation under WISHA, an employee will know that he or she recently raised a safety concern. Then, the employee claiming wrongful termination need only file a complaint with L&I within 30 days, at which point L&I itself *shall* conduct an appropriate investigation. RCW 49.17.160(2). This gives the employee significant additional time over 30 days to prepare a case in the event that L&I declines to pursue the matter.[3] Importantly, the 30-day deadline is not a strict time bar. "There may be circumstances . . . that justify tolling the thirty-day period on recognized equitable principles or because strongly extenuating circumstances exist, e.g., where the employer has concealed, or misled the employee regarding the grounds for, discharge or other adverse action." WAC 296-360-030(4). The 30-day deadline therefore does not make the statutory remedy inadequate. Cudney has asserted no reason why he was

[3] The dissent also takes issue with the fact that L&I, not the complainant, controls the litigation if it pursues the complaint. Dissent at 9-10. This, however, misses the point of the jeopardy prong of the analysis, which is to consider whether the statutory protections are *adequate to protect the public policy*, not whether the claimant could recover more through a tort claim. If L&I pursues a claim, it enforces the public policies underlying WISHA. While we find it irrelevant as long as the public policies are adequately protected, nothing in WISHA prohibits L&I from pleading tort-like remedies. WAC 296-360-020 ("The suit may ask the court to . . . grant other appropriate relief."); *see* RCW 49.17.160(2). The role of L&I does not render WISHA inadequate.

unable to file a claim within 30 days. He could have filed his complaint the very moment he was terminated or requested tolling of the 30-day time period if there was reason for his delay.

Our decisions in *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991), and *Ellis* do not alter our analysis. It is true that in *Wilmot* we held that a statute (RCW 51.48.025) similar to RCW 49.17.160 was not the mandatory and exclusive remedy for an employee who was allegedly terminated for filing a workers' compensation claim. *Id*. at 51, 65. While we did briefly mention the comprehensiveness and adequacy of the statute, *id*. at 61, we focused primarily on whether the statute was mandatory and exclusive. Our decision in *Wilmot* preceded our enumeration of the four-part *Gardner* test by five years. Since then, we have consistently said that a plaintiff must show that other means of promoting the public policy are inadequate. *See Gardner*, 128 Wn.2d at 945; *see also Hubbard*, 146 Wn.2d at 713; *Korslund*, 156 Wn.2d at 181-82; *Danny*, 165 Wn.2d at 222.

We pointed out in *Korslund* that *Wilmot* and *Korslund* addressed two entirely separate issues. In *Wilmot*, the issue was whether the legislature intended RCW 51.48.025 to be mandatory and exclusive, thus precluding a tort cause of action for violation of public policy. *Korslund*, 156 Wn.2d at 183. The key question in *Korslund* was, in contrast, "whether other means of protecting the public policy [were] adequate

so that recognition of a tort claim in these circumstances [was] unnecessary to protect the public policy." *Id.* In fact, *Korslund* specifically found that statutory remedies were adequate to protect the public policy, even though the United States Supreme Court has found that the same statute was not mandatory and exclusive. *Id*. at 182-83. Our analysis here should follow our reasoning in *Korslund*. Even if a similar statute is not mandatory and exclusive, as in *Wilmot*, WISHA is still adequate to protect public policy. *Wilmot* is simply not on point.

In *Ellis*, we addressed whether it was appropriate for a trial court to issue summary judgment against a plaintiff who was allegedly terminated for refusing to follow improper procedure and filing a WISHA claim. 142 Wn.2d at 457-58. The question presented by that case was whether a plaintiff had to prove that the employer's conduct would actually violate public policy or whether the plaintiff merely had to have a reasonable belief that the employer's actions violated the law. *Id*. at 460. We held that "the jeopardy prong of the *Gardner* test may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action." *Id*. at 461. In *Ellis*, we simply did not address whether WISHA adequately promoted public policy, as we necessarily only decided the questions presented by the parties. The issue of WISHA's adequacy is now squarely before us, and we disapprove of any implication in either *Wilmot* or *Ellis* that public

policy is not adequately promoted by WISHA.

In light of *Korslund* and our other post-*Gardner* cases outlining the adequacy standard of the jeopardy element, we do not find that the robust statutory remedies available in WISHA are inadequate to protect the underlying public policies of worker safety and protection of workers from retaliation for raising safety concerns. Accordingly, we answer the first certified question affirmatively: WISHA and its accompanying regulations adequately protect the identified public policies.

II. DUI Laws

Washington has a series of laws criminalizing driving while under the influence of alcohol. RCW 46.61.502, .504. RCW 46.61.5055 sets out the penalties for these criminal offenses, which include a mandatory jail sentence, a $5,000 fine, suspension or revocation of one's driver's license, and the installation of an ignition interlock device. Social penalties can also adhere, such as the loss of status in the community and possible suspension or termination at work. While drinking and driving remains a social problem, it does not necessarily follow that the laws in place are an inadequate means to address the problem.

For Cudney to succeed in this claim, he must prove that telling his manager about Bartich's drunk driving is the "*only available adequate means*" to promote the public policy of protecting the public from drunk driving.[4] *Danny*, 165 Wn.2d at 222.

[4] It is notable that Cudney reported the drunk driving to his employer, not to the police.

For this to be true, the criminal laws, enforcement mechanism, and penalties all have to be inadequate to protect the public from drunk driving. Cudney admits that he did not call 911 and inform the police of Bartich's drunk driving. Police and state troopers patrol our roads and highways looking for signs of driving under the influence. There is a huge legal and police machinery around our state designed to address this very problem. It is very hard to believe that the "*only available adequate means*" to protect the public from drunk driving was for Cudney to tell his manager about Bartich's drunk driving. *Id*.

Cudney's reporting drinking and driving to his employer is a roundabout remedy that is highly unlikely to protect the public from the *immediate* problem of a drunk driver on its roads. This is different from *Hubbard*, where we noted that it is important to protect employees against retaliation when they speak up before violations of public policy occur so that the violations can be prevented altogether. *See* 146 Wn.2d at 717. Hubbard was an employee of the Spokane County Planning Department, and he reported concerns about zoning violations to his direct supervisor,

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As we have previously noted, "the jeopardy element . . . generally involves a question of fact," as well as a question of law. *Korslund*, 156 Wn.2d at 182 (citing *Hubbard*, 146 Wn.2d at 715). For now we decide the issue as a matter of law. However, we might have a different case if Cudney acted pursuant to or in service of enforcement of the state's DUI laws and faced termination for that. There, Cudney might be able to argue that his action "'was necessary for the effective enforcement of the public policy.'" *Id*. at 181 (internal quotation marks omitted) (quoting *Hubbard*, 146 Wn.2d at 713). The statutory system in place is adequate to promote the public policy. Cudney's problem here is that he acted outside of it.

a decision maker on zoning issues. *Id*. at 703. By speaking up, Hubbard could actually stop the alleged public policy violation. That is not the case here with a DUI report to an employment supervisor with no law enforcement capability. Under a strict adequacy analysis, Cudney simply cannot show that having law enforcement do its job and enforce DUI laws is an inadequate means of promoting the public policy. *See Korslund*, 156 Wn.2d at 181-82.

Finally, we must remember that it is the public policy that must be promoted, not Cudney's individual interests. "The other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy." *Hubbard*, 146 Wn.2d at 717. Cudney has not shown that the current DUI laws are an inadequate means of promoting the public policy, so his claim fails.

CONCLUSION

This court has long used the adequacy standard, finding, under the jeopardy element of our four-part *Gardner* analysis, that a tort of wrongful discharge in violation of public policy can proceed only when other remedies are inadequate. Accordingly, we answer the federal court's certified questions by holding that Washington's public policies of (1) promoting workplace safety and protecting workers who report safety violations and (2) protecting the public from drunk drivers

are adequately promoted by WISHA and Washington's DUI laws, respectively.

AUTHOR:
Justice Susan Owens

WE CONCUR:
Chief Justice Barbara A. Madsen
Justice Mary E. Fairhurst
Justice James M. Johnson
Justice Gerry L. Alexander