

CAUSE No. 83124-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MATTHEW CUDNEY,

Plaintiff,

v.

ALSCO, INC.,

Defendant.

AMICUS CURIAE MEMORANDUM BY
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WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. Introduction

The United States District Court from the Eastern District of Washington certified two questions for this court's consideration: 1) Does the Washington Industrial Safety and Health Act (WISHA) and accompanying regulations adequately promote the public policy of insuring workplace safety and protecting workers who report safety violations so as to preclude a separate claim for wrongful discharge in violation of public policy?; and 2) Do the driving under the influence of alcohol laws of Washington adequately promote the public policy of protecting the public from drunken drivers so as to preclude a separate claim for wrongful discharge in violation of public policy? In response to these certified questions, the Court answered both questions in the affirmative which foreclosed the jeopardy element of the Public Policy Tort thereby defeating the claim. *See Cudney v. ALSCO, Inc.*, No. 83124-6 (en banc Sept. 1, 2011).

The Plaintiff has moved this court to reconsider its decision. Amici curiae joins in the Plaintiff's motion, and respectfully urges this court to reconsider its decision.

II. Summary of Argument

Constrained by the question as framed on certification, the Court mistakenly directed its attention to two Washington statutes and the adequacy of their statutory remedies rather than directing its attention to the employment relationship at the heart of the dispute that gave rise to the litigation. Properly framed, the issue would lead the court to a different

conclusion, based on its own prior decisions and on the “Perritt jeopardy analysis,” which the Court has embraced in the past and which it reiterated in the *Cudney* decision.

The nature of the employment relationship is the central focus for an analysis concerning whether the jeopardy element is satisfied. The purpose of the Public Policy Tort is to prevent an employer from using its power over employees to subvert clearly articulated public policy. That purpose is defeated when an employer can retaliate with impunity against an employee who refuses to violate or exposes violations of public policy.

The Public Policy Tort protects an individual employee from retaliation as a means to protect public policy. Without a sufficient remedy, employees will refrain from the protected activity that the cause of action was intended to encourage. The weaker the remedies made available, the less likely that the employee will assume the extraordinary risks associated with complaining about illegal governmental or corporate conduct. The complete lack of any remedy defeats the claim’s central purpose of promoting public policy by protecting employees. Criminal statutes frequently provide no remedy for the employee and are therefore not an adequate alternative means to vindicate public policy within the meaning of the jeopardy analysis. The remedies made available to the individual employee are inextricably tied to the adequacy of alternative means of vindicating public policy.

In this case it is hard to imagine a clearer set of circumstances in

which an employer used its power in the workplace to punish an employee for trying to protect the public. The lack of any available remedy under Washington's DUI statute renders that statute an inadequate alternative means to vindicate public policy. The Court should reconsider its ruling to the contrary.

This Court has ruled that Washington State's driving under the influence statute, RCW 46.61.502 *et seq.*, is an adequate alternative means of protecting public policy. The Court reasoned that it is public policy that must be protected and not the 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." Slip Opinion at 16. Outside of Washington State, amicus has been able to find no authority for the proposition that the remedies and process made available to the employee are irrelevant to the adequacy of the alternative means to vindicate public policy.

III. Argument

A. The Nature of the Employment Relationship Is the Central Focus of the Analysis.

An analytical framework for the Public Policy Tort, was developed comprising four elements: a "clarity" element, a "jeopardy" element, a "causation" element," and an "overriding justification" element. Henry H. Perritt, Jr., *Employee Dismissal Law and Practice* § 7.04 (5th ed. 2010 and

2011 supplement) [hereinafter “Perritt”]. This framework has been widely adopted by federal and state courts, including the Washington Supreme Court, and by commentators. The Washington Supreme Court has been in the forefront of careful and prudent common-law analysis to apply a robust analytical framework to shape Public Policy Tort liability. In this *Cudney* opinion, it has been led astray by an inartfully framed certification from the federal court. The Court has the discretion to reframe a certified issue and it should do so. *Danny v. Laidlaw*, 165 Wash.2d 200, 205 & n.1, 193 P.3d 128, 130 & n.1(2008) (reformulating question on certification of Public Policy Tort question).

Constrained by the question as framed on certification, the Court mistakenly directed its attention to two Washington statutes and the adequacy of their statutory remedies rather than directing its attention to the employment relationship at the heart of the dispute that gave rise to the litigation. Properly framed, the issue would lead the court to a different conclusion, based on its own prior decisions and on the *Perritt* jeopardy analysis, which the Court has embraced in the past and which it reiterated in the *Cudney* decision.

The central idea of the Public Policy Tort is to create privately enforceable disincentives for private and public employers to use their power in the workplace to undermine important public policies. Public Policy Tort analysis is different from the analysis involved when the question is whether

a private right of action should be implied from a statute. *See* Perritt at § 7.10. The latter focuses entirely on the statute. The former focuses on the employment relationship. The question is not whether the traditional governmental and bureaucratic tools are adequate, compared with other governmental and bureaucratic enforcement regimes; the question is focused on the employer relationship: whether, as a matter of employment law, an employer should be able to use its power over employees to subvert public policy.

To be sure, courts, including the courts of Washington, proceed cautiously in recognizing exceptions to the Employment at Will Rule. The clarity and jeopardy elements channel this caution. Unless the public policy implicated by a particular employment termination is sufficiently clear and important, the clarity element eliminates employer liability. Unless the terminated employee's conduct is sufficiently linked to realization of the public policy, the jeopardy element defeats liability. In many cases, the jeopardy element is not satisfied because the statutory scheme identified in the clarity analysis contains its own remedies to constrain employer power, as by providing administrative mechanisms available to a terminated employee. *See* Perritt, § 7.06[A] (explaining why jeopardy elements are weakened when employees have statutory or administrative procedures adequate to protect them against adverse employer action).

In other cases the jeopardy element is weakened because of a poor fit between what the employee did and the public policy asserted. The fit may be poor because of ambiguity in the public policy or because the employee's conduct was only indirectly related to the public policy. *Hubbard v. Spokane County*, 146 Wash.2d 699, 50 P.3d 602 (2002), cited by the Court in *Cudney*, presented a quite different jeopardy situation, compared with the situation in *Cudney*. In *Hubbard*, there was a bona-fide dispute as to the content and meaning of the asserted public policy. The Court's focus on the adequacy of other remedies addressed mechanisms for resolving the uncertainty as to the content of the public policy. Here, however, there is no dispute over the content of the public policy: it violates public policy in Washington to drive drunk. The focus in *Hubbard* was not on the need to discourage employers from using their power to subvert clear public policy, but on the undesirability of thrusting courts into pretermittting administrative agency interpretation of their own policies.

Similarly, in *Danny v. Laidlaw*, 165 Wash.2d 200, 193 P.3d 128(2008), a case also cited in the *Cudney* opinion, the jeopardy analysis does not support the conclusion in *Cudney*. The central issue in *Danny*, unlike *Cudney*, was the clarity element. The *Danny* court considered the jeopardy element only in explaining why its resolution of the clarity element would not open the floodgates to frivolous litigation. The facts of *Danny* presented a much weaker jeopardy argument because the employee sought to link taking

time off work to the public policy opposing domestic violence. The fit between the employee's conduct and the public policy was attenuated. The fit in *Cudney* is nearly perfect: the plaintiff was fired for reporting drunk driving.

Nothing in either *Hubbard* or *Danny* compels this Court to focus its analysis on adequacy of administrative enforcement mechanisms rather than on the employment relationship and the appropriate limits of employer power.

B. Criminal Statutes Seldom Provide Complete Protection for the Public Policy They Express.

In a market economy, the actions of private individuals are more important than the actions of government agencies, which always operate at the margins. Especially in the case of drunk driving, realization of the policy of protecting the public from the hazards of impaired drivers depends on widespread voluntary compliance and prophylactic measures, far more than on checkpoints and police breathalyzer tests. The policy can be realized only when fewer individuals drive when they are impaired, only when groups of individuals choose "designated drivers," only when friends discourage their friends from driving drunk, and only when employees protest or report drunk driving by their coworkers and bosses.

In *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d377 (1996), the plaintiff was an armored truck driver. His employer maintained a strict policy prohibiting its drivers from exiting their vehicle

between scheduled stops to prevent robbery of the valuable contents of the truck and likely injury to their employees in the process. As Gardner was driving, he witnessed a man threaten a bank manager with a knife, so Gardner ran from his truck and saved the woman's life. Loomis fired him. Citing a series of court decisions using criminal statutes as *the* sources of public policy, this Court held that Loomis committed a public policy tort. *Id.* at 944. Implicitly, *Gardner* recognizes that prosecuting the man wielding the knife after he murders the bank manager would not be an adequate alternative to affording Gardner protection under the public policy tort. "It is fair to conclude that the exigencies of the situation were satisfied better by Mr. Gardner's immediate intervention than by sitting and waiting for help to arrive in response to a radio call, the public address system, or the siren. It was reasonable to conclude, as the majority did, that under the particular circumstances, the other available remedies were inadequate. *Perritt*, § 7.06 at 7-73.

The overwhelming majority of criminal statutes provide no protection for the employee who exposes their violation. Without common law protection, employees will be deterred from exposing or objecting to criminal violations, which is the very type of protected conduct the common law cause of action was designed to encourage. Criminal statutes therefore are seldom an adequate alternative means for protecting public policy. Although public prosecutors are responsible for protecting the public policy reflected in

criminal statutes, criminal enforcement is dependent upon the uncertainty of apprehending the offender and the discretion of the prosecutor. In the absence of common law protection for employees, many crimes will go unreported because of fear of employer retaliation.¹

This Court's opinion in *Cudney* appears to rule that criminal statutes are an adequate alternative means of vindicating public policy even where the reporting employee can be retaliated against by the employer with impunity. That ruling is clearly inconsistent with the Public Policy Tort's central purpose which is to prevent the employer from utilizing its power to subvert public policy. Unless reconsidered, Washington State will be the only state in the United States which applies the common law claim in that way.

C. The Employer Should Not Be Allowed to Use its Power to Retaliate Against Mr. Cudney for Having Reported a Supervisor's Driving While Intoxicated.

Taking the allegations in the complaint as true, Mr. Cudney does not seek protection for conduct in the workplace that benefitted himself, as when

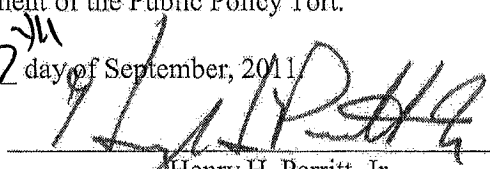
¹ See also *Dahl v. Combined Ins. Co.*, 621 N.W.2d 163, 2001 SD 12 (S.D. 2001) (Recognizing a public policy tort for reporting criminal conduct, "the reporting of unlawful or criminal conduct to a supervisor or outside agency plays an invaluable role in society. . . . Indeed, there is no public policy that can be said to be more basic or necessary than the enforcement of the state's criminal code or the protection of the life and property of its citizens"); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 85 Ill.2d 124, 132, 134 (Ill. 1981) ("No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters. . . . The law is feeble indeed if it permits [employers] to take matters into its own hands by retaliating against its employees who cooperate in enforcing the law") (cited in numerous Washington cases); *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 176, 164 Cal.Rptr. 839, 844, 610 P.2d 1330, 1335 (1980) ("an employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied 'promises set forth in the [employment] contract,' but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes").

an employee seeks to recast forbidden time off in public policy clothing. He did not seek Public Policy Tort protection for his side of a bona-fide dispute about employer business strategies or techniques. Nothing he did would disrupt the orderly management of his employer's enterprise. Rather he reported to his employer that a supervisory employee was using employer resources to jeopardize public safety by driving drunk. Rather than making sure that its supervisors did not drive company vehicles while impaired by alcohol, the employer fired Mr. Cudney. It is hard to imagine a clearer set of circumstances in which an employer used its power in the workplace to punish an employee for trying to protect the public. This is exactly the type of circumstance to which the Public Policy Tort was intended to apply.

IV. Conclusion

The Court should reconsider its decision that Washington's DUI criminal statute is an adequate source of public policy so as to foreclose the jeopardy element of the Public Policy Tort.

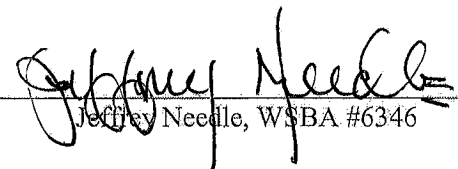
Dated this 27th day of September, 2011



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