IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN RAMONA DANNY, Plaintiff, v. LAIDLAW TRANSIT SERVICES, INC., Defendant.	)	No. 78421-3 En Banc Filed October 3, 2008

OWENS, J. -- The United States District Court for the Western District of Washington (District Court) certified the following question to this court:

> Has the State of Washington established a clear mandate of public policy prohibiting an employer from discharging an at-will employee because she experienced domestic violence and took leave from work to take actions to protect herself, her family, and to hold her abuser accountable?

Order at 1. We are unable to answer the question as written because parts of the original question would require us to make factual inquiries that the District Court

itself must undertake. We choose to reformulate the question.[1] The reformulated question is: Has the State of Washington established a clear mandate of public policy of protecting domestic violence survivors and their families and holding their abusers accountable? We answer the question in the affirmative. This policy is manifested in numerous legislative, judicial, constitutional, and executive expressions of public policy.

FACTS

The District Court and the parties prepared a statement of facts to guide this court in reaching its decision. Order at 3-4. According to the statement of facts, defendant Laidlaw Transit Services, Inc. (Laidlaw) hired plaintiff Ramona Danny in February 1997. Laidlaw provides transit services in King County, Washington, working with big subcontractors on projects that provide public transit route bids to King County. In October 2002, Laidlaw promoted Danny to the position of scheduling manager.

While she was working at Laidlaw, Danny and her five children experienced ongoing domestic violence at the hands of her husband. She moved out of her house in February 2003 after suffering serious physical abuse but had to leave her children behind. In June 2003, she told Project Manager Jeff Kaeder about her domestic

[1] This court may reformulate a certified question. *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999).

violence situation. In August 2003, Danny requested time off so she could move her children away from the abusive situation at their home. The project manager initially refused because Danny was working on a large project with an October deadline. The project was a route bid for Laidlaw's largest subcontractor; the route bid covered 3,000-4,500 of the call center rides each day, and it was Danny's job to put the route bid together. On August 20, 2003, Danny's husband beat her 13-year-old son so badly that he had to be hospitalized. Danny immediately moved all five children out of the home. When she returned to work, Danny again requested time off to move her children to a shelter. The project manager approved paid time off between August 25 and September 8, 2003. The record reveals that during late August and early September 2003, Danny conferred with police regarding protection from her husband and assisted in the prosecution against him for the assault of her son. Danny Decl. at 1. During this time, Danny also used services from the King County Department of Community and Human Services to obtain transitional housing, domestic violence education, counseling and health services, and legal assistance. *Id*. at 2.

On October 9, 2003, about a month after returning to work, Laidlaw demoted Danny from manager and offered her the position of scheduler, which she accepted. Laidlaw terminated Danny's employment on December 3, 2003. Laidlaw's stated reason for termination was falsification of payroll records.

Danny filed her complaint against Laidlaw on May 10, 2005, alleging that Laidlaw terminated her employment in violation of public policy and Washington's Law Against Discrimination, chapter 49.60 RCW. On October 27, 2005, Laidlaw filed a motion for judgment on the pleadings seeking to dismiss Danny's public policy claim. The District Court stayed its decision on Laidlaw's motion and instead certified the above question to this court.

ANALYSIS

Wrongful Discharge in Violation of Public Policy. Absent a contract to the contrary, Washington employees are generally terminable "at will." *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 935, 913 P.2d 377 (1996). An at-will employee may quit or be fired for any reason. *Id*. The common law tort of wrongful discharge is a narrow exception to the terminable-at-will doctrine. *Id*. at 935-36. The tort of wrongful discharge applies when an employer terminates an employee for reasons that contravene a clearly mandated public policy. *Id*. As this court has previously stated, the tort of wrongful discharge "'operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy.'" *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 313, 96 P.3d 957 (2004) (emphasis omitted) (quoting *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000)).

To sustain the tort of wrongful discharge in violation of public policy, Danny must establish (1) "the existence of a clear public policy (the *clarity* element);" (2) "that discouraging the conduct in which [she] engaged would jeopardize the public policy (the *jeopardy* element);" (3) "that the public-policy-linked conduct caused the dismissal (the *causation* element);" and (4) "[Laidlaw] must not be able to offer an overriding justification for the dismissal (the *absence of justification* element)." *Gardner*, 128 Wn.2d at 941. Whether Washington has established a clear mandate of public policy is a question of law subject to de novo review. *Sedlacek v. Hillis*, 145 Wn.2d 379, 388, 36 P.3d 1014 (2001); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 149 Wn.2d 660, 670, 72 P.3d 151 (2003).

The reformulated certified question requires us to determine whether Danny has met the "clarity" element of wrongful discharge in violation of public policy. To determine whether a clear public policy exists, we must ask whether the policy is demonstrated in "'a constitutional, statutory, or regulatory provision or scheme.'" *Thompson v. St. Regis Paper Co.*, 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)). Although judicial decisions may establish public policy, "'courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.'" *Id*. (emphasis omitted) (quoting *Parnar*, 65 Haw. at 380). To qualify

as a public policy for purposes of the wrongful discharge tort, a policy must be "truly public" and sufficiently clear. *Sedlacek*, 145 Wn.2d at 389; *see also Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989) ("'[P]ublic policy concerns what is right and just and what affects the citizens of the State collectively.'" (quoting *Palmateer v. Int'l Harvester Co.*, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 52 Ill. Dec. 13 (1981))).

This court has always been mindful that the wrongful discharge tort is narrow and should be "applied cautiously." *Sedlacek*, 145 Wn.2d at 390. Washington courts have generally recognized the public policy exception when an employer terminates an employee as a result of his or her (1) refusal to commit an illegal act, (2) performance of a public duty or obligation, (3) exercise of a legal right or privilege, or (4) in retaliation for reporting employer misconduct. *Gardner*, 128 Wn.2d at 935-36.

Danny argues that she performed a public duty when she acted to protect herself and her children and that she exercised a legal right to obtain protection from her abuser. Danny points to several sources of this public policy from the legislative, executive, and judicial branches of government. We find a public policy of preventing domestic violence most clearly established in the State's legislative enactments. We also find the policy pronounced by executive and judicial sources.

Legislative Expression of Public Policy. As early as 1979, the legislature recognized that domestic violence is a community problem that accounts for a

"significant percentage" of violent crimes in the nation and is disruptive to "personal and community life." RCW 70.123.010. At that time, the legislature declared "that there is a present and growing need to develop innovative strategies and services which will ameliorate and reduce the trauma of domestic violence." *Id*. To that end, the legislature created funding for domestic violence shelters, recognizing that many domestic violence victims are unable to leave violent situations without proper resources. *Id*. Also in 1979, the legislature enacted the domestic violence act (DVA), chapter 10.99 RCW, requiring law enforcement to respond to domestic violence. The legislature stressed "the importance of domestic violence as a serious crime against society and [sought] to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide." RCW 10.99.010. The legislature later expanded the DVA to require the mandatory arrest of domestic violence perpetrators, RCW 10.99.030(6)(a), and has also expanded the definition of domestic violence to include violence between nonmarried individuals and individuals in "dating relationship[s]." Laws of 1995, ch. 246, § 21(1). Most recently, "[t]he legislature reaffirm[ed] its determination to reduce the incident rate of domestic violence," and directed law enforcement organizations to develop policies "on domestic violence committed or allegedly committed by sworn employees of agencies." Laws of 2004, ch. 18, § 1; RCW 10.99.090(1).

In 1984, soon after enacting the DVA, the legislature enacted a separate Domestic Violence Prevention Act (DVPA), chapter 26.50 RCW, to provide domestic violence victims with the ability to obtain a civil protection order against their abusers. RCW 26.50.030. The legislature recognized protection orders as "a valuable tool to increase safety for victims and to hold batterers accountable." Laws of 1992, ch. 111, § 1. Significantly, it found that "Domestic violence costs millions of dollars each year in the state of Washington for health care, *absence from work*, services to children, and more. The crisis is growing." *Id*. (emphasis added) ("Domestic violence must be addressed more widely and more effectively in our state.").

The legislature has since amended the DVPA several times to improve the protection order process "so that victims have . . . easy, quick, and effective access to the court system." *Id*. The legislature has eliminated the filing fee requirement to "increase victim's access to protection" and comply with the federal Violence Against Women Act (42 U.S.C. § 13701). S.B. Rep. on S.B. 5219, at 4, 54th Leg., Reg. Sess. (Wash. 1995). The legislature also amended the DVPA to give full faith and credit to out-of-state protection orders to remove "the barriers faced by persons entitled to protection." RCW 26.52.005.

In 1991, following enactment of the DVPA, the legislature created an address confidentiality program (ACP), chapter 40.24 RCW, to protect domestic violence

victims "attempting to escape from actual or threatened domestic violence." RCW 40.24.010. The law provides domestic violence victims another layer of protection by allowing the secretary of state to provide victims with a substitute address in order to prevent abusers from locating their victim. *Id*. As one commentator has noted, the ACP "provides a method to help victims of domestic violence avoid being tracked by their assailants, and thereby attempt a fresh start on their lives and those of their children." Jeffrey T. Even, *Washington's Address Confidentiality Program: Relocation Assistance for Victims of Domestic Violence*, 31 Gonz. L. Rev. 523, 524 (1995/96). Indeed both the DVPA and the ACP provide important mechanisms that assist victims escaping domestic violence.

In recent years, the legislature has expanded domestic violence protection in Washington and highlighted the need for community involvement. In 2002, apparently recognizing that fear of losing employment may hinder escape from domestic violence, the legislature enacted laws allowing domestic violence victims to receive unemployment compensation through the state if they must leave employment to protect themselves or their immediate family from violence. RCW 50.20.050 (1)(b)(iv).[2] The legislature further facilitated escape options for domestic violence

[2] Laidlaw argues that the legislature intended RCW 50.20.050 to provide the sole remedy for victims who lose their jobs as a result of domestic violence. However, "the statutory remedy, or lack thereof, does not define the policy." *Roberts v. Dudley*, 140 Wn.2d 58, 69 n.10, 993 P.2d 901 (2000). Moreover, neither the plain language nor the legislative history characterizes RCW 50.20.050 as the sole remedy. More importantly, Laidlaw's

victims in 2004, by allowing victims to terminate residential leases without penalty. Laws of 2004, ch. 17, § 1; RCW 59.18.575, .580. This legislation further prohibits landlords from refusing to enter into a lease agreement based on an individual's status as a domestic violence victim. In enacting the law, the legislature explicitly recognized the difficulty victims face when leaving their abusers: "The legislature finds that the inability of victims to terminate their rental agreements hinders or prevents victims from being able to safely flee domestic violence, sexual assault, or stalking." Laws of 2004, ch. 17, § 1(1). The legislature clearly sought to remove barriers domestic violence victims face in order to be safe from harm: "The legislature further finds that victims of these crimes who do not have access to safe housing are more likely to remain in or return to abusive or dangerous situations. . . . The legislature further finds that evidence that a prospective tenant has been a victim of domestic violence . . . is not relevant to the decision whether to rent to that prospective tenant." *Id*.

In 2005, the legislature took another step to encourage victims of domestic violence to escape and prevent further violence by creating a domestic violence prevention account in the state treasury and directing the Department of Social and Health Services to distribute funds to "preventive, nonshelter community-based

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argument ignores the breadth and depth of the legislature's stated commitment to encouraging Washington's domestic violence victims to escape violent situations and then aid in the prosecution of their abusers.

services" for "victims of domestic violence . . . and . . . children who have witnessed domestic violence." RCW 70.123.150, .030(6). The legislature specifically intended to fund legal services for domestic violence victims who "have the highest need in terms of legal services," but "do not have access to legal services and do not know their rights under the law." H.B. Rep. on H.B. 1314, at 3, 59th Leg., Reg. Sess. (Wash. 2005).

In addition to facilitating domestic violence victims in their escape, the legislature has also emphasized the importance of prosecuting domestic violence perpetrators. The legislature has emphasized that crime victims have a "civic and moral *duty*" to "fully and voluntarily cooperate with law enforcement and prosecutorial agencies." RCW 7.69.010 (emphasis added). In 1996, the legislature recognized the difficulty domestic violence victims face when reporting abuse and declared it a gross misdemeanor for a domestic violence perpetrator to interfere in the victim's reporting of the abuse. RCW 9A.36.150. The legislature has also made violation of a protection order under the DVPA a crime. RCW 26.50.110. The legislature has treated domestic violence as a serious crime against society, imposed harsh penalties, and denied earned early release time for domestic violence offenders. RCW 9.94A.728. In an effort to prevent perpetrators from engaging in further violence, the legislature has created domestic violence treatment programs for abusers

and provided courts with the ability to order a perpetrator into treatment. RCW 26.50.150.

The legislature has been equally as adamant in demanding protection for child victims of family violence such as Danny's 13-year-old son: "[C]hild abuse and neglect is a threat to the family unit and imposes major expenses on society. . . . It is . . . the intent of the legislature that prevention of child abuse and child neglect programs are partnerships between communities, citizens, and the state." RCW 43.121.010, .020 (establishing council for the prevention of child abuse and neglect); *see also* Laws of 1987, ch. 351, § 1 ("Child abuse and neglect prevention programs can be most effectively and economically administered through the use of trained volunteers and the cooperative efforts of the communities, citizens, and the state."); Wash. State Gender & Justice Comm'n, Domestic Violence Manual for Judges 2-35 (rev. ed. 2001) (noting the overlap between domestic violence and child abuse). The legislature has specifically recognized that children "are deeply affected by the violence" in their homes "and could be the next generation of batterers and victims." Laws of 1991, ch. 301, § 1. The legislature has also created procedures for obtaining a protective order against the abuser of a child. Significantly, the legislature has declared that individuals with the physical custody of a child "have an affirmative *duty* to assist in the enforcement of the restraining order." RCW 26.44.063(8) (emphasis

added).

The legislature's consistent pronouncements over the last 30 years evince a clear public policy to prevent domestic violence—a policy the legislature has sought to further by taking clear, concrete actions to encourage domestic violence victims to end abuse, leave their abusers, protect their children, and cooperate with law enforcement and prosecution efforts to hold the abuser accountable. The legislature has created means for domestic violence victims to obtain civil and criminal protection from abuse, established shelters and funded social and legal services aimed at helping victims leave their abusers, established treatment programs for batterers, created an address confidentiality system to ensure the safety of victims, and guaranteed protection to victims exercising their duty to cooperate with law enforcement. The legislature's creation of means to prevent, escape, and end abuse is indicative of its overall policy of preventing domestic violence. This public policy is even more pronounced when a parent seeks, with the aid of law enforcement and child protective services, to protect his or her children from abuse.[3]

[3] Laidlaw argues that the extensive legislation establishing a public policy is irrelevant because the 2001 legislature failed to pass legislation that would have resulted in the protection Danny seeks. *See* S.B. 5329, 57th Leg., Reg. Sess. (Wash. 2001). We disagree. Senate Bill 5329 would have required employers to grant as many as six weeks off to *all* crime victims. *Id*. at 3. We have no way of knowing whether the legislature would have rejected a narrower version of the statute covering only domestic violence victims who need to take limited leave from work to protect themselves or their children and hold their abusers accountable. The legislature's failure to pass a broad law covering all crime victims simply does not evince legislative intent to deny the narrower class of

The legislature's articulated policy is "truly public" in nature. *Sedlacek*, 145 Wn.2d at 389. The legislature has repeatedly and unequivocally declared that domestic violence is an immense problem that impacts entire communities. *E.g.*, Laws of 1992, ch. 111, § 1 (declaring that "[d]omestic violence is a problem of immense

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domestic violence victims protection from discharge in the limited situation presented in the certified question. *See Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 453 n.4, 842 P.2d 956 (1993) ("We refuse to speculate about the reasons for nonpassage of the bills. There are simply too many possibilities for us to reach the conclusion which DSHS has advanced."); *Red Lion Broad. Co. v. Fed. Commc'ns Comm'n*, 395 U.S. 367, 381 n.11, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969) ("[U]nsuccessful attempts at legislation are not the best of guides to legislative intent.").

Laidlaw nevertheless argues that our prior case law requires us to hold the legislature's failure to pass Senate Bill 5329 dispositive. For support, Laidlaw relies on our holding in *Sedlacek*. In *Sedlacek*, we noted that the legislature failed to adopt language of a federal law on which Sedlacek relied for support of a public policy. 145 Wn.2d at 389-90. We also noted, however, that the Washington Administrative Code and then-recent case law from this court had also rejected the public policy the *Sedlacek* plaintiffs asserted. *Id*. at 390. Moreover, in *Roberts*, 140 Wn.2d 58, we allowed an employee to assert the common law tort of wrongful discharge even though the employee clearly lacked a statutory remedy. *Id*. at 69 n.9 (noting the failure of bills that would have created a statutory remedy for Roberts by subjecting small employers to state antidiscrimination law).

The concurrence/dissent now refers to Substitute Senate Bill (SSB) 5900 from the most recent legislative session as an example of the legislature's "declin[ing] to enact" relevant legislation. Concurrence/dissent at 19. Far from declining to enact the legislation, the legislature unanimously passed an essentially identical bill the first time both houses voted on such a bill. The language of SSB 5900 was virtually the same as the recently passed Substitute House Bill (SHB) 2602, discussed below. *Compare* Substitute S.B. 5900, 60th Leg., Reg. Sess. (Wash. 2008) *with* Laws of 2008, ch. 286. SSB 5900 passed the senate unanimously in February 2008, but the house did not vote on it before the parallel SHB 2602 passed both houses. *See* Bill Information, SB 5900 - 2007-08, http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5900 (last visited September 29, 2008); Laws of 2008, ch. 286. Myriad reasons may explain why SSB 5900 did not come to a vote in either house in 2007, and its "nonpassage" says nothing about the legislature's intent with respect to the subject matter of the bill.

proportions affecting individuals as well as communities"); Laws of 2004, ch. 17, § 1(1) ("Domestic violence, sexual assault, and stalking are widespread societal problems that have devastating effects for individual victims, their children, and their communities."); RCW 10.99.010 (noting the "serious consequences of domestic violence to society and to the victims"); Laws of 1991, ch. 301, § 1 ("[T]he community has a vested interest in the methods used to stop and prevent future violence."); *see also* Washington State Task Force on Gender and Justice in the Courts, Final Report 18 (1989) (noting the idea that domestic violence is a "'family matter'" is a gender biased belief).[4]

Moreover, the legislature has specifically acknowledged that domestic violence negatively impacts victims *and* their employers. The legislature has declared "that domestic violence is the leading cause of injury among women" that often goes undiagnosed. RCW 43.70.610. The legislature has similarly recognized that domestic

[4] The legislature's creation of task forces and panels to study domestic violence also demonstrates this state's dedication to preventing domestic violence through statewide partnerships to increase knowledge on domestic violence. In 1987, legislative mandates resulted in this court's creation of the gender and justice task force. In 1990, the legislature funded the Washington State Domestic Violence Task Force to study "domestic violence issues in the criminal justice systems and make recommendations for reform." Washington State Domestic Violence Task Force, Final Report 1, 13 (June 1991). In 1994, the Supreme Court established the Gender and Justice Commission to promote gender equality in our legal system. The court renewed its order in 1997 and in 2000 extended it for five years. *In re Renewal of Gender & Justice Comm'n*, No. 25700-B-380 (Wash. State Supreme Ct. Apr. 6, 2000). In 2000, the legislature created a domestic violence fatality review panel to study and report on domestic violence related fatalities. RCW 43.235.020.

violence and its resulting trauma result in millions of dollars of costs in the form of "health care, *absence from work*, services to children, and more."[5] Laws of 1992, ch. 111, § 1 (emphasis added); *accord* Laws of 1991, ch. 301, § 1 ("The collective costs to the community for domestic violence include the systematic destruction of individuals and their families, *lost lives, lost productivity, and increased health care*." (emphasis added)). We find ample evidence of a clear public policy in the legislature's pervasive findings and enactments over the past 30 years.[6]

Executive's Expression of Public Policy. Washington State's public policy of preventing domestic violence is also expressed in Executive Order 96-05, issued by former Washington State Governor Mike Lowry in 1996. Wash. St. Reg. 96-21-011 (Nov. 6, 1996). Governor Lowry's executive order directs each state agency to create workplace environments that provide "assistance for domestic violence victims without fear of reproach" (§ 1) and notes that domestic violence causes "loss of productivity, increased health care costs, increased absenteeism, and increased

[5] According to national statistics, violence against women costs companies $727.8 million each year due to lost productivity. Nat'l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control & Prevention, Dep't of Health & Human Servs., Costs of Intimate Partner Violence Against Women in the United States 31 (Mar. 2003).

[6] Amicus curiae Washington Employment Lawyers Association contends that Washington has a "public policy favoring a full realization of equal employment opportunities for women." Wash. Employment Lawyers Ass'n Br. at 17. It contends that the majority of domestic violence victims are women and that terminating Danny under the circumstances presented in the certified question would frustrate the policy of providing equal opportunities for women. Although we find this argument engaging, we need not reach it to answer the certified question.

employee turnover." *Id*. The executive order further directs agencies to "assure[] that every reasonable effort will be made to adjust work schedules and/or grant accrued or unpaid leave to allow employees who are victims of domestic violence to obtain medical treatment, counseling, legal assistance, to leave the area, or to make other arrangements to create a safer situation for themselves." *Id*. § 3(d).

Laidlaw contends that the executive order is not a proper source of public policy because it is not a "'constitutional, statutory, or regulatory provision or scheme.'" *Thompson*, 102 Wn.2d at 232 (quoting *Parnar*, 65 Haw. at 380). We disagree. This court has never characterized the list set forth in *Thompson* as exhaustive. On the contrary, we have recognized that while statutes and case law are "primary sources of Washington public policy," public policy may come from other sources. *Sedlacek*, 145 Wn.2d at 388. We have previously found public policy in a federal statute, *Thompson*, 102 Wn.2d at 234; a municipal fire code, *Ellis v. City of Seattle*, 142 Wn.2d 450, 466-67, 13 P.3d 1065 (2000); and in zoning and building codes, *Hubbard v. Spokane County*, 146 Wn.2d 699, 709, 50 P.3d 602 (2002). Other states have recognized that executive orders may form the basis of public policy. *E.g.*, *Kovalesky v. A.M.C Associated Merch. Corp.*, 551 F. Supp. 544, 548 n.5 (S.D.N.Y. 1982) (stating that termination must violate public policy expressed in laws, executive orders, regulations, or constitutions.); *Hutson v. Analytic Scis. Corp*., 860 F. Supp. 6,

12 (D. Mass. 1994) (citing executive order as articulating public policy). The executive order is yet another expression of our state's public policy of preventing domestic violence by assisting victims of domestic violence to leave their abusers, protect themselves and children, and hold their abusers accountable through cooperation with police and prosecution.[7]

Constitutional Expression of Public Policy. This state's policy of preventing domestic violence also finds expression in Washington Constitution's crime victim amendment. Washington Constitution's crime victim amendment acknowledges that "Effective law enforcement depends on cooperation from victims of crime." Wash. Const. art. I, § 35. This constitutional expression of public policy encourages crime victims like Danny to cooperate with law enforcement in order to hold their abusers accountable and thus prevent further violence.

Judicial Expression of Public Policy. The judicial expression of public policy is likewise pervasive. This court has specifically recognized a public policy interest in preventing domestic violence. *State v. Dejarlais*, 136 Wn.2d 939, 944-45, 969 P.2d 90 (1998) (finding a clear statement of public policy to prevent domestic violence and holding that reconciliation may not void a domestic violence protection order); *In re Disciplinary Proceeding Against Turco*, 137 Wn.2d 227, 253 n.7, 970 P.2d 731 (1999)

[7] Laidlaw argues that the executive order does not apply to private employers. Laidlaw's argument urges an unprecedented narrow approach to the clarity element.

(holding that "[t]he Legislature has established a clear public policy with respect to the importance of societal sensitivity to domestic violence and its consequences"); *see also State v. Dejarlais*, 88 Wn. App. 297, 304, 944 P.2d 1110 (1997) ("The Legislature has clearly indicated that there is a public interest in domestic violence protection orders."), *aff'd*, 136 Wn.2d 939, 969 P.2d 90 (1998).

Likewise, our court has previously recognized, in dicta, a public policy of encouraging citizen cooperation with a police investigation when requested. *Gardner*, 128 Wn.2d at 942; *see also Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 637, 128 P.3d 627 (2006) ("[R]ecognition of a public policy to assist law enforcement is fundamental."), *review denied*, 158 Wn.2d 1029 (2007). The United States Supreme Court's recent holdings limiting the use of testimonial hearsay evidence make a domestic violence victim's cooperation with law enforcement and prosecution efforts to hold an abuser accountable even more salient. *See Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); *see also* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 768 (2005) ("*Crawford's* impact has been particularly great on prosecutions of domestic violence**,** because these cases are more likely than others to rely on hearsay statements by accusers who may recant or refuse to cooperate with the prosecution at the time of trial."); Andrew King-

Ries, Crawford v. Washington*: The End of Victimless Prosecution?*, 28 Seattle U. L. Rev. 301, 301 (2005) ("Domestic violence offenses are difficult to prosecute because the batterer's actions often make the victim unavailable to testify."). A victim's participation in the investigation and prosecution of the abuser is now critical to successful prosecution.

Our court has also recognized a public policy of protecting human life from imminent harm. *Gardner*, 128 Wn.2d at 944. In *Gardner*, an employee left his armored truck against company policy to help a bank employee being chased by a man with a knife. This court held that "saving persons from life threatening situations" satisfied the clarity element. *Id*. at 945. Although the *Gardner* court recognized the policy in the context of *imminent* life threatening situations and the case alone does not establish the public policy that Danny seeks, its holding provides further evidence that this court has endorsed the protection of human life: "Society places the highest priority on the protection of human life." *Id*. at 944.

The Significance of Evidence of Public Policy. Laidlaw insists that any evidence of public policy is meaningless unless it directly addresses employers' responsibilities in preventing domestic violence. Resp't Br. at 16 ("[N]one of the statutes cited . . . mandate a clear public policy in the employment arena."). The dissent and the concurrence/dissent agree with Laidlaw that a court may not find a

clear mandate of public policy absent a legislative expression of public policy specific to the employment arena. Both opinions cite *Thompson*, our seminal wrongful discharge case, for the proposition that in order to demonstrate a clear public policy and satisfy the "clarity" element, the plaintiff must show that the *employer* contravened the public policy. This interpretation conflates the elements of wrongful discharge.

The "clarity" element does not require us to evaluate the employer's conduct at all; the element simply identifies the public policy at stake. Other elements of the tort serve to evaluate the employer's conduct in relation to that public policy. In *Gardner*, 12 years after *Thompson*, this court adopted the current four-part test for discharge in violation of public policy. *Gardner*, 128 Wn.2d at 941. The new test explicitly separated the requirement of a clear public policy (the "clarity" element) from the requirement that the employer's conduct threaten that policy (the "jeopardy" and "causation" elements). *Id*. at 941-42. The court specifically recognized that "[w]hereas prior decisions have lumped the clarity and jeopardy elements together, a more consistent analysis will be obtained by first asking if any public policy exists whatsoever, and then asking whether, on the facts of each particular case, the employee's discharge contravenes or jeopardizes that public policy." *Id*. at 941.

Because the "clarity" element does not concern itself with the employer's

actions, the public policy need not specifically reference employment. In *Thompson* itself, the source of the public policy—the Foreign Corrupt Practices Act of 1977—did not specifically address employment but rather prohibited bribery of foreign officials. 102 Wn.2d at 234. In *Ellis*, we found that a municipal fire code established a public policy against unauthorized disabling of a fire system without requiring the fire code to reference employment. 142 Wn.2d at 461. In *Gardner*, this court examined a situation in which an employer terminated an employee who violated company policy in order to save a human life. 128 Wn.2d at 933. We recognized a clear public policy in support of preservation of human life without determining how such a duty might arise in the employment context. *Id*. at 944-45. In *Gardner*, we established that where a "fundamental public policy is clearly evidenced by countless statutes and judicial decisions," an employer may be liable for wrongful discharge if the employer fires an employee for taking actions necessary to protect that policy, regardless of whether the public policy itself addresses the employment context. *Id*.

The legislature's recent actions show that this state's clear and forceful public policy against domestic violence supports liability for employers who thwart their employees' efforts to protect themselves from domestic violence. The 2008 legislature unanimously passed Substitute House Bill 2602: "AN ACT Relating to

increasing the safety and economic security of victims of domestic violence . . ." Substitute H.B. 2602, 60th Leg., Reg. Sess. (Wash. 2008). All 142 legislators who voted on the bill agreed that

> [i]t is in the public interest to reduce domestic violence, sexual assault, and stalking by enabling victims to maintain the financial independence necessary to leave abusive situations, achieve safety, and minimize physical and emotional injuries, and to reduce the devastating economic consequences of domestic violence, sexual assault, and stalking to employers and employees.

Laws of 2008, ch. 286, § 1(1). To that end, the new law provides for "reasonable leave" for domestic violence victims to seek legal remedies, law enforcement assistance, treatment for injuries, services from shelters and other agencies, or to relocate themselves or their families, among other things. Laws of 2008, ch. 286, § 3. Though the legislature had not yet considered such a bill at the time of Danny's discharge, the fundamental public policy underlying the bill had long been established at that time.

The legislative, judicial, and executive branches of government have repeatedly declared that it is the public policy of this state to prevent domestic violence by encouraging domestic violence victims to escape violent situations, protect children from abuse, report domestic violence to law enforcement, and assist efforts to hold their abusers accountable. The public policy in this case overwhelmingly requires an affirmative answer to the certified question.

Limitations of this Holding. We are mindful of the employer's burden and the need to narrowly construe the public policy exception "in order to guard against frivolous lawsuits." *Gardner*, 128 Wn.2d at 936. In this case, we simply hold that Washington State has a clear public policy of protecting domestic violence survivors and their children and holding domestic violence perpetrators accountable.

Laidlaw argues that recognizing the clearly established public policy in this case will "require employers to serve as a functional equivalent of the Department of Social and Health Services." Resp't Br. at 11. Laidlaw also argues that "[a]n employee fearing discharge for what may be legitimate reasons need only claim to be a victim of domestic violence to be half way to a valid public policy claim when they are discharged." *Id*. at 39. Laidlaw's parade of horribles is unfounded. Our holding will in no way open the floodgates of litigation. The clarity element is merely one of the elements Danny and future plaintiffs must successfully establish in order to maintain a wrongful discharge claim. Plaintiffs like Danny must also satisfy the jeopardy, causation, and absence of justification elements of the wrongful discharge tort. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119 (2005).

We reformulated the original certified question precisely because it implicated other elements of the tort beyond the "clarity" element. The original certified question

asked whether the employer in this case was prohibited from discharging the employee for *taking time off work* to protect herself from domestic violence. Such a question requires a factual inquiry that is properly before the trial court under the "jeopardy" element.

To satisfy the "jeopardy" element, the employee "must prove that discouraging the conduct in which [she] engaged would jeopardize the public policy." *Gardner*, 128 Wn.2d at 941. This court was careful to note in *Gardner* that in order to satisfy the jeopardy element, the employee must show that her conduct "*directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy." *Id.* at 945. Accordingly, the employee must show that other means of promoting the policy are inadequate. *Id*.

The "jeopardy" element strictly limits the scope of claims under the tort of wrongful discharge. In this case, for example, in order for Danny to show that her conduct satisfies the "jeopardy" element, she will have to show that the time that she took off work was the *only available adequate means*[8] to prevent domestic violence against herself or her children or to hold her abuser accountable.[9] This inquiry will

[8] Note that newly passed SHB 2602 provides a civil cause of action against employers who discharge employees for taking "reasonable" time off in response to domestic violence. Laws of 2008, ch. 286, § 12. The tort of wrongful discharge provides narrower protections for employees than does the new legislation.

[9] As noted above, Laidlaw argues that some employees might make false claims of domestic violence. The validity of an employee's claim of domestic violence is generally established through the actions the employee must take. For example, a person normally

turn on the nature of the danger, the particular actions that Danny took, and the details of her work schedule. For example, if she wished to get a protection order, but the court was only open during her scheduled work hours, time off may have been necessary. The amount of time off would turn on her distance from the court and other relevant factual circumstances. On the other hand, if she worked at night, her employer would likely not have been obligated to give her any time off work to seek a protection order. Time off would only be required if she could not obtain the order outside of work hours. Likewise, if she were called to testify against her abuser, time off would have been necessary if the hearing were during her work hours. If she needed to move her family to a shelter, the inquiry would turn on whether constraints such as the shelter's rules or her abuser's schedule made moving during work hours the *only adequate means* of protecting herself and her children.[10]

The concurrence/dissent would decide as a matter of law that time off work is never necessary to prevent domestic violence. We cannot decide the jeopardy element as a matter of law here because that which is "necessary" varies with the surrounding circumstances and cannot be determined without the factual record. Our case law

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will not seek a protection order or move her or his children to a shelter unless the threat of domestic violence is real. Employers are free to require documentation that employees are actually taking the actions for which they request time off.

[10] Again, the factual circumstances would determine the amount of time off necessary. We stress, however, that time off would be necessary only to protect herself and her children from actual domestic violence. She would be entitled to time off to move her children directly from harm's way, but not to run errands or generally reorder her life.

makes it clear that a court must evaluate the facts of a case when deciding whether an employee's actions were "*necessary* for the effective enforcement of the public policy." *Id*. In *Ellis*, a case in which we reviewed a grant of summary judgment, we inquired (1) whether Ellis had a reasonable belief that his refusal to disable a fire alarm was necessary to prevent violation of the public policy and (2) whether his actions were in fact necessary given the city's claim that it would never have asked him to disable a fire alarm without fire department authorization. 142 Wn.2d at 461-64. This court concluded that there were "at least two fact issues as to the ["jeopardy"] prong of the *Gardner* test, both mandating reversal of the summary judgment." *Id*. at 464. Similarly, in *Gardner*, the court stated that the "jeopardy" element required the court to ask "whether, on the facts of each particular case, the employee's discharge contravenes or jeopardizes [the] public policy." 128 Wn.2d at 941. The court examined the facts to determine whether the truck driver needed to leave his vehicle, including the screams and pleas for help of the woman as she was chased with a knife, *id*. at 934, the position of the truck, and the fact that no one else seemed ready to help, *id*. at 946.[11] We recognized again in *Korslund* that the "jeopardy" element "generally involves a question of fact." 156 Wn.2d at 182 (citing

[11] The concurrence/dissent rejects "the proposition an employee's *need for leave* is an appropriate criterion for deciding the scope of" protected activity. Concurrence/ dissent at 16. But the *Gardner* jeopardy analysis demonstrates that whether the employee's act of leaving work is factually "necessary" to protect the public policy is the very heart of the jeopardy inquiry.

Hubbard, 146 Wn.2d at 715 (citing *Ellis*, 142 Wn.2d at 460-63)). Only the trial court is equipped to make the requisite factual inquiries to decide the "jeopardy" element. We cannot decide it in this opinion because we simply lack the factual record to do so.

The concurrence/dissent's proposed holding would also require us to overrule *Gardner*. The concurrence/dissent would compel Danny to show that her employer discharged her simply because she acted to prevent domestic violence and not because she took time off work to take those actions. In *Gardner*, this court recognized that absenteeism is protected when it is part and parcel of the public-policy-protecting actions. There, the employer argued that it discharged the armored truck driver solely because he left the truck, not because he saved a woman's life. This court explicitly rejected that reasoning, saying, "Gardner's leaving the truck cannot be analyzed in isolation: his initial act of getting out of the truck is inextricably intertwined with his motive for leaving it and his subsequent actions." 128 Wn.2d at 947.[12]

In this case, like in *Gardner*, Danny was faced with a critical situation that was not related to her employment duties. Like in *Gardner*, she took action in response. Like in *Gardner*, those actions entailed leaving work for a period of time in an effort to further a clearly established public policy. If her actions were necessary to further the

[12] Likewise, in the "jury duty" and "subpoena" cases cited by the concurrence/dissent, the employees were discharged because responding to these public duties required time off work, not because their employers disliked the actions of serving on a jury or testifying in court.

public policy, as the truck driver's actions were in *Gardner*, her conduct is protected.[13]

In an effort to distinguish *Gardner* from the present case, the concurrence/ dissent conflates the "jeopardy" and "absence of justification" elements. The concurrence/dissent asserts that in *Gardner*, this court did a special balancing of the employer's needs against the public policy in light of the fact that the public policy did not have a specific employment nexus—a balancing that it asserts we have failed to do here. Concurrence/dissent at 7, 15. However, the language cited by the concurrence/dissent falls squarely in the middle of the *Gardner* analysis of the "absence of justification" element. *See id*. at 7; *Gardner*, 128 Wn.2d at 947-49. There, the court concluded that the employer's work rule did not provide an "overriding justification" for the discharge and thus the employee had met the fourth and last element of the tort. *Gardner*, 128 Wn.2d at 947-49. The *Gardner* opinion did no extraordinary analysis. It merely required the plaintiff to satisfy the "absence of justification" element, another hurdle that Danny must clear before her employer can be held liable for wrongful discharge. But the "absence of justification" element is

[13] *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991), does not compel a contrary conclusion. There, we held, under the "absence of justification" element, that it was possible for an employer to use absenteeism as a legitimate justification for discharging an employee who had filed a workers' compensation claim. *Id*. at 75. However, the plaintiff there did not suggest that time off work was necessary to protect the right to file workers' compensation claims, the public policy in question. In contrast, Danny's time off work may have been necessary to protect her and her children from domestic violence. The *Wilmot* opinion's commentary on absenteeism is inapposite.

beyond the scope of the certified question, and it also often contains factual components, *see Ellis*, 142 Wn.2d at 466; *Hubbard*, 146 Wn.2d at 718. We cannot decide it here without a factual record, and we must not do so under the guise of deciding a different element altogether.

We keep in mind that the critical inquiry in the four-part wrongful discharge test is not whether the employer's actions *directly* contravene public policy, but whether the employer fired the employee because the *employee* took necessary action to comply with public policy. *See Gardner*, 128 Wn.2d at 941. The authors of all three opinions in this case agree that Washington State has a clearly defined public policy of protecting domestic violence survivors and their families and holding abusers accountable. The tort serves to safeguard that important public policy by allowing employees to do what they must to prevent domestic violence, without fear of losing their economic independence.[14] But the concurrence/dissent's narrow reading of the jeopardy element tort would overly limit the tort's application. While it would protect employees from discharge based on their *status* as victims of domestic violence, it would leave exposed any employee who took an absolutely necessary morning off work to get a protection order, to give a statement to police, or to move her children out of imminent harm's way. Discouraging this conduct will directly endanger our

[14] As noted above, the tort's comprehensive four-part structure and its assignment of the burden of persuasion to the plaintiff serve to protect employers from unnecessary liability.

community's efforts to end domestic violence.

Finally, we note that statistics suggest that it is in an employer's best interest to work with employees experiencing domestic violence and that such work will ultimately result in a stronger and more stable workforce. *E.g.*, L'Nayim A. Shuman-Austin, Comment, *Is Leaving Work to Obtain Safety "Good Cause" to Leave Employment?—Providing Unemployment Insurance to Victims of Domestic Violence in Washington State*, 23 Seattle U. L. Rev. 797, 821 (2000) (stating that domestic violence results in increased medical, health, and leave expenses and "dramatically affects women's workforce participation").

Conclusion

We hold that Danny has satisfied her burden of proving the clarity element of a claim for wrongful discharge in violation of public policy. Washington State has unequivocally established, through legislative, judicial, constitutional, and executive expressions, a clear mandate of public policy of protecting domestic violence survivors and their families and holding abusers accountable. Having answered the reformulated certified question in the affirmative, we return the case to the District Court.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Justice Tom Chambers

Bobbe J. Bridge, Justice Pro Tem.