No. 17-36002

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Appeal from United States District Court, Western District of Washington
No. 16-cv-00727-JCC

YVETTE BAILEY,

Plaintiff-Appellant,

v.

ALPHA TECHNOLOGIES INCORPORATED, *et al*,

Defendants-Appellees.

BRIEF OF *AMICUS CURIAE* WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT'S ARGUMENT FOR REVERSAL

Daniel F. Johnson, WSBA # 27848
BRESKIN JOHNSON & TOWNSEND PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
(206) 652-8660

Jeffrey L. Needle, WSBA # 6346
LAW OFFICE OF JEFFERY L. NEEDLE
119 1st Ave. South, Suite 200
Seattle, Washington 98104
(206) 447-1560

Attorneys for *Amicus Curiae*
Washington Employment Lawyers Association

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I. INTEREST OF *AMICUS CURIAE*

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 180 attorneys admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. The tort of wrongful discharge in violation of public policy is fundamental to the enforcement of employee rights and respect for the rule of law. This brief is filed pursuant to FRAP 29.

Pursuant to FRAP 29(E), no party's counsel has authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person has contributed money that was intended to fund preparing or submitting the brief.

WELA has received consent from all parties to file this amicus brief.

II. SUMMARY OF ARGUMENT

The law on wrongful discharge in violation of public policy is in flux in Washington. Just three years ago, the state supreme court issued three decisions that overruled parts of many prior cases and substantially altered the formula with

which courts should analyze most wrongful discharge cases.[1] These changes are sure to bring more changes; one case raising follow-on issues is currently under review and another is pending.[2] The law remains unsettled in the Washington Court of Appeals.[3] For that reason, WELA urges this Court to certify the legal questions in this appeal to the Washington Supreme Court.

The district court in this case made two legal rulings that are either not consistent with current law or not consistent with the direction of the law. First, it held that employees fired for reporting financial misconduct must prove that the misconduct they reported actually violated the law. The state supreme court has never so held, and its most recent case held the opposite. Such a rule is out of step with the vast majority of anti-retaliation laws and would frustrate and undermine the protection of whistleblowers and the promotion of the rule of law.

Second, the district court held that an employee whistleblower must have reported suspected misconduct for the purpose of furthering the public good. That

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[1] *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 277, 286-87, 358 P.3d 1139 (2015); *see also Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P. 3d 1153 (2015); *Becker v. Community Health Systems*, 184 Wn.2d 252, 359 P. 3d 746 (2015) (collectively the "*Rose* trilogy").

[2] *See Martin v. Gonzaga Univ.*, 190 Wash. 2d 1002, 412 P.3d 1262 (2018); *Billings v. Town of Steilacoom*, 2 Wash. App. 2d 1, 408 P.3d 1123 (2017) (petition for review pending).

[3] *See, e.g., Vargas v. City of Asotin*, 2018 Wash. App. LEXIS 924, *22 (Wash. Ct. App. Apr. 24, 2018) (dissenting opinion regarding the elements of a wrongful termination claim) (unpublished).)

was not required by the Washington Supreme Court when it first recognized this tort, and it should not be required now. The focus is and should remain on the public policy at stake. An employee whistleblower protects that public policy whether he acted selfishly or altruistically. Reporting corporate misconduct is furthers the public good if the misconduct violates public policy; the employee's motive is irrelevant.

This Court should reverse the district court or certify these legal issues to the Washington Supreme Court.

III. ARGUMENT

A. An employee should not be required to prove the employer actually violated the law in order to be protected from retaliation.

The district court ruled that a plaintiff must prove an actual violation of public policy in order to prevail on a claim of wrongful discharge in violation of public policy. ER 8. In fact, the Washington Supreme Court has never said that, and the weight of authority as well as recent trends in the law favor the opposite conclusion—that a plaintiff's objective reasonable belief that the law may be violated is a sufficient predicate to a wrongful discharge claim.

1. The state supreme court has not required employees to prove an actual violation.

The tort of wrongful discharge in violation of public policy was first recognized in Washington in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). *Thompson* did not suggest the employee should have to prove the accuracy of his or her concerns about illegal conduct. It set out the elements of the claim:

> Thus, to state a cause of action, the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, *may have been contravened*.

Id. at 232 (emphasis added).

In holding that the employee must also prove that the policy was *actually* violated, the district court relied solely on *Ellis v. City of Seattle*, 142 Wn.2d 450, 460-61, 13 P.3d 1065 (2000). But *Ellis* did not hold that proving an actual violation was required; in fact, it held the opposite—that, in that case at least, an "objectively reasonable belief" would suffice. The case was brought by a technician who claimed he was fired for refusing to disable part of a fire alarm system at a municipal arena. *Id.* at 452.

> In the context of concerns regarding public safety where imminent harm is present, we hold 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.[4] The court observed that two divisions of the Washington Court of Appeals had required proof of an actual violation of law or policy "in situations involving financial misconduct" and declined to overrule those cases "at this time," with respect to "situations not involving immediate harm to life and limb." *Id.*[5]

A few years after *Ellis*, the court again expressed ambivalence about whether the "reasonable belief" standard adopted in that case might extend to all types of whistleblowers:

> When imminent harm is threatened, the jeopardy element "may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action." *Ellis*, 142 Wn.2d at 461. In situations not involving imminent harm, the plaintiff *may* be required to prove an actual violation of the policy.

Korslund v. DynCorp Tri-Cities Servs., 121 Wash. App. 295, 320, 88 P.3d 966, 978 (2004) (emphasis added) (citing *Bott* and *Wlasiuk*).

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[4] As mentioned above, the court recently significantly clarified the public policy. It moved away from the "*Gardner* test," which had in turn been derived from Henry H. Perritt, Workplace Torts: Rights and Liabilities § 3.7 (1991). *Rose*, 184 Wn.2d at 277, 286-87. The court held the Perritt formula was unnecessary except in those rare cases which do not fit neatly into one of the four traditional categories of wrongful discharge cases (which include "whistleblower" cases like this one), and returned to the tort's roots in *Thompson, supra*. *Rose* at 287.

[5] Citing *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 914 P.2d 102 (1996); *Bott v. Rockwell Int'l*, 80 Wn. App. 326, 908 P.2d 909 (1996). In both of these cases, the plaintiff employee prevailed on other grounds, and their wrongful discharge in violation of public policy claims were predicated on vague allegations of employer wrongdoing. *See Wlasiuk* at 179 (internal dispute about dealer pricing that allegedly violated "fair trade practices"); *Bott* at 329, 336 (internal dispute about disposal rates plaintiff "viewed as a conflict of interest").

Then, in 2015, as part of the "*Rose* trilogy" mentioned above, the Supreme Court firmly *rejected* a requirement that the plaintiff prove an actual, rather than suspected, violation of law or policy:

> We have never adopted as an element of the four-part Perritt test, or of wrongful discharge generally, a requirement that the plaintiff confirm the validity of his or her concerns before taking action.

Rickman, 184 Wn.2d at 312. In that case, the plaintiff had pursued what the Court described as her "gut feeling" that what her employer was doing "might violate HIPAA laws." *Id.* at 305. She even admitted she did not know whether the employer's practice was illegal. *Id.* Yet the Court held that her claim could proceed. *Id.* at 315.

Accordingly, the district court misinterpreted Washington law when it reached a contrary conclusion and held that Ms. Bailey's claim fails because she did not prove actual tax fraud.

2. Other anti-retaliation laws consistently use the "reasonable belief" standard.

Applying a "reasonable belief" standard to whistleblower claims for wrongful discharge is consistent with the mainstream of anti-retaliation law. Most laws that protect employees from retaliation do not require them to prove actual violations of the underlying laws and, instead, use a reasonable, good-faith belief standard. *See, e.g.*, *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 526 (9th Cir. 1994)

(Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a)); *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845-46 (9th Cir. 2002) (False Claims Act, 31 U.S.C. § 3730(h)). This is true of Washington's law against discrimination, RCW 49.60. *See Estevez v. Faculty Club*, 129 Wash. App. 774, 798, 120 P.3d 579, 590 (2005) (employee "need only prove that her complaints went to conduct that was at least arguably a violation of the law, not that her opposition activity was to behavior that would actually violate the law against discrimination."). It is also true of Washington's statute protecting state employee whistleblowers, who are protected from retaliation for reporting any improper governmental action, so long as they do so in good faith and "make a reasonable attempt to ascertain the correctness" of the information they furnish. RCW 42.40.020(b), 035, and 050.

In the specific context of claims for wrongful termination in violation of public policy, most states outside Washington apply a "reasonable belief" standard. *See TFS of Gurdon, Inc. v. Hook*, 474 S.W.3d 897, 903 (Ark. App. 2015) (an employee in a wrongful-discharge claim must only show "she was terminated for reporting suspected violations of law"); *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 847 (Mo. App. 2007) (an employee does not need "to allege or prove conclusively the law has been violated"); *Stebbings v. Univ. of Chi.*, 726

N.E.2d 1136, 1144 (Ill. App. 2000) ("the employee must have a good-faith belief that [the law] prohibits the [employer's] conduct in question"); *Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1059 (Cal. 1998) ("an employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity."); *Mehlman v. Mobil Oil Corp.*, 707 A.2d 1000, 1015-16 (N.J. 1998); *Fox v. City of Bowling Green*, 668 N.E.2d 898, 902 (Ohio 1996); *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992); *see also* Arizona Employment Protection Act, A.R.S. § 23-1501(3)(c) (whistleblower statute requiring only that Plaintiff have a "reasonable belief" that Defendant violated state law).[6]

The vast majority of anti-retaliation laws in Washington and elsewhere require only that the employee possessed an "objectively reasonable belief" that the conduct he or she opposed was illegal.

[6] *But see Rosella v. Long Rap, Inc.*, 121 A.3d 775, 779 (D.C. 2015) (rejecting wrongful termination claim by employee who "had a reasonable belief that at least some of [his] employer's accounting practices were likely unlawful"); *Clark v. Modern Group*, 9 F.3d 321 (3d Cir. 1993) (predicting that Pennsylvania would not recognize a wrongful discharge claim when employee's discharge "is based on a disagreement with management about the legality of a proposed course of action unless the action the employer wants to take actually violates the law.").

3. Requiring an employee to prove an actual violation would serve no legitimate purpose and pose an arbitrary hurdle.

Following the district court's rule and requiring proof that the employer actually violated the law or policy at issue would not advance public policy or protect employees who act to protect it. First, in cases involving complex transactions and regulatory schemes, of which modern financial misconduct claims like the one here are a prime example, it could take a concerned employee hundreds of hours and extensive investigation, and even consultation with experts, to establish with certitude whether his or her employer is engaging in unlawful conduct. To require that would impose an unreasonable burden and unrealistic hurdle on employee whistleblowers. This, in turn, would discourage whistleblowing and undermine the protection of public policy. As the Ohio Supreme Court explained:

> The "actual violation" standard could delay a whistle-blower's reporting of a violation which endangers the public safety, or at worst, prevent him from reporting the violation at all. The statute expects a whistle-blower to be vigilant, attuned to the public's safety, loyal to his employer, and sometimes even brave -- it does not require him to be infallible.

Fox v. City of Bowling Green, 668 N.E.2d 898, 902 (1996).

Laws protecting employees from retaliation almost invariably are triggered by conduct that the employees reasonably believe to be illegal. This is the

approach that Washington has and will take with whistleblowers who claim wrongful discharge, and WELA urges this Court to so hold, or to certify the issue to the state supreme court.

B. Employee whistleblowing furthers the public good so long as the policy at stake relates to a general public concern; an employee's subjective motivation should not matter.

The district court also concluded that the plaintiff failed to prove she acted "in furtherance of the public good" because her motives were allegedly selfish: "The evidence demonstrates that Bailey made the report for her own benefit and the benefit of her employers." ER 10. "[I]n other words, she was doing her job by reporting the information." ER 9. This conclusion—that the plaintiff's subjective reason for reporting illegal conduct should determine whether her employer can fire her for it—misconstrues the objectives underlying the claim, serves no public purpose, and requires parties and courts to examine motive where it should be irrelevant.

1. The "public purpose" must be found in the public policy, not the employee's state of mind.

The district court relied on *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 807 P.2d 830 (1991), which said "[a] finding that the employer violated either the letter or the purpose of the law is sufficient 'so long as the employee sought to further the public good.'" *Id.* at 669 (*quoting Dicomes v. State*, 113 Wn.2d 612,

620 (1989)). It appears that the court's interest in the plaintiff's motives arose from the peculiar facts in that case. Plaintiff was a nurse who had a dispute with her employer, a Christian organization that runs nursing homes. She opposed, on religious grounds, her employer's decision to terminate life-sustaining procedures on one of her patients. *Id.* at 663. She had repeatedly admitted her employer's alleged misconduct was *not* illegal. *Id.* at 671. The court rejected her claim on that ground alone, but went on to discuss her motive, noting "her concern appears to be directed at urging Christian health care providers to adopt her view rather than furthering the public good." It is not clear why the court was interested in this question.

In any event, the court misconstrued its own prior cases on wrongful discharge and the requirement of "furthering the public good." First, its source for the supposed concern about the employee's motive, *Dicomes*, had in turn relied on *Thompson v. St. Regis Paper Co.*, the case in which Washington first recognized the tort of wrongful termination in violation of public policy:

> In *Thompson*, we cited with approval the West Virginia Supreme Court's decision in *Harless*, which recognized the need to distinguish between employee conduct motivated by purely private interests, and that conduct motivated by a concern for the welfare of the general public.

Dicomes, 113 Wn.2d at 620 (citing *Thompson*, 102 Wn.2d at 232; *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978)). However neither *Thompson* nor *Harless* actually expressed any concern about the employee's motives. Instead, they were focused on the nature of the underlying *policy*; they each made a distinction between policies that involved "general public concerns" and those "found to be purely private in nature." *Thompson*, 102 Wn.2d at 232 (citing *Harless*, 246 S.E.2d at 125). An employee who reports violations of a law or policy aimed at protecting the public is, by definition, acting "in furtherance of the public good." Stated correctly, the requirement that the whistleblower employee's action "further the public good" simply emphasizes that the policy at issue must truly involve *public* concerns.

This distinction can be seen in the remainder of the discussion in *Thompson*. There, the court contrasted *Harless* with a case from the Oregon Supreme Court that involved private rather than public concerns. *Id.* (citing *Campbell v. Ford Indus., Inc.*, 274 Or. 243, 546 P.2d 141 (1976)). In that case, an employee had demanded certain records from his employer under a statute that permitted stockholders to see such records. The Oregon Supreme Court rejected his claim, not because his *motivation* was purely private, but because the *law* at stake

protected primarily "the private and proprietary interest of stockholders, as owners of the corporation." *Campbell*, 274 Or. at 249-50, 546 P.2d at 145.

As the court noted in *Farnam*, the focus should be on the employer's alleged misconduct, not on the employee's motivation for opposing it. *Farnam*, 116 Wn.2d at 671. And as *Thompson* explained, the focus is on the public policy at stake, not the employee's state of mind:

> Thus, to state a cause of action, the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened. This protects against frivolous lawsuits and allows trial courts to weed out cases that do not involve a public policy principle.

Thompson, 102 Wn.2d at 232.

2. Focusing on the nature of the policy at stake will promote effective protection of public policy.

Focusing on the "public purpose" behind the law or policy allegedly violated helps focus the inquiry where it belongs, on the public policy at stake. As the Supreme Court of Illinois stated in a case that has often been cited by Washington courts, "[t]he foundation of the tort of retaliatory discharge lies in the protection of public policy." *Palmeteer v. International Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981), *quoted in Dicomes*, 113 Wn.2d at 618. "In general, public policy concerns what is right and just and what affects the citizens of the state collectively." *Dicomes*, 113 Wn.2d at 617-18 (quoting *Palmeteer* at 878).

Conversely, focusing on the plaintiff's motive in taking action to protect or promote the public policy is arbitrary and counter-productive. The public is no better served by an employee who reports corporate malfeasance for personal reasons than by one whose intentions are altruistic.

An employee's personal motivation for exposing a public policy violation should be irrelevant. Many employees, for example, are motivated to oppose employer misconduct to protect themselves or their employer from criminal or civil sanctions. If those public policies serve a general public purpose, the employee's conduct should be protected regardless of her self-interested motivation. *E.g. Becker*, 184 Wn.2d at 256 ("As the CFO, Becker himself was potentially criminally liable for misleading reporting"). Likewise, an employee may report illegal conduct internally as part of the employee's job responsibilities. If the illegal conduct reported violates a public policy of general public concern, it is irrelevant that the employee was motivated only to do her job. *E.g.*, *Thompson*, 102 Wn.2d at 223 (Plaintiff "argued he was fired because he instituted accurate accounting procedures in compliance with the Foreign Corrupt Practices Act . . . , and his summary discharge without approval of the corporate controller was intended to be a warning to all the divisional controllers").

This Court should hold that an employee whistleblower in Washington has acted "to further the public good" if the public policy at issue involves issues of public concern. The employee's motivation should not be relevant. Alternatively, this issue should be certified to the state supreme court.

IV. CONCLUSION

WELA respectfully asks that this Court reverse the district court's rulings (1) that an employee must prove an actual violation of law or policy in order to prevail on a claim of wrongful discharge in violation of public policy, and (2) that an employee who reports conduct that may violate a law or policy that involves matters of public concern must be personally motivated to "further the public good." Alternatively, the Court should certify these questions to the Washington Supreme Court for decision.

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Respectfully submitted this 27th day of April, 2018.

BRESKIN JOHNSON & TOWNSEND PLLC

By */s/ Daniel F. Johnson*
Daniel F. Johnson, WSBA No. 27848
1000 Second Avenue, Suite 3670
Seattle, WA 98104
(206) 652 8660

LAW OFFICE OF JEFFERY L. NEEDLE
Jeffrey Needle, WSBA No. 6346
119 1st Ave. South, Suite 200
Seattle, Washington 98104
(206) 447-1560

Attorneys for *Amicus Curiae* Washington Employment Lawyers Association

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Circuit Rules 29 and 32. The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 3,421, not including the table of contents, table of citations, certificate of service, or certificate of compliance.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, *amicus curiae* is not aware of any other related cases pending in this Court within the meaning of that Rule.

DATED: April 27, 2018

/s/ Daniel F. Johnson
Daniel F. Johnson, WSBA No. 27848

PROOF OF SERVICE

I hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals by using the CM/ECF system. I certify that all participants in the case are registered CF/ECF users and that service will be accomplished by the CM/ECF system.

Dated April 27, 2018.

/s/ Leslie Boston
Leslie Boston, Legal Assistant

CERTIFICATION

I hereby certify that the foregoing brief is identical to the version submitted electronically.

Dated April 27, 2018.

/s/ Leslie Boston
Leslie Boston, Legal Assistant