

NO. 95269-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID MARTIN,

Plaintiff/Appellant,

v.

GONZAGA UNIVERSITY,

Defendant/Respondent

**AMICUS CURIAE BRIEF
BY WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION**

Michael Subit, WSBA #29189
FRANK FREED SUBIT &
THOMAS LLP
705 2nd Ave Ste 1200
Seattle, WA 98104-1798
Telephone: (206) 682-6711
Facsimile: (206) 682-0401
msubit@frankfreed.com

Jeffrey L. Needle, WSBA #6346
LAW OFFICE OF JEFFREY L.
NEEDLE
119 First Avenue South, Suite 200
Seattle, Washington 98104
Telephone: (206) 447-1560
Facsimile: (206) 447-1523
jneedlel@wolfenet.com

Attorneys for Washington Employment Lawyers Association

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I. INTRODUCTION AND INTEREST OF AMICUS

In *Martin v. Gonzaga University*, 200 Wn. App. 332, 402 P.3d 294 (2017), the Plaintiff filed suit alleging that a “substantial factor” in the decision to terminate his employment was his opposition to safety violations in the University gymnasium. He also alleged that he was denied access to his personnel files in violation of RCW 49.12.250. The University denied both allegations. It alleged that he was terminated for insubordination and performance related reasons. The trial court granted summary judgment in favor of the University and Plaintiff appealed.

In a sharply divided opinion, the Court of Appeals affirmed summary judgment on the wrongful discharge claim and reversed on the claim alleging denial of access to the personnel files. This Court granted the Plaintiff’s Petition for Review on the wrongful discharge claim and the University’s Cross Petition on the personnel file claim.

The Washington Employment Lawyers Association (WELA) urges this Court to reverse the Court of Appeals on the wrongful discharge claim, affirm on the personnel file claim, and to remand to the trial court for further proceedings.

WELA is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 180 attorneys who are 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.

II. SUMMARY OF ARGUMENT

The claim for wrongful discharge in violation of public policy is a critical vehicle for the enforcement of state and federal public policy. The exposure of public policy violations in the workplace is frequently dependent upon employees of conscience who are willing to provide the necessary information to management, government agencies, or the media. Retaliation against employees willing to expose the truth is far more real than theoretical. Legal protection from retaliation is therefore required to protect employees willing to risk their livelihood to protect public policy. Without that protection employees have a disincentive to expose illegal behavior because they correctly understand that there exists no obstacle to retaliation. Clear direction to the lower courts and legal community is essential to facilitate the ability of employees to protect public policy.

In *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d at 274, 358 P.3d 1139 (2015), the Court made clear that there exist two separate methods to prove a claim of wrongful discharge in violation of public policy. The primary method is based upon this court's seminal decision in *Thompson v. St. Regis*, 102 Wn.2d 219, 685 P.2d 1081 (1984). Under this approach, an employee must demonstrate that the claim falls within one of the four traditional categories of cases recognized in *Thompson*; that a statutory remedy is not exclusive; and that a "substantial factor" in the decision to terminate employment was the employee's protected activity. The lower

courts erred by not applying the *Thompson* framework to Martin’s wrongful discharge claim.

An employee’s conduct “furthers the public good” if that conduct directly relates to a policy of general public concern. Employee conduct which relates both to a policy of general public concern and also confers a private benefit nevertheless “furthers the public good.” An employee’s personal motivation for exposing a violation of public policy is irrelevant.

The alternative to the *Thompson* approach to wrongful discharge is based upon a treatise by Henry Perritt. The Perritt formulation only applies in those rare cases which do *not* fit into one of the four traditional categories of cases recognized in *Thompson*. *Rose*, 184 Wn. 2d. at 276. In those cases, “a more refined analysis is required.” *Becker v. Community Health Sys., Inc.*, 184 Wn.2d 252, 259, 359 P.3d 746 (2015). Judge Fearing, without concurrence, erred in applying the Perritt framework because, as all parties now agree, this is a whistleblower case falling within one of the four traditional categories recognized by *Thompson*. Indeed, Gonzaga now concedes that the *Thompson* framework applies to this case. Resp. Supp. Brief, at 1 n1. Courts continue apply the Perritt framework even though the case at bar falls into one of the four *Thompson* categories. This Court should reaffirm that it is wrong to do so.

Judge Fearing’s analysis of “overriding justification” in *Martin* creates substantial legal confusion. This Court should take this opportunity explain what “overriding justification” does and does not means so that

courts can properly apply the doctrine in those limited number of cases where the Perritt framework applies.

“Overriding justification” is part of the Perritt formulation. *Gardner v. Loomis Armored Car, Inc.*, 128 Wn.2d 931, 941, 913 P.3d 377 (1996). It is an affirmative defense. Although there may exist foundational questions of fact, the balancing of competing public policies is decided as a question of law. “Overriding justification” is analogous to the “business necessity” defense under state and federal law. As in *Gardner v. Loomis*, an employer must concede that it terminated the employee because of the employee’s protected conduct, as opposed to asserting an unrelated legitimate business reason. *Id.* at 946-47. Legitimate business reasons for termination unrelated to the protected conduct are subsumed in the causation component of a wrongful discharge claim. Contrary to Judge Fearing’s lead opinion, the alleged overriding justification must actually motivate the employer to terminate the employee. The federal “after acquired evidence” doctrine provides no support for a contrary rule of law.

Thompson did not recognize an affirmative defense to the tort of wrongful discharge. Whether such an affirmative defense exists in a *Thompson* case—including whether it is question of fact or law—is not before this Court. Such an affirmative defense has not been pled, argued, or briefed by the parties. Insofar as the content of a hypothetical affirmative defense in *Thompson* cases is no broader than the “overriding justification”

affirmative defense in *Perritt* cases, such an affirmative defense would necessarily fail under the facts of this case.

RCW 49.12.250 provides employees with a right of access to their “personnel file(s).” The statute should be construed broadly to effectuate its purpose. Regardless of a file’s designation, an employee must have access to all *files* maintained by the employer that contain information related to the employee. Copies of personnel files, subject to reasonable copying cost, must be provided to the employee. Access must be afforded at a location near the employee’s actual work site or by mailing copies.

III. ARGUMENT

A. There Are Two Separate Tracks for Claims Alleging Wrongful Discharge in Violation of Public Policy.

In 2015, the Court decided a trilogy of cases which clarified the public policy tort and ruled that strict adequacy was not required to satisfy the jeopardy element of the *Perritt* formulation. *See Rose*, 184 Wn.2d at 274; *Becker*, 184 Wn. 2d at 258; *Rickman v. Premera Blue Cross*, 184 Wn. 2d 300, 358 P. 3d 1153 (2015).

Rose reaffirmed the four traditional categories of claims to which the public policy tort might apply: (1) when employees are fired for refusing to commit an illegal act, (2) when employees are fired for performing a public duty or obligation, such as serving jury duty, (3) when employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims, and (4) when employees are fired in retaliation for reporting employer misconduct, *i.e.*, whistle-blowing. 184 Wn.2d at 276

(citing *Gardner*, 128 Wn.2d at 936). This Court then held that “[w]hen the plaintiff’s case does *not* fit neatly within one of these scenarios, a more refined analysis may be necessary and the four-factor Perritt analysis may provide helpful guidance.” *Becker*, 184 Wn.2d at 259 (emphasis added). On the other hand, when the plaintiff’s case does fall within one of the four traditional wrongful discharge scenarios “such detailed analysis is unnecessary” and courts should not employ the four *Perritt* factors when evaluating the legal sufficiency of the plaintiff’s claim. *Id*; *Rose*, 184 Wn.2d at 287.

Here, the Court of Appeals used the Perritt formulation despite the fact that Martin brings a whistleblower claim—one of the four traditional categories of cases recognized in *Thompson*. The University now concedes that the Perritt formulation does not apply in this case. Resp. Supp. Brief at 1 n. 1. Unfortunately, courts continue to erroneously apply the Perritt formulation even in whistleblowing cases. *E.g.*, *Vargas v. City of Asotin*, No. 35093-2-III (April 24, 2018) (unpublished); *Billings v. Town of Steilacoom*, 2 Wn. App. 2d 1, 408 P.3d 1123 (2017), *rev. denied*, --- Wn.2d --- (May 2, 2018); *Kartsetter v. King County Corrections Guild*, 1 Wn.App. 2d 822, 407 P.3d 384 (2017); *Coomes v. Edmonds School Dist. No. 15*, 816 F. 3d 1255, 1265 (9th Cir. 2016). This Court should reiterate that the Perritt formulation applies only to those cases that do not fit within the four traditional categories recognized by *Thompson*. *See Vargus* (Pennell, J., dissenting).

B. Where a Jury Could Reasonably Find that the Plaintiff Satisfies the “Substantial Factor” Causation Standard, the Employer Cannot Obtain Summary Judgment by Pointing to Evidence of a Legitimate Reason for Termination.

In *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 821 P. 2d 18 (1991), this Court considered the application of the wrongful discharge tort to an allegation that plaintiff was terminated for filing a worker’s compensation claim. The Court began its analysis by adopting for the tort of wrongful discharge the same “shifting burdens” approach used in statutory discrimination cases (*i.e.*, the *McDonnell Douglas-Burdine* framework). *Id.* at 68. The Court explained that the “first step . . . is for plaintiff to make out a prima facie case for retaliatory discharge.” *Id.* at 68-69. To do this, plaintiff must show (1) that he or she was engaged in protected activity, (2) that he or she was discharged; and (3) that there is a causal connection between the exercise of the legal right and the discharge, *i.e.*, that the employer's motivation for the discharge was the employee's protected activity. *Id.* at 69.

The term “prima facie case” has been the source of significant confusion in employment law because courts use the term in two different ways. As a general matter, the term “prima facie case” simply identifies the elements the plaintiff must prove to prevent a dismissal of her claim. *See, e.g., Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 587, 397 P.3d 120 (2017) (describing elements of prima facie case of a meal break violation). Once the plaintiff establishes her prima facie case, *the burden of persuasion* shifts to the defendant to either show that plaintiff has not satisfied an

essential element of her claim or to prove an affirmative defense, if one is available. By contrast, in the shifting burdens context, “prima facie case” means the establishment of a legally mandatory, rebuttable presumption. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 n. 7 (1981). Under *McDonnell Douglas-Burdine*, plaintiff’s satisfaction of the prima facie case shifts the burden of production, *but not persuasion*, to the defendant. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000).

Wilmot used the term “prima facie case” in the shifting burdens sense of that term. 118 Wn.2d at 68-70. Consistent with *Wilmot*, to satisfy the “prima facie case” the plaintiff must “produce evidence” that the public policy-linked conduct was “a cause of the firing, and may do so by circumstantial evidence.” *Id.* at 70 (emphasis in original). To satisfy a prima facie case under *Wilmot*, the plaintiff need only show that protected activity was a factor in the firing as distinguished from proving it was a *substantial* factor in the firing. *Compare id.* with *id.* at 73. If plaintiff were required to show substantial factor causation as part of the prima facie case, there would be no need to shift the burden to the employer because a finding of substantial factor is dispositive of employer liability.

“If the plaintiff presents a prima facie case, the burden shifts to the employer...[to] articulate a legitimate nonpretextual non-retaliation reason for the discharge.” *Id.* at 70. “[T]he plaintiff may respond to the employer’s articulated reason either by showing that the reason is pretextual, or by

showing that although the employer's stated reason is legitimate, the worker's pursuit of or intent to pursue workers' compensation benefits was nevertheless a substantial factor motivating the employer to discharge the worker." *Id.* at 73.

Here, Martin has met his prima facie case in the *Wilmot* sense of the term and the University has articulated a non-discriminatory reason. Martin then established a question of fact about whether his public-policy linked conduct was a "substantial factor" in the decision to terminate his employment. Therefore, even assuming the University could prove there were a legitimate performance-based reason for his termination, it would be insufficient as a matter of law to defeat liability so long as an illegal reason was a substantial factor in the decision to terminate. *See Wilmot*, 118 Wn.2d at 73. *Accord Scrivener v. Clark College*, 181 Wn.2d 439, 447-48, 334 P.3d 541 (2014) (WLAD).

Wilmot rejected the "determining factor" standard in favor of the substantial factor standard. 118 Wn. 2d at 70-73. The Court also rejected the "same decision" defense in wrongful discharge cases. The Court recognized that courts adopting the "determining factor" standard "generally place the *burden of persuasion* on the employer to prove that even without pursuit of the workers' compensation claim, the employer would have discharged the employee." *Id.* at 72 (emphasis original) (describing the so-called "same action" or "same decision" defense). "We have concluded that in actions based upon violation of the public policy . .

. , the burden of persuasion never shifts to the employer.” *Id.* By contrast, the federal same decision affirmative defense does shift the burden of persuasion to the employer to establish that it would have taken the same action even without consideration of the protected activity. *See* 42 U.S.C. § 2000e-5(g)(2)(B); *Costa v. Desert Palace, Inc.*, 299 F. 3d 838, 848 (9th Cir. 2002) (en banc), *aff’d*, 539 U.S. 90 (2003). This Court has broadly rejected the importation of the same decision defense into Washington law. *See Mackay v. Acorn Cabinetry*, 127 Wn. 2d 302, 316-17, 898 P. 2d 284 (1995) (Madsen, J., dissenting on the failure to adopt the federal same decision defense under the WLAD).

C. An Employer Cannot Prohibit Whistleblowing and Then Claim Insubordination as a Legitimate Reason for Termination

“Insubordination” is not a legitimate reason for terminating an employee who blows the whistle when the disobeyed employer directive was a command not to blow the whistle. An employer does not have a legitimate interest in covering up its illegal conduct. A contrary rule would defeat tort’s purpose to advance public policy by protecting whistleblowers against employer retaliation. *See Johnson v. Multnomah County, Or.* 48 F.3d 420, 427 (9th Cir. 1995) (“[T]he County does not have a legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure”).

In this case, Judge Fearing’s Lead Opinion concluded that Martin “disobeyed a directive not to contact employees of Gonzaga University

other than the employees in the Human Resource Office and Jose Hernandez. He telephoned and e-mailed the Gonzaga University president, through the president's assistant.” *Martin*, 200 Wn. App. at 366. The record reflects that Martin was terminated for allegedly having given information to the student newspaper. *See Martin Supp. Brief*, at 3. These activities related to his safety concerns. 200 Wn. App. at 343-45. While Martin’s conduct may have been technically “insubordinate” it is the type of whistleblowing activity the tort was created to protect. As a matter of law, disobedience of an employer directive to not blow the whistle about illegal or unsafe activity cannot be a legitimate reason for termination.

D. An Employee’s Conduct Furthers the Public Good If the Public Policy Furthers a Public Concern. An Employee’s Personal Motivation is Irrelevant.

In *Thompson* the Court recognized the wrongful discharge claim as an exception to the employment-at-will doctrine. The Court explained that “[t]he exception has been utilized in instances where application of the terminable at will doctrine would have led to a result clearly inconsistent with a stated public policy and the community interest it advances.” 102 Wn. 2d at 231. The Court gave an example of when an exception to employee-at-will should *not* apply: “when the interest alleged by the plaintiff/employee has been found to be *purely* private in nature and not of general public concern, the general rule applied and no liability attached to the employer's action.” *Id.* at 232 (emphasis added).

In *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 807 P.2d 830 (1991), the 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." *Id.* at 672-73. It was in this context that the court stated "[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, 782 P.2d 1002 (1989)).

In *Rickman* the Court declined to require that an employee confirm her concerns about the reported public policy violation. 184 Wn.2d at 312. "Instead, the reasonableness of the plaintiff's conduct relates to whether the plaintiff's conduct furthers public policy goals. This inquiry may be satisfied by showing "the employee sought to further the public good, and not merely private or proprietary interests." *Id.* at 313 (citations omitted). *Rickman* does not suggest an employee's personal motivation is at all relevant to whether he engaged in public policy-linked conduct.

As stated in *Thompson*, the underlying question is whether denial of the employee's claim for legal protection from discharge would lead "to a

result clearly inconsistent with a stated public policy and the community interest it advances.” 102 Wn.2d at 231. An employee’s personal motivation is unrelated to the stated public policy or the community interest it advances. Whether an employee’s conduct furthers the public good is determined by the policy the employee’s conduct advances. It does not depend on the motivation of the employee in exposing a violation of public policy. As long as the employee’s conduct furthers a policy of general public concern, it furthers the public good even though it may also further a private interest.¹

E. The Court of Appeals Misapplied the Overriding Justification Element of the Perritt Formulation.

The overriding justification defense is part of the Perritt formulation, *Becker*, 184 Wn.2d at 259; *Rose*, 184 Wn. 2d at 287. Judge Fearing wrote at length about overriding justification. The University concedes that the Perritt formulation does not apply to this case. Nevertheless, to avoid future confusion in those cases where the Perritt formulation does apply, the Court should take this opportunity to explain how and when overriding justification applies.

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¹ Many employees are motivated to oppose employer misconduct to protect themselves or their employer from criminal or civil sanctions. If the employee’s conduct serves a public purpose, the conduct is protected regardless of the employee’s self-interested motivation. *E.g. Becker*, 184 Wn.2d at 256 (“As the CFO, Becker himself was potentially criminally liable for misleading reporting”). Likewise, often an employee will often report illegal conduct internally as part of the employee’s job responsibilities. If the illegal conduct reported violates a public policy, it is irrelevant the employee was motivated only to do her job. *E.g., Thompson*, 102 Wn.2d at 223 (Plaintiff “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”).

1. Overriding justification is a question of law.

“This court must balance the public policies raised by Plaintiff against Loomis' legitimate interest in maintaining a safe workplace and determine whether those public policies outweigh Loomis' concerns.” *Gardner*, 128 Wn.2d at 948-949. Professor Perritt well explains the rationale for leaving the balancing of interests to the court:

It is desirable for the judge to retain control over the balancing process. Only in this way can the appellate courts retain adequate control over the direction in which the public policy balance is struck. If juries are allowed to strike the balancing in individual cases, the constraints on employer discretion will be unpredictable and the outcomes largely immune from appellate review.

Perritt §§ 7.08 at 7-101. *See also Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 225, 193 P.3d 128 (2008) (plurality opinion clarifying to the concurrence/dissent that the “balancing” in *Gardner* was part of the “absence of justification” element analysis). To be sure, a jury may be called upon to resolve underlying factual disputes, *e.g.*, whether the employer’s stated interest was the real reason for the discharge, and not simply a pretext. Because the court retains the role of balancing the competing interests, questions of whether an overriding justification defense applies should ordinarily be resolved in advance of trial.

Not every employer legitimate reason is sufficient to outweigh public policy and qualify as an overriding justification. If routine performance deficiencies could defeat an employer’s liability for an

unlawful termination, the existence of an illegal motive that is a substantial factor would become irrelevant instead of determinative. Allegations of performance deficiencies should be resolved within the context of the causation analysis and not overriding justification. *See Rickman*, 184 Wn.2d at 314 (employer’s claim it was justified in discharging employee for performance reasons “blend[s] the separate issues of causation and overriding justification”).

2. The overriding justification element is an affirmative defense.

Judge Fearing was unclear whether “overriding justification” was an affirmative defense, and he cited cases which he believed supported the contrasting positions. *Martin*, 200 Wn. App at 361-62. Ultimately, Judge Fearing left the question undecided because in his view “no matter who carries the burden and the extent of the burden, we hold that Gonzaga University is entitled to summary judgment on the justification element.” *Id.* at 362.

Overriding justification is an affirmative defense. *See Rickman*, 184 Wn.2d at 314 (“Once a plaintiff presents a prima facie case of wrongful discharge in violation of public policy, the burden of proof shifts to the employer to show the termination was justified by an overriding consideration”); *Ellis v. City of Seattle*, 142 Wn.2d 450, 459, 13 P.3d 1065 (2001) (“The defendant must not be able to offer an overriding justification for the dismissal (*the absence of justification* element”) (emphasis original).

Because overriding justification is an affirmative defense, the employer has both the burden of production and persuasion.

3. The overriding justification affirmative defense only applies where the Defendant admits causation.

The overriding justification affirmative defense applies only in cases where, unlike this case, the defendant concedes that the reason for the dismissal was the plaintiff's public-policy-linked conduct. *Rickman v. Premera Blue Cross*, 193 Wn. App. 1048 (2016) (unpublished) (“The ‘absence of justification’ or ‘overriding justification’ . . . inquiry presupposes that an employee was fired for public policy-linked conduct; in other words, it applies only when the causation element is not in dispute”) (internal quotation omitted); Henry H. Perritt, Jr., *Employee Dismissal Law & Practice*, §7.08 at p. 7-100.1 (overriding justification applies *only* where “employer does not deny that the determining factor or dominant reason for the dismissal was the employee's public-policy-linked conduct”).² In *Gardner* the employer effectively admitted causation. This Court refused to distinguish the protected activity of leaving the truck to save a life and the violation of workplace rule not to leave the truck. 128 Wn. 2d at 941.

In this case, Judge Fearing relied on overriding justification to defeat Martin's wrongful termination claim based on alleged performance deficiencies that were *unrelated* to Martin's protected conduct. 200 Wn.

² The overriding justification defense under wrongful discharge law is analogous to the business necessity defense that exists under employment discrimination law. Perritt, *supra*, at 7-100.1, 7-102.2. Under both the business necessity and overriding justification doctrines, the employer concedes that it acted because of a legally prohibited reason but asserts that under the circumstances it was justified in doing so. *Id.*

App. at 364-367. Such an analysis directly conflicts with *Gardner*. It also contradicts the very purpose for the overriding justification defense, which requires the court to balance the public policies that the plaintiff's conduct implicates against the employer's interests in proscribing that conduct.

4. The employer must be motivated by the “overriding justification.”

Judge Fearing ruled that the employer need not be motivated by the overriding justification it claims: “The university may avoid liability if insubordination constitutes a justifying reason under the law and overrides the advocacy of safety concerns regardless of whether insubordination motivated the firing.” *Id.* at 362-63. Judge Fearing relied by analogy upon the “after-acquired evidence” doctrine. *Id.* at 363. The after-acquired evidence doctrine provides no support for Judge Fearing's analysis. The after-acquired evidence doctrine limits the damages an employee may recover. It has nothing to do with liability.

The “after-acquired evidence” doctrine was first recognized by the U.S. Supreme Court under federal law in *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 115 S. Ct. 879, 130 L.Ed.2d 852 (1995). Presuming the same doctrine exists under Washington law, the court of appeals has described the doctrine as follows:

[The after-acquired evidence doctrine] limit(s) economic damages if the employer shows evidence of the employee's wrongdoing that it discovered only after the discharge. Under this after-acquired evidence rule, an award for back pay is calculated from the date of the unlawful discharge to the date the employer discovered a lawful basis for discharge. To establish an after-acquired

evidence defense, an employer must prove that the wrongdoing was of such severity that had the employer discovered the misconduct earlier, it would have terminated the employee on those grounds alone.

Currier v. Northland Services, Inc., 182 Wn.App. 733, 750, 332 P. 3d 1006 (2014); *see also Lodis v. Corbis Holdings, Inc.*, 192 Wn.App. 30, 60, 366 P. 3d 1246 (2015).³

Judge Fearing apparently reasoned that if evidence discovered after termination can be relied upon to limit damages, an overriding justification discovered after termination can be used to defeat liability even though, by definition, that justification could not have motivated the employer's decision to terminate. Judge Fearing cites no legal authority of any kind in support of this opinion and there is none. Following Judge Fearing's logic, an employer would be better off claiming that the overriding justification was discovered after the fact because then it could defeat liability (not limit damages) even if overriding justification played no part in the decision to terminate. The "after acquired evidence" doctrine, on the other hand, requires that the employer prove that it would have terminated the employee on the newly discovered evidence alone. *See Currier*, 182 Wn. App. at 750. If an employer claims that it terminated an employee for an overriding justification, it must prove that it was actually motivated by that reason and that it was not a pretext.

³ This Court has not ruled on whether the after-acquired evidence defense exists under Washington law. The defense is inconsistent with the substantial factor causation standard and the absence of a same action defense. This Court should, however, leave for another day whether there is an after-acquired evidence defense in Washington.

In *Gardner* this Court properly analyzed and applied overriding justification. Perritt, *supra*, at 7-104 through 7-105 (describing *Gardner* as a correct application of overriding justification). Judge Fearing's analysis of overriding justification is inconsistent with both *Gardner* and Professor Perritt's treatise. This Court should reject Judge Fearing's analysis.

F. RCW 49.12.250 Mandates a Liberal Construction.

For the reason's set forth in Martin's brief, this Court should hold RCW 49.12.250 provides an implied right of action. RCW 49.12.250 is a remedial statute. Remedial statutes are liberally construed to give effect the legislature's intent. *See Gaglidari v. Denny's Rests., Inc.*, 117 Wn.2d 426, 450-51, 815 P.2d 1362 (1991) (recognizing statute's remedial nature and liberal construction requirement); *Naches Valley Sch. Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989). A liberal construction requires that the coverage of the statute's provisions “be liberally construed [in favor of the employee] and that its exceptions be narrowly confined.” *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees*, 130 Wn.2d 401, 407, 924 P.2d 13 (1996).

The purpose of the RCW 49.12.250 is to allow employees to have access to all documents relevant to their employment that are maintained by their employer. While the employer has no obligation to maintain all relevant documents, it must produce those documents that it has maintained regardless of the label the employer has put on the file containing the documents. This reading is consistent with the language of the statute which

requires that “file(s)” be made available. RCW 49.12.250(1). While the statute does not require that copies be produced to the employee, a narrow reading of the statute holding that employers do not need to make copies available would be inconsistent with its purpose of allowing access to the files to rebut their content. It would be unrealistic, for example, to expect an employee to memorize the substance of an adverse employment evaluation or to spend hours making notes of the file’s content. This Court should hold that the employer has the obligation to provide copies subject to the payment of reasonable expenses.

The Court should hold that a “reasonable time” for the production of the file(s) should not exceed 30 days; the time allowed for producing documents under CR 34. The Court should also hold that making the files “available locally” means either producing them at a location in close proximity to the employee’s place of employment or mailing copies to the employee’s current residence. Any other rule would defeat the purpose of the statute.

IV. CONCLUSION

The Court should reverse the lower court’s ruling and remand for a trial on the merits.

Respectfully Submitted the 14th day of May 2018.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By, /s/ Jeffrey Needle /s/ Michael Subit
Jeffrey Needle, WSBA #6346
Michael Subit, WSBA #29189