Smith v. Bates Technical College: Washington Extends the Availability of the Tort of Wrongful Discharge in Violation of Public Policy, But a Little Too Far: Employees Should Still Exhaust Other Remedies

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I. INTRODUCTION

Bates Technical College (Bates), a Washington State-operated vocational-technical institution, employed Kelly Smith as a television traffic programmer.[1] Washington law entitled her to civil service protection, and the collective bargaining agreement (CBA) of her state employees union also afforded her negotiated grievance procedure coverage.[2]

Bates fired Smith, an eight-year employee, for alleged disruptive and insubordinate behavior.[3] Smith filed a grievance under the CBA, protesting her termination.[4] She also filed charges with the State under civil service laws, claiming unfair labor practices.[5] Smith's grievance proceeded to arbitration, where the arbitrator issued an award in her favor.[6] Bates reinstated Smith to a comparable position and provided back pay and related benefits.[7] Smith then filed suit in Pierce County Superior Court, seeking damages for various tort and statutory claims.[8] The trial court granted Bates's summary judgment motion in part and dismissed Smith's wrongful discharge claim for failure to ex-

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1. *See* Smith v. Bates Technical Coll., 139 Wash. 2d 793, 796, 991 P.2d 1135, 1137 (2000).
2. *Id.* at 794, 991 P.2d at 1137.
3. *Id.* at 798, 991 P.2d at 1138.
4. *Id.*
5. *Id.* at 799, 991 P.2d at 1138.
6. *Id.* at 798, 991 P.2d at 1138.
7. *Id.* at 799, 991 P.2d at 1138.
8. *Id.* at 799, 991 P.2d at 1139.

haust her remedies.[9] The Washington Supreme Court ultimately reversed the trial court's dismissal of Smith's wrongful discharge in violation of public policy claim.[10]

In its January 27, 2000 decision, the Washington Supreme Court held that the common law tort of wrongful discharge in violation of public policy is available to all employees, whether terminable-at-will or covered by a CBA or other administrative procedure.[11] The court also held that an employee need not exhaust contractual or administrative remedies before bringing an independent tort action of this kind.[12] Previously, the public policy tort was available only to at-will employees who had no other recourse. *Smith v. Bates Technical College* changes the common law in Washington by extending the availability of the public policy tort to employees already protected by CBA "for cause" provisions or, in the case of public employees, administrative appeal procedures. This expansion creates an additional avenue of appeal and additional remedies not previously available. Furthermore, it may lead to an increase in tort filings, the threat of lawsuits to leverage more favorable settlements, and to erosion of union influence and strength.

This Note will present and analyze two significant issues addressed by the *Smith* court. First, the court properly decided that state common law claims are not preempted by collective bargaining agreements or available administrative procedures. Second, the court incorrectly determined that exhaustion of administrative or contractual remedies is not a prerequisite to seeking tort relief in court.[13] The judiciary should give deference to administrative or contractual procedures specifically designed to resolve the matter in dispute.

This Note will analyze the preemption issue by first examining, in Part II, the general function of common law torts, the doctrine of employment-at-will, and the tort of wrongful discharge in violation of public policy. Part III reviews the policy underlying the public policy tort, a United States Supreme Court decision on preemption,[14] and the law of other states regarding the public policy tort.[15] Part IV analyzes the *Smith* court's reasoning and findings on the availability of the public policy tort in Washington. Finally, Part V addresses Washington

9. *Id.* at 799, 991 P.2d at 1138.

10. *Id.* at 816, 991 P.2d at 1147.

11. *Id.*

12. *Id.*

13. The court also addressed a First Amendment issue, which is beyond this Note's scope. *See id.* at 811, 991 P.2d at 1145, .

14. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

15. The states are split on the CBA preemption issue. *See* discussion *infra* Part III(C).

case law on the issue of exhaustion of remedies and applies the law to the facts in *Smith*.

II. BACKGROUND

A. Defining the Function of Common Law Torts

There is no all-encompassing definition of torts. Very broadly, a tort is a civil wrong carried out by one party against another party in breach of a duty and resulting in injury.[16] To give more content to this definition, it is perhaps best to start by identifying the purpose of tort law—in contrast, for example, to the purposes of contract and criminal law. Contract law protects a single, limited interest: having the promises of others performed.[17] Criminal law protects the interests of the public at large, as represented by the state. The purpose of criminal law is most often effectuated by extracting a penalty from the wrongdoer.[18] The purpose of tort law, on the other hand, is to adjust the losses arising from the civil wrongs of one party against another, as a result of the conduct of the other.[19] Historically, the law of torts has been concerned with the compensation of the losses to individuals, rather than to the public at large. A successful plaintiff in a tort action will therefore recover money damages for the injuries suffered at the hand of the tortfeasor.

However, the purpose of tort law has evolved. "Perhaps more than any other branch of the law, the law of torts is a battleground of social theory."[20] The last century has seen an increased recognition of the impact that private disputes have on society's interests in general.[21] This impact may occur in either of two ways: as punishment of the tortfeasor, so as to deter further tortious actions or unsafe behaviors, or as vindication of a recognized public interest.[22] When the decisions of the courts become known, there is a strong deterrent effect on those who may potentially act contrary to public interests. Further, the court decisions make normative statements about desirable or undesirable behavior. In this way, tort law encourages employees and employers, as well as citizens in general, to meet their societal and community obligations.

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16. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 4–5 (5th ed. 1984).
17. *Id.* at 5.
18. *Id.*
19. *Id.* at 6.
20. *Id.* at 15.
21. *Id.*
22. *Id.* at 6, 25.

B. The Doctrine of Employment-at-Will

The common law doctrine of employment-at-will provides that, absent a contract of specific duration, either party may terminate an employment relationship at any time.[23] An employer can discharge an at-will employee for good cause, for no cause, or even for bad cause, without being guilty of an unlawful act.[24]

There have always been exceptions to the employment-at-will doctrine, including express and implied contracts, collective bargaining agreement provisions, and statutory protections.[25] As employment law has evolved, the number of exceptions to the doctrine has increased. These exceptions fall into three general categories: contracts,[26] statutes,[27] and torts.[28] Recently, tort claims—including the tort of wrongful discharge—have increasingly been used in employment disputes.[29] Because of growing societal and judicial reaction to incidents of egregious employer conduct, wrongful discharge in violation of public policy is one of the most rapidly growing torts in this area of the law.

C. The Tort of Wrongful Discharge in Violation of Public Policy

The tort of wrongful discharge in violation of public policy is an exception to the employment-at-will doctrine. This tort provides a way to identify certain reasons for discharge that will support an action for wrongful discharge.[30] Those reasons are ones that contravene public policy.[31] One of the earliest recognitions of this tort was by a

23. MARK W. BENNETT ET AL., EMPLOYMENT RELATIONSHIPS: LAW & PRACTICE § 2.02[A] (1999 Supp.).

24. *See, e.g.*, Payne v. Western & Atl. R.R., 81 Tenn. 507 (1884).

25. 1 PAUL H. TOBIAS, LITIGATING WRONGFUL DISCHARGE CLAIMS 1–2 (2001).

26. Examples include explicit contracts, employee handbooks, and implied promises by actions.

27. Examples include the Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (2001), and the Occupational Safety and Health Act, 29 U.S.C. §§ 651–77 (2001), both of which forbid retaliation for the exercise of rights under the law.

28. Examples include wrongful discharge, negligent discharge, intentional infliction of emotional distress, and tortious interference with a contract.

29. 1 TOBIAS, *supra* note 25, at 3.

30. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 698 (2nd ed. 1999).

31. This usually occurs when an employee is terminated for exercising some right or responsibility clearly established by public policy. Mark E. Brossman & Laurie C. Malkin, *Beyond the Implied Contract: The Public Policy Exception, The Implied Covenant of Good Faith and Fair Dealing, and Other Limitations on an Employer's Discretion in the At Will Setting*, in WRONGFUL TERMINATION CLAIMS 2000, at 691 (PLI Litig. & Admin. Practice Course, Handbook Series No. H0-005O, 2000).

California appeals court in the 1959 decision, *Petermann v. International Brotherhood of Teamsters Local 396*.[32]

Petermann was a union business agent, who refused to commit perjury in testimony concerning union corruption.[33] Petermann contested his discharge by the union, and the court recognized this new tort claim, stating that "the right to discharge an employee . . . may be limited by . . . public policy."[34] However, the wrongful discharge tort did not gain wider acceptance until after Professor Lawrence E. Blade's 1967 article[35] advocating the adoption of this new cause of action.[36] By the end of the 1980's, the majority of states recognized the doctrine,[37] although there were significant differences in what the source of public policy should be.[38]

Washington first recognized the public policy tort in 1984, in *Thompson v. St. Regis Paper Co.*[39] *Thompson* involved an employee who claimed that he was fired for instituting accounting procedures that ensured compliance with a federal antibribery statute.[40] In *Thompson*, the Washington Supreme Court stated: "We join the growing majority of jurisdictions and recognize a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy."[41] The court regarded this tort as an exception to the employment-at-will doctrine.[42] The court noted that the exception has been used where the employment-at-will doctrine would have "led to a result clearly inconsistent with a stated public policy and the community interest it advances."[43] As an example, the *Thompson* court noted a case where the employer would be liable for discharge because the discharge "would otherwise frustrate a clear manifestation of public policy . . . ."[44]

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32. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

33. *Id.* at 26.

34. *Id.* at 27.

35. Lawrence E. Blade, *Employment-at-Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

36. Deborah A. Ballam, *Employment-at-will: the Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 659 (2000).

37. *Id.* at 664.

38. Examples include performing a public obligation (e.g., jury duty), whistleblowing, exercising statutory appeal rights, filing for workers' compensation, reporting violations of consumer protection or safety regulations, and reporting criminal activities.

39. 102 Wash. 2d 219, 685 P.2d 1081 (1984).

40. *Id.* at 223, 685 P.2d at 1084.

41. *Id.* at 232, 685 P.2d at 1089.

42. *Id.*

43. *Id.* at 231, 685 P.2d at 1088.

44. *Id.* at 232, 685 P.2d at 1088–89.

III. AVAILABILITY OF THE PUBLIC POLICY TORT TO EMPLOYEES WHO MAY ONLY BE TERMINATED FOR CAUSE

A. The Policy Issues Behind the Public Policy Tort

Tort law has evolved to include, as one of its purposes, the vindication of a recognized public interest. The need to encourage the meeting of societal obligations is expressed nowhere as strongly as in the relatively recent tort of wrongful discharge in violation of public policy.[45] As noted above, a majority of jurisdictions now recognize this tort.[46] Although there may be differences over the source of the policy, the common thread is the recognition of an underlying societal activity in which the discharged employee was engaged. However, it is not clear or agreed upon whether the primary function of the tort claim is the vindication of the societal interest involved in that activity, or the adjustment of the losses arising from the wrongs of one party against another.[47]

The availability of damages under the public policy tort has been a major consideration in many jurisdictions. Unionized employees are essentially limited to breach of contract remedies, which traditionally include reinstatement, back pay, and recoverable benefits.[48] Tort remedies, such as punitive damages and recovery for emotional distress, are generally not available in contract cases.[49] Precluding these additional forms of remedy would seemingly disadvantage a unionized worker. However, one must look at both the general and particular tradeoffs in the larger picture of collective bargaining to determine if the unionized worker is truly disadvantaged.

Bypassing a bargained-for, CBA-based, remedy ultimately weakens the union's role in employment matters and undermines the labor-management relationship. If the grievance-arbitration procedure was no longer the exclusive remedy for resolving discharge disputes, employees could forum shop, or possibly relitigate the merits of their claims. This would have the foreseeable impact of weakening the un-

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45. *See* McQuary v. Bel Air Convalescent Home, Inc., 684 P.2d 21, 23 (Or. Ct. App. 1984) (holding that a discharge for reporting nursing home violations to the state health division under Oregon's Nursing Home Patient's Bill of Rights would be a discharge for fulfilling a societal obligation); Foley v. Interactive Data Corp., 765 P.2d 373, 377 n.7 (Cal. 1988) (holding that the public policy tort vindicates the public interest in not permitting employers to impose on employees requirements that cause the employees to act contrary to public policy).

46. *See* ROTHSTEIN ET AL., *supra* note 30.

47. *See* 2 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 7.12 (4th ed. 1998).

48. Jane Byeff Korn, *Collective Rights and Individual Remedies: Rebalancing the Balance After Lingle v. Norge Division of Magic Chef, Inc.*, 41 HASTINGS L.J. 1149, 1156–57 (1990).

49. Brossman & Malkin, *supra* note 31, at 737–38.

ion's role in the collective bargaining process. Indeed, some employees may no longer see a need for a union at all, if their primary interest is simply job protection. Employers may even be inclined to exclude arbitration procedures from CBAs, even though such procedures may afford the quickest, most efficient form of dispute resolution for all parties.[50] If employees were permitted several bites of the apple by using successive dispute resolution forums, employers might seek concessions from the union during bargaining, in exchange for a grievance-arbitration procedure. This might tip the scales against union gains in other areas, such as wages, benefits, and working conditions.

Further, many workers lack the financial means to pursue private litigation in the courts. Professor Clyde W. Summers has observed that "[t]hey cannot afford a lawyer, and the claims are too small to produce a viable contingency fee."[51] Professor Summers also notes that the large punitive and emotional distress awards in public policy tort cases really represent a lottery with a few big winners and many losers.[52] Although the availability of additional tort damages may be attractive to employees initially, the ultimate result for unionized employees may be negative: a losing case, an unintended decline in unionization, and a loss of leverage in the collective bargaining process.

Thus, in consideration of the dollar cost to workers (as Professor Summers notes) and of the potential damage to unionization as a whole, one may argue that deference to arbitration through a CBA should be the preferred dispute resolution method for unionized workers.[53] Possible solutions to the negative impact on collective bargaining include the following: elimination of extra-contractual remedies from common law wrongful discharge; provision of statutory arbitration of discharge for at-will employees; and inclusion of extra-contractual remedies in CBAs. Also, there is some authority stating that arbitrators may have the power to award punitive damages.[54] Arbitrators' reluctance in this area may result more from tradition than

50. Korn, *supra* note 48, at 1172.

51. Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 25 (1988).

52. *Id.* at 27.

53. In fact, Washington has long favored arbitration of employment disputes. *See, e.g.*, Munsey v. Walla Walla Coll., 80 Wash. App. 92, 94, 906 P.2d 988, 989 (1995) (noting the strong public policy in Washington favoring arbitration of disputes; among other things, arbitration eases court congestion, provides an expeditious method of resolving disputes, and is generally less expensive than litigation).

54. *See* MARVIN F. HILL, JR., & ANTHONY V. SINICROPI, REMEDIES IN ARBITRATION 444–47 (2nd ed. 1999). But the majority of authority holds that punitive damages should not be available in the arbitration process.

from the force of the law.[55] Nevertheless, this reluctance would, as the *Smith* court noted, illogically grant at-will employees greater protection from these tortious terminations than unionized workers.[56]

B. Preemption of Tort Claims by Collective Bargaining Agreements

Employees who are represented by unions are usually covered by a CBA, which typically provides that an employee may not be terminated without good cause. The CBA also provides a grievance-arbitration procedure for employees to challenge terminations. Courts have uniformly held that where a claim involves a negotiable right, subject to the provisions of a CBA, the grievance procedure is exclusive and bars a common law action for breach of contract.[57] The filing of a common law tort action, however, receives different treatment.

Although state labor-management relations are not covered by the National Labor Relations Act (NLRA),[58] it is instructive to look at analogous federal labor law preemption policy. In *Lingle v Norge*,[59] Jonna Lingle alleged that she was discharged for filing a workers' compensation claim.[60] She filed a grievance under her union's CBA and a tort action in state court for retaliatory discharge.[61] Although an arbitrator ordered her reinstated with back pay, she continued pursuing her tort claim. Illinois recognizes the tort of retaliatory discharge for filing workers' compensation claims.[62] Lingle's state tort claim was removed to federal district court, which dismissed the claim, as preempted by section 301 of the Labor Management Relations Act.[63] The district court concluded that a claim of retaliation was "inextricably intertwined" with the CBA provision on discharge for just cause only and that allowing the state claim to proceed would undermine the

55. However, it is likely that employers would resist the inclusion, in CBAs, of non-traditional remedies such as punitive damages. For a detailed analysis of these options, see Henry J. Perritt, Jr., Symposium, *Beyond Collective Bargaining and Employment-At-Will: the Future of Wrongful Dismissal Claims: Where Does employer Self-interest Lie?*, 58 U. CIN. L. REV. 397, 1194–96 (1989).

56. *Smith*, 139 Wash. 2d at 805, 991 P.2d at 1141.

57. CHARLES S. BAKALY, JR., THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS 233 (2nd ed. 1989) (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)).

58. Section 2 of the NLRA as amended by the Labor Management Relations Act, 29 U.S.C. § 152 (2001), excludes coverage for states and political subdivisions. State law governs labor relations in public employment (non-federal).

59. 486 U.S. 399 (1988).

60. *Id.* at 401.

61. *Id.*

62. *Id.* at 406.

63. Labor Management Relations Act § 301, 29 U.S.C. § 185(a) (2001). § 301 provides a cause of action for breach of a collective bargaining agreement. A tort claims is preempted by § 301 if it is "inextricably intertwined with consideration of the terms of a labor contract." *See* Korn, *supra* note 48, at 1163 (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985)).

arbitration process in the CBA.[64] The Seventh Circuit affirmed, finding that "the same analysis of facts" was implicated under both procedures.[65]

The Supreme Court, however, reversed, holding that the state tort claim was not preempted by the CBA "just cause" provision.[66] The Court found that the state claim was "'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement."[67] Even though the arbitrator would need to decide the same facts as in the tort claim, the terms of the CBA would not need to be interpreted for purposes of the tort claim. Thus, a claim under state law (including, for example, a common law public policy claim) can survive preemption by federal labor law if it does not require construction or interpretation of the CBA.[68]

C. The Public Policy Tort in Other Jurisdictions

State courts disagree on whether the tort of wrongful discharge in violation of public policy is available only to at-will employees, or to all employees including those covered by CBAs or statutory protections. These decisions are generally based on the underlying purpose in recognizing the tort in that jurisdiction.

A number of state courts have held that all employees may file public policy tort claims, regardless of existing contractual rights. *Midgett v. Sackett-Chicago, Inc.*[69] is a case frequently cited for its holding that CBA-protected union members retain the right to sue in court for the public policy tort. The Illinois Supreme Court's holding in *Midgett* was based on the need to afford an employee a complete remedy (i.e., punitive damages). "[T]he recognition of a cause of action in tort merely allows an employee an additional remedy in areas where strong public policies, as opposed to purely private interests, are involved."[70] Similarly, in *Retherford v. AT&T Communications of the Mountain States, Inc.*,[71] the Utah Supreme Court found that all em-

64. Lingle v. Norge Div. of Magic Chef, Inc., 618 F. Supp. 1448, 1449 (S.D. Ill. 1985).

65. Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987).

66. *Lingle*, 486 U.S. at 413.

67. *Id.* at 407.

68. *Id.* at 413 ("In sum, we hold that an application of state law is preempted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement.").

69. 473 N.E.2d 1280 (Ill. 1984).

70. *Id.* at 1284.

71. 844 P.2d 949 (Utah 1992).

ployees, whether covered by employment contracts or at-will, can file tort actions for discharge in violation of public policy.[72] The court noted both the vindication of public policy and the difference in remedies:

> A primary purpose behind giving employees a right to sue for discharges in violation of public policy is to protect the vital state interest embodied in such policies. We cannot fulfill such a purpose if we hinge this cause of action on employees' contractual status and thus limit its availability to any one class of employees.[73]

> [A]n employer who violates clear and substantial public policies should be liable for the more expansive penalties of tort, a potentially harsher liability commensurate with the greater wrong against society.[74]

Other cases have allowed for public policy tort claims on the belief that the arbitration process is inadequate. For example, in *Coleman v. Safeway Stores, Inc.*,[75] the Kansas Supreme Court found that the arbitration procedure is not designed to protect the individual rights and public policy interest in this area.[76] The *Coleman* court cited the Supreme Court's decision, *Alexander v. Gardner-Denver, Inc.*,[77] for the proposition that arbitration is a potentially inferior process for public policy tort issues. Other state supreme courts have reached similar conclusions.[78]

In contrast, courts in other states, although recognizing the public policy tort, have extended it only to at-will employees and not to those covered by CBA provisions. For example, the New Mexico Supreme Court in *Silva v. Albuquerque Assembly & Distribution Freeport Warehouse Corp.*[79] found that "if an employee is protected from wrongful discharge by an employment contract, the intended protection afforded by the retaliatory discharge [tort] action is unnecessary and inapplicable."[80] The *Silva* court found that the express reason for recognizing this tort was the need to encourage job security for those

72. *Id.* at 953–54.
73. *Id.* at 960.
74. *Id.*
75. 752 P.2d 645 (Kan. 1988).
76. *Id.* at 651.
77. 415 U.S. 36 (1974).
78. *See* 2 PERRITT, *supra* note 47, § 7.41. Perritt cites cases in Maryland, Hawaii, Iowa, and New Jersey.
79. 738 P.2d 513 (N.M. 1987).
80. *Id.* at 515.

employees without an employment contract.[81] Likewise, the Superior Court of Pennsylvania in *Phillips v. Babcock & Wilcox*[82] found that the difference in remedies was not enough to justify the extension of coverage of the public policy tort to employees covered by labor agreements.[83] The *Phillips* court took into consideration "the strong public policy which favors the rights of parties to enter into contracts."[84]

The Wyoming Supreme Court in *Hermreck v. United Parcel Service, Inc.*[85] deferred to the existence of another remedy: "It is clear then that the whole rationale undergirding the public policy exception is the vindication or protection of certain strong policies of the community. If these policies or goals are preserved by other remedies, then the public policy is sufficiently served."[86] Other courts have similarly restricted the availability of the public policy tort.[87]

IV. *SMITH V. BATES* AND THE PUBLIC POLICY TORT

A. Smith v. Bates Technical College—*Facts and Issues*

Bates Technical College is a vocational-technical institution operated by the State of Washington.[88] Beginning in February 1986, Bates employed Kelly Smith as a traffic programmer for its onsite television station.[89] As a state technical college employee, Smith was afforded civil service protections under Washington law.[90] She was also a member of the Tacoma Association of Public School Professional-Technical Employees Union.[91] Smith's union elected to participate in the collective bargaining process,[92] which provided for coverage under the State Public Employment Collective Bargaining statute.[93] There-

81. *See id.* (citing Vigil v. Arizona, 699 P.2d 613, 619 (N.M. 1983)).

82. 503 A.2d 36 (Pa. 1986).

83. *Id.* at 38.

84. *Id.*

85. 938 P.2d 863 (Wyo. 1997).

86. *Id.* at 866.

87. *See* Scott v. Sisco Food Servs., No. Civ A 99-2150, 1999 WL 554599 (E.D. Pa. June 18, 1999) (finding that the protection of a grievance procedure renders the additional tort remedy unnecessary); Keenan v. Allen, 91 F.3d 1275, 1280 n.7 (9th Cir. 1996) (affirming the district court's holding that the public policy exception applies only to at-will employees).

88. Smith v. Bates Technical Coll., 139 Wash. 2d 793, 796, 991 P.2d 1135, 1137 (2000).

89. *Id.*

90. *See* WASH. REV. CODE § 41.56.024 (2001).

91. *Smith*, 139 Wash. 2d at 796, 991 P.2d at 1137.

92. *See* WASH. REV. CODE § 41.56.201 (2001).

93. WASH. REV. CODE §§ 41.56.010–.950 (2001). RCW 41.56 provides remedies for any alleged unfair labor practices by a state technical college employer. This statute also provides

fore, Smith was covered by the statutory unfair labor practice provisions[94] and also by the labor-management CBA, which, among other things, provided for employee discipline only "for cause" and established a grievance procedure with arbitration as the final step.[95]

Beginning in 1991, Smith was involved in a series of disputes with her supervisors, with Smith believing that she was not being treated fairly and properly and her supervisors claiming that she was uncooperative and insubordinate.[96] From July 1993 through January 1994, Smith filed seven grievances under the CBA.[97] She was reprimanded on three separate occasions.[98] On February 11, 1994, the President of Bates terminated Smith's employment, and Smith filed a grievance contesting her termination.[99] On May 7, 1994, an arbitrator issued an award favorable to Smith, finding that she was not terminated for cause and that Bates had not followed progressive discipline procedures.[100] Bates complied with the arbitration award by reinstating Smith, providing back pay and accrued benefits of more than $13,300, and purging her personnel file of all records about the case.[101]

Smith also filed four separate unfair labor practice charges with the State Public Employment Relations Commission (PERC) under sections 41.56.140 and 41.56.160 of the Revised Code of Washington (RCW).[102] She filed two of the unfair labor practice charges before, and two after, her termination. In the charges, she complained of unfair workplace treatment, retaliation for filing grievances, and the termination of her employment.[103] Before PERC could address the unfair labor practice charges, Smith filed suit in Pierce County Superior Court.[104]

Smith sued Bates, the college district, and four of her supervisors, seeking damages for wrongful discharge in violation of public policy (retaliation against her for filing grievances and complaints), defamation (by Smith's supervisors and Bates), and for violation of her First Amendment rights under 42 U.S.C. § 1983 (the right to petition and

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classified employees of Washington's technical colleges with the right to engage in union activity and to collectively bargain for rights and benefits beyond those provided by the statute.

94. WASH. REV. CODE §§ 41.56.140, .160 (2001).

95. *Smith*, 139 Wash. 2d at 798, 991 P.2d at 1137.

96. *Id.* at 797, 991 P.2d at 1137.

97. *Id.*

98. *Id.* at 798, 991 P.2d at 1137.

99. *Id.*

100. *See* Respondent's Brief at 18, Smith v. Bates Technical Coll., 91 Wash. App. 1008 (1998) (No. 19937-8-II).

101. *Smith*, 139 Wash. 2d at 799, 991 P.2d at 1138.

102. *Id.*

103. *See* Respondent's Brief, *supra* note 100, at 16–17.

104. *Smith*, 139 Wash. 2d at 799, 991 P.2d at 1138.

the right to associate).[105] The trial court granted Bates's summary judgment motion in part and dismissed Smith's wrongful discharge claim for failure to exhaust her remedies with the PERC.[106] The trial court also dismissed the § 1983 First Amendment violation claims, before the trial for Bates, and after the trial for the named individuals.[107] Only the defamation claim proceeded to trial, and the jury found that Smith had not been defamed.[108] In an unpublished opinion, the Washington Court of Appeals (Division II) affirmed the superior court decision.[109] The Washington Supreme Court granted review on the wrongful discharge in violation of public policy and the § 1983 claims.[110] In a divided opinion,[111] the Washington Supreme Court reversed the trial court's dismissal of Smith's wrongful discharge claim and remanded the case to the trial court.[112]

B. The Smith *Court's Reasoning and Findings on the Availability of the Public Policy Tort in Washington*

In *Smith*, the Washington Supreme Court held that the tort of wrongful discharge in violation of public policy is available to all employees, including those protected by a CBA or other administrative procedure.[113] The *Smith* majority cited *Thompson v. St. Regis Paper Co.*[114] as the first Washington case to recognize the public policy tort. The *Thompson* court found that the tort of wrongful discharge in violation of public policy has been used 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.[115] The *Smith* court then concluded, "[T]hus, in Washington the tort of wrongful discharge is not designed to protect an employee's purely private interest in his or her continued employment; rather, the tort operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public

105. *Id.*

106. *Id.* at 799, 991 P.2d at 1139.

107. *Id.*

108. *Id.* at 800, 991 P.2d at 1139.

109. Smith v. Bates Technical Coll., 91 Wash. App. 1008 (1998) (unpublished opinion).

110. *Smith*, 139 Wash. 2d at 796, 991 P.2d at 1137.

111. Justice Sanders authored the majority opinion, with Justices Alexander, Smith, Johnson, Madsen, and Ireland concurring. Justices Talmadge, joined by Justice Guy, concurred in part and dissented in part.

112. The court affirmed the trial court's dismissal of the § 1983 claim, *see Smith*, 139 Wash. 2d. at 816, 991 P.2d at 1147, but this Note does not address this issue.

113. *Smith*, 139 Wash. 2d at 816, 991 P.2d at 1147.

114. 102 Wash. 2d 219, 685 P.2d 1081 (1984).

115. *See id.* at 231, 685 P.2d at 1088.

policy."[116] The court found contrary cases from other jurisdictions to be unpersuasive. The court read *Thompson* as giving a right independent of contractual rights and emphasized the broader purpose of vindication of public interest.

In addition, the *Smith* majority noted with approval the 1997 Washington Court of Appeals (Division I) decision in *Wilson v. City of Monroe*,[117] in which the court held that the public policy tort extends to all employees, regardless of other available remedies. The *Wilson* court relied upon federal labor policy, which avoids preemption of state claims if no contract issues are implicated,[118] and upon the court's finding that the issue before the court did not depend on the meaning of any CBA provisions.[119]

The *Smith* majority also noted the fundamental distinction between tort and contract actions and the remedies available for each, stating that duties of conduct giving rise to torts are based primarily on social policy.[120] Further:

> What is vindicated through the [tort] cause of action is not the term or promises of the particular employment relationship involved, but rather the public interest in not permitting employers to impose as a condition of employment a requirement that an employee act in a manner contrary to fundamental public policy.[121]

The majority concluded that it logically follows that if an employee is terminated in violation of a clear mandate of public policy, the employee should be permitted to recover for the violation of his or her legal rights.[122]

C. The Smith *Dissent on Extension of the Public Policy Tort*

The *Smith* dissent partly concurred in the result[123] but disagreed that the tort of wrongful discharge in violation of public policy should be extended to those employees covered by administrative procedures or collective bargaining agreements with "just cause" termination

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116. *Smith*, 139 Wash. 2d at 801, 991 P.2d at 1140 (emphasis omitted).

117. 88 Wash. App. 113, 943 P.2d 1134 (1997).

118. *See generally* Lingle v. Norge Div. of Magic Chef Inc., 486 U.S. 399 (1988); *see also* discussion *supra* Part III(B).

119. *Wilson*, 88 Wash. App. at 117, 943 P.2d at 1136.

120. *Smith*, 139 Wash. 2d at 804, 991 P.2d 1141.

121. *Id.* at 804, 991 P.2d at 1141 (quoting Foley v. Interactive Data Corp., 765 P.2d 373 n.7 (Cal. 1988)).

122. *Id.*

123. The dissent concurred in the dismissal of the § 1983 First Amendment claim. *Id.* at 816, 991 P.2d at 1147 (Talmadge, J., concurring in part and dissenting in part).

rights.[124] Contrary to the majority, the dissent found that the public policy tort is meant to afford "job security protections to employees who, unlike civil servants or employees subject to a collective bargaining agreement (CBA), may have no other remedy for arbitrary employer conduct."[125] The dissent also criticized the majority for overlooking the weight of authority from other jurisdictions against extending the tort to employees covered by CBAs.[126] As noted in Part III(C) of this Note, the weight of authority is actually split.

D. Analysis of the Smith *Court's Holding on Extension of the Public Policy Tort*

The *Smith* majority correctly decided that the public policy tort is available to all employees under Washington law, regardless of contractual coverage. The *Thompson* decision, relied upon by the majority, specifically addressed the purpose of recognizing the public policy tort: "[t]he policy underlying the exception is that the common law doctrine [of employment-at-will] cannot be used to shield an employer's action which otherwise frustrates a clear manifestation of public policy."[127] The *Thompson* court cited, as an example, the case of *Harless v. First National Bank*,[128] in which a bank employee was discharged after attempting to make his employer comply with consumer credit and protection laws.[129] The discharge in that case would otherwise frustrate a clear manifestation of public policy, protection of consumers of credit.[130]

The *Thompson* court recognized that employee job security is also protected against employer actions that contravene public policy,[131] but this was not the stated policy reason behind the court's recognition of this cause of action. Thus, in *Thompson*, the Washington Supreme Court established that the basis for the public policy tort in Washington is the protection of the public policy implicated by the activity giving rise to the discharge. Permitting employers to discharge employees whose actions are beneficial to society would discourage employees from acting in the best interest of the public.[132]

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124. *Id.* at 817, 991 P.2d at 1147 (Talmadge, J., concurring in part and dissenting in part).
125. *Id.*
126. *Id.* at 820, 991 P.2d at 1149 (Talmadge, J., concurring in part and dissenting in part).
127. *Thompson*, 102 Wash. 2d at 231, 685 P.2d. at 1088.
128. 246 S.E.2d 270 (W. Va. 1978).
129. *Id.* at 272.
130. *Thompson*, 102 Wash. 2d at 232, 685 P.2d at 1088–89.
131. *Id.* at 233, 685 P.2d at 1089.
132. In *Harless*, the best interest of the public was the protection of consumer credit, but it may be, for instance, notice of safety rules violations, serving on a jury, participating in collective

Each state, either through legislation or through the development of common law, is free to define the scope of causes of action for employee discharge. The distinction between the cases from other jurisdictions[133] is based on the underlying policy or purpose of recognizing this tort. Those jurisdictions that recognize a tort claim by CBA-covered employees do so either because of the vindication of the public interest or because of the difference in possible remedies. Those jurisdictions that prohibit the public policy tort for CBA-covered employees reason that either existing CBA protections are adequate or that the rights of parties to contract must be protected. The *Smith* majority identified the vindication of the public interest as the basis for the public policy tort in Washington.

The *Smith* majority furthers the evolution of tort law[134] as it recognizes the impact that private disputes have on societal interests. Preventing employers from discouraging socially beneficial behavior actually encourages employees (and citizens in general) to meet their societal and community obligations. This admittedly exceeds the original fundamental purpose of tort law (adjusting the losses of the plaintiff) but is consistent with the broader, modern purpose of the law, which focuses on both the deterrence of tortious acts and the advancement of societal interests.

The result in *Smith* also agrees with the United States Supreme Court's holding in *Lingle v. Norge*. In that case, the Court held that the Labor Management Relations Act preempts state law only if the state law claim requires interpretation of a collective bargaining agreement.[135] The policy behind *Lingle* is the fostering of uniform adjudication of cases that involve disputes over the meaning of CBAs.[136] Interpretation of CBAs should remain with arbitrators, who have the requisite knowledge and expertise in industrial relations. The courts should decide questions related to labor-management relations only if it is not necessary to construe the CBA.[137] Applying the reasoning in *Lingle* to the facts in *Smith*, Smith's claim did not involve interpretation of the CBA, and although the arbitrator certainly looked at the facts spanning both issues, preemption would not occur under federal labor policy.

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bargaining—any of the "public policies" that a State has recognized as warranting protection. *Harless*, 246 S.E.2d 170.

133. *See supra* Part III(C).

134. *See supra* Part II(A).

135. Because Smith was a state employee, the NLRA does not apply. However, in cases involving non-public employees, this issue does come into play. Regardless, the policy issues are relevant.

136. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 410–11 (1988).

137. *Id.* at 411.

Finally, as noted in Part III(A), the arbitration process is a creation of the parties to the CBA. The resistance of employers to adding extra-contractual remedies, and the reluctance of arbitrators to award these remedies, argue against the exclusivity of the arbitration process for unionized workers.

V. EXHAUSTION OF REMEDIES

A. Washington Law on Exhaustion of Remedies

The Washington Supreme Court has stated, "A party must generally exhaust all available administrative remedies prior to seeking relief in superior court."[138] This principle is founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges.[139] The United States Supreme Court in *McKart v. United States*[140] stated the policies underlying this principle: (1) to insure against premature interruption of the administrative process; (2) to allow the agency to develop the necessary factual background on which to base a decision; (3) to allow exercise of agency expertise in its area; (4) to provide for a more efficient process; and (5) to protect the administrative agency's autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts.[141]

B. Smith *and the Exhaustion of Remedies*

Smith filed four unfair labor practice charges with the State Public Employment Relations Commission (PERC) under RCW 41.56.140 and 41.56.160.[142] She filed two charges before her termination, and two after.[143] In the charges, Smith complained of unfair workplace treatment, retaliation for filing grievances, and the termination of her employment.[144] Before PERC could address the unfair la-

138. Citizens for Mount Vernon v. City of Mount Vernon, 133 Wash. 2d 861, 866, 947 P.2d 1208, 1211 (1997) (citing Simpson Tacoma Kraft Co. v. Dept. of Ecology, 119 Wash. 2d 640, 646, 835 P.2d 1030 (1992)).

139. *Id.* (citing South Hollywood Hills Citizens Ass'n v. King County, 101 Wash. 2d 68, 73, 677 P.2d 114 (1984)).

140. 395 U.S. 185 (1969).

141. *Id.* at 193–94.

142. Smith v. Bates Technical Coll., 139 Wash. 2d 793, 799, 991 P.2d 1135, 1138 (2000).

143. *Id.*

144. *See* Respondent's Brief, *supra* note 100, at 16–17.

bor practice charges, Smith filed suit in Pierce County Superior Court.[145]

The *Smith* majority held that an employee need not exhaust administrative remedies before bringing an independent tort action for wrongful discharge in violation of public policy.[146] The majority found that the tort was independent of any underlying contractual agreement or civil service law.[147] The majority also found that PERC had no authority over wrongful discharge claims, that these actions are not within PERC's special expertise, and that tort-like damages are not available through PERC.[148]

The dissent in *Smith* again disagreed, stating, "This unfathomable extension of judicial power, heedless of any restraint, is not only unsupported in law, but also positively dangerous to public employers and employees."[149] The dissent favored giving deference to labor arbitrators and PERC in their respective areas of expertise.[150]

C. Analysis of the Smith *Court's Exhaustion Holding*

The *Smith* majority incorrectly decided this issue. The majority should have held that Smith must exhaust the available remedies to her unfair labor practice charges before seeking judicial review.

As a state technical college employee, Smith was covered by civil service protections under RCW 41.56.024.[151] PERC derives its authority from the legislature under RCW 41.58, the statute that created PERC, and under RCW 41.56, the Public Employees Collective Bargaining Act. PERC "[i]s empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders."[152] Smith filed four such unfair labor practice charges. Bates contended that even if the public policy tort were extended to all employees, Smith did not state a claim for violation of public policy.[153] Bates claimed that Smith's grievances dealt with commonplace, personal workplace disputes that are of no public concern.[154] The majority found that a cause of action for wrongful discharge in violation of public policy exists where an employee is fired for exercising a legal right or privi-

145. *Smith*, 139 Wash. 2d at 799, 991 P.2d at 1139.
146. *Id.* at 811, 991 P.2d at 1145.
147. *Id.* at 809, 991 P.2d at 1143.
148. *Id.* at 810, 991 P.2d at 1144.
149. *Id.* at 823, 991 P.2d at 1150 (Talmadge, J., concurring in part and dissenting in part).
150. *Id.*
151. *Id.* at 796, 991 P.2d at 1137.
152. WASH. REV. CODE § 41.56.160 (2001).
153. *Smith*, 139 Wash. 2d at 807, 991 P.2d at 1142.
154. *See* Respondent's Brief, *supra* note 100, at 16.

lege.[155] The public policy at issue is that it is an unfair labor practice for a public employer to discharge a public employee for engaging in the protected activity of pursuing a grievance.[156]

The remedial powers of PERC are not limited to back pay, reinstatement, or the traditional breach of contract remedies.[157] The legislature did not place any restrictions on the remedies that PERC could award.[158] Contrary to the majority's finding, PERC could have required the payment of damages to Smith, if it found that damages were warranted. "If the commission determines that any person has engaged in . . . an unfair labor practice, the commission shall . . . take such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees."[159] The Washington Supreme Court has previously recognized PERC's expertise in resolving labor disputes and in fashioning remedies.[160] In Smith's situation, the Washington statute, which protects public employees from discharge for pursuing a grievance, provides for its own administrative remedy – the PERC unfair labor practice process.

In an analogous federal labor law case, *Lingle v. Norge*, the Supreme Court concluded that although section 301 of the Labor Management Relations Act preempts state law only insofar as resolution of the state law claims requires interpretation of the CBA, other federal labor law principles might preempt state law.[161] The *Lingle* Court stated that when it is clear, or may fairly be assumed, that the activities in question are protected by section 7 of the NLRA[162] or that such activities constitute an unfair labor practice under section 8 of the NLRA,[163] state jurisdiction must yield.[164] "[I]t is essential to the administration of the NLRA that these determinations be left in the first

155. *Smith*, 139 Wash. 2d at 807, 991 P2d. at 1143.

156. *Id.*

157. WASH. REV. CODE § 41.56.160.

158. *See id.*

159. *See id.* § 41.56.160(2).

160. *See* Municipality of Metro. Seattle v. Pub. Employment Relations Comm'n, 118 Wash. 2d 621, 826 P.2d 158 (1992).

161. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 409 n.8 (1988).

162. National Labor Relations Act § 7, 29 U.S.C. § 157 (2001) (Rights of Employees) (covering the rights of employees to organize, form, join, or assist labor organizations, bargain collectively, or to engage in concerted activities for mutual aide or self-protection, or to refrain from such activities).

163. National Labor Relations Act § 8, 29 U.S.C. § 158 (2001) (Unfair Labor Practices) (covering various employer unfair labor practices).

164. *Lingle*, 486 U.S. at 409 n.8 (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).

instance to the National Labor Relations Board [(NLRB)]"[165] Here, since the legislature has given PERC the power to prevent and remedy unfair labor practices (analogous to the NLRB's federal authority), the jurisdiction of the state courts should likewise yield.

Thus, the majority's conclusion that Smith need not exhaust other remedies was based upon the erroneous reasoning: (1) that the tort was independent of any underlying contractual agreement or civil service law; (2) that these actions were not within PERC's special expertise; and (3) that tort-like damages were not available though PERC. Smith, therefore, should have been required to exhaust the remedies available through PERC before bringing an independent action in court.[166]

The exhaustion requirement would not deprive Smith of the opportunity for judicial review. RCW 41.56.160(3) permits PERC to petition the appropriate superior court for the enforcement of its orders, and PERC decisions in unfair labor practice cases are reviewable under the provisions of the Administrative Procedures Act.[167] Furthermore, an employee with civil service protection may utilize a cause of action specifically created by statute (i.e., where the legislature has specifically created a protection).[168]

VI. CONCLUSION

In *Smith v. Bates Technical College*, the Washington Supreme Court appropriately extended the tort of wrongful discharge in violation of public policy to all employees, regardless of collective bargaining agreement coverage. Following Washington precedent and policy, the court properly based its holding on vindication of the underlying public policy interest: employers should be discouraged from retaliating against employees who are acting in the public interest. This holding is also consistent with analogous federal labor relations law on preemption of state claims involving interpretation or application of CBAs. This holding continues the historical progression of the employment relationship from employment-at-will, through a collective bargaining approach, to the present day emphasis on protection of both individual rights and societal interests.

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165. *Id.*

166. Smith did exhaust her remedies in the grievance-arbitration process. But, as noted, her tort claim is independent of the arbitration because interpretation of the CBA is not involved, and (arguably) arbitrators are reluctant to address the damages issue.

167. City of Pasco v. Pub. Employment Relations Comm'n, 119 Wash. 2d 504, 833 P.2d 381 (1992).

168. Smith v. Bates Technical Coll., 139 Wash. 2d 793, 823, 991 P.2d 1135, 1150 (2000).

The court, however, incorrectly decided the issue of exhaustion of remedies. The Washington Public Employment Relations Commission should have been allowed to adjudicate Smith's unfair labor practice charges. PERC is empowered by the legislature to address precisely this type of claim. PERC has the required expertise and can structure and enforce remedies, including damages. The court should have given proper deference to PERC's jurisdiction and expertise. Where, as in *Smith*, an aggrieved employee has administrative remedies available, and those remedies would not be futile, the employee should be required to exhaust those remedies.