Closing the Door on the Public Policy Exception to At-Will Employment: How the Washington State Supreme Court Erroneously Foreclosed Wrongful Discharge Claims for Whistleblowers in *Cudney v. ALSCO, Inc.* 

### Laura A. Turczanski\*

#### I. INTRODUCTION

In 2008, Matthew Cudney was terminated from his employment with ALSCO, Inc. a few weeks after reporting to his supervisor and human resources manager that he observed the branch general manager appearing intoxicated at work and driving away in a company vehicle.<sup>1</sup> Cudney brought an action for wrongful discharge in violation of public policy, claiming that he was terminated in retaliation for reporting the manager's drinking and driving.<sup>2</sup> Cudney asserted that the Washington Industrial Safety and Health Act (WISHA) establishes a public policy protecting workers who report safety violations.<sup>3</sup> He also asserted that Washington's DUI laws<sup>4</sup> clearly indicate a public policy protecting the public from drunk drivers.<sup>5</sup> In a 5-4 decision, the Washington Supreme Court held that the statutory remedies available under WISHA are adequate to protect the underlying public policy.<sup>6</sup> The court also held that Washington's criminal DUI laws are not an inadequate means of promoting the public policy, and that the public policy—rather than Cudney's own interests—must be promoted. Based on these two conclusions, the

<sup>\*</sup> J.D. Candidate, Seattle University School of Law, 2013; B.S., Business Administration and B.A., International Relations, University of Southern California, 2004. Thanks to Jason Kelley and the staff of the Seattle University Law Review for their assistance on this Note. Thank you also to my parents, Lyle and Gayle Hedgpeth, and my husband, Kamil Turczanski, for their love and support.

<sup>1.</sup> Cudney v. ALSCO, Inc., 259 P.3d 244, 245 (Wash. 2011).

<sup>2.</sup> Id. at 245-46.

<sup>3.</sup> Id. at 246.

<sup>4.</sup> The term "DUI laws" refers to Washington's laws criminalizing driving while under the influence of alcohol or drugs. See WASH. REV. CODE §§ 46.61.502 (2012), 46.61.5055 (2012).

<sup>5.</sup> Cudney, 259 P.3d at 246.

<sup>6.</sup> Id. at 250.

<sup>7.</sup> *Id*.

court held that Cudney's tort claim of wrongful discharge in violation of public policy could not proceed.<sup>8</sup>

This Note contends that the *Cudney* court erred in determining that WISHA adequately promotes the public policy of insuring workplace safety; in deciding that public safety is adequately promoted by Washington's DUI laws; and in finding that the common law exception of wrongful discharge in violation of public policy does not apply in this case. The court's conclusion that WISHA was an adequate remedy was erroneous because of the unreasonably short time period available to file a claim under the statute, the lack of a robust administrative scheme, and the lack of full remedies available to a discharged employee. Furthermore, the court's determination that DUI laws adequately promote public policy, regardless of whether a remedy is available to the terminated employee, leaves an employee with no recourse for a wrongful termination and may discourage employees from reporting criminal activity.

This Note proceeds in seven parts. Part II discusses the history of employment at-will in Washington as well as the development of the public policy exception. This section also addresses the four-factor test adopted by the court to analyze a wrongful discharge claim. Part III introduces the Washington Industrial Safety and Health Act, including the public policy served by the Act, as well as the protections provided for workers. In addition, this Part highlights cases in which the court found the public policy exception applicable for claims premised on workplace protection laws. This Part also discusses the split in other jurisdictions regarding the adequacy of statutory remedies. Part IV introduces Washington's DUI laws and discusses what remedies are available under the criminal statutes. Part V analyzes the majority and dissenting opinions in Cudney and discusses the final resolution of the case. Part VI discusses possible future implications of the *Cudney* decision and proposes remedial legislation that the Washington State Legislature should adopt. Part VII concludes that the Washington Supreme Court incorrectly foreclosed a common law cause of action in the Cudney case, and that action by the court or the legislature is necessary to properly balance the interests of employers, employees, and society.

# II. WASHINGTON EMPLOYMENT AT-WILL AND THE PUBLIC POLICY EXCEPTION

This Part discusses the development of Washington's employment at-will doctrine, including the public policy exception, and sets out the

<sup>8.</sup> Id. at 251.

four-part test that a court will use in analyzing a tort claim of wrongful discharge in violation of public policy.

### A. Doctrine of Employment At-Will

Under the doctrine of employment at-will, either the employer or employee may terminate an employment contract of indefinite period atwill without incurring liability. Washington has recognized the doctrine since as early as 1928;<sup>10</sup> the doctrine's roots stem from a treatise written by Horace Gray Wood in 1877. 11 Although employment at-will remains the default rule, an employer's ability to terminate an employee has been constrained by both state and federal law. For example, statutes prohibit an employer from discharging an employee based on race, color, religion, sex, or national origin. 12 Further, statutes prohibit employers from discharging an employee who has filed a complaint with the government regarding workplace safety<sup>13</sup> or minimum wage violations.<sup>14</sup> Some statutes require that certain public employees are terminated only for cause. 15 In addition to statutory constraints, the doctrine of employment at-will may be limited by contract between the parties; moreover, collective bargaining agreements may prohibit an employer from terminating an employee except for cause. 16

<sup>9.</sup> Davidson v. Mackall-Paine Veneer Co., 271 P. 878 (Wash. 1928). The employment at-will rule allows an employer to dismiss an at-will employee "for any reason or no reason." HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE, § 1.01 (5th ed. Supp. 2009).

<sup>10.</sup> Davidson, 271 P. 878.

<sup>11.</sup> HORACE GRAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877). Prior to the development of the at-will doctrine, employment was viewed in light of the master–servant relationship, in which a general hiring, without a specified time limit, was construed as a contract for one year. HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE, § 1.03 (5th ed. 2006). Following large-scale organization and production brought by the Industrial Revolution, both employers and employees sought more flexibility in negotiating employment terms. *Id.* at § 1.04. Wood's 1877 treatise repudiated the one-year contract rule and articulated the rule that "a general or indefinite hiring is *prima facie* a hiring at will." *Id.* The at-will rule quickly spread and was adopted by the majority of jurisdictions by as early as 1913. *Id.*; *see also* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

<sup>12.</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e–2; Washington Law Against Discrimination, WASH. REV. CODE § 49.60.030 (2009) (mirroring the federal protections with the addition of protection for honorably discharged veterans and those with a sensory, mental, or physical handicap).

<sup>13.</sup> Wash. Rev. Code § 49.17.160 (2010).

<sup>14.</sup> Wash. Rev. Code § 49.46.100 (2010).

<sup>15.</sup> See, e.g., WASH. REV. CODE § 28A.400.300 (2012) (limiting discharge of school employees to "sufficient cause"), WASH. REV. CODE §§ 41.08.090 (2007), 41.14.120 (2012), 41.12.090 (2007), 43.43.070 (1984) (requiring cause to discharge firefighters, sheriffs, city police, and Washington State Patrol officers).

<sup>16. 82</sup> AM. JUR. 2D *Wrongful Discharge* § 3. *See, e.g.*, Comfort & Fleming Ins. Brokers, Inc. v. Hoxsey, 613 P.2d 138, 141 (Wash. 1980) (a contract provision requiring "[t]ermination for good cause shown is a restriction on the employer's right to discharge an employee at will"); Peninsula

### B. Wrongful Discharge in Violation of Public Policy

One judicial constraint on the doctrine of employment at-will is the common law tort of wrongful discharge in violation of public policy. The court will not allow the at-will doctrine to shield an employer's action "which otherwise frustrates a clear manifestation of public policy." The majority of states have also recognized the public policy exception as a cause of action. <sup>18</sup>

The Washington Supreme Court first recognized the public policy exception in *Thompson v. St. Regis Paper Co.*<sup>19</sup> The *Thompson* court held that the "narrow public policy exception should be adopted because it properly balances the interest of both the employer and employee."<sup>20</sup> The court recognized that a "growing majority" of jurisdictions had adopted a public policy exception to the doctrine of employment atwill.<sup>21</sup> In a tort claim for wrongful discharge in violation of public policy, the employee has the burden to show that the discharge contravened a clear mandate of public policy.<sup>22</sup>

Since *Thompson*, the Washington Supreme Court has continued to hold that the public policy exception should be construed narrowly.<sup>23</sup> The court has identified four general areas that discharge may be in violation of a clear public policy: (1) where the employee was discharged for re-

Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula, 924 P.2d 13, 15 (Wash. 1996) ("Job security provisions, including a just cause limit on terminations, come within the ambit of 'working conditions' and constitute a mandatory subject of bargaining.").

<sup>17.</sup> Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1088 (Wash. 1984). The public policy tort "require[s] courts to balance employee, employer, and societal interests." HENRY H. PERRITT JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES § 3.1 (1991). The employer has an economic interest in freely running its business, while the employee has an economic interest in maintaining employment. *Id.* The public policy tort recognizes that society's interests can tip the scales in either direction. *Id.* Society's interest in freedom of contract, expressed in the at-will rule, will add weight to the employer's side of the scale. *Id.* But if the discharge contravenes public policy, society's interest in protecting that policy may tip the scales back to the employee's side. *Id.* 

<sup>18.</sup> Michael A. DiSabatino, Annotation, *Modern Status of Rule that Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R.4th 544 (1982) (listing thirty-four states that have recognized, or stated their willingness to recognize, the cause of action).

<sup>19.</sup> Thompson, 685 P.2d 1081.

<sup>20.</sup> Id. at 1089.

<sup>21.</sup> *Id.* at 1088. The court noted fifteen jurisdictions that had explicitly adopted the exception and an additional two courts that had implied in dicta that they may. *Id.* at 1088 n. 1.

<sup>22.</sup> Id. at 1089.

<sup>23.</sup> See, e.g., Cudney v. ALSCO, Inc., 259 P.3d 244, 246 (Wash. 2011) ("From this court's first recognition of the tort of wrongful discharge in Thompson v. St. Regis Paper Co., we emphasized that 'courts should proceed cautiously.") (quoting Thompson, 685 P.2d at 1089); Sedlacek v. Hillis, 36 P.3d 1014, 1017 (Wash. 2001) ("we have recognized that the tort of wrongful discharge in violation of public policy is a narrow exception to the employment at-will doctrine in Washington State"); Gardner v. Loomis Armored Inc., 913 P.2d 377, 380 (Wash. 1996) ("the exception should be narrowly construed in order to guard against frivolous lawsuits").

fusing to commit an illegal act; (2) where the employee was discharged due to performing a public duty or obligation; (3) where the employee was discharged for exercising a legal right; and (4) where the employee was discharged due to "whistleblowing" activity.<sup>24</sup>

#### 1. The Four-Element Framework

The court in *Gardner v. Loomis Armored, Inc.* adopted a four-part test for analyzing wrongful discharge claims involving violations of public policy. First, the plaintiff must prove the existence of a clear public policy: the clarity element. Second, the plaintiff must prove that the public policy would be jeopardized if the conduct the employee engaged in was discouraged: the jeopardy element. Third, the plaintiff must prove that the conduct related to public policy caused the discharge: the causation element. Finally, the defendant must not be able to justify the discharge on other grounds: the absence of justification element.

In *Cudney v. ALSCO, Inc.*—the focus of this Note—the parties stipulated that WISHA and Washington's DUI laws established clear public policies and therefore the clarity element was not under consideration.<sup>27</sup> The causation and absence of justification elements are typically questions of fact, which are not usually decided on summary judgment, and the court was not asked to consider these elements.<sup>28</sup> The only element that the *Cudney* court was asked to decide was the jeopardy element.<sup>29</sup>

The court has recognized that the jeopardy element "strictly limits the scope of claims under the tort of wrongful discharge." In order to

<sup>24.</sup> Dicomes v. State, 782 P.2d 1002, 1006–07 (Wash. 1989) (providing case examples of each general area). "Along with a growing number of jurisdictions, we recognize the public policy found in protecting employees who are discharged in retaliation for reporting employer misconduct, i.e., employee 'whistleblowing' activity." *Id.* at 1007. Generally, the term "whistleblower" refers to an "employee who reports employer wrongdoing to a governmental or law-enforcement agency." BLACK'S LAW DICTIONARY (9th ed. 2009). The term may also include an employee who makes a complaint to "his or her superior within his employer's organization." DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 22 (2d ed. 2004). "'Whistleblowing' occurs when an employee reports illegal or improper conduct to superiors or to outside authorities and is discharged in retaliation for doing so. It falls within the 'public policy' exception to the at-will doctrine because, although no law compels an individual to step forward and communicate his suspicions regarding criminal activity, public policy clearly favors the exposure of crime." *Wrongful Discharge*, *supra* note 16, at § 117.

<sup>25. 913</sup> P.2d 377.

<sup>26.</sup> Id. at 382 (adopting the test advocated in PERRITT, supra note 17, at § 3.7).

<sup>27.</sup> Cudney, 259 P.3d at 245-46.

<sup>28.</sup> Id. at 247 n.1.

<sup>29.</sup> Id. at 246.

<sup>30.</sup> Danny v. Laidlaw Transit Services, Inc., 193 P.3d 128, 139 (Wash. 2008).

successfully prove the jeopardy element, the plaintiff must show that his or her conduct directly relates to public policy, that other means of promoting public policy are inadequate, and that the actions the plaintiff took were the "only available adequate means" to promote public policy.<sup>31</sup>

When the statutory source of a clear public policy also includes administrative remedies, the jeopardy element is far more difficult for the plaintiff to establish.<sup>32</sup> However, in his treatise, Professor Perritt argues that the administrative remedies can only shield employee conduct, thereby precluding public policy tort claims, if the remedies "are available to the particular type of plaintiff involved."<sup>33</sup>

### III. WASHINGTON INDUSTRIAL SAFETY AND HEALTH ACT

This Part discusses the history, purpose, and enforcement of the Washington Industrial Safety and Health Act. It also discusses cases where a plaintiff has brought a claim of wrongful discharge in violation of public policy premised on WISHA or other workplace safety laws.

### A. History and Purpose of the WISHA Statute

The Washington Industrial Safety and Health Act of 1973<sup>34</sup> was enacted following extensive federal legislation in 1970, which resulted in the Occupational Safety and Health Act (OSHA).<sup>35</sup> Under OSHA, a state may choose to maintain its own industrial safety plan, with approval from the Secretary of the Occupational Safety and Health Administration

<sup>31.</sup> *Id*.

<sup>32.</sup> Perritt, supra note 17, at § 3.15.

<sup>33.</sup> *Id*.

<sup>34.</sup> Wash. Rev. Code § 49.17 (2013).

<sup>35. 29</sup> U.S.C. §§ 651–677 (1970). On January 23, 1968, President Lyndon B. Johnson sent a message to Congress proposing a "comprehensive Occupational Health and Safety Program, to protect the worker while he is on the job." President Lyndon B. Johnson, Special Message to the Congress, *To Earn a Living: The Right of Every American*, THE AMERICAN PRESIDENCY PROJECT (Jan. 23, 1968) http://www.presidency.ucsb.edu/ws/?[id=28849. The President indicated that adequate protection did not exist to safeguard workers from hazards on the job and proposed federal protection for all workers engaged in interstate commerce and federal support for the states to protect workers engaged in intra-state commerce. *Id.* at 8. Between 1968 and 1970, both the House and Senate conducted hearings on the proposed Act before finally adopting the Occupational Safety and Health Act of 1970 on December 29, 1970. Occupational Safety and Health Act of 1970, Pub. L. No. 91–596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. § 651–677). OSHA sets out duties of employers and employees, 29 U.S.C. § 654, and delegates responsibility to the Secretary of Labor to promulgate safety and health standards. 29 U.S.C. § 655.

if certain conditions are met.<sup>36</sup> WISHA is Washington's approved industrial safety plan and preempts the applicable federal law.

WISHA establishes that an employer has a duty to comply with promulgated regulations and to furnish employees with a place of employment free from recognized hazards that are causing, or are likely to cause, serious injury or death to employees.<sup>37</sup> The purpose of WISHA is to ensure safe and healthy working conditions for every man and woman working in the state of Washington.<sup>38</sup>

In addition to the general employer duties, WISHA adopted the language of OSHA's anti-discrimination statute. 39 WISHA prohibits employers from discharging or discriminating against any employee who has filed a safety complaint, has testified or is planning to testify in any WISHA proceeding, or has exercised any right afforded under WISHA.<sup>40</sup> If an employee believes that his discharge violates these protections, he may file a complaint with the director of the Department of Labor and Industries within thirty days of his termination. 41 Following receipt of a complaint, the director must investigate the situation, and if the director determines that WISHA has been violated, he or she must bring a cause of action against the employer. 42 If the director determines that the employer did not violate the statute, the employee may still bring a cause of action on his own behalf within thirty days of the director's determination. 43 In such an action, the court may order all appropriate relief including rehiring or reinstating the employee to his or her former position with back pay.44

### B. Enforcement of WISHA

The legislature delegated the administration and enforcement of WISHA to the Department of Labor and Industries (the Department).<sup>45</sup> In order to ensure the enforcement of the WISHA anti-discrimination statute, the Department promulgated regulations setting out the administrative procedure the Department uses upon receipt of a WISHA com-

<sup>36. 29</sup> U.S.C. § 667; see also Alan S. Paja, The Washington Industrial Safety and Health Act: WISHA's Twentieth Anniversary, 1973–1993, 17 U. PUGET SOUND L. REV. 259, 264 (1994).

<sup>37.</sup> WASH. REV. CODE § 49.17.060(1) (2010).

<sup>38.</sup> Wash. Rev. Code  $\S$  49.17.010 (1973).

<sup>39. 29</sup> U.S.C. § 660(c) (1970); WASH. REV. CODE § 49.17.160 (2010).

<sup>40.</sup> Wash. Rev. Code § 49.17.160 (2010).

<sup>41.</sup> WASH. REV. CODE § 49.17.160(2) (2010).

<sup>42.</sup> Id.

<sup>43.</sup> *Id*.

<sup>44.</sup> Id.

<sup>45.</sup> Wash. Rev. Code § 49.17.020 (2010).

plaint.<sup>46</sup> The Department procedures contain slight changes from the statutory language that weaken the administrative remedies. For example, while the WISHA statute states that the director *must* file a cause of action upon finding a violation, the regulation states that the Department "*may* bring a civil action against the violator."<sup>47</sup> The regulations also delegate responsibility to the assistant director (rather than the director) for investigation and determination of complaints.<sup>48</sup> If the assistant director determines that a violation has not occurred, the employee may file a written request for review by the director within fifteen days of receipt of the determination.<sup>49</sup>

The regulations also provide further detail regarding the timing of complaints. WISHA provides for a thirty-day window for an employee to file a complaint.<sup>50</sup> The Department will presume that complaints that are not filed within the thirty-day window are untimely and will decline to accept them.<sup>51</sup> There may be some circumstances, however, where the Department will toll the thirty-day period, such as instances where the employer has concealed or misled the employee regarding the grounds for discharge.<sup>52</sup>

# C. Wrongful Discharge Claims Under Workplace Safety Laws in Washington

In Washington, case law involving wrongful discharge premised on workplace safety laws has developed from early cases, in which a claim was found to be barred by statute, to later cases allowing a claim to move forward regardless of statutory remedies. In *Jones v. Industrial Electric-Seattle, Inc.*, the Court of Appeals, Division II, held that WISHA "both states a policy and affords a remedy." The court pointed to language in the statute authorizing the court to order "all appropriate relief," and stat-

<sup>46.</sup> WASH. ADMIN. CODE 296-360-010 (2013).

<sup>47.</sup> WASH. ADMIN. CODE 296-360-020 (2013) (emphasis added).

<sup>48.</sup> Id.

<sup>49.</sup> Wash. Admin. Code 296–360–040(2) (2013).

<sup>50.</sup> Wash. Rev. Code § 49.17.160(2) (2010).

<sup>51.</sup> WASH. ADMIN. CODE 296-360-030(4) (2013).

<sup>52.</sup> *Id*.

<sup>53.</sup> Jones v. Indus. Elec.-Seattle, Inc., 768 P.2d 520, 522 (Wash. 1989) overruled by State v. WWJ Corp., 980 P.2d 1257 (Wash. 1999); see also Wilmot v. Kaiser Aluminum & Chem. Corp., 821 P.2d 18 (Wash. 1991) (disapproving of Jones). Jones was discharged after making several complaints about unsafe working conditions. Jones filed a timely complaint with the Department of Labor and Industries and was notified that the Department would take no action following its investigation. Jones brought suit two years later, and summary judgment was granted to the defendant because Jones did not bring the action within thirty days of the department's determination, as required by statute.

ed that this language indicates a comprehensive remedy with no room for judicial legislation.<sup>54</sup> Because the plaintiff did not bring his claim within the statutory period, he was unable to move forward with his tort claim of wrongful discharge.<sup>55</sup>

The Jones decision was distinguished by the Washington Supreme Court in Wilmot v. Kaiser Aluminum & Chemical Corp. 56 The statute at issue in Wilmot was a Washington industrial insurance statute with a statutory remedy very similar to the WISHA statute.<sup>57</sup> The court held that the statute was not mandatory and exclusive and that therefore an employee "may file a tort claim for wrongful discharge . . . independent of the statute."58 One reason the court gave for this decision centered on the language of the statute. Like the language in WISHA, the statute at issue in Wilmot contained language stating that an employee who believes he has been discriminated against may file a complaint with the director, and upon receipt the director shall conduct an investigation.<sup>59</sup> The court stated that the use of the word "may" in the same provision as "shall" is "strong evidence that the Legislature did not intend [the statute] to provide the exclusive procedure and remedies to redress retaliatory discharges resulting from exercise of a worker's rights."60 The court also noted that the statute contained no language, express or implied, that would indicate the statute was intended to be the exclusive remedy.<sup>61</sup> Also similar to WISHA, the insurance statute contained a provision allowing an employee to file an action in court if the director finds no violation. This further strengthened the court's view that the statute was not the exclusive remedy. 62 The court also questioned whether the statutory

<sup>54.</sup> Jones, 768 P.2d at 539.

<sup>55.</sup> Id.

<sup>56.</sup> Wilmot, 821 P.2d 18. Plaintiffs in Wilmot were twenty-two former employees who were injured on the job and either missed work due to the injury or continued to work with an injury due to company policy stating an employee who misses work will be terminated. Each plaintiff filed a claim for worker's compensation benefits and all claimed they were discharged because of their workers' compensation claims. None of the plaintiffs filed a claim with the Department of Labor and Industries, as required by the statute. The employer moved to dismiss on the grounds that the statute provided an exclusive remedy, but the Washington Supreme Court held that the remedy was not exclusive and allowed the tort claims to move forward. Id.

<sup>57.</sup> WASH. REV. CODE § 51.48.025 (1985). The statute prohibits an employer from discharging or discriminating against any employee because the employee has filed or communicated to the employer an intention to file a claim for compensation. *Id.* The only significant difference between the two statutes is that the industrial insurance statute provides a window of ninety days for the employee to file a claim, rather than the thirty days provided by WISHA.

<sup>58.</sup> Wilmot, 821 P.2d at 21.

<sup>59.</sup> WASH. REV. CODE § 51.48.025(2) (1985) (emphasis added).

<sup>60.</sup> Wilmot, 821 P.2d at 22.

<sup>61.</sup> Id.

<sup>62.</sup> Id. at 23.

remedy would provide the employee with the ability to recover all of the same damages that he would be entitled to in a tort action, such as emotional distress damages.<sup>63</sup>

Following *Wilmot*, the Court of Appeals, Division I, in *Wilson v. City of Monroe* considered whether WISHA was intended to provide the exclusive and mandatory remedy.<sup>64</sup> Noting the similarities between WISHA and the industrial insurance statute under consideration in *Wilmot*, the *Wilson* court followed the analysis in *Wilmot* and determined that WISHA was not the exclusive remedy for claims under the statute. Therefore, the plaintiff was allowed to bring a cause of action for wrongful discharge.<sup>65</sup> While *Jones* and *Wilmot* were both decided prior to the Washington Supreme Court's adoption of the four-part test in *Gardner*, the *Wilson* case was decided after *Gardner*.

Several years after *Wilson*, the Washington Supreme Court allowed a wrongful discharge claim to move forward under WISHA in *Ellis v*. *City of Seattle*. <sup>66</sup> The primary question presented for the court's determination was whether the plaintiff must prove an actual violation of WISHA or whether the plaintiff's objectively reasonable belief that the policy has been violated would suffice. <sup>67</sup> The court held that, in the context of public health and safety, the jeopardy element may be established by the plaintiff's "objectively reasonable belief the law may be violated in the absence of his or her action." <sup>68</sup> The court held that "to establish his retaliation claim under RCW 49.17.160(1) . . . [a]ll he has to do is prove

<sup>63.</sup> Id. at 25.

<sup>64.</sup> Wilson v. City of Monroe, 943 P.2d 1134 (Wash. 1997). Wilson was employed by the City of Monroe as a waste water treatment facility plant manager. Wilson filed complaints regarding illegal discharges into the Skykomish River with the Washington State Department of Ecology and the Environmental Protection Agency. The city terminated Wilson for poor performance, and he was notified of his right to pursue a grievance under a collective bargaining agreement. Wilson filed a complaint with the city and his union representative filed a grievance on his behalf, but Wilson dismissed his administrative law claims and instead chose to pursue remedies in superior court. The court reversed summary judgment for the employer, holding that Wilson's failure to exhaust remedies under his agreement did not preclude a wrongful discharge tort action and that WISHA did not provide a mandatory and exclusive remedy.

<sup>65.</sup> Id. at 1140.

<sup>66.</sup> Ellis v. City of Seattle, 13 P.3d 1065 (Wash. 2000). Ellis was employed as a sound technician at the Seattle Center. Ellis raised complaints to his superior about an order to bypass a fire alarm system and after he insisted on obtaining proper authorization before bypassing the fire alarm relay, Ellis was suspended by the human resources manager. Ellis then made a complaint to the Department of Labor and Industries about being asked to disable part of the fire alarm system, and shortly thereafter Ellis was discharged for gross insubordination. The Washington Supreme Court reversed summary judgment for the employer, holding that Ellis either met all four elements or that factual questions on the jeopardy and absence of justification elements should preclude summary judgment.

<sup>67.</sup> Id. at 1070.

<sup>68.</sup> Id. at 1071.

the City terminated him for making a WISHA complaint"<sup>69</sup> and allowed the plaintiff's claim for wrongful discharge to move forward.

Another case involving safety and protection of workers who report safety violations, although not based on WISHA, is Korslund v. Dyn-Corp Tri-Cities Services, Inc. 70 In Korslund, the Washington Supreme Court held that the plaintiffs had not satisfied the jeopardy element because the statute upon which the plaintiffs relied provided adequate means for promoting public policy. 71 The plaintiffs asserted that a clear public policy was established by the federal Energy Reorganization Act (ERA), which prohibits an employer from discharging or discriminating against an employee who notified his employer of a violation of the Atomic Energy Act of 1954.<sup>72</sup> The court recognized a clear public policy of encouraging and protecting employees who report violations without fear of retaliation.<sup>73</sup> However, the court identified the comprehensive administrative remedies contained within the statute as protecting the public policy. 74 The court distinguished the *Wilmot* case, stating that in Korslund, the question was "whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy."<sup>75</sup> The court held that the remedies under the ERA were adequate to protect public policy, and therefore, the plaintiff's claims for wrongful discharge failed as a matter of law.<sup>76</sup>

## D. Wrongful Discharge Under Federal and State Workplace Protection Laws Outside of Washington

Jurisdictions outside of Washington are split over whether OSHA or comparable state laws adequately protect public policy to preclude a common law tort claim.<sup>77</sup> After considering this question, courts in some states have determined that the remedial procedures that OSHA provides

<sup>69.</sup> Id.

<sup>70.</sup> Korslund v. DynCorp Tri-Cities Services, Inc., 125 P.3d 119 (Wash. 2005).

<sup>71.</sup> Id. at 126.

<sup>72.</sup> Id

<sup>73.</sup> Id.

<sup>74.</sup> Id. at 127.

<sup>75.</sup> Id.

<sup>76.</sup> Id

<sup>77.</sup> See George v. D.W. Zinser Co., 762 N.W.2d 865, 872 (Iowa 2009) ("Although state courts and circuit courts are split on the issue of whether OSHA and the state equivalents preclude common law claims for wrongful discharge, the majority recognize the statutory remedies are not exclusive."). See generally Monique C. Lillard, Exploring Paths to Recovery for OSHA Whistleblowers: Section 11(c) of the OSHAct and the Public Policy Tort, 6 EMPL. RTS. & EMPL. POL'Y J. 329 (2002); Occ. Safety & Health L. § 20:1 (2011 ed.); 75 A.L.R.4th 13 § 3 (Originally published in 1989).

are inadequate to protect the public policy of workplace safety. The reasons given for allowing a common law claim to move forward are, generally, that OSHA does not explicitly preclude a state common law tort claim; that the OSHA filing procedures are too limited to adequately protect public policy; that terminating an employee who has reported a safety complaint is an affront to safety concerns; and that the potential to deter other employees from reporting issues is too great to justify precluding a claim.<sup>78</sup>

In states that have determined that OSHA provides an adequate statutory remedy, courts have stated that the plaintiff's common law claim is precluded. Those courts generally indicate that the common law claim must fail because the statute specifies the civil remedy available to an employee who is alleging wrongful termination.<sup>79</sup>

Federal courts are also split over whether OSHA provides adequate remedies. <sup>80</sup> The public policy exception is a state common law tort and is not based on federal law, so any federal court analyzing the adequacy of statutory remedies will be evaluating the state common law and will thus split along the same state lines discussed above.

#### IV. WASHINGTON'S DUI LAWS

This Part discusses Washington's statutes criminalizing driving while under the influence of alcohol and the penalties and remedies available under the statutes.

<sup>78.</sup> See, e.g., Hentzel v. Singer Co., 188 Cal. Rptr. 159, 168 (Ct. App. 1982) ("We do not find . . an intent on the part of the Legislature to preclude an employee from suing on his own behalf."); Flenker v. Willamette Indus., Inc., 967 P.2d 295 (Kan. 1998) (finding an "employee's remedy for wrongful discharge in retaliation for filing complaint under OSHA . . . is inadequate"); Cerracchio v. Alden Leeds, Inc., 538 A.2d 1292, 1298–99 (N.J. App. Div. 1988) ("retaliation against the reporting employee as a punitive measure and as a deterrent to other observers of unsafe conditions, directly affronts our policy in favor of safety"); Kulch v. Structural Fibers, Inc., 677 N.E.2d 308, 323–24 (Ohio 1997) ("such retaliatory practices could deter employees from reporting what they believe to be legitimate health and safety concerns. . . .").

<sup>79.</sup> See, e.g., Burnham v. Karl & Gelb, P.C., 745 A.2d 178, 184 (Conn. 2000) ("because the plaintiff had a remedy under 29 U.S.C. § 660(c)(2) for the retaliatory discharge she had alleged, she was not 'otherwise without [a] remedy' and her common-law cause of action for wrongful discharge is precluded"); Benningfield v. Pettit Envtl., Inc., 183 S.W.3d 567, 571 (Ky. Ct. App. 2005) ("the statute provides both the unlawful act and specifies the civil remedy available to aggrieved parties"); Franklin v. Clarke, CIV. 1O–00382–CL, 2011 WL 4024638 (D. Or. Sept. 9, 2011) ("Because Plaintiff has an adequate remedy in his state statutory whistle-blower claims, his wrongful discharge claim is precluded.").

<sup>80.</sup> Compare Miles v. Martin Marietta Corp., 861 F. Supp. 73, 74 (D. Colo. 1994) ("Colorado law is clear that a separate public policy wrongful discharge claim is not available where the statute at issue provides a wrongful discharge remedy."), with Kohrt v. MidAmerican Energy Co., 364 F.3d 894, 901–02 (8th Cir. 2004) (holding that Iowa common law allows a wrongful discharge claim under OSHA remedial schemes).

In Washington, it is illegal for a person to drive or physically control a vehicle if the person has a blood alcohol content of 0.08 or higher or is under the influence of an intoxicating liquor or drug.<sup>81</sup> A violation of the statute is generally a gross misdemeanor.<sup>82</sup> Penalties for violators include mandatory imprisonment and a mandatory fine.<sup>83</sup> Any person convicted of violating the statute may also be required to apply for an ignition interlock device, which prevents the vehicle from starting when the driver's breath sample has an alcohol concentration of 0.025 or higher.<sup>84</sup>

In spite of the existing criminal penalties for driving while under the influence, drunk driving remains a problem. The Washington Traffic Safety Commission (WTSC) ranks impaired driving prevention as a top priority because impaired driving is a leading factor in traffic fatalities. The WTSC reports that between 2004 and 2008, there were 1,221 fatal crashes involving impaired driving, resulting in a total of 1,363 fatalities. In 2009 alone, Washington reported 492 total traffic fatalities, 42% of which involved a driver with blood alcohol content above 0.08.

The WTSC uses several mechanisms to enforce Washington's DUI laws, including expanded DUI patrols, public awareness campaigns, and law enforcement training. However, there are no statutory "whistle-blower" protections available for someone who reports impaired driving. Thus, if an employee is terminated for reporting impaired driving, that

<sup>81.</sup> Wash. Rev. Code §§ 46.61.502 (2013), 46.61.504 (2013).

<sup>82.</sup> WASH. REV. CODE § 46.61.502(5) (2013). Driving under the influence is a class C felony if (a) the person has four or more prior offenses within ten years; or (b) the person has previously been convicted of vehicular homicide while under the influence or vehicular assault while under the influence. WASH. REV. CODE § 46.61.502(6) (2013).

<sup>83.</sup> Penalties depend upon the blood alcohol level of the offender and whether this is his or her first violation of the statute. A first-time offender with alcohol concentration below 0.15 will be imprisoned for between 1 to 364 days and fined between \$350 and \$5,000. WASH. REV. CODE § 46.61.5055(1)(a) (2012). A first-time offender with alcohol concentration equal to or above 0.15 will be imprisoned for between 2 to 364 days and fined between \$500 and \$5,000. WASH. REV. CODE § 46.61.5055(1)(b) (2012). Prior offenders will have both increased minimum jail sentences as well as increased minimum fines. See WASH. REV. CODE § 46.61.5055(2)–(3) (2012).

<sup>84.</sup> Wash. Rev. Code § 46.61.5055(5) (2012).

<sup>85.</sup> Programs and Priorities: Impaired Driving, WASH. TRAFFIC SAFETY COMMISSION http://www.wtsc.wa.gov/programs-priorities/impaired-driving/ (last visited Apr. 3, 2013). The WTSC defines "impaired driving" as driving while under the influence of drugs, while impaired by alcohol, or with a blood alcohol concentration of 0.08 or above. *Id.* 

<sup>86.</sup> WASH. TRAFFIC SAFETY COMM'N, *Fatal Crashes Involving Impairment in Washington*, 2004 – 2008 (2009), available at http://www.wtsc.wa.gov/wp-content/uploads/downloads/2010/02/dui092.pdf.

<sup>87.</sup> Fatality Analysis Reporting System, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. http://www-fars.nhtsa.dot.gov/States/StatesAlcohol.aspx (last visited Apr. 3, 2013).

<sup>88.</sup> Programs and Priorities: Impaired Driving, supra note 85.

employee has no statutory remedy available under the DUI laws to protest his termination.

### V. APPLICATION OF THE COMMON LAW TORT IN CUDNEY V. ALSCO, INC.

This Part discusses the facts of the *Cudney* case and the reasoning of both the majority and dissent in analyzing the plaintiff's wrongful discharge claim.

### A. Facts and Procedural History

Matthew Cudney was hired by ALSCO in April of 2004 as service manager of its Spokane branch. During his employment with ALSCO, Cudney complained numerous times to his supervisor about the alcohol use of John Bartich, the general manager of the Spokane branch. On June 10, 2008, Cudney reported to his supervisor and the human resources manager that he believed Bartich to be intoxicated at work: Cudney stated that Bartich was weaving back and forth, had slurred speech and glazed eyes, and smelled of alcohol. Cudney then observed Bartich drive off in a company vehicle. Cudney then observed was terminated from his job.

Cudney filed an action in Spokane Superior Court claiming that he was terminated in retaliation for reporting Bartich's drinking and driving and that his discharge was a clear contravention of public policy. Such as two sources showing the public policy in Washington's DUI laws as two sources showing the public policy in Washington to be protected. Stack ALSCO removed to federal court and the U.S. District Court for the Eastern District of Washington certified two questions to the Washington State Supreme Court. The Eastern District asked the Washington Supreme Court to determine whether WISHA and Washington's DUI laws adequately promote Washington's public policies so as to preclude a separate claim for wrongful discharge.

\_

<sup>89.</sup> Cudney v. ALSCO, Inc., 259 P.3d 244, 245 (Wash. 2011).

<sup>90.</sup> Id.

<sup>91.</sup> *Id*.

<sup>92.</sup> Id.

<sup>93.</sup> *Id*.

<sup>94.</sup> Id. at 245-246.

<sup>95.</sup> Id. at 246.

<sup>96.</sup> Id. at 245.

<sup>97.</sup> Id.

The only issue presented for the court's consideration was the "jeopardy" element. The court had to determine "whether current laws and regulations provide an adequate means of promoting the public policies of ensuring workplace safety, protecting against retaliation for reporting safety violations, and protecting the public from the dangers of drinking and driving."

In addition to the briefs submitted by the parties to the case, the Department of Labor and Industries, the Washington Employment Lawyers Association (WELA), and the Washington State Association for Justice Foundation (WSAJ Foundation) each filed amicus curiae briefs. 100 All three amici argued that the court should hold that a common law cause of action for wrongful discharge was available under the WISHA statute. 101 While the Department's brief discussed only the first question (regarding WISHA), the WSAJ Foundation urged the court to answer no to both certified questions. 102

The Department of Labor and Industries' brief argued that the remedies provided by WISHA are inadequate to protect public policy. <sup>103</sup> As the agency responsible for administering and enforcing WISHA, the Department is very familiar with the rights and remedies available under the statute. When discussing the regulatory scheme, the Department asserted that there is no citation or penalty assessed by the Department if it determines that a violation has occurred. <sup>104</sup> Instead, the Department refers the matter to the Attorney General's Office to file an action in court. <sup>105</sup> The Department argued that the court had recognized a tort for wrongful discharge in *Wilmot* and that the court should not revisit the issue without

<sup>98.</sup> *Id.* at 246. The clarity element was undisputed because the parties stipulated that WISHA establishes a clear public policy of ensuring the safety of workers and protecting those who report workplace safety violations and that the DUI laws establish the clear public policy of protecting the public from drunk drivers. *Id.* at 247 n.1. The court was not asked to decide the causation and absence of justification elements as those are fact-specific inquiries. *Id.* 

<sup>99.</sup> Id. at 247.

<sup>100.</sup> Brief for Department of Labor & Industries as Amici Curiae Supporting Petitioner, Cudney v. ALSCO, Inc., 259 P.3d 244 (Wash. 2011) (No. 83124–6) [hereinafter L&I Brief]; Brief for Washington Employment Lawyers Ass'n as Amici Curiae Supporting Petitioner, Cudney v. ALSCO, Inc., 259 P.3d 244 (Wash. 2011) (No. 83124–6) [hereinafter WELA Brief]; Brief for Washington State Ass'n for Justice Foundation as Amici Curiae Supporting Petitioner, Cudney v. ALSCO, Inc., 259 P.3d 244 (Wash. 2011) (No. 83124–6) [hereinafter WSAJF Brief].

<sup>101.</sup> L&I Brief, *supra* note 100, at \*8–10; WELA Brief, *supra* note 100, at \*3–4; WSAJF Brief, *supra* note 100, at \*5–6.

<sup>102.</sup> WSAJF Brief, supra note 100, at \*17, \*25.

<sup>103.</sup> L&I Brief, *supra* note 100, at \*8.

<sup>104.</sup> Id. at \*3.

<sup>105.</sup> Id.

a change in the statute. 106 The Department also argued that the WISHA remedy was inadequate under either a *Wilmot* or *Korslund* analysis. 107

The WSAJ Foundation argued that the court should allow a claim to move forward under both WISHA and the DUI laws. They argued that when the employee's conduct directly relates to the public policy in question, the employee should not be required to show that his conduct was necessary for the enforcement of the public policy. Following this line of reasoning, they argued that Cudney's action in reporting his suspicions was directly related to the WISHA public policy, and therefore, the jeopardy element was satisfied. In the alternative, WSAJ also argued that if the plaintiff must show the inadequacy of other remedies, Cudney would still prevail because the remedies under WISHA are inadequate. Finally, the WSAJ argued that criminal prosecutions are not an adequate means of promoting the public policy embodied in the DUI laws and that therefore actions such as reporting suspected impaired drivers is necessary for the effective enforcement of DUI laws.

WELA also argued in favor of the plaintiff on both questions. Regarding the WISHA question, WELA argued that WISHA was not intended as the exclusive means of protection and that the administrative scheme is not an adequate means of vindicating public policy. WELA obtained data from the Department of Labor and Industries showing that 13.8% of cases received by the Department are rejected as untimely and argued that the thirty-day filing period did not provide an adequate alternative means. Finally, WELA reasoned that criminal statutes are seldom an adequate means for protecting public policy due to the lack of remedies for the employee who exposes a violation.

Ultimately, a narrow majority of the Washington Supreme Court answered that both WISHA and Washington's DUI laws adequately promote public policy, and therefore, a separate claim of action is precluded. 115

<sup>106.</sup> Id. at \*5.

<sup>107.</sup> Id. at \*8, \*10.

<sup>108.</sup> WSAJF Brief, supra note 100, at \*8.

<sup>109.</sup> Id. at \*17-18.

<sup>110.</sup> Id. at \*19-20.

<sup>111.</sup> Id. at \*20-21.

<sup>112.</sup> WELA Brief, supra note 100, at \*14-20.

<sup>113.</sup> Id. at \*19-20.

<sup>114.</sup> Id. at \*10.

<sup>115.</sup> Cudney v. ALSCO, Inc., 259 P.3d 244, 250 (Wash. 2011).

### B. The Washington Supreme Court's Holding

In Cudney, the majority held that WISHA and its accompanying regulations adequately protected the identified public policy. The court set out three reasons for its determination that "WISHA's retaliation statute provides extensive protections to employees who claim that they suffered retaliation for filing complaints related to workplace safety."116 First, the statute prohibits employers from discharging employees for exercising any WISHA rights. 117 Second, the statute provides a complaint filing and investigation procedure, which results in the director filing an action on the employee's behalf if he or she determines a violation has occurred. 118 Even if the director does not determine a violation has occurred, the employee may still bring a suit on his own behalf. 119 Regardless of who files the suit, the superior court is authorized to order all appropriate relief. 120 Finally, the court noted that the superior court is not limited to the relief specifically mentioned in the statute. 121

The court found Korslund to be controlling in its determination of the adequacy of WISHA's remedies in promoting the public policy. In Korslund, the court held that the Energy Reorganization Act of 1974 (ERA) provided comprehensive remedies that adequately promoted the public policy, precluding the plaintiff's wrongful discharge claim. 122 In comparing the ERA to WISHA, the *Cudney* court noted that both statutes provide for agency investigations and determinations, and both allow the plaintiff to bring their own claim if the agency does not take action. 123 The ERA sets out what remedies the secretary should take if it determines that a violation has occurred; in contrast, WISHA does not set out specific remedies, but does grant the superior court power to order all appropriate relief. 124 The court stated that by not determining specific remedies, "WISHA is actually more comprehensive than the ERA and is more than adequate." The court found Cudney's argument that the

<sup>116.</sup> Id. at 247.

<sup>117.</sup> Id.

<sup>118.</sup> Id.

<sup>119.</sup> Id.

<sup>120.</sup> Id.

<sup>121.</sup> Id.

<sup>122.</sup> Id. at 248.

<sup>123.</sup> Id.

<sup>124.</sup> Id.

<sup>125.</sup> Id.

thirty-day filing deadline contained in WISHA makes the statute inadequate to protect public policy meritless. 126

Although not overruling any prior cases, the court did distinguish *Cudney* from both *Wilmot* and *Ellis* and disapproved any implication in either case that WISHA does not adequately promote public policy. The court noted that *Wilmot* was not controlling here, even though a statute similar to WISHA was considered, because the focus in *Wilmot* was on whether the statute was the mandatory and exclusive remedy, not whether the statute was adequate to promote the public policy. Moreover, the court noted that *Wilmot* preceded the articulation of the four-part test in *Gardner* by five years and that in cases since *Gardner*, the court had said "the plaintiff must show that other means of promoting the public policy are inadequate." The court therefore determined that *Wilmot* was not on point in determining the outcome in this case. The court found that *Ellis* was not determinative because the court in *Ellis* did not address whether WISHA adequately promoted public policy in answering the questions presented by the parties in that case.

Based upon the *Korslund* analysis, and distinguishing *Wilmot* and *Ellis*, the court held that WISHA's statutory remedies are adequate in promoting public policy; thus, the plaintiff was unable to satisfy the jeopardy element required for a claim of wrongful discharge in violation of public policy. <sup>132</sup>

The court also held that Cudney was unable to show that current DUI laws were inadequate to protect public policy. In order to prevail, the court stated that Cudney had to show that reporting suspected drunk driving to his manager was the "only available adequate means" to promote the public policy. <sup>133</sup> In light of the criminal laws, enforcement mechanism, and penalties, the court held that Cudney's conduct was a "roundabout remedy that is highly unlikely to protect the public from the *immediate* problem of a drunk driver on its roads." <sup>134</sup> The court finally

<sup>126.</sup> *Id.* at 248–49. The court reasoned that an employee has immediate notice of a discharge and would know that he had recently raised a safety concern, so requiring the employee to file a complaint within thirty days of the discharge does not make the statutory remedy inadequate. *Id.* The court also pointed out the potential to toll the thirty-day period under certain circumstances as another factor in its determination. *Id.* 

<sup>127.</sup> Id. at 249-50.

<sup>128.</sup> Id. at 249.

<sup>129.</sup> Id.

<sup>130.</sup> *Id*.

<sup>131.</sup> *Id*.

<sup>132.</sup> Id. at 250.

<sup>133.</sup> Id.

<sup>134.</sup> Id.

stated that the "other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy."<sup>135</sup> The court therefore held that "Cudney has not shown that the current DUI laws are an inadequate means of promoting the public policy, so his claim fails."<sup>136</sup>

### C. The Dissent's Reasoning

Justice Stephens, joined by Justice Charles Johnson, Justice Chambers and Justice Pro Tem Sanders, dissented. The dissent would have answered no to both certified questions and allowed Cudney's claim to move forward under both WISHA and the DUI laws. 137 In analyzing WISHA, Justice Stephens argued that the court should not change its interpretation of a statute that has remained unchanged since its enactment in 1973. 138 The dissent argued that Wilmot was instructive in deciding this case and questioned both of the majority's assertions that Wilmot and Korslund contemplated different issues and that Wilmot was outdated. 139 Although Wilmot was decided before the court established the Gardner four-part test, the Gardner court stated that the "adoption of this test does not change the existing common law in this state." <sup>140</sup> Moreover, the dissent noted that had the court felt the reasoning in Wilmot was unsound, it could have rejected the Wilmot analysis in deciding Ellis, which was decided several years after the Gardner decision. 141 The Ellis court, however, solidified the *Wilmot* reasoning by citing *Wilson* with approval, which recognized WISHA as the basis for a public policy tort claim. 142

The dissent noted in dicta that, even if the question had not been decided in *Wilmot*, the court should still allow a claim to move forward because the remedies under WISHA are inadequate to promote the public

<sup>135.</sup> Id. (quoting Hubbard v. Spokane County, 50 P.3d 602, 611 (Wash. 2002)).

<sup>136.</sup> Id. at 250-51.

<sup>137.</sup> Id. at 256 (Stephens, J., dissenting).

<sup>138.</sup> Id. at 255.

<sup>139.</sup> Id. at 253.

<sup>140.</sup> Id. at 251 (quoting Gardner v. Loomis Armored Inc., 913 P.2d 377, 382 (Wash. 1996)).

<sup>141.</sup> *Id.* at 253–54. The dissent points out that the *Ellis* court "expressly addressed the jeopardy prong and held that the Court of Appeals erred by concluding as a matter of law that Ellis's conduct was not necessary to enforce the public policy at issue." *Id.* at 254. Furthermore, the dissent notes that the *Ellis* analysis "echoed Professor Perritt's view that 'public policy tort cases involving employee reports of employer misconduct to outside agencies present relatively strong arguments on the jeopardy element, because of the likelihood that agencies charged with public policy enforcement depend on such reports." *Id.* (quoting PERRITT, *supra* note 17, § 3.34). Finally, the dissent argued that the *Ellis* decision solidified the existence of a public policy claim under WISHA, regardless of statutory remedies, by citing *Wilson* with approval. *Id.* 

<sup>142.</sup> Id. at 254.

policy at issue.<sup>143</sup> The dissent's arguments are supported by several limitations on the WISHA remedies. First, assuming a claim has merit, the Department will bring the action in court, but the Department does not represent the employee.<sup>144</sup> Second, while the statute authorizes the court to grant all appropriate relief, the Department "does not plead compensatory damages, including emotional distress damages, or front pay."<sup>145</sup> Finally, the dissent identified the thirty-day filing period as "the most striking feature of the WISHA administrative scheme that renders the statutory remedy inadequate."<sup>146</sup>

While the majority characterized the thirty-day filing period as enough time for an employee to bring a claim, the dissent pointed to other court decisions holding that shortened filing periods are substantively unconscionable. The dissent argued that an employee may not know the true reason for the termination right away, especially if the employee is not given any reason at all. While WISHA regulations allow for tolling of the thirty-day period if the employer concealed or misled the employee, it does not allow for tolling if the employer provides no reason for the termination. The dissent found it "unrealistic . . . to expect that within 30 days of getting a pink slip an employee will be able to find and hire a lawyer, investigate the real reason for his or her termination, and file suit."

Although the majority relied on *Korslund* in analyzing the adequacy of WISHA remedies, the dissent argued that the remedies provided by the ERA are quite different than WISHA and that the majority's reliance on *Korslund* was misplaced.<sup>151</sup> The ERA establishes an administrative process for adjudicating complaints and provides comprehensive remedies including reinstatement, back pay, compensatory damages, and attorney and expert witness fees.<sup>152</sup> In contrast, WISHA does not contain any administrative process for reviewing and adjudicating complaints,<sup>153</sup> and does not provide the same remedies for the plaintiff.

```
143. Id.
```

<sup>144.</sup> *Id*.

<sup>145.</sup> Id. at 254 (citing L&I Brief, supra note 100, at \*10–12).

<sup>146.</sup> Id. at 254.

<sup>147.</sup> *Id*.

<sup>148.</sup> Id. at 255.

<sup>149.</sup> Id. Under the at-will doctrine, an employer is not required to give a reason for termination.

<sup>150.</sup> Id. at 255.

<sup>151.</sup> Id. at 254.

<sup>152.</sup> Korslund v. DynCorp Tri-Cities Services, Inc., 125 P.3d 119, 127 (Wash. 2005).

<sup>153.</sup> L&I Brief, supra note 100, at \*19.

The dissent concluded that the remedies provided by WISHA are inadequate and that this should be considered evidence of the legislature's intent for WISHA to supplement the existing private cause of action. <sup>154</sup> The dissent argued that the court should follow *Wilmot* and *Ellis* and allow the tort claim to move forward.

The dissent also argued that Cudney's claim under the DUI laws should be allowed to move forward and that the existence of a criminal enforcement mechanism does not necessarily preclude the claim. For the dissent, the key question in determining whether public policy would be jeopardized was if an employee could be fired for reporting violations. The dissent argued that "[r]elying solely upon the criminal law mechanism for enforcement of the DUI laws thus leaves the enforcement of the public policy uncertain" and that the certified question should be answered no, allowing Cudney's claim to move forward.

### D. The Motion for Reconsideration

Following the court's decision, the plaintiff filed a Motion for Reconsideration on September 21, 2011. The motion was supported by Professor Henry Perritt, WELA, and the WSAJ Foundation. The defendant filed an answer on January 12, 2012, and the court denied the motion on March 5, 2012.

# VI. FLAWS IN THE MAJORITY'S REASONING AND POTENTIAL FUTURE IMPACT OF THE COURT'S DECISION

This Part contends that the majority opinion erred in determining that WISHA adequately protected the public policy of providing safe workplaces and protecting workers who report safety concerns and that the majority opinion incorrectly determined that Washington's DUI laws precluded a cause of action for wrongful discharge. This Part also discusses the impact the *Cudney* decision will have on future wrongful discharge.

<sup>154.</sup> Cudney, 259 P.3d at 255 (Stephens, J., dissenting).

<sup>155.</sup> Id. at 256.

<sup>156.</sup> Id.

<sup>157.</sup> Id.

<sup>158.</sup> Motion for Reconsideration, Cudney v. ALSCO, Inc., 259 P.3d 244 (Wash. 2011) (No. 83124-6).

<sup>159.</sup> Amicus Curiae Memorandum by Henry H. Perritt, Jr. and the Washington Employment Lawyers Ass'n, Cudney v. ALSCO, Inc., 259 P.3d 244 (Wash. 2011) (No. 83124–6) [hereinafter WELA ACM]; Washington State Ass'n for Justice Foundation Amicus Curiae Memorandum on Reconsideration, Cudney v. ALSCO, Inc., 259 P.3d 244 (Wash. 2011) (No. 83124–6) [hereinafter WSAJF ACM]. Professor Perritt, who articulated the four-part test adopted by the court in *Gardner*, is an expert on this topic and often quoted by the court. He co-authored the WELA ACM.

charge cases under WISHA and other statutes. Finally, this Part argues that the Washington legislature should consider enacting remedial legislation and that the Washington Supreme Court should consider redefining the narrow boundaries of the common law exception in a future case.

# A. The Majority Erred in Holding that WISHA Adequately Protects Public Policy

The majority's holding that WISHA adequately protected public policy is incorrect for three reasons. First, the thirty-day filing period provided by WISHA is inadequate and does not account for the realities that a terminated employee faces following a discharge. Second, the administrative remedies provided by WISHA are not sufficiently robust and are not comparable to the statutory scheme the court found to be adequate in *Korslund*. Third, even if an employee does file a claim within the thirty-day period and the Department does file a suit on the employee's behalf, the potential remedies for that cause of action are not equal to what an employee could recover under a public policy tort claim.

### 1. The Thirty-Day Filing Period: An Unreasonable Remedy

As opposed to a public policy tort claim, which has a three-year statute of limitations, an employee who is terminated in violation of WISHA is allowed only thirty days to file a claim with the Department of Labor and Industries. Although the majority found thirty days to be plenty of time for a terminated worker to file a complaint, the opinion overlooked the practical realities that a terminated employee is faced with following a job loss. The immediate concerns for most terminated workers will revolve around finding a new job, applying for unemployment, arranging for health insurance, managing finances, and dealing with the emotional strain that accompanies a termination. These activities may extend well beyond the first thirty days of termination. Even an employee who immediately decides to pursue legal action will find it difficult, within thirty days, to "find and hire a lawyer, investigate the real reason for his or her termination, and file suit." 160

In addition to these practical issues, a thirty-day filing period should be considered legally inadequate as well. As noted by the dissent in *Cudney*, the Washington Supreme Court held a claim-filing period of 180 days to be substantively unconscionable in the context of employer–employee arbitration contracts. <sup>161</sup> In that context, the court held that by

<sup>160.</sup> Cudney, 259 P.3d at 255 (Stephens, J., dissenting).

<sup>161.</sup> Id. at 254.

limiting the period in which an employee can bring a claim, the employer gains an unfair advantage and the employee may be forced to forgo the opportunity to file a claim. While the arbitration contract context involves a contract between the employer and employee, it seems ridiculous to suggest that it is unconscionable to limit an employee to a 180-day filing period, but that a thirty-day limitation for claims under WISHA is adequate.

Finally, the fact that the thirty-day filing period is unreasonable can be inferred from the number of potential claims that are rejected by the Department of Labor and Industries because of the thirty-day filing period. Between 2004 and 2009, the Department rejected 112 out of 807 claims because they were untimely. This figure does not account for any additional cases that "were never filed with L&I because the complainant learned of the 30 day limit after the time had expired."

#### 2. WISHA Does Not Provide a Robust Statutory Scheme Like the ERA

The majority also erred in determining that WISHA provided robust statutory remedies that were as comprehensive as the remedies provided under the ERA. <sup>165</sup> The administrative schemes created by the two statutes are remarkably different, and the majority ignored key components of the ERA that enhance that statute's ability to serve as a comprehensive remedy. Both statutes prohibit discrimination against an employee who reports violations and allow the employee to file a complaint if he believes he has been subject to discrimination. <sup>166</sup> But one of the most striking differences is that under WISHA, if the director determines a violation has occurred, he must bring a cause of action against the employer in court. <sup>167</sup> In contrast, if the Secretary of Labor (the Secretary) determines a violation of the ERA has occurred, the Secretary has the power to order the employer to reinstate the employee, provide compensatory damages, and assess attorney's fees against the employer. <sup>168</sup> Thus

<sup>162.</sup> Adler v. Fred Lind Manor, 103 P.3d 773, 787 (Wash. 2004).

<sup>163.</sup> WELA Brief, supra note 100, at \*16.

<sup>164.</sup> Id. at \*19.

<sup>165.</sup> The majority actually stated that WISHA remedies were more comprehensive than the remedies under the ERA because WISHA does not set out specific remedies available. *Cudney*, 259 P.3d at 248.

<sup>166. 42</sup> U.S.C. § 5851 (2010); WASH. REV. CODE § 49.17.160 (2010).

<sup>167.</sup> WASH. REV. CODE § 49.17.160(2) (2010). However, in practice L&I will refer the matter to the Attorney General's Office. L&I Brief, *supra* note 100, at \*3.

<sup>168. 42</sup> U.S.C. § 5851(b)(2)(B) (2010). The statute provides that reinstatement requires compensation (including back pay), terms, conditions, and privileges of his employment. *Id*.

under WISHA, all that is granted is a cause of action, whereas under ERA, the Secretary can directly authorize a remedy.

The ERA and WISHA also differ in the filing period allowed by the statute. Under the ERA, an employee has 180 days following a discharge to file a complaint with the Secretary of Labor. <sup>169</sup> The Secretary has thirty days to complete an investigation into the complaint and must either issue an order providing relief or dismiss the complaint within ninety days of receipt. <sup>170</sup> If the Secretary has not issued a final order within one year after the filing of the complaint, the employee may bring an action in district court for de novo review. <sup>171</sup> As discussed above, WISHA only allows an employee thirty days to file a complaint with the Department of Labor and Industries. <sup>172</sup> Thus, the WISHA filing period is significantly shorter than the period available under the ERA.

# 3. The Department of Labor and Industries Does Not Claim All Potential Remedies

The majority's determination that WISHA is an adequate remedy is also erroneous because the administrative agency tasked with enforcing WISHA does not provide an employee filer with the full complement of remedies available under the common law tort claim. In a suit instituted by the Department of Labor and Industries, the Department only seeks the remedies explicitly provided for in the statute, such as back wages and reinstatement. 173 The Department does not plead other damages that an employee may recover in a tort claim, such as compensatory damages or front pay. <sup>174</sup> The majority relied on the fact that the statute authorizes the court to grant "all appropriate relief" in concluding that the remedies are adequate. 175 But if the agency bringing the claim does not plead those types of remedies, <sup>176</sup> and is not truly representing the plaintiff, <sup>177</sup> then the court cannot reasonably expect that a full array of remedies will be provided to a wrongfully discharged employee. Maintaining all potential remedies would effectuate public policy by encouraging and protecting employees who report wrongful conduct. If the employee does not have

<sup>169. 42</sup> U.S.C. § 5851(b)(1) (2010).

<sup>170. 42</sup> U.S.C. § 5851(b)(2)(A) (2010).

<sup>171. 42</sup> U.S.C. § 5851(b)(4) (2010).

<sup>172.</sup> Wash. Rev. Code § 49.17.160(2) (2010).

<sup>173.</sup> L&I Brief, supra note 100, at \*11.

<sup>174.</sup> Id.

<sup>175.</sup> Cudney v. ALSCO, Inc., 259 P.3d 244, 248 (Wash. 2011).

<sup>176.</sup> L&I Brief, *supra* note 100, at \*11.

<sup>177.</sup> *Id.* The L&I Brief states that the Department will bring suit to fulfill its statutory duties but that the "Department does not represent the complainant." *Id.* 

access to all remedies available to him, he is being penalized for engaging in conduct that public policy and statute asks him to do.

# B. DUI Laws Are Inadequate to Protect Public Policy and Contain No Remedy for Employees

As discussed in Part IV of this Note, impaired driving is a serious problem in Washington State, and impaired drivers were involved in the majority of fatal car accidents. Even though drivers caught while under the influence of alcohol or drugs face serious criminal penalties, the criminal statutes have not fully eliminated the problem. Because current statutes and enforcement mechanisms have not solved the problem of impaired driving, the majority erroneously concluded that Washington's DUI laws are adequate to protect public policy.

In addition to the general inadequacy of the criminal statutes, the court also erred in determining that Cudney's claim was barred regardless of the lack of a remedy for the employee. The majority concluded that it is "the public policy that must be promoted, not Cudney's individual interests. 'The other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy.'" 180

However, this conclusion undermines the purpose of the public policy exception. The Washington State Supreme Court adopted the public policy exception because it properly balanced the interests of employees and employers. <sup>181</sup> In his treatise, Professor Perritt argued that the exception required courts to balance employee, employer, and societal interests. <sup>182</sup> The majority opinion in *Cudney* erred in ignoring the balancing of these interests.

The four-part test ensures this balancing by only allowing an employee to prevail when he meets all four elements (clarity, jeopardy, causation, and absence of justification). The interests of society in protecting public policy are represented because an employee must show a clear mandate of public policy and that his conduct directly relates or was necessary to protect that public policy. The interest of employers in freely running their businesses is represented by requiring that the discharge be

<sup>178.</sup> See supra notes 85-88 and accompanying text.

<sup>179.</sup> See supra notes 81-88 and accompanying text.

<sup>180.</sup> Cudney, 259 P.3d at 249 (quoting Hubbard v. Spokane Cnty., 50 P.3d 602, 611 (Wash. 2002)).

<sup>181.</sup> See supra note 20 and accompanying text.

<sup>182.</sup> See supra note 17 and accompanying text.

<sup>183.</sup> See supra note 26 and accompanying text.

caused by the conduct and by requiring that the employer not have a legitimate justification. In *Cudney*, the majority focused so narrowly on the certified question of the adequacy of the two Washington statutes that it failed to consider the interests of the employer or employee. Furthermore, the court did not consider the interests of society beyond the rote enforcement of the statutes. This failure led to the erroneous conclusion that Cudney's claims were barred due to alternative means of protecting public policy.

### C. Impact on Future Wrongful Discharge Claims

One of the immediate consequences of the court's decision in *Cudney* is that it precludes any future plaintiffs from raising a claim of wrongful discharge when the public policy violated arises from WISHA. In many cases, a terminated employee will not file a complaint with the Department of Labor and Industries within the thirty-day filing requirement. <sup>184</sup> For those employees, a wrongful discharge claim will necessarily fail unless the plaintiff can provide an alternative public policy consideration that is not supported by statutory remedies like those contained in WISHA. The practical effect of this decision will be to keep plaintiffs with meritorious cases out of court and to potentially silence future whistleblowers that would have otherwise reported wrongful conduct.

Another potential impact on the common law tort may arise if the court utilizes the *Korslund* and *Cudney* analysis when determining whether statutes with similar remedial language sufficiently protect public policy. As discussed above, the workers compensation statute at issue in *Wilmot* contains an anti-discrimination statute that mirrors WISHA. <sup>185</sup> Based on the majority's analysis in *Cudney*, it is quite possible that a reviewing court will determine that the workers compensation statute adequately protects public policy so as to preclude a common law tort claim by a discharged employee. This is especially true in light of the fact that the workers compensation statute has an even longer filing period—ninety days instead of the thirty-day period provided by WISHA. <sup>186</sup> The workers compensation statute is the only statute that shares the same remedial language as WISHA.

The future impact of the court's analysis regarding the DUI laws creates perhaps even greater concerns. The court's opinion in *Cudney* "appears to rule that criminal statutes are an adequate alternative means

<sup>184.</sup> WELA Brief, supra note 100, at \*19.

<sup>185.</sup> See supra note 57.

<sup>186.</sup> WASH. REV. CODE § 51.48.025 (1985).

of vindicating public policy even where the reporting employee can be retaliated against by the employer with impunity. . . . Washington State will be the only state . . . which applies the common law claim in that way." 187 By determining that a cause of action was precluded because the DUI laws adequately protected public policy, the court has potentially foreclosed a claim for any employee who reports illegal conduct to his employer and is subsequently discharged. All criminal activity has a statute that will proscribe the conduct and provide penalties for offenders. Crimes also have an enforcement mechanism, such as the police and the justice system. Under the *Cudney* analysis, an employer who discharges an employee for reporting illegal conduct can point to the criminal statute and to the police force, and argue that the employer is free from liability. This cannot be the outcome the court intended. Without a private cause of action, there is no remedy for a wrongfully discharged employee, and therefore, there is a disincentive for an employee to report illegal conduct.<sup>188</sup>

### D. Two Suggestions for Reopening the Door

1. The Washington Legislature Should Adopt Remedial Legislation to Provide for a Private Cause of Action Outside of the Filing Period

With the *Cudney* decision, the court has foreclosed any wrongful discharge claims premised off workplace safety violations under WISHA or reporting criminal activity under Washington's DUI laws. The court's analysis has also potentially precluded claims under other workplace or criminal statutes. This decision has removed an important tool in ensuring that public policy is protected. To ensure that employers are not allowed to terminate employees in violation of public policy, the Washington State Legislature should adopt remedial legislation that creates a civil cause of action for a termination in violation of a clear mandate of public policy.

#### a. Proposed Senate Bill 6072

In the 2012 regular session, the Washington State Senate heard proposed Senate Bill 6072 (SB 6072). SB 6072 would prohibit em-

<sup>187.</sup> WELA ACM, supra note 159, at 9.

<sup>188.</sup> Without common law protection, employees will be deterred from exposing or objecting to criminal violations, which is the very type of protected conduct the common law cause of action was designed to encourage. *Id.* at 8.

<sup>189.</sup> There was a public hearing on SB 6072 on November 29, 2011, in the Senate Committee on Judiciary, and the bill was first read on January 11, 2012, and referred to the Committee on Judiciary.

ployers from taking "materially adverse action against an employee or independent contractor where retaliation is a substantial factor in the employer's decision to take action." If enacted, the new statute would provide a civil cause of action for any employee or independent contractor who has been retaliated against for conduct "that the employee or independent contract reasonably believes promotes a clear mandate of any public policy." The new cause of action is independent of a common law action and is available regardless of the "existence of any other . . . statutory or administrative means of protecting public policy," and provides for a three year statute of limitations. 192 An employee bringing a cause of action can "recover actual damages . . . together with . . . reasonable attorneys' fees and any other appropriate remedy authorized by the Washington law against discrimination." While the proposed legislation would certainly ameliorate any effects of the court's decision in *Cudney*, the scope of the bill creates broader employee protections than those provided under the common law tort.

SB 6072 is not simply a codification of the pre-*Cudney* common law tort of wrongful discharge. Some elements are familiar, such as the requirement of a "clear mandate of any public policy." Yet SB 6072 extends protections farther than the common law tort, covering both employees and independent contractors for a cause of action after any materially adverse action by the employer, <sup>195</sup> not just a discharge. Employee advocates would argue that this broadening is appropriate to ensure that public policy and employee interests are protected. But the expansion neglects to account for the interests of the employer, or the societal interests in allowing the free movement of labor and the unfettered management of a business. The court has recognized the need to balance interests of the employer, employee, and society, and the Washington State Legislature should do the same in considering remedial legislation.

### b. Proposal for Narrower Legislation

To ensure the interests of all parties are properly balanced, the legislature should enact narrow remedial legislation that would create a civil

ciary. Committee Meeting Documents, WASH. STATE LEGISLATURE http://apps.leg.wa.gov/billinfo/summary.aspx?bill=6072&year=2011 (last visited Mar. 30, 2013). Full text of the bill is available at http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/6072.pdf.

<sup>190.</sup> S.B. 6072, § 2, 62d Leg., Reg. Sess. (Wash. 2012).

<sup>191.</sup> Id.

<sup>192.</sup> Id.

<sup>193.</sup> *Id*.

<sup>194.</sup> Id.

<sup>195.</sup> Id.

cause of action for any employee who has been constructively or actually discharged in violation of a clear mandate of public policy. The new cause of action should adopt many of the constraints of the common law tort of wrongful discharge. The burden of proof would be on the employee to prove that a clear public policy exists, that the employee's conduct was either directly related to the public policy or was necessary for effective enforcement of the public policy, and that there is a causal relationship between the employee's conduct and the termination. Several aspects of SB 6072 could also be incorporated into a narrow remedial statute. The cause of action should be available regardless of other statutory or administrative remedies available to the employee and a three-year statute of limitations should apply. In addition, the employee should be able to recover actual damages, attorney's fees, and any other appropriate remedy the court shall deem necessary, such as reinstatement or injunctions against future action.

This narrow remedial legislative scheme will encompass many of the important employee protections that were once available to Washington employees under a cause of action for wrongful discharge in violation of public policy. By the enactment of this statute, an employer will not be allowed to discharge an employee with impunity when that discharge violates a clear mandate of public policy. Thus society's competing interests in the promotion of public policy and the free flow of labor are balanced with the employer's desire to run its business free of unnecessary judicial interference and with the employee's interest in employment.

While this legislation is narrow in the sense that it limits recovery to only an actual or constructive discharge, it is nevertheless broader than protections offered in some other states. For instance, some states prohibit an employer from discharging or retaliating only against an employee who reports a violation of law. <sup>196</sup> New Jersey's Conscientious Employee Protection Act (CEPA) falls on the other side of the spectrum and provides a very large amount of protection for employees. CEPA prohibits any retaliatory action against an employee who reports or refuses to par-

<sup>196.</sup> See, e.g., CONN. GEN. STAT. ANN. § 31–51m(b) (prohibiting discharge or discipline against any employee who reports a violation of any state or federal law or regulation to a public body); N.D. CENT. CODE ANN. § 34–01–20(1)(a) (prohibiting discharge or discipline against an employee who reports a violation of law to the employer, government body, or law enforcement official); see also Claudia G. Catalano, Annotation, What Constitutes Activity of Private-Sector Employee Protected Under State Whistleblower Protection Statute Covering Employee's "Report," "Disclosure," "Notification," or the Like of Wrongdoing—Nature of Activity Reported, 36 A.L.R.6th 203 (Originally published in 2008) (discussing the scope of activity covered by state whistleblower protection statutes).

ticipate in activity that is a violation of law, fraudulent or criminal activity, or is "incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment." <sup>197</sup>

The Washington legislature should narrowly tailor remedial legislation to maintain the balance of power between employers and employees in Washington State. A broad worker protection statute is unnecessary. In order to ensure that employers are free to run their businesses as they see fit, but that employees are protected from discharge in contravention of a clear mandate of public policy, the legislature should enact narrow remedial legislation creating a private cause of action.

## 2. Washington Supreme Court Should Reverse the *Cudney* Decision in a Future Wrongful Discharge Case

For the reasons discussed above, the Washington Supreme Court erred in holding that WISHA and Washington's DUI laws adequately promote public policy so as to foreclose a common law cause of action. The Cudney decision created uncertainty regarding the new scope of the common law public policy exception. The court did not eliminate the exception as a cause of action and continued to utilize the four-part Perritt framework in its analysis. However, by determining that both the WISHA administrative scheme and the DUI enforcement mechanisms adequately protected their respective public policies, it is still unclear when the court will apply the exception. While unlikely, the ideal outcome would be for the court to reverse Cudney upon its next consideration of the public policy exception. 198 Barring a reversal, the court should provide clear guidance for when a cause of action exists under the narrow confines of the Cudney decision.

### 3. Counterarguments and a Response

Supporters of the *Cudney* decision may argue that the court was correct in its holding because the public policy exception is narrow, and the court was right to limit its reach. Supporters would likely make two main arguments. First, remedial legislation is unnecessary because employees are already protected by both statutory remedies and common law exceptions. Second, the court should let the *Cudney* decision stand because it properly narrowed the public policy exception to only those

<sup>197.</sup> N.J. STAT. ANN. § 34:19-3 (2006).

<sup>198.</sup> Although the court does not easily reverse prior decisions, one fact does make this a viable (though not necessarily probable) suggestion. The case was decided by a very narrow split, and one of the justices who joined the majority, Justice Alexander, retired from the court. There is no way to know at this time how his departure will affect the balance of the court on future cases.

situations where other adequate means of protecting the public policy do not exist. Each of these arguments is addressed below.

## a. Necessity of Remedial Legislation

Many employers and proponents of the *Cudney* decision may argue that there is no need for the Washington State Legislature to entertain the proposal for remedial legislation. They would argue that employees are already protected in many ways by statute, such as the anti-discrimination statute in WISHA. The argument maintains that Cudney could have filed a timely complaint with the Department of Labor and Industries, had his complaint investigated, and then filed suit if the Department chose not to pursue action. Proponents would argue that providing Cudney with another avenue for remedy is unnecessary when a statutory remedy already exists.

What this argument fails to account for is that when a statutory remedy or administrative scheme does not fully protect the employee, as it did not here, the public policy is threatened regardless of what statutory remedies the employee may have available. In this situation, the interests of society in protecting public policy will weigh heavily in favor of the employee. With narrowly tailored remedial legislation, an employee will be protected from an employer improperly using its power to thwart public policy, and the interests of the employee and society will be protected.

### b. Narrowness of the Exception

A second argument that proponents may raise is that the public policy tort is a very narrow exception to the doctrine of employment at-will. They would argue that the court's decision in *Cudney* was correct because it properly narrowed the scope of the exception to only those cases where other adequate means of protecting public policy are not available. The public policy tort requires the court to balance the interests of employees, employers, and society. Proponents of the *Cudney* decision may argue that the interest of society in freedom of contract will only be outweighed by the interest to protect public policy when that policy is threatened. Thus, where other adequate means to protect the public policy exist, there is no need for societal concern.

But public policy may still be threatened, even if other means are available for protection. If an employee can make a complaint within thirty days, and the court finds that to be an adequate remedy, society

<sup>199.</sup> See supra note 17.

may still have an interest in the public policy of protecting whistleblowers. If an employer is allowed to terminate a whistleblower, escaping liability only because the employee did not file a complaint within thirty days, then it is highly probable that this type of employee conduct will be discouraged. If employees are not protected in reporting inappropriate activity, then those reports are likely to stop. Regardless of what other means may exist to protect public policy, deterring an employee from reporting such activity is contrary to public policy, and thus societal interests will weigh in favor of protecting the employee's interests.

#### VII. CONCLUSION

Since Washington's 1984 adoption of the common law tort of wrongful discharge in violation of public policy, courts have determined that it is a narrow exception to the doctrine of employment at-will. In *Cudney*, the court narrowed the exception too far. By foreclosing a wrongful discharge claim in workplace safety cases, the court has constrained the potential remedies available to an employee to the narrow remedies provided by the WISHA anti-discrimination statute. The requirement that an employee file a complaint within thirty days of termination, the absence of a robust administrative scheme, and the lack of full remedies available renders these statutory remedies inadequate to protect public policy. Furthermore, the court's determination that a criminal statute also forecloses a common law claim, despite a complete lack of remedy for an employee, creates a strong disincentive for an employee to report illegal conduct and undermines the foundation of the public policy exception.

The narrow public policy exception to at-will employment is intended to prevent employers from discharging an employee in contravention of a clear public policy. The court's decision in *Cudney* provided the employer with impunity to do just that. In order to rectify this deviation from past precedent and from the purpose of the tort, the Washington legislature should enact narrow remedial legislation providing an employee with a private cause of action. Furthermore, the Washington Supreme Court should consider reframing the limits of the public policy exception in a future case. Without action from either the legislature or the court, or both, many wrongfully discharged employees will find that the door to the public policy exception has been firmly closed by the court.