The Firehouse Lawyer

Volume 13, Number 10

October 2015

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Trilogy of Errors? A Major Change to Wrongful Discharge Claims

In September 2015, the Washington Supreme Court (Court) fundamentally changed the doctrine of wrongful discharge in violation of public policy. Three Court opinions, which we will call the "*Rose* Trilogy", accomplished this change. The Court decided all three of these cases at the same time, which signifies their importance.[1] We will discuss each in turn here. But first, we must set out the general rules for these claims.

A claim for wrongful discharge in violation of public policy (WDVP) has been recognized in Washington for over 30 years, and was first created by our Court, as an exception to the employment-at-will doctrine. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, (1984).The doctrine has been expanded to also apply to employees that are terminable for good cause. *Smith v. Bates Technical College*, 139 Wn.2d 793 (2000). To succeed in a claim for WDVP, a plaintiff must demonstrate the following, if the conduct that caused their termination does not fall into a specific category (*See Becker*, below):

(1) The existence of a "clear public policy";

(2) "discouraging the conduct in which [the employee] engaged would jeopardize the public policy" (we will call this the "jeopardy" element);

[1] These cases are *Rose v. Anderson Hay and Grain Company*, No. 90975-0; *Rickman v. Premera Blue Cross*, NO. 91040-5; and *Becker v. Community Health Systems*, No. 90946-6 (2015).

(3) the "public-policy-linked conduct caused the dismissal"; and

(4) the employer is not "able to offer an overriding justification for the dismissal." *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 942 (1996). The *Rose* Trilogy strictly addressed the "jeopardy" element.

In the past, a plaintiff, to establish the jeopardy element, had to demonstrate that there was no adequate alternative statutory remedy to further the particular policy in question (such as a safety statute like RCW 49.17, WISHA, that provides employees who report safety violations with a remedy if they are retaliated against). *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524 (2011) (plaintiff in *Cudney* lost a WDVP claim because WISHA provided such remedies). Washington courts have called this a "strict adequacy" requirement. *Id.* Three different factual scenarios caused the *Rose* Court to reconsider the validity of "strict adequacy", and abandon the concept altogether. Because of the *Rose* Trilogy, the fact that an alternative statute exists, which may provide a remedy to an employee that is terminated for furthering a public policy[2], **does not bar that employee from suing for WDVP.** We begin with *Rose*, the opinion which explicitly abandoned the concept of "strict adequacy."

[2] Such policies must be judicially or legislatively recognized, or rooted in the constitution, and include, but are not limited to: not punishing employees for whistleblowing, internally reporting sexual harassment or safety violations, or jumping from an armored car to save a person from being assaulted (all based on real Washington cases).

Rose v. Anderson Hay

The plaintiff in *Rose*, a truck driver, claimed that his employer fired him for refusing to falsify his driving records. He sued for WDVP. Because the plaintiff was a commercial truck driver, the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105[3], provided him with administrative remedies. Therefore, the employer trucking company raised that as a defense. Because there was an adequate statutory remedy, the defendant argued, the "jeopardy" element was lacking. The Court disagreed, and held that the existence of other nonexclusive statutory remedies does not prevent a terminated employee from suing for WDVP.

The Court began its analysis by reviewing the history of the doctrine, and how the four-part test established in *Gardner* developed over time. The Court reiterated the underlying purpose of the doctrine of WDVP: to further public policy, not protect a particular employee's rights. But to continue applying the "strict adequacy" requirement would force the courts to go through alternative statutes "line-by-line" to discern whether adequate remedies existed, the Court opined. Such a requirement eviscerates the purpose of the doctrine, the Court said. Finally, the Court reasoned it should adhere to the original framework, established over 30 years, that it would only consider whether the statutes at issue were exclusive—providing no other remedies. Under the facts in *Rose*, the STAA provided alternative remedies. Therefore, in abandoning the "strict adequacy" requirement, the court allowed the WDVP claim to proceed, despite the STAA providing

[3] This statute contains a nonpreemption clause, which essentially permits an employee to seek other remedies in addition to the STAA.

alternative remedies (see footnote 4). The Court acknowledged that under the "strict adequacy" formulation, the plaintiff in *Rose* would lose.

The Court noted that the "strict adequacy" requirement was created in order to maintain the narrowness of the WDVP claim. Ultimately, the *Rose* Court abandoned the "strict adequacy" requirement, but adhered to the four-part test established in *Gardner*, noted above. We next turn to the remaining cases in this trilogy, which echoed *Rose.*

Rickman v. Premera

The plaintiff in *Rickman* was an employee of Premera Blue Cross, who was terminated after raising concerns with HIPAA violations. The trial court dismissed her WDVP claim, on the grounds that Premera's internal reporting policies afforded adequate alternative means to promote the public policy (What is that policy? You got it: internal reporting of potential patient privacy concerns). The Court reversed the trial court, and found that nothing within Premera's internal reporting system, HIPAA, or the Washington Health Care Information Act, precluded the plaintiff's claim for WDVP.

The facts of *Rickman* are much more complex than *Rose*, but may be summarized as such: Two companies, underwritten by two separate insurers (one being Premera), were going to merge. The plaintiff had a "gut feeling" that aspects of this merger might cause breaches of protected health information: the companies may have to perform "risk bucketing", in which they essentially reviewed the frequency of claims of individual persons, to discern which persons presented more risks for underwriting. The plaintiff expressed these concerns to her supervisor. Crucial fact: she was "not exactly sure" if "risk bucketing" was illegal. She only reported her concerns to her supervisor, not Premera's compliance and ethics department (which oversaw HIPAA breaches etc…). After the plaintiff raised these issues, her supervisor abandoned the "risk bucketing" plan, even though Premera's underwriting department found that this was not per se illegal. The plaintiff was terminated, allegedly because of a conflict of interest.[4] The plaintiff sued for WDVP, and lost at the trial court level.

The trial court found that the jeopardy element was lacking, for two reasons: First, Premera had a "robust" internal reporting system, and second, because the plaintiff did not independently verify that "risk bucketing" was illegal. The Court reversed the trial court, first recognizing that the "strict adequacy" requirement was abandoned in *Rose*, therefore nullifying the first reason the trial court dismissed the plaintiff's claim (robust internal reporting). Additionally, the Court observed that Premera had pointed to no authority "for the proposition that a private employer's workplace policy should be accorded equal status to a duly enacted statute." Consequently, the employer may not rely on their own policies to argue that adequate alternative remedies exist for addressing public policy concerns.[5] Then the

[4] Allegedly, the plaintiff engaged in nepotism, by hiring, promoting, and granting a salary increase to her son, in rapid succession; but the Court restricted its reasoning to the "jeopardy" element, not the fourth element of a WDVP: whether the employer had a separate justification for the firing.

[5] The Court also pointed out that neither HIPAA nor the HCIA provided exclusive remedies—as alternative remedies are not enough to preclude a WDVP claim, under *Rose*.

court turned to the second reason for the trial court's dismissal: the plaintiff's "gut feeling."

The Court reasoned that it had never held that, as an element of the four-part test, a plaintiff must demonstrate the validity of their beliefs before taking action. Instead, the Court opined, "the reasonableness of the plaintiff's conduct relates to whether the plaintiff's conduct furthers public policy goals." This reasoning is consistent with *Rose,* in that the doctrine of WDVP is aimed at furthering the public good, not at ensuring that employees understand every aspect of the law before they address perceived wrongdoing. Be that as it may, perhaps a "gut feeling" is not enough.

Ultimately, the Court reversed the trial court, and reiterated that the "strict adequacy" requirement had been abolished in *Rose*. As a side note, the dissent in *Rickman* opined that the "adequate alternative remedies" analysis was "critical to maintaining the narrow scope of the doctrine of wrongful discharge." The dissent noted that the public policy in this case was clear, either under HIPAA or the HCIA: protecting patient privacy. But the dissent ultimately found that the alternative remedies in those statutes should have at least been *considered.*[6] The dissent agreed with the majority that internal reporting policies do not afford employees with legally enforceable remedies, and therefore should play no part in the jeopardy analysis—but why would that matter after *Rose*? Because of *Rose*, a plaintiff need not demonstrate that *any* statute provided an alternative remedy—although if the statute provided an *exclusive* remedy, the WDVP claim would fail.

The takeaway from *Rickman*: A plaintiff need not have affirmative proof that the conduct they are complaining about is illegal; they need only have a "gut feeling" that it is. The plaintiff's actions need only be aimed at furthering public policy goals, such as protecting patient privacy. The plaintiff does not need to actually know that the conduct they are complaining about is illegal. When a person has a "gut feeling" of wrongdoing, a decision by an employer that would preclude an employee from acting on that "gut feeling" would jeopardize the public policy the employee's conduct promotes (such as preventng potential violations of HIPAA, or possible violations of safety laws such as WAC 296-305). We now turn to the final chapter in the *Rose* Trilogy.

Becker v. Community Health

As mentioned above, the four-prong test from *Gardner*, which contains the "jeopardy" element, need not be utilized if the plaintiff's conduct falls within a specific category. This is because the *Becker* Court essentially threw out the four-part test, as it pertained to the facts of the case. The four specific categories of behavior, which, for purposes of this article, we will call the "*Becker* categories", are:

(1) Discharge for refusing to commit an illegal act;

(2) discharge for performing a public duty or obligation, such as serving jury duty;

[6] The dissent made the poignant observation that neither HIPAA nor the HCIA would afford an adequate remedy, because neither provided a plaintiff with compensatory or other damages for taking an employer to task for not complying with HIPAA or the HCIA. Therefore, the plaintiff in *Rickman* may have been successful even if *Rose* had not abolished "strict adequacy."

(3) discharge for exercising a legal right or privilege, such as filing workers' compensation claims; and

(4) discharge for reporting employer misconduct, i.e., whistle blowing.

The plaintiff in *Becker* fell into the first *Becker* category, and therefore, the court did not even have to consider the "jeopardy" element.[7] The plaintiff in *Becker* worked for a publicly traded company and refused to conceal a material misrepresentation of his employer's finances. The CEO of the company initiated an unscheduled evaluation of his performance. He was placed on a performance improvement plan. As part of that PIP, the plaintiff was again asked to conceal the misrepresentation. He again refused, and sought legal counsel. After reporting up in the organization and to another organization, he informed the CEO that he felt compelled to resign. The employer accepted his resignation. The plaintiff then sued the employer for WDVP and for violation of the Sarbanes-Oxley Act, a federal law covering financial disclosures. The trial court dismissed his claim because, surprise, the "jeopardy" element was lacking.

The *Becker* Court swiftly rebuffed the trial court because the "jeopardy" element was not relevant. The plaintiff's conduct fell into the first *Becker* category: refusing to commit an illegal act (concealing the misrepresentation). Therefore, the plaintiff only needed to show, to survive dismissal, that his termination "violated a clear mandate of public policy."

[7] It should be noted that although the plaintiff in *Rose* probably fell into the first *Becker* category as well, the *Rose* Court still vigorously analyzed that case following the four-part test from *Gardner*.

The Bottom Line

We have a series of conclusions, based on our analysis of the *Rose* Trilogy: First, when sued for WDVP, an employer may not raise, as a defense, that adequate alternative statutory remedies exist. This means that an employer may be subject to additional civil damages beyond those afforded by statute, when sued for WDVP, by either an at-will employee or one that may only be terminated for just cause.[8] Because "strict adequacy" has been abandoned, an employer may not rely on their own internal policies, or remedies afforded by statute, to argue that adequate alternative remedies exist to vindicate the public policies in question. Only when a statute provides for an exclusive remedy, pre-empting the remedy question, can the employer prevail with such a defense.

Second, an employee need only have a "gut feeling" of wrongdoing by the employer, such as actions that may result in a breach of health care information systems, or lead to accusations of sexual harassment. This is not breaking any new ground. Washington courts have never held that a "gut feeling" is not enough. But the *Rose* Trilogy settles this concept in the law.

Third, and assuming a plaintiff's conduct does not fall into one of the four *Becker* categories, statutes may still be considered when deciding whether the "jeopardy" element is met. But those statutes may only be considered for whether they provide *exclusive* remedies, as opposed to *adequate* ones. The Court in *Rose* found that statutes should only preclude

[8] Note further that an employee need not exhaust his or her administrative remedies prior to suing for WDVP. *See Smith, supra.*, at 809 (union employee not required to exhaust remedies in collective bargaining agreement prior to suing for WDVP).

common law remedies when the statute specifically states that it affords the exclusive remedy.

Finally, because of *Becker*, the courts will no longer apply the four-part *Gardner* test until they first determine whether the plaintiff's conduct falls into one of the four *Becker* categories. The consideration of "jeopardy", which no longer requires a "strict adequacy" analysis, becomes relevant in the gray areas—as was the case in *Rickman*, and perhaps about half of the WDVP claims that have succeeded or failed in Washington courts.

What Does the Word "Destroy" Mean in the Records Retention Schedules?

The Local Government Common Records Retention Schedule (CORE) was recently updated. Not much has changed, but we always recommend that your fire department, or any public agency, maintain the most current version of CORE in your office.[9]

Speaking of CORE, this retention schedule may be vague in one way, that may cause confusion to local governments. This vagueness is encompassed in the word "destroy", as that appears in CORE 2015, and those before it. As we have mentioned before, there are generally two types of public records in CORE: those that are "archival", and those that are "non-archival." In CORE 2015, records designated as "archival" may not be destroyed, and generally must be transferred to the Washington State Archivist for disposition. *See* CORE 2015, page 1.

Records that are "non-archival", with a retention period of "Life of the Agency" or "Permanent" also may not be destroyed. However, all other types of non-archival records are in a somewhat nebulous region. For example, court orders served on the agency, such as subpoenas[10], are "non-archival", and are not designated as "Life of the Agency" or "Permanent." *See* CORE 2015, page 30. Therefore, based on the language of CORE 2015, page one, subpoenas served on a fire department may be destroyed at the end of their retention period, right? Not so fast.[11] The retention period for these non-archival records is "retain until no longer needed for agency business, then destroy." *See* CORE 2015, page 30. (emphasis added). The same is true for "transitory" records, and a great many others.[12] But CORE 2015 provides minimal guidance on *who* may destroy those records.

CORE 2015 was approved by the local records committee, pursuant to RCW 40.14.070. *See*

[9] CORE 2015 may be located here: https://www.sos.wa.gov/archives/recordsmanagement/UsingtheLocalGovernmentCommonRecordsRetentionScheduleCORE.aspx

[10] Subpoenas often appear when fire departments are faced with medical records requests from attorneys, pursuant to RCW 70.02.060.

[11] That would also depend on whether those subpoenas were the subject of ongoing or anticipated litigation, in which case they may not be destroyed, even after their retention period has expired; the same is true if those subpoenas become subject to a public records request. *See* CORE 2015, page 1; *See Also* RCW 42.56.100.

[12] See our May 2015 article on "transitory records": http://www.firehouselawyer.com/Newsletters/May_2015.pdf

CORE 2015, page 1. That same statute reads that "except as otherwise provided by law, no public records shall be destroyed until approved for destruction by the local records committee." *See* RCW 40.14.070 (2)(a). What one might reasonably presume is that CORE 2015 is an example of what the legislature meant by "except as otherwise provided by law." Perhaps CORE 2015 is the catalyst by which a public record is "approved for destruction by the local records committee." These two presumptions seem reasonable, in that CORE 2015 itself was adopted pursuant to RCW 40.14.070. The first sentence in CORE 2015 reads that "this retention schedule authorizes the destruction/transfer of the public records of all local government agencies relating to the common functions of the management of the agency." Consequently, a reasonable person may read that language to be the "approval for destruction by the local records committee" necessary to destroy certain records without intervention from the local records committee or the State Archivist, in compliance with RCW 40.14.070 (2)(a).

This recently came up at a conference we taught. We are convinced that an agency can and should destroy non-archival public records, which are not designated as for the "Life of the Agency" or "Permanent", at the end of their minimum retention period. If an agency did not do so, and retained, for example, every citizen complaint ever received by the agency, going back 20 years, the agency would have to produce all of those complaints, if asked to do so by a public records requestor. That is because of RCW 42.56.100. But citizen complaints are non-archival records with a retention period of "three years after matter closed then destroy." *See* CORE 2015, page 14. Recall that your agency only has to produce public records that actually exist, and has no obligation to create records. If your agency adhered to records retention schedules appropriately, then you would only have to produce citizen complaints that were closed no more than three years ago. This is only an example. But the Firehouse Lawyer maintains that the records retention schedules promulgated by the local records committee authorize the destruction of certain non-archival records *by the agency itself*, in compliance with RCW 40.14.070 (2)(a), and without further intervention by the local records committee. This is a common sense interpretation of what a retention schedule is designed to do. If you are only required to retain something for three years, is it not a logical negative inference to conclude that after the three years pass you are no longer required to retain it? Therefore you can dispose of it, throw it away, shred it, i.e. destroy it. We based our conclusion on the first sentence of CORE 2015 (see above). We know that this concept may raise hairs, as the willful destruction of a public record is a Class C Felony. *See* RCW 40.16.010. But this is not so if such destruction is authorized by law. *See* CORE 2015, page one.

Light Duty and Unilateral Changes in Working Conditions: What PERC Thinks

In early 2015, the Public Employment Relations Commission (PERC) decided *Port of Anacortes*, Decision 12160-A. This case involved an employer, who did not have a light duty policy for on or off-the-job injuries, who denied a light duty assignment, without bargaining with the union. Two issues were raised in *Anacortes*: (1) whether the employer discriminated against an employee by denying light duty work for a non-work related injury; and (2) whether the employer unilaterally changed working

conditions, in violation of RCW 41.56.030 (4), by changing when light duty would be assigned, without bargaining.

PERC quickly affirmed the hearing examiner that found that the employer did not engage in any discrimination. The unilateral change issue merited much more attention. PERC began its analysis of that issue by reaffirming the obligation of the employer not to unilaterally change working conditions. However, PERC stated that an employer may implement such a change, under the following conditions:

(1) The employer gives notice to the union;
(2) provides an opportunity to bargain before making a final decision;
(3) upon request, bargains in good faith; and
(4) bargains to agreement or a good faith impasse concerning a mandatory subject of bargaining.

Griffin School District, Decision 10489-A (PECB, 2010). The Commission reminded us that light duty policies are a mandatory subject of bargaining, as they affect wages, hours and working conditions. *City of Wenatchee*, Decision 6517-A (PECB, 1999). The panel also reminded us of what the union must prove to establish a unilateral change:

(1) The dispute involves a mandatory subject of bargaining (light duty is);
(2) the employer made a decision giving rise to a duty to bargain (denying light duty);
(3) a relevant status quo or past practice; and
(4) a meaningful change to a mandatory subject of bargaining.

In *Anacortes,* the employer decided that a union-represented employee would not be granted light duty for his off-duty injury. The Commission had a difficult time identifying a past practice or the status quo, because this case involved a brand new bargaining unit, where the first collective bargaining agreement was being negotiated. For those reasons, the union could not prove a past practice. PERC noted that the employer used an employee handbook, which contained no light duty policy, whether injuries were on or off-the-job. Furthermore, this was the first time the employer had ever been presented with a request for light duty for an off-the-job injury. Therefore, PERC found that there was no status quo.. *Anacortes* hinged on the unique circumstances of there being no CBA. But that did not influence PERC's decision. Although there was no relevant status quo or past practice, PERC, once again, felt process was lacking, and found that the employer should have given notice to the union of the change in working conditions. The panel found that "[T]he bargaining obligation is not onerous and does not have to be drawn out."

Because of *Anacortes*, and the law pertaining to unilateral changes without bargaining, the employer may risk grievances and more if it denies a light duty position when it does not have a light duty policy. If the employer wishes to unilaterally implement such a policy, it must follow the four steps in the *Griffin* decision, specified above. Although *Anacortes* does not break a gaping hole in the ground, it reminds us of the importance of adopting light duty policies, before denying—or granting—light duty assignments. As a side note, perhaps a review of PERC decisions over the last five years is a good topic for our next Municipal Roundtable.

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