

## Employment law

# Cudney & the latest wrong turn for wrongful discharge in violation of public policy

by André M. Peñalver

Twenty-seven years ago, the landmark decision of *Thompson v. St. Regis Paper Co.*,<sup>1</sup> first articulated the tort of wrongful discharge in violation of public policy, providing some important protection for internal whistleblowers. The Washington Supreme Court has recognized this cause of action in numerous cases since then. But on September 1, 2011, in *Cudney v. AlSCO, Inc.*,<sup>2</sup> the Court refused to apply this tort where an employee complained about another employee driving drunk in a company car. In a 5-4 decision, the Court held that the tort was not necessary to effectuate the public policy against drunk driving because Mr. Cudney could have called the police instead of making an internal complaint. This decision sets a dangerous precedent, and it demands a legislative solution to correct it.

The subject of the decision is Matthew Cudney who in April of 2004 began work as a service manager at the Spokane branch of ALSCO, Inc., a linen cleaning service with locations in several states. Since starting, Cudney had made numerous complaints to his supervisor about the alcohol use of John Bartich, the branch's general manager. On June 10, 2008, Bartich was again visibly drunk—slurring his speech, weaving back and forth, and smelling of alcohol. Cudney intended to

find someone to drive Mr. Bartich home, but when Bartich drove away in a company car, Cudney chose to report the matter to Marty Siebe, the Assistant General Manager and Mr. Cudney's immediate supervisor. He also reported his concerns to the human resources manager.

On August 5, 2008, ALSCO terminated Cudney, who was then ranked the No. 1 Service Manager in ALSCO's Northwest Region.<sup>3</sup> Cudney sued in Spokane County Superior Court for wrongful discharge in violation of public policy: he claimed retaliation for his complaints about Bartich, and he pointed to WISHA and the state's DUI laws as sources of public policy that should have protected his complaints. Spokane County removed the case to federal court in the Eastern District of Washington, which then certified the question about public policy to Washington's Supreme Court. On September 1, 2011, the Court held that there was no discharge in violation of public policy because WISHA and the DUI laws already adequately promote the policies that they articulate.

To arrive at its holding, the Court relies on *Gardner's* four-part test where a plaintiff must establish: (1) a clear public policy ("clarity"), (2) discouraging the conduct in which the employee engaged would jeopardize the public policy ("jeopardy"), (3) the conduct caused the discharge ("causation"), and (4) there is no overriding jus-

tification for the discharge ("absence of justification" element).<sup>4</sup> According to the Court, it is the jeopardy element on which Mr. Cudney's claim fails: the "hardy statutory remedies" of the WISHA and the DUI laws the court found, are more than adequate to protect their public policies.

The Court relies on the remedies found in WISHA and related regulations. If an employee is discharged for reporting workplace safety concerns, WISHA provides protection through the Department of Labor & Industries.<sup>5</sup> An employee need only report his or her complaint within 30 days of the termination, and if L&I decides not to sue on behalf of the employee, then the employee has another 30 days to bring suit. These remedies—the Court holds—"are adequate to promote the public policies of ensuring workplace safety and protecting workers who report safety violations."<sup>6</sup>

Of course, this holding expects quite a lot from the recently terminated employee—that they immediately contact the right attorney to help them file a complaint within 30 days. A terminated employee may have some worthy distractions in the first 30 days of being jobless: finding another job, applying for unemployment benefits, processing whatever pretext the employer gave for the dismissal may well take months to resolve, hence the need for

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a three-year statute of limitations for most wrongful termination cases.

The Court then turns to the DUI laws, which it holds are adequately protected by "a huge legal and police machinery around our state designed to address this very problem."<sup>7</sup> The Court faults Cudney for dealing with his problem internally rather than through the police. But this holding turns a blind eye to how businesses work, where an employee is conditioned—perhaps even required—to bring problems to his or her manager before going to the authorities. Should calling the police be necessary, it would be prudent to have the supervisor—not the co-worker—make that call. Professor Henry Perritt, whose treatise *Employee Dismissal Law and Practice* inspired *Gardner's* four-part test, served as

co-counsel for WELA's motion for reconsideration. He explains that criminal statutes such as DUI laws are inadequate to promote any public policy because the fear of employer retaliation is a deterrent. Perritt concludes that unless the case is reconsidered, "Washington State will be the only state in the United States which applies the common law claim in that way."

*Cudney* represents a break from the well-established (and already narrow) at-will exception for wrongful discharge in violation of public policy. Previously, and as discussed at length in Justice Stephens's dissent, the "starting premise of these cases is that there can be no doubt about the existence of a public policy tort claim when the plaintiff is in fact protected by the statutory remedies. It would turn this premise on its head to suggest that the

existence of statutory remedies instead precludes a public policy tort claim."<sup>8</sup>

Of the earlier line of cases that *Cudney* threatens, the most noteworthy is *Wilmot v. Kaiser Aluminum & Chem. Corp.*,<sup>9</sup> which recognized a claim for discharge in violation of public policy for workers' compensation retaliation even when the plaintiff neglected to follow the statutory claim procedures under RCW 51.48.025. The majority opinion in *Cudney* gives only cursory treatment to *Wilmot*, merely pointing out that it preceded *Gardner's* four-part test by five years. As the dissent points out, the reasoning in *Wilmot* was reaffirmed by *Ellis v. City of Seattle*,<sup>10</sup> a case decided four years after *Gardner* and which allowed a claim for wrongful discharge in violation of public policy for retaliation for a WISHA complaint. Although the Court of Appeals had rejected *Ellis's* claim on the jeopardy element, the Supreme Court reversed. As Justice Stephens explains, *Ellis* gave the Court a chance to address this jeopardy element, but "[i]nstead of rejecting this claim under the jeopardy prong, we solidified its existence."

In response to *Cudney*, the WSAJ legislative team is working with WELA and interested legislators to introduce the necessary legislation to correct the decision. As Larry Shannon, WSAJ's legislative

strategist, explains, “We are refining this legislation to properly address the Supreme Court’s *Cudney* decision to reflect the very clear and well thought out dissent, and the many of years of common law behind it.”

WSAJ expects some heated opposition to the legislation, which its opponents will almost certainly label as “job killing.” Shannon encourages WSAJ members to speak to their legislators and to answer the opponent who raises the “job-killing” argument. Looking closely at *Cudney*, Shannon asks, “Whose job do we want to protect? The drunk driver who endangered public safety or the public spirited whistleblower who risked his job to report this threat?” To fair-minded citizens and legislators, the answer should be evident.

**Endnotes:**

1. 102 Wn.2d 219, 234, 685 P.2d 1081 (1984).
2. 259 P.3d 244, 2011 WL 3849516 (Wash. 2011).
3. Bartich later admitted to coming to work drunk. He received a verbal reprimand. Pl.’s Brief, at 14.
4. *Cudney*, at \*2 (citing *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996)).
5. RCW 49.17.060.
6. *Cudney*, at \* 3.
7. *Id.* at \*6.
8. *Id.* at \*9 (Stephens, J., dissenting) (emphasis in original).
9. 118 Wn.2d 46, 821 P.2d 18 (1991).
10. 142 Wn.2d 450, 13 P.3d 1065 (2000).

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