



Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 75662-7  
Title of Case: Steven M. Korslund, et al, Respondents v.  
Dyncorp Tri-Cities, Inc., et al, Petitioners.  
File Date: 12/22/2005  
Oral Argument Date: 06/07/2005

SOURCE OF APPEAL

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Appeal from Superior Court,  
County  
Honorable Vic L. Vander Schoor

JUSTICES

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Concurring: James Johnson  
Bobbe J Bridge  
Charles W. Johnson  
Gerry L Alexander  
Susan Owens  
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Dissenting: Richard B. Sanders  
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No. 75662-7

CHAMBERS, J. (concurring/dissenting) -- I part ways with the majority on two grounds. First, the majority unnecessarily reaches an issue not properly before us. On plaintiffs' claims of wrongful discharge and wrongful retaliation in violation of public policy, the trial court did not make any factual determinations with regard to the jeopardy element. Despite this, and in my view without appropriate factual basis, the majority holds as a matter of law that the plaintiffs fail to satisfy the jeopardy element. Given the record, I would not so precipitously reach this issue.

Second, while I agree 'that an employee who is forced to permanently leave work for medical reasons may have been constructively discharged,' majority at 11, I disagree that that same employee cannot be found to be constructively discharged merely because she continues to receive some employment benefits. It is antithetical to any remedy grounded in public policy to require an employee to suffer great economic consequences and forgo needed medical, disability, and other benefits the offending employer is already obligated to provide before seeking redress for wrongful discharge. In my view, it is a question of fact whether such employees have been constructively discharged.

In this case, present and former Hanford employees have brought actions for, among other things, wrongful discharge and wrongful retaliation for reporting alleged employer misconduct. Plaintiffs contend they observed and reported acts and omissions which threatened the health and safety of the plant and the community, wasted and misused government property and funds, and showed abuse of authority. As a result of the alleged misconduct and management's failure to respond, Steven M. Korslund initially sought medical leave, but ultimately quit. Virginia A. Miller

sought long term medical disability. John Acosta continues to work at the Hanford facility.

#### THE JEOPARDY ELEMENT

The trial court granted summary judgment in favor of DynCorp Tri-Cities Services, Inc., on the sole grounds that plaintiffs failed to show they were constructively discharged and that DynCorp did not make any promises of specific treatment in its policy manuals. The trial court did not grant summary judgment in favor of DynCorp because plaintiffs were unable to prove that important policies of the State would be jeopardized. The Court of Appeals was correct to conclude that 'whether a plaintiff has satisfied the jeopardy element is a question of fact.' *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 121 Wn. App. 295, 320, 88 P.3d 966 (2004) (citing *Hubbard v. Spokane County*, 146 Wn.2d, 699, 715, 50 P.3d 602 (2002); *Ellis v. City of Seattle*, 142 Wn.2d 450, 463, 13 P.3d 1065 (2000)). Given the record, this court should not reach such an important and fact driven issue.

Since the majority does reach the jeopardy issue, I write separately to express my disagreement. The remedies offered to employees under the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. sec. 5851, are neither mandatory nor exclusive. For instance, administrative remedies under the ERA are permissive only; they do not supplant common law torts nor do they provide the same remedies to an injured employee. 42 U.S.C. sec. 5851(h). In addition, the ERA is more restrictive, it does not permit direct civil action by the employee, it does not provide for jury trials, and it is limited to complaints which the employee elects to submit to the Department of Labor. See generally 42 U.S.C. sec. 5851.

Proof of jeopardy to public policy is an either/or test: that is, the employee must show that her conduct furthers a clear mandate of public policy either because that policy directly promotes the conduct or because the conduct is necessary to the effective enforcement of the policy. See *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 945, 913 P.2d 377 (1996); *Henry H. Perritt, Jr.*, *Workplace Torts: Rights and Liabilities* sec. 3.14, at 75 (1991). Nevertheless, the majority, without any record or factual finding to support its conclusion, reaches up into the thinnest of atmospheres to conclude as a matter of law that plaintiffs cannot meet the jeopardy element because the ERA allegedly provides an adequate alternative means of promoting the public policy. Majority at 13, 15.

Additionally, an employee can prove jeopardy by a showing of imminent harm. When imminent harm is threatened, the jeopardy element 'may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action.' *Ellis*, 142 Wn.2d at 461. In other words, the plaintiff need not prove an actual violation of public policy, but merely show that they had an objectively reasonable belief that a violation would occur. *Id.*

In *Ellis*, this court found imminent harm threatened, and thus the jeopardy element satisfied when the plaintiff refused orders to disable the fire alarm system at Key Arena because the plaintiff reasonably believed that disabling the system would not only break the law, but jeopardize public safety. *Id.* In my humble opinion, an employee's good faith concerns about safety procedures at a nuclear power plant may very well be categorized as 'imminent harm,' on the same or greater level than the facts found to be sufficient in *Ellis*.

I must emphasize again, the trial court in this case, in granting summary judgment, never reached this issue, and the majority has now foreclosed this issue by ruling as a matter of law the jeopardy element cannot be satisfied. I respectfully disagree and would await a case that squarely presents the issue.

#### WHEN IS AN EMPLOYEE DISCHARGED?

Constructive discharge is the imposition on the employee of intolerable working conditions which cause the employee to abandon his job. *Bulaich v. AT&T Info. Sys.*, 113 Wn.2d 254, 262, 778 P.2d 1031 (1989). An employee should not be required to either forgo mitigating options short of resignation and suffer the economic consequences (such as the loss of all employment benefits) or refrain from reporting workplace conduct that

violates public policy. Miller, for example, was treated for symptoms of anxiety, poor concentration, poor memory, and panic attacks. Major stressors included her fears of retaliation and being targeted at work. She was also diagnosed with major depressive disorder, irritable bowel syndrome, hypertension, and glaucoma--all a likely consequence of the intolerable working conditions she was placed under. A Social Security administrative law judge found that the 'medical evidence establishes' she (Miller) has 'severe impairments: an affective disorder {depression} and an anxiety disorder,' that she 'lacks the residual functional capacity to perform basic mental requirements of any work {and} . . . is unable to perform the requirements of her past relevant work.' Clerk's Papers at 382. She was awarded Social Security benefits. The evidence is substantial that plaintiff Miller not only abandoned her employment, but the evidence shows she was simply unemployable. Surely, Miller should not, as a matter of law, have had to forgo all her employment benefits before bringing a wrongful discharge action. Unfortunately, the majority seems to reach this ominous conclusion.

#### PROMISES OF SPECIFIC TREATMENT

Finally, on the issue of specific promises, I read the majority as affirming our holding in *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 27 P.3d 1172 (2001) and the jury instruction approved therein. I therefore agree with the majority's resolution with regard to that issue.

#### CONCLUSION

I would remand this case back to the trial court to determine: (1) whether the plaintiffs can satisfy the jeopardy element by showing imminent harm, and if not, (2) whether the plaintiffs can show there are not other means of promoting the public policy which are adequate. *Gardner*, 128 Wn.2d at 945 (citing *Perritt*, supra, sec. 3.14, at 77). Without these factual determinations, this court cannot reasonably decide whether the torts of wrongful discharge and retaliation in violation of public policy exist in this case. I would also hold that an employee need not forgo her employment benefits in order to maintain actions for wrongful discharge and retaliation in violation of public policy. Because I agree this case must be returned to the trial court, I concur in part and dissent in part.