

No. 91040-5

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

ERICKA M. RICKMAN,

Petitioner,

v.

PREMERA BLUE CROSS, INC.,

Respondent.

Court of Appeals, Division I, Case No. 70766-3-I

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT**

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**IDENTITY AND
INTEREST OF AMICUS CURIAE**

Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Respondent Premera Blue Cross, Inc. PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of the public interest. PLF's Northwest Center in Bellevue, Washington, actively litigates in the Pacific Northwest. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation created its Free Enterprise Project. The Project seeks to protect the free enterprise system from a civil justice system that grants excessive liability awards, and is therefore concerned with unwarranted expansion of the wrongful termination tort that undermines the economically beneficial default rule of at-will employment.

**INTRODUCTION AND
STATEMENT OF THE CASE**

Ericka Rickman was the director of Ucentris, a subsidiary insurance agency of Premera Blue Cross. While Rickman was employed in a position of senior management, as director of a Premera subsidiary, her son was employed as an insurance agent under her supervision. *Rickman v. Premera Blue Cross*, 183 Wn. App. 1015, *1-*2 (2014). She approved his promotion

that included a raise double the amount of his new peers; she did not make the disclosures about her relationship with her son that were required by Premera's protocols; and she engaged in increasingly controversial actions that generated accusations of favoritism and unethical conduct. *Id.* at *2-*3. An independent contractor who worked with Rickman complained to Premera which, pursuant to its standard protocols, conducted an investigation. Ultimately, Premera fired Rickman. *Id.* at *3.

Meanwhile, a few weeks before her termination, while the investigation was ongoing, Rickman heard that Premera was considering a proposed new business plan (required by its merger with another company) and Rickman believed that certain aspects of that plan violated the Health Insurance Portability and Accountability Act (HIPAA) and Washington's Uniform Health Care Information Act. *Id.* Rickman did not know the details of the plan, and did not share her concerns with anyone other than her supervisor. *Id.* at *3-*4. Premera never adopted the plan to which Rickman objected. *Id.* at *4. After she was fired, Rickman filed a complaint with the Equal Employment Opportunity Commission, and then filed suit, alleging that her termination was retaliation for her expressed concerns with the business plan. *Id.*

ARGUMENT

I

AT-WILL EMPLOYMENT ADVANCES IMPORTANT PUBLIC POLICY OBJECTIVES THAT WOULD BE UNDERMINED IF COURTS CREATED BROAD EXCEPTIONS TO THE DOCTRINE

A. At-will Employment Is a Just and Economically Efficient Doctrine

Washingtonians have a fundamental right to earn a living, subject to such regulations as are necessary to protect the public welfare. This right was considered among the most important rights protected by the common law. *Lowe v. S.E.C.*, 472 U.S. 181, 228, 105 S. Ct. 2557, 2582, 86 L. Ed. 2d 130 (1985); *Duranceau v. City of Tacoma*, 27 Wn. App. 777, 780, 620 P.2d 533, 535 (1980) (“The right to hold specific private employment free from unreasonable government interference is a fundamental right which ‘comes within the “liberty” and “property” concepts of the Fifth Amendment, . . .’”) (citation omitted); *Cary v. City of Bellingham*, 41 Wn.2d 468, 472, 250 P.2d 114, 117 (1952) (“The right to earn a living” is “‘one of those inalienable rights covered by the statements in the Declaration of Independence and secured to all those living under our form of government by the liberty, property, and happiness clauses of the national and state Constitutions.’”)

(citation omitted). Citizens frequently exercise this right by entering into employment contracts, particularly at-will employment contracts. See *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 520, 826 P.2d 664, 668 (1992) (“In general, an employment contract indefinite in duration may be terminated by either the employer or the employee at any time, with or without cause.”) (citing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 223, 685 P.2d 1081, 1085 (1984)).

At-will employment serves at least five important public policy goals. First, it allows employers to try out inexperienced, entry-level employees without incurring substantial risks. “‘You can start Tuesday and we’ll see how the job works out’ is a highly intelligent response to uncertainty.” Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. Chi. L. Rev. 947, 969 (1984). If employers were required to offer jobs only on a permanent or semi-permanent basis, bad hiring decisions would impose much greater costs on employers, leading them to fear the possibility of being “stuck” with costly and poorly performing workers, or of being exposed to liability for a worker’s incapacity, negligence, harassment of fellow employees, or other shortcomings. If terminating an employee becomes expensive and time-consuming, employers will adopt a stingy attitude toward job offers. As one court noted:

[A]brogation of the at-will rule could have the socially deleterious effect of forcing employers to become overly cautious about who[m] they hire, perhaps fearing to hire marginally qualified persons who would be more likely candidates for discharge at some point. The employer would naturally not care to hire someone who might later subject him to a lawsuit.

Veno v. Meredith, 357 Pa. Super. 85, 99 n.3, 515 A.2d 571, 579 n.3 (1986).

While this might have little effect in those sectors of the economy where workers generally work on a contract or salary basis, it would have a major effect on unskilled, day labor employees—who tend to be poorest and to be most in need of work. Katy Rand, *Employment At Will in Maine: R.I.P.?*, 22 Me. B.J. 12, 17-18 (2007) (“[L]ower income individuals are the ones most likely to experience loss in job opportunities and income because risk-averse employers are less likely to offer employment to marginal applicants, who tend to be less educated, low income, and . . . minority.”).

Second, at-will employment requires little negotiation, thus keeping transaction costs low. Epstein, *supra*, at 970. Employers and workers avoid a more complicated, expensive, or time-consuming hiring process while gaining a wider range of choices. In a dynamic economy, it is desirable to ensure that a worker can move to another job as circumstances dictate and that an employer can fill vacancies quickly. Nationwide, over the past decade, workers have stayed on the job for about 4.6 years on average, with

younger workers changing jobs more frequently (about 3 years on average for workers aged 25 to 34 years). U.S. Dep't of Labor, Bureau of Labor Statistics, *Employee Tenure in 2014* (released Sept. 18, 2014).¹ Moreover, the time and money saved from a more complicated hiring procedure can be applied to improving job conditions or lowering prices instead. "The massive scale of the societal changes at the root of our current economic instability argue against the one-size-fits-all responses offered by the legal system." Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 Tex. L. Rev. 1901, 1904 (1996).

Third, at-will employment provides employees with a check against employer abuses after the contract is formed, and vice-versa. Epstein, *supra*, at 965-67. Since workers can quit whenever they decide a job costs them more than it is worth, the ability to end the employment relationship benefits the employee. *Id.* at 966. "[T]he contract at will provides both employer and employee with a simple, informal 'bond' against the future misfeasance of the other side: fire or quit." *Id.* at 979. Providing workers with job protection even where they are willing to agree to an employment contract without it, harms job performance and encourages wrongful behavior on both sides. *See, e.g., Payne v. Sunnyside Cmty. Hosp.*, 78 Wn. App. 34, 37, 94

¹ Available at <http://www.bls.gov/news.release/pdf/tenure.pdf> (last visited Apr. 16, 2015).

P.2d 1379, 1381 (1995) (quoting employment contract that “Employees have the right to resign the employment at any time, without notice, for any reason or no reason.”); *Nelson v. Southland Corp.*, 78 Wn. App. 25, 28, 894 P.2d 1385, 1386 (1995) (same). See further John P. Frantz, *Market Ordering Versus Statutory Control of Termination Decisions: A Case for the Inefficiency of Just Cause Dismissal Requirements*, 20 Harv. J.L. & Pub. Pol’y 555, 567 (1997) (“If employers can no longer credibly threaten employees with tough disciplinary measures, employees will have little incentive to produce efficiently.”); *Geary v. U.S. Steel Corp.*, 456 Pa. 171, 181-82, 319 A.2d 174, 179 (1974) (“The everpresent threat of suit might well inhibit the making of critical judgments by employers concerning employee qualifications.”). In short, restricting at-will employment can “translate into an institutionalization of mediocre performance.” Todd H. Girshon, *Wrongful Discharge Reform in the United States: International & Domestic Perspectives on the Model Employment Termination Act*, 6 Emory Int’l L. Rev. 635, 704 (1992).

Fourth, the at-will employment contract remains flexible enough that parties can adjust their bargain as events warrant. The employee will not exercise his power to quit if he is offered and willing to accept a new duty or change of position. The employer, meanwhile, remains amenable to

adjustments on his side as well, such as accommodating employees who ask for raises or more time off. Thus, the at-will contract “allows for small adjustments *in both directions* in ongoing contractual arrangements with a minimum of bother and confusion.” Epstein, *supra*, at 967. It is an important protection for both workers and employers who need maximum flexibility to respond to changes in both the economy and their personal needs. As Professor Katherine Van Wezel Stone explains, “Many workers, especially younger workers, see themselves as free agents who sell their knowledge, skill, and talent in a fluid labor market. Just as firms no longer demonstrate long-term attachment to their workers, many workers have no expectation or desire to spend their entire lives with one employer.” *Green Shoots in the Labor Market: A Cornucopia of Social Experiments*, 36 *Comp. Lab. L. & Pol’y J.* 293, 297 (2015). Workers are not helped by rules that make it harder and more expensive for employers to hire them. See James N. Dertouzos & Lynn A. Karoly, *Labor-Market Responses to Employer Liability* 55 (1992)² (documenting a 5.5 percent - 7.2 percent decline in employment in the services and financial sectors attributable to adoption of the broadest common-law exceptions to the at-will doctrine).

² Available at <http://www.rand.org/content/dam/rand/pubs/reports/2007/R3989.pdf> (last visited Apr. 16, 2015).

By making it less expensive and complicated for workers to obtain employment, the at-will doctrine helps ensure that the right to earn a living at a lawful occupation is a reality and not an illusion. “The employer’s self interest is to maximize its profits. The employee’s self interest is to maximize his or her wage. These interests are compatible and optimally served by at-will employment.” Mary Jean Navaretta, *The Model Employment Termination Act—META—More Aptly the Menace to Employment Tranquility Act: A Critique*, 25 Stetson L. Rev. 1027, 1045 (1996). Ultimately, the question is not just a matter of economic efficiency but of individual rights:

Freedom of contract is an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs The desire to make one’s own choices about employment may be as strong as it is with respect to marriage or participation in religious activities, and it is doubtless more pervasive than the desire to participate in political activity.

Epstein, *supra*, at 953.

Finally, at-will employment not only improves the positions of workers and managers, but of consumers in general. The cost of providing more secure jobs—and thereby incurring the risk of poor employee performance—is borne by the employer who must make up the cost by charging more for the ultimate product or service. At-will employment

allows companies to keep prices low and achieve greater economic efficiency. David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment At Will Versus Job Security*, 146 U. Pa. L. Rev. 975, 1003 (1998) (“[M]isconduct will be harder to punish and, therefore, more likely to occur under a job-security contract term than under an at-will term. This . . . represents a cost peculiar to a job-security regime, and . . . employers will seek to pass [it] on to the work force.”). Of course there are limits to this freedom of contract, such as the covenant of good faith implied in all contracts, *Edmonson v. Popchoi*, 172 Wn.2d 272, 280, 256 P.3d 1223, 1227 (2011), and obligations imposed by civil rights laws. *Sambasivan v. Kadlec Med. Ctr.*, 184 Wn. App. 567, 579, 338 P.3d 860, 867 (2014). But in general, “[t]he doctrine of employment at-will is well established and serves important social and economic goals. A significant erosion of the Doctrine could produce unacceptable costs in employment relationships.” *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 448-49 (Del. 1996). See also *Bammert v. Don’s Super Valu, Inc.*, 254 Wis. 2d 347, 356, 646 N.W.2d 365, 369 (2002) (expressing reluctance to broaden the narrow tort theory of recovery because employment at will is a “stable fixture” of the common law of the state and is “central to the free market economy and ‘serves the interests of employees as well as employers’ by

maximizing the freedom of both”); *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 367, 353 N.W.2d 469, 474 (1984) (“An employer’s ability to make and act upon independent assessments of an employee’s abilities and job performance as well as business needs is essential to the free-enterprise system.”); *Crain Indus., Inc. v. Cass*, 305 Ark. 566, 572, 810 S.W.2d 910, 914 (1991) (same). With the above principles in mind, this Court should exercise restraint when interpreting exceptions to at-will employment.

**B. The Public Policy Exception to
At-will Employment Should Be Narrowly
Construed To Promote Certainty and Stability**

The vagueness of a public policy exception to at-will employment “provides the flexibility needed to apply the exception to a variety of contexts,” but “its undefinable parameters imbue the exception with a disconcerting unpredictability.” Steven H. Winterbauer, *Wrongful Discharge in Violation of Public Policy: A Brief Overview of an Evolving Claim*, 13 Indus. Rel. L.J. 386, 393 (1991-1992). The law places a high value on stability, certainty, and predictability because they promote confidence in the legal system and reduce the number and cost of disputes. *See State ex rel. Yates-Am. Mach. Co. v. Superior Court*, 147 Wn. 294, 298, 266 P. 134, 136 (1928); Joseph R. Grodin, *Are Rules Really Better Than Standards?*, 45 Hastings L.J. 569, 570 (1994). By eliminating speculation as to what the law

is and avoiding a need for interpretation, clarification, or explanation, certainty promotes efficiency and innovation for businesses and individuals.

Paul E. Loving, *The Justice of Certainty*, 73 Or. L. Rev. 743, 764 (1994).

The notion of “public policy” is so ambiguous that decisions interpreting it often rely on the particular facts and the courts’ level of outrage (as exemplified by the trial court in this case), making it difficult for employers to anticipate exactly what they may and may not do. See Thomas P. Owens III, *Employment At Will in Alaska: The Question of Public Policy Torts*, 6 Alaska L. Rev. 269, 307 (1989); Jeffrey M. Hahn & Kevin M. Smith, *Wrongful Discharge: The Search for a Legislative Compromise*, 15 Employee Rel. L.J. 515, 532 (1990). Uncertainty creates “headaches for employers, who do not know what specific standards they must meet in terminating an employee nor what the results of a mistake will be.” Recognizing this, the California Supreme Court stated in *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 696, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), that

predictability of the consequences of actions related to employment contracts is important to commercial stability. In order to achieve such stability, it is also important that employers not be unduly deprived of discretion to dismiss an employee by the fear that doing so will give rise to potential tort recovery in every case.

This Court recognized that a narrow reading of the public policy exception to at-will employment “protects against frivolous lawsuits and allows trial courts to weed out cases that do not involve any public policy principle.” *Thompson*, 102 Wn.2d at 232. This Court should avoid deviating from this established precedent and reject Rickman’s request to extend the public policy exception to the expression of speculative concerns about a proposed plan that is never implemented.

II

INTERNAL REPORTING OF A VAGUE SENSE THAT AN EMPLOYER’S PROPOSED ACTION MIGHT BE ILLEGAL CANNOT SUPPORT A WHISTLEBLOWING CLAIM

Public policy does not encourage legal actions based on workplace disagreements involving no legally culpable acts. Application of the whistleblowing version of the wrongful termination doctrine to this case would vastly expand the traditionally limited application of this exception—well beyond the unique facts of this case—and would be a severe impediment to employment at-will.

Conflicts between managers and employees are not uncommon in the workforce. Workplaces “are rarely idyllic retreats.” *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996). Instead, they are “complex environments in

which decisions are made by a variety of people for a variety of reasons.”

Ann Clarke Snell & Lisa R. Eskow, *What Motivates the Ultimate Decisionmaker? An Analysis of Legal Standards for Proving Causation and Malice in Employment Retaliation Suits*, 50 Baylor L. Rev. 381, 382 (1998).

Conflicts may arise when management makes decisions about business operations, over the objections of employees. While employees may have legitimate criticism to make about management, they have no legally enforceable right to be satisfied with the skills of their supervisors or the business judgment of a firm’s directors. “Traditionally, the interest of the employer in selecting its own management team has been recognized and insulated from protected employee activity.” *Abilities & Goodwill, Inc. v. NLRB*, 612 F.2d 6, 8 (1st Cir. 1979).

Instead, if at-will employees are dissatisfied with management, they may end the employment relationship at any time without fear of retribution. This fact creates an incentive for managers to formulate their policies and practices with care, lest the firm lose valuable employees. Yet it also allows management the flexibility to choose policies that some workers may find unwise or too demanding, but which in management’s judgment is best for the firm. The option of resigning in protest, as the employees in *Briggs v. Nova Services* did, 166 Wn.2d 794, 799, 213 P.3d 910, 912 (2009), provides

a sufficient counterbalance to the power of management without hampering management's ability to make decisions. In that case, this Court found no wrongful discharge in violation of public policy when the company fired two employees "based on an undeniable conflict of personalities and a stated inability to work within the company" and when the company accepted the resignation of six other workers. *Briggs*, 166 Wn.2d at 807. Constraining the right of business owners to terminate at-will employees who are dissatisfied with the performance or personalities of their supervisors would imperil the free discretion of management and restrict the competitive ability of firms. *See Thompson*, 102 Wn.2d at 227 (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 377, 652 P.2d 625, 629 (1982)) (" '[T]o imply into each employment contract a duty to terminate in good faith would . . . subject each discharge to judicial incursions into the amorphous concept of bad faith.'").

Courts in other states have rejected employee wrongful termination claims that arise in circumstances similar to those here, where the employee vaguely expresses concerns about the legality of a proposed employer action that never comes to fruition. For example, in *Fowler v. Criticare Home Health Services, Inc.*, 27 Kan. App. 2d 869, 874-77, 10 P.3d 8, 14-15 (2000), *aff'd*, 271 Kan. 715, 26 P.3d 69 (2001), the court considered a plaintiff employee's disagreement with the firm's general manager as to the legality

of shipping guns and live ammunition via UPS to the defendant firm's owner who was on vacation. After the employee was fired and sued, the court rejected the whistleblowing claim, stating that the disagreement was "just that," a disagreement; and did not qualify as an "internal report to management of illegal coworker or company conduct." *Id.* at 876. *See also Willis v. Dep't. of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998) (Rejecting whistleblowing claim because "[d]iscussion and even disagreement with supervisors over job-related activities is a normal part of most occupations. It is entirely ordinary for an employee to fairly and reasonably disagree with a supervisor who overturns the employee's decision.").

Similarly, in *Petroskey v. Lommen, Nelson, Cole & Stageberg, P.A.*, 847 F. Supp. 1437, 1447-48 (D. Minn. 1994) (applying state law), the court held that an employee could not base a statutory whistleblower claim on "mere musings" that "an employer may contemplate action which, if consummated, could be contrary to public policy." The employee in that case asserted that his employer's proposed action would constitute insurance fraud, in violation of federal and state statutes. But, admitting he was ignorant of the actual facts of the matter, the employee was reduced to alleging "it sounded like something that they shouldn't be doing," *id.* at 1448, echoing Rickman's speculative comment that Premera's proposed plan "had

HIPAA written all over it.” The *Petroskey* court realistically assessed the typical workplace:

[I]nescapably, the workplace is a variegated skein of personalities, temperaments and idiosyncracies. With seeming inevitability, the commingling of such an array of human chemistries portends toward conflict, as aspirations or self-esteem, which are held with good intention, go crosswise. In apparent recognition of these naturally relentless forces, the laws of Minnesota have purposefully left unactionable conduct in the workplace which would unduly circumscribe personal interaction.

Id. at 1450. *Cf.* Valerie P. Kirk & Ann Clarke Snell, *The Texas Whistleblower Act: Time for a Change*, 26 *Tex. Tech. L. Rev.* 75, 103 (1995) (Whistleblowing statute “is certainly not to serve as a refuge for unsatisfactory employees by allowing them to retain their positions by merely looking for and talking about imagined or remotely possible improprieties.”).

Permitting a wrongful termination claim in these circumstances creates such an expansion of the tort as to undermine at-will employment. The Tenth Circuit Court of Appeals highlighted the importance of differentiating between “internal dissatisfaction from the protected act of whistleblowing,” *Lykins v. CertainTeed Corp.*, 555 *Fed. Appx.* 791, 795 (10th Cir. 2014), and refused to allow an employee to claim whistleblower protection simply for raising issues with a supervisor. Such an exception would “swallow the ‘at will’ rule [because o]rdinary dialogue and

disagreement between management and employees would become the substance of whistleblowing claims.” *Id.* See also *Carter v. Lee County*, No. 13-1196, 2015 WL 161833 *9 (Iowa Ct. App. Jan. 14, 2015) (holding that “voicing one’s subjective disagreement with the actions of one’s supervisors is not whistleblowing”) (citation omitted).

CONCLUSION

Restrictions on at-will employment—such as creating “public policy” exceptions to it—have the potential to severely undermine the economy and cost the people of Washington millions of dollars and jobs. The doctrine should be preserved and exceptions to it should be narrowly construed.

The decision below should be affirmed.

DATED: April 23, 2015.

Respectfully submitted,

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