
Judiciary Committee

HB 2710

Title: An act relating to the protection of workers acting in furtherance of public policy.

Brief Description: Creating a cause of action for the protection of employees acting in furtherance of public policy.

Sponsors: Representatives Jinkins, Roberts and Pollet.

<p style="text-align: center;">Brief Summary of Bill</p> <ul style="list-style-type: none">• Creates and defines a statutory civil cause of action making it unlawful for an employer to take materially adverse action against an employee for conduct the employee reasonably believes promotes a clear mandate of public policy.
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Hearing Date: 2/4/14

Staff: Cece Clynch (786-7195).

Background:

At Will Employment.

"Employment at will" is a common law doctrine stemming from the 19th century which generally allows - in the absence of a contract or law that says otherwise - an employer to fire an employee for any reason without fear of liability.

Exception to the Rule -- Tort of Wrongful Termination in Violation of Public Policy.

Courts have recognized a public policy exception to the at will doctrine, predicating the exception upon tort principles and utilizing it in instances where application of the terminable at will doctrine would lead to a result clearly inconsistent with a stated public policy and the community interest it advances.

These public policy tort actions have generally fallen into four categories:

1. Where employees are fired for refusing to commit an illegal act.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

2. Where employees are fired for performing a public duty or obligation, such as jury duty or the like.
3. Where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims.
4. Where employees are fired in retaliation for reporting employer misconduct, sometimes referred to as "whistleblowing."

The Washington Supreme Court first recognized the tort in the case of *Thompson v. St. Regis Paper Co.* in 1984. In that case, the plaintiff-controller was discharged after 17 years of employment, during which he had been promoted and received merit pay and bonuses. The employer's only stated reason was that he had "stepped on somebody's toes." Among other things, the plaintiff claimed that his discharge was in retaliation for having instituted an accurate accounting program in compliance with a federal act which makes it a crime to offer a bribe to foreign officials in order to obtain business and requires companies subject to the reporting requirements to institute certain accounting controls.

The *Thompson* court ultimately determined that the federal act was a clear expression of public policy, and remanded the case to the trial court, instructing that if the plaintiff's discharge was premised upon his compliance with that act, and intended as a warning to other controllers, then his discharge was contrary to a clear mandate of public policy and, thus, tortious.

With respect to the elements and burden of proof, under *Thompson* the employee had the burden of proving his dismissal violated a clear mandate of public policy. To state a cause of action, the employee was required to plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened. Once the employee demonstrated that his discharge may have been motivated by reasons that contravened a clear mandate of public policy, the burden shifted to the employer to prove that the dismissal was for reasons other than those alleged by the employee.

A dozen years later, in *Gardner v. Loomis Armored, Inc.*, a case involving an armored car driver fired for leaving his vehicle to assist a woman being threatened with a knife by a bank robber, the court adopted the "Perritt" elements of a public policy tort case:

1. The plaintiffs must prove the existence of a clear public policy (the clarity element).
2. The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element).
3. The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element).
4. The defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element).

In 2011, in a 5-4 decision in the case of *Cudney v. ALSCO, Inc.*, the Washington Supreme Court addressed the "jeopardy" element in a case involving a claim by an employee who was fired after he reported that a managerial employee had driven a company vehicle while drunk. Holding that a separate claim for wrongful termination in violation of public policy was precluded, the court determined that:

- WISHA adequately promotes the public policy of ensuring workplace safety and protecting workers who report safety violations; and

- Washington's laws prohibiting driving while under the influence (DUI) adequately promote the public policies underlying them.

In so holding, the majority of the court noted that it is the public policy that must be promoted, not individual interests.

The *Cudney* dissent maintained that the majority opinion departed from long-standing precedent and transformed the jeopardy prong into an automatic rule of exclusion.

The Washington Law Against Discrimination.

The Washington Law Against Discrimination (WLAD) provides that it is an "unfair practice" to discriminate against a person in a variety of transactions, including employment, on the basis of race, color, creed, national origin, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability. There is a whistleblower provision included in the WLAD.

The WLAD includes an administrative hearing process, and also explicitly permits a civil cause of action to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by the WLAD, the U.S. Civil Rights Act of 1964, or the federal Fair Housing Act.

Summary of Bill:

Intent.

Intent is expressed to protect employees who act in furtherance of public policy and to reject the change to common law wrought by *Cudney v. ALSCO*.

Statutory Cause of Action Created.

A new section is added to WLAD, making it unlawful for an employer to take materially adverse action against an employee where retaliation is a substantial factor in the employer's decision to take adverse action. A statutory civil cause of action is made available for a violation, notwithstanding the existence of any other means to protect public policy, and independent of any civil cause of action or remedy that may exist at common law.

Definitions.

For purposes of this action, "retaliate" means "to commit a materially adverse action against an employee for conduct that the employee reasonably believes promotes a clear mandate of public policy. Protected conduct includes, but is not limited to, refusing to commit an illegal act, performing a legal duty or obligation, exercising a legal right or privilege, or reporting employer misconduct or whistleblowing."

An "adverse action" is not material if it has only a trivial effect.

Elements and Burden of Proof.

In order to maintain an action for the violation of public policy, an employee must show *all of* the following:

1. That a clear public policy exists, which may be reflected in federal, state, or local laws, including constitutions, statutes, regulations, ordinances, and codes, as well as prior judicial decisions. Whether a clear public policy exists is a question of law for the court to decide.
2. That discouraging the conduct the employee engaged in would jeopardize the public policy. In order to establish this element, an employee must show that the conduct relates to public policy, and that the threat of adverse action will discourage others from engaging in such conduct.
3. That the public-policy related conduct was a substantial factor in the employers' decision to take adverse action.

In the event that an employer asserts that there is an overriding justification for the decision to take adverse action, the employer bears the burden of asserting and proving this affirmative defense, including that the balance of public policies relied upon by the employer outweigh the public policies relied upon by the employee. Whether there is an overriding justification is a question of law for the court to decide.

This affirmative defense is only available to an employer admitting that adverse action was taken because of the employee's public policy related conduct.

Statute of Limitations.

The statute of limitations for bringing suit is three years.

Remedies.

Remedies for violation include injunctive relief as well as actual damages, the recovery of the costs of the lawsuit, including reasonable attorneys' fees, and any other appropriate remedy authorized under the WLAD.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.