

Briggs v. Nova Servs.

No. 79615-7

OWENS, J. (dissenting) -- I dissent from the lead opinion today because the conduct alleged in this case is not excluded from the public policy protecting the right to engage in concerted activity. Furthermore, I think it imprudent to determine as a matter of law that the alleged concerted activity did not cause the terminations in this case. For these reasons, I would reverse the Court of Appeals and remand for further proceedings.

Analysis

I

This court recognizes the tort of wrongful discharge in violation of public policy as an exception to the at-will employment relationship. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 935-36, 913 P.2d 377 (1996). The tort requires a plaintiff to prove three elements: ““(1) the existence of a clear public policy”” (clarity); ““(2) that discouraging the conduct in which [the employee] engaged would jeopardize the

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public policy” (jeopardy); “and (3) that the [protected] conduct

caused the dismissal” (causation). *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119 (2005) (quoting *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002)). Upon making a prima facie showing of these elements, the burden shifts to the employer to produce some legitimate reason for the termination (justification) sufficient to create a question of fact. *Id.*; *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 68, 821 P.2d 18 (1991).

A

I agree with the lead opinion to the extent that RCW 49.32.020 creates a public policy applicable as an exception to the general at-will employment rule. However, I part ways with the lead opinion’s extremely narrow interpretation of that policy. While chapter 49.32 RCW specifically deals with limitations on injunctive relief sought in labor disputes, this court has recognized that the policy articulated in RCW 49.32.020 offers broader protections than the specific purpose of the statute. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 755-57, 888 P.2d 147 (1995). The policy tracks the language of a federal statute, originally known as the Norris-LaGuardia Act, 29 U.S.C. § 102 (1932). See *Nat’l Labor Relations Bd. v. City Disposal Sys., Inc.*, 465 U.S. 822, 834-35, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984). Many states, including Washington, enacted “little Norris-LaGuardia” statutes, such as RCW 49.32.020, that included the language of the federal statute. *Morris v. Local Union No. 494 of Amalgamated Meat*

Cutters & Butcher Workmen of Spokane, 39 Wn.2d 33, 40, 234 P.2d 543 (1951) (Finley, J., dissenting). See generally Eileen Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction*, 11 Hofstra Lab. L.J. 97 (1993). Congress incorporated the same language into section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157. This court has referred to section 7 as the “federal analogue” of RCW 49.32.020 and has considered federal case law interpreting the meaning of concerted activities in regards to section 7 as persuasive authority in interpreting RCW 49.32.020. *Bravo*, 125 Wn.2d at 754-55.

Further, the phrase “or other mutual aid or protections” includes a broader purpose than formal union activities or collective bargaining efforts.¹ *Eastex, Inc. v. Nat’l Labor Relations Bd.*, 437 U.S. 556, 565-66, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978) (recognizing “labor's cause often is advanced on fronts other than collective bargaining” and that “the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of ‘mutual aid or protection’ as well as for the narrower purposes of ‘self-organization’ and ‘collective bargaining’”); *Halstead Metal Prods. v. Nat’l Labor Relations Bd.*, 940 F.2d 66, 69 (4th Cir. 1991) (recognizing that section 7 of the NLRA “effectively insulate[s] employees from discharge . . . for

¹ “Collective bargaining” is as a term of art in the context of labor law, which generally refers to an employer’s statutory obligation to formally negotiate with employees through a designated representative on certain topics. *Patrol Lieutenants Ass'n v. Sandberg*, 88 Wn. App. 652, 656, 946 P.2d 404 (1997).

engaging in concerted activities for mutual aid or protection, ‘even though no union activity be involved, or collective bargaining be contemplated’” (quoting *Joanna Cotton Mills Co. v. Nat’l Labor Relations Bd.*, 176 F.2d 749, 752-53 (4th Cir. 1949))). Mutual aid or protection more generally refers to the right of employees to work together “to improve terms and conditions of employment or otherwise improve their lot,” even outside the process of formal collective bargaining efforts. *Eastex*, 437 U.S. at 565; see *Bob Evans Farms, Inc. v. Nat’l Labor Relations Bd.*, 163 F.3d 1012, 1021 (7th Cir. 1998). Indeed, not all employees have the same practical opportunities or incentives to form a union. Such unorganized employees often may require the protection to engage in concerted activity more than union employees for the very reason that nonunion employees have no one to negotiate with the employer on their behalf. *Halstead*, 940 F.2d at 70 (“The broad protection of the [NLRA] applies with particular force to unorganized employees, who, because they have no designated bargaining representative, have ‘to speak for themselves as best they [can].’” (alteration in original) (quoting *Nat’l Labor Relations Bd. v. Wash. Aluminum Co.*, 370 U.S. 9, 14, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962))). Therefore, the policy protects more than formal labor organizing activities such as designating a representative or self-organization.

Justice Charles Johnson incorrectly concludes that an actual violation of RCW

49.32.020 is a threshold requirement to a claim of wrongful discharge in violation of public policy. Concurrence (Charles Johnson, J.) at 2. Rather, as we recognized in *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000), a statute may provide a clear mandate of public policy to support a wrongful discharge tort claim even where the plaintiff has no claim under the statute. *Id.* at 66-73 (recognizing public policy of Washington's Law Against Discrimination, chapter 49.60 RCW, supported wrongful discharge claim though statute provided no remedy to plaintiff). The implied cause of action arising under RCW 49.32.020 and the tort of wrongful discharge remain entirely separate, distinct causes of action. Their common ground is simply the public policy clearly set forth in the statute.

B

The jeopardy element requires a showing that the plaintiff engaged in conduct that “directly relates to the public policy, or was necessary for the effective enforcement of the public policy.” *Gardner*, 128 Wn.2d at 945 (emphasis omitted). This court has recognized four general types of conduct involved in wrongful termination actions, including, “situations where employees are fired for refusing to commit an illegal act, for performing a public duty or obligation, for exercising a legal right or privilege, or for engaging in whistleblowing activity.” *Korlund*, 156 Wn.2d

at 178. Because Ken Briggs and his fellow employees (Employees)² have alleged conduct that falls within the scope of protected activity under RCW 49.32.020 and that such conduct directly relates to the public policy, they should have survived summary judgment.

1

The Employees were terminated for exercising a legal right to engage in concerted activities under RCW 49.32.020. The Employees engaged in two kinds of concerted activities: communicating with the board of directors (Board) and collectively walking off their jobs. The lead opinion incorrectly holds that neither of these activities in this context constituted concerted activities afforded protection. I dissent because in my view the Employees exercised a legal right as the law did not prohibit them from engaging in such collective actions.

Generally, concerted activity means “action in concert” or simply acting together. *Bravo*, 125 Wn.2d at 752. Of course, not all action taken together is protected concerted activity. *See Trompler, Inc. v. Nat’l Labor Relations Bd.*, 338 F.3d 747, 748 (7th Cir. 2003) (noting that concerted activities “obviously cannot be

² The Employees are petitioners Ken Briggs, Judy Robertson, Mark Johnson, Shirley Bader, Beverly Nunn, Jami Smith, Margaret Clark, and Valerie Bruck. Briggs, Robertson, Johnson, Bader, Nunn, and Smith held self-described management positions at Nova and are referred to collectively hereinafter as “Managers.” Clark and Bruck held nonmanagement positions. The two remaining petitioners, Odalys Castillo and Pam Zeller, are not parties to this appeal. *See* lead opinion at 3 n.1.

read literally” to condone illegal behavior). On the other hand, federal courts have protected a broad range of conduct as concerted activity and have limited protection only when the conduct is “unlawful, violent, in breach of contract, or otherwise ‘indefensible.’” *Id.* (“the mere fact that [concerted activities] are not ‘reasonable’ does not forfeit the protection of the [NLRA]”); *Wash. Aluminum*, 370 U.S. at 16-17.

The Employees engaged in concerted activity by acting together to communicate their concerns with the Board. Concerted activity includes listing grievances or complaints. *See FiveCAP, Inc. v. Nat’l Labor Relations Bd.*, 294 F.3d 768, 782-84 (6th Cir. 2002) (holding that circulating a petition constituted concerted activity). Nova Services claims that the Employees’ letters to the Board were not protected because its internal policies forbid employees from communicating directly with the Board and that all grievances should have been presented to Nova’s executive director, Linda Brennan. Clerk’s Papers (CP) at 143; Br. of Resp’ts at 2. However, an internal rule or policy does not necessarily restrict an employee’s right to engage in concerted activity. *See Wash. Aluminum*, 370 U.S. at 16-17 (holding that the violation of a company rule does not grant the employer authority “to punish a man by discharging him for engaging in concerted activities”). Communication with Brennan about the Employees’ complaints was probably futile because she refused to respond to their complaints. CP at 164, 169, 183.

In any event, the Board did not initially forbid the Managers from directly communicating with it. In fact, the Board responded to the Managers' first letter by allowing the Employees to address the Board in person. In addition, the Board hired an attorney to investigate the complaints and a human resource consultant to improve Brennan's relationship with the Employees. Therefore, the Board itself did not enforce its rule about prohibiting employee communication.

The Employees also engaged in protected activity by walking off their jobs for their mutual aid and protection. An employee walkout in protest of working conditions has long been recognized as a protected concerted activity for mutual aid or protection, even when not connected with a formal union protest. In *Bravo*, this court held that nonunion employees who participated in a strike after attempting to negotiate for better working conditions were engaged in concerted activity and protected for exercising a legal right under RCW 49.32.020. 125 Wn.2d at 756-58. In *Washington Aluminum*, the Supreme Court upheld the right of unorganized employees to engage in a spontaneous walkout to protest a working condition (the temperature setting in a factory) without first giving notice to their employer. 370 U.S. at 15-17; *see also Halstead*, 940 F.2d at 70 ("Employees who collectively refuse to work in protest over wages, hours, or other working conditions are engaged in 'concerted activities' for 'mutual aid or protection' within the meaning of the [NLRA]."). Therefore, at-will

employees do not lose legal protection for engaging in a collective walkout.

The Employees have alleged that they acted together to communicate their concerns to the Board and to collectively walk off their jobs. Based on our precedent and analogous federal case law, such conduct is included within the meaning of concerted activity as contemplated in RCW 49.32.020.

2

Beyond a lack of prohibition, the conduct of exercising a legal right must directly relate to the public policy. In the present context, the public policy articulated under RCW 49.32.020 protects concerted activity directly related to the “terms and conditions of employment.” In *Bravo*, this court stated that concerted activities are protected when employees undertake action “for the purpose of improving their working conditions.” 125 Wn.2d at 752. Such language is consistent with federal case law interpreting section 7 of the NLRA. *See Wash. Aluminum*, 370 U.S. at 14 (“[T]he policy of the [NLRA is] to protect the right of workers to act together to better their working conditions.”).

a

The lead opinion holds in part that the Employees’ conduct was not protected because it did not relate to a term or condition of employment. Lead opinion at 12. I disagree. The evidence presented by the Employees demonstrates that the alleged

motivation behind their concerted activities related to their dissatisfaction with Brennan's professional performance as executive director of Nova. In their initial letter to the Board, the Managers criticized Brennan's management of Nova and pointed out specific concerns relating to their working conditions, including: lack of adequate supervision, CP at 73 ("leav[ing] managers to do . . . work in isolation and without support"); failure to properly delegate authority, *id.*; failure to hire needed staff, CP at 73-74; failure to accurately apply accrued sick leave in violation of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201, CP at 74; failure to communicate with employees, *id.* ("Managers work in isolation without any knowledge of the overall condition of the organization."), CP at 75 ("Open communication is not fostered at Nova."); and failure to adequately manage finances, CP at 74. Based on these complaints, the Managers requested Brennan's termination.

These articulated concerns regarding delegation, communication, hiring of staff, and financial management related to the Employees' working conditions by their own terms. In *Bravo*, we recognized that "better wages, improved medical coverage, better treatment from supervisors, and lunch and rest breaks," constituted "terms and conditions of employment," for which employees were protected in attempting to negotiate with their employer. 125 Wn.2d at 748-49. Similarly, the accrual of sick leave and compliance with the FLSA directly relate to a term of employment. *See*,

e.g., Nat'l Labor Relations Bd. v. Pyromatics, Inc., 677 F.2d 24, 26 (6th Cir. 1982)

(recognizing concerted activity by employee who circulated a petition to fellow employees for increased vacation time). Likewise, a lack of adequate supervision and lack of communication with a supervisor are analogous to “treatment from supervisors.” *Bravo*, 125 Wn.2d at 748; *Trompler*, 338 F.3d at 749. Proper supervision, delegation of authority, and communication often can affect job performance and general satisfaction in the work environment.

Finally, a director’s professional competency and ability to manage a company are also proper employee concerns. Federal courts have held that employee concerns regarding a supervisor’s conduct and management of a company may directly relate to working conditions. *See Trompler*, 338 F.3d at 749 (“A complaint that a supervisor's conduct is impairing the terms or conditions of the employment of the workers whom he supervises is, however, a legitimate subject for concerted activity.”); *FiveCAP*, 294 F.3d at 783-84 (holding that a petition seeking the removal of the executive director and financial officer for failure to properly manage a nonprofit corporation related to working conditions “[b]y its very terms”). In *FiveCAP*, the court held that employees of a nonprofit corporation engaged in protected conduct by circulating a petition that sought the removal of the executive director and financial officer “for their failure to manage [the corporation] properly.” *Id.* at 783. Specifically, the court held that the

failure to properly manage claims included “mishandling . . . funds by cutting programs . . . ; terminating needed employees without replacing them; and using . . . funds to deter the Union's campaign.” *Id.* The court concluded that the petition related to working conditions “[b]y its very terms.” *Id.* The terms of the Employees’ complaints also demonstrated their concerns related to working conditions under Brennan’s management of Nova.

Brennan’s own statements also acknowledge that the Employees’ concerns related to improving working conditions, rather than mere personal differences. After the Board took steps to resolve the Employees’ conflict with Brennan, Brennan herself expressed her commitment to address the concerns raised, which she summarized as “poor morale, staff/client ratio, pay rates, and Nova’s performance management system to name a few.” CP at 300. Brennan further pledged her commitment “to improve the workplace for all employees.” *Id.* Viewing the record in this case in the light most favorable to the Employees, the lead opinion should have concluded that the alleged concerns raised by the Employees related to the improvement of their working conditions at Nova.

b

The lead opinion imports a line of cases to our concerted activity jurisprudence that goes too far in narrowing the exception. Even if I agreed that the exception

should be narrowed, the lead opinion's resulting analysis misses the question presented in this case.

Although courts have recognized that employees generally are not protected for engaging in concerted activity specifically for the purpose of seeking the termination of a supervisor if such decision is within the exclusive prerogative of the employer, *see Bob Evans Farms*, 163 F.3d at 1021 (holding that the termination of a supervisor does not relate to a term or condition of employment), an employee protest over a change in management that affects the working conditions of the employees “would in principle be protected activity,” *Abilities & Goodwill, Inc. v. Nat’l Labor Relations Bd.*, 612 F.2d 6, 9 (1st Cir. 1979).³ Further, the court in *FiveCAP* held that employees of a nonprofit corporation were protected in circulating a petition that sought the removal of the executive director and financial officer for alleged mismanagement of the corporation. 294 F.3d at 783-84. Finally, depending on the level of hierarchy in an organization, lower level employees may engage with a titular head of the organization in more of a cooperative, team oriented approach. In those instances, it is entirely

³ The lead opinion cites to *Abilities & Goodwill* for the proposition that collective requests to hire or fire management fall outside of the concerted activities exception. Lead opinion at 11. However, the court in *Abilities & Goodwill* adopts a multifaceted approach that recognizes, among other factors, the dichotomy between protests regarding upper management and lower level supervisory management. Because Brennan was the executive director, such a balancing test may tip in Nova’s favor. However, such a holding would require an analysis of the workplace structure beyond that provided in the lead opinion.

reasonable to describe the working relationship between the manager and employees as “related to” the working conditions of the employees.

I would hold that employee protests over management personnel decisions are protected when the decision relates to the employees’ working conditions. The main purpose of the public policy protecting concerted activity is to give employees the ability to pressure their employer to address the terms or conditions of employment that they otherwise would have no power to change. Of course, the right to protest such management decisions does not mean that employees have the right or power to make such decisions.⁴ An employee walkout can bring employee concerns about management to the attention of the employer but does not require the employer to concede authority over such matters to the employees.

Courts also have recognized that employees are protected in engaging in concerted activity for the purpose of seeking the reinstatement of a co-worker. *See Nat’l Labor Relations Bd. v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941, 946 (1st Cir. 1961) (“[E]mployees are also free to use concerted activities to seek reinstatement of the employee.”); *Nat’l Labor Relations Bd. v. Pioneer Plastics Corp.*, 379 F.2d 301,

⁴ Ultimately, this case is about whether the Employees are without recourse for being terminated for engaging in this protest, not whether or not employers must act on the protestations of their respective employees’ concerns about members of management. Boards of directors are free to ignore the protests, reject the underlying requests or demands, or even discharge the employees, but if and when boards choose the latter option, they will potentially be liable for wrongful termination under the concerted activity exception.

307 (1st Cir. 1967) (“There is no question that employees may spontaneously agree to cease work in protest against their employer's conduct toward fellow employees and that such concerted action is protected activity.”). Here, the Managers asserted in their first letter to the Board that they would collectively leave if Brennan terminated any one of them for complaining to the Board. The record indicates that the Employees walked out almost immediately after Briggs and Robertson were terminated, which raises an inference that the walkout related to the terminations.⁵

Based on my review of the record, I cannot conclude as a matter of law that the Employees’ concerted activity did not relate to a term or condition of employment. Of course, such a conclusion does not establish that the Employees’ conduct did in fact relate to their working conditions. *Korslund*, 156 Wn.2d at 182 (“[T]he question whether the jeopardy element is satisfied generally involves a question of fact.”). At trial, the evidence might support a finding under the circumstances that the Employees acted out of personal dissatisfaction or animus against Brennan. In any event, such a determination presents a question of fact sufficient to overcome summary judgment.

C

⁵ In their memo in opposition to summary judgment, the Employees contend that they walked out to protest working conditions and expressly deny specifically protesting the termination of Briggs and Robertson. CP at 201. However, in the first letter to the Board, the Managers stated that they would walk out if Brennan retaliated against any one of them for expressing their concerns. Furthermore, the second letter to the Board expressly demanded Briggs’s and Robertson’s reinstatement. As such, the protected nature of the conduct raises a question of fact.

With regard to the question of causation, the lead opinion holds that the Employees, except Briggs and Robertson, have no claim for wrongful discharge because they voluntarily resigned and therefore were not terminated at all. I disagree because the Employees have sufficiently raised a question of material fact that they did not voluntarily resign and that Brennan terminated them for engaging in protected concerted activity.

1

As an initial matter, the record clearly raises a question of fact regarding the termination of Briggs and Robertson. Brennan affirmatively terminated Briggs and Robertson. CP at 61. In her response to interrogatories, Brennan claimed that Briggs and Robertson were terminated, in part for “utiliz[ing] company time to enlist the support of fellow managers to undermine the Executive Director’s authority and position.” CP at 143. This statement itself raises a question whether Brennan terminated Briggs and Robertson for acting in concert with their fellow managers.

2

With regard to the remaining employees, absent Bader, the lead opinion finds the causation element lacking. Lead opinion at 14. I disagree. The termination of these employees occurred when they were replaced after walking out. Because they were exercising a protected right, subsequent displacement by Nova is causally related

to their concerted activity.

Brennan's own understanding that the Employees voluntarily resigned does not determine the Employees' right to protection. *See Puerto Rico Rayon Mills*, 293 F.2d at 945-46 ("The right of employees to engage in activity guaranteed by Section 7 of the [NLRA] should not be subject to defeasance merely because the employer believes he is not violating the Act in restraining the employee in his exercise of such rights."). Brennan's state of mind only becomes relevant for consideration once the Employees meet the causation element and the burden shifts to Nova to show a legitimate reason for the termination. *See Korslund*, 156 Wn.2d at 178.

The fact that the Employees stated that they would not return to work until the Board met their requests does not necessarily determine that they had permanently resigned from Nova. Federal courts have refused to interpret such words in isolation and have rejected them as justification for an employer's decision to terminate or replace workers who engage in a walkout. *See Halstead*, 940 F.2d at 70 ("An employee's use of the word 'quit' in a mass walk out does not always mean that the employee intended to terminate his or her employment."). For example, in *Nat'l Labor Relations Bd. v. Martin*, 207 F.2d 655, 658 (9th Cir. 1953), the court rejected the employer's claim that the employee voluntarily resigned after claiming he "was quitting" if his supervisor did not respond in 24 hours to his and fellow employees'

demands regarding bonus pay. The court noted that when the employee left work that day, he did not follow the “customary procedure” (taking his tools with him) for a permanent resignation. *Id.* The court concluded that the employer’s decision to treat the employee’s statement as a permanent resignation amounted to a retaliatory discharge for participating in concerted activities. *Id.* at 659. Likewise, in *Halstead*, the court determined that nine employees who walked off their jobs had not resigned, even though they indicated that they would not return to work until they could talk to management and two of them expressed that they were quitting. 940 F.2d at 70-71. The court considered the employees’ conduct in the context of their labor dispute, including the fact that “the employees did not submit termination notices or ask for final paychecks” at the time they left work. *Id.* at 71. The court also noted that “it is highly unusual for nine employees to terminate their employment at the same time, and it is more likely that the employees had banded together to protest [working conditions].” *Id.* These courts recognize that statements made during a strike or walkout raise questions of fact regarding the employment status of the employee and must be viewed in the context of the ongoing labor dispute.

I find this line of reasoning compelling. An employee does not lose his or her right to engage in collective activity solely by stating his or her intent to quit or leave during the course of a walkout. An employee’s stated intention to quit or refusal to

return to work during a walkout certainly is a factor in determining whether the employee has permanently resigned. However, courts must also consider whether the employee simply made such a statement as part of an overall effort to improve his or her labor conditions. *See id.*

In this case, the walkout occurred immediately after Brennan fired Briggs and Robertson allegedly for insubordination and for gathering support from fellow workers. From these facts I assume, for purposes of summary judgment, that the Employees reasonably inferred from the terminations that any further attempt to engage in concerted activity against Brennan would subject them to termination for the same reasons. In other words, the termination of Briggs and Robertson effectively cut off the ability of the remaining Employees to engage in protected concerted activity for the improvement of their working conditions without risking their own jobs. The walkout remained the last option they had to protect themselves against Brennan's alleged retaliation. While the Employees stated their intent not to return to work unless certain requests were met, they did not state that they would permanently resign from Nova. Furthermore, the record does not indicate that the Employees followed the customary procedure for resigning, such as cleaning out their desks or completing the appropriate paperwork as to indicate a permanent resignation. *Id.*; *Martin*, 207 F.2d at 658.

My colleague Justice Charles Johnson acknowledges that this court has opined that constructive discharge may support a wrongful discharge claim. Concurrence (Charles Johnson, J.) at 2 n.2. In *Korlund*, we recognized that we never considered or rejected a constructive discharge theory. 156 Wn.2d at 179. The *Korlund* plaintiffs alleged that they were forced to take extended medical leave because of actions taken against them for engaging in protected activity. *Id.* at 176. We recognized such allegations may support a claim for wrongful discharge: “Deliberately creating conditions so intolerable as to make the employee so ill that he or she must leave work permanently is functionally the same as forcing the employee to quit.” *Id.* at 180 (also noting, “[t]he leave must be, in other words, comparable to termination of employment”). I see no reason to discard the *Korlund* dicta as an incorrect statement of law; rather, I believe it to accurately represent how this court should and would analyze a wrongful termination by constructive discharge claim.

Whether the employees had been terminated was the threshold question in *Korlund*; had we held to the contrary, it would not have been necessary to address further the elements of the tort of wrongful discharge as we did. *Id.* at 181-82. Thus, constructive discharge, if proved, suffices as discharge for purposes of the public policy tort.

The fact that the Employees requested the reinstatement of fellow workers and

the termination of Brennan indicates that the walkout was a continuation of their ongoing efforts to effectuate some change in their own working conditions rather than simply to abandon their jobs. The Employees' statement that these requests were nonnegotiable is consistent with the purpose of a walkout, which by its very nature is a tactic used by employees when negotiations have broken down. Indeed, from the Employees' perspective, previous attempts to negotiate with the Board led to Briggs's and Robertson's termination.

Ultimately, whether an employee who engages in a walkout has voluntarily resigned presents a question of fact that must be determined in light of the circumstances of each case. The right to walk out of a job is not unlimited and must relate to some concerted activity for the purpose of improving working conditions. However, we believe that the reasonableness of the action and the employer's response will largely turn on the facts of each case. Having recognized that walkouts and strikes fall within the scope of concerted activity protected by RCW 49.32.020, we cannot determine as a matter of law that the Employees were not protected in walking off their jobs.

Employee Bader's situation requires specific attention regarding causation because she technically did not participate in the walkout. After Briggs and Robertson

were terminated and before the remaining Employees walked out, Bader alleged that she informed Brennan of her intent to resign “if things were not going to get better at Nova.” CP at 160. According to Bader’s affidavit, Brennan asked Bader if she would “stay around long enough that she could replace me.” *Id.* Later that day, Bader alleged that Brennan asked Bader if she could be personally loyal to Brennan before she left. *Id.* Bader responded that she could be loyal to Nova but not to Brennan personally. *Id.* At this point, Bader alleges that Brennan asked her to leave by the end of the day. *Id.*

Bader’s affidavit raises a question of fact whether she was terminated or voluntarily resigned from Nova.⁶ According to Bader, she only indicated her intent to leave Nova at some indeterminate time in the future, and it was Brennan who affirmatively and immediately terminated her employment. Furthermore, she told Brennan that she intended to leave because of the lack of improved working conditions at Nova. As with the other Employees, this evidence raises a genuine question of fact as to whether Brennan terminated Bader for engaging in concerted activities with the other Employees.

⁶ Generally, the nonmoving party cannot rely solely on “speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value.” *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 612, 62 P.3d 470 (2003). However, Bader’s affidavit relies on personal knowledge of a critical event in this case. As such, her affidavit presents arguable facts, not merely unsupported conclusions.

Conclusion

This court has expressly recognized a public policy protecting the right of nonunion employees to engage in concerted activities for the purpose of improving working conditions. The record in this case presents a genuine question of material fact as to whether the Employees' concerted activities directly related to the improvement of their working conditions. Furthermore, the record also presents a question of fact as to whether Brennan terminated the Employees for engaging in protected concerted activity or whether some of the Employees voluntarily resigned. Finally, RCW 49.32.020 does not expressly exempt managers or supervisors from the right to engage in concerted activities. For these reasons, I would reverse the Court of Appeals and remand to the trial court for further proceedings.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Justice Mary E. Fairhurst

Justice Debra L. Stephens

Justice Tom Chambers

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