IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KEN BRIGGS, JUDY ROBERTSON, MARK JOHNSON, BEVERLY NUNN, JAMI SMITH, SHIRLEY BADER, PAM ZELLER, MARGARET ("PEGGY") CLARK, ODALYS P. CASTILLO, and VALERIE BRUCK, Petitioners, v. NOVA SERVICES, a Washington non-profit corporation, and LINDA BRENNAN, Respondents.	)	No. 79615-7 En Banc Filed August 27, 2009

J.M. JOHNSON, J.—Eight employees of a nonprofit organization did not support the executive director appointed by its board. Instead, the employees made efforts to remove her from office, including sending a letter

to the board of directors demanding she be fired. After the board reviewed the employees' charges and affirmed the board's support of the executive director, six of the employees quit and two were fired. The employees claim that their actions constituted "concerted activities" statutorily protected under Washington law. The employees argue that this prevents the employer from terminating any of the employees. However, we are constrained from creating broad exceptions to the general Washington rule that employers and employees can end their relationship at will. We hold that the conduct at issue here is not encompassed in the public policy of chapter 49.32 RCW protecting the employees' right to engage in concerted activities relating to the improvement of working conditions. The statutory exception to the general rule is simply not broad enough to apply here. Accordingly, we affirm the Court of Appeals, which upheld summary judgment for the nonprofit employer Nova Services and its director.

Facts

Eight former employees (Employees) allege they were wrongfully terminated by Nova Services, a Washington nonprofit corporation that provides services to disabled persons. Six of the Employees held self-

described management positions at Nova, including Ken Briggs, Judy Robertson, Mark Johnson, Shirley Bader, Beverly Nunn, and Jami Smith (collectively Managers). The remaining two Employees, Margaret Clark and Valerie Bruck, held nonmanagement positions.[1] All of the Employees worked under the supervision of Nova's executive director, Linda Brennan.

After unsuccessfully attempting to talk with director Brennan directly, the Managers sent a letter to the board of directors on April 6, 2004, regarding their ongoing concerns about director Brennan's management of the organization. The letter addressed the Managers' dissatisfaction with director Brennan's performance in the areas of leadership, administration, finance, board development, corporate culture, and community and government relations. Clerk's Papers (CP) at 73-77. The Managers requested an in person meeting with the board to elaborate on their concerns and to discuss "plans of action." CP at 76. At the end of the letter, the Managers asserted that they would collectively "leave" Nova if director Brennan terminated one or more of them for raising concerns with the board. *Id*.

Nova argues that the Managers' letter violated its internal policy

[1] Odalys Castillo stipulated to the dismissal of her claims. Clerk's Papers (CP) at 355. Pam Zeller apparently abandoned her claims as well. Appellants' Opening Br. at 6.

barring direct employee communication with the board. However, Nova took no disciplinary action against the Managers at that time. Instead, the board responded to the letter by hiring an attorney, Michael Love, to investigate the Managers' concerns. After conducting an investigation, Mr. Love determined that director Brennan had not engaged in illegal conduct. CP at 81. Love recommended that the board terminate either director Brennan or Briggs and Robertson because "personal animosity runs too deep" to allow continued working together. CP at 120.

The board did not follow Love's recommendation, but employed a human resource consultant, Ellen Flanigan, to mediate. After director Brennan and the Managers refused to attend mediation sessions with each other, Ms. Flanigan arranged a meeting between the Managers and the board on June 29, 2004, to discuss their dissatisfaction with director Brennan.

On July 12, 2004, Ms. Flanigan and director Brennan met with Bader, Nunn, Johnson, and Smith individually. Director Brennan told each that she was willing to make every effort to better communicate to address their concerns, CP at 61, and to take steps "to improve the workplace for all employees." CP at 65, 300. That same day, director Brennan terminated

Briggs and Robertson for insubordination, petitioning grievances directly to the board, and for using "company time to enlist the support of fellow managers to undermine [director Brennan's] authority and position." CP at 143.

Upon learning of Briggs's and Robertson's termination, Bader informed director Brennan of her intent to leave Nova in response to those terminations. Bader claims that she and director Brennan agreed that she would remain at Nova until director Brennan found a replacement. Later the same day, director Brennan asked Bader to leave by the end of the day.

On July 15, 2004, the remaining Employees, including Bader, sent a letter to the board requesting the reinstatement of Briggs and Robertson and the firing of director Brennan. CP at 79. The letter indicated that the Employees would "walk out of Nova Services" if the board did not contact them by the end of the following day, that they would not return until their requests were met, and that the requests were "non-negotiable." *Id*. The board did not contact the Employees the next day. As promised, Johnson, Smith, Clark, Bruck, Zeller, and Nunn did not come to work. Director Brennan considered this action as a group resignation and began to hire

replacements for all of the Employees.

The Employees filed a complaint against Nova on September 17, 2004, alleging wrongful "termination" in violation of public policy,[2] unlawful retaliation-wrongful discharge, negligent infliction of emotional distress, intentional infliction of emotional distress/outrage, and negligent supervision/retention. CP at 3-10. Nova filed a motion for summary judgment before either party had taken depositions. The Employees filed a motion to compel discovery and a motion for continuance based on their inability to complete discovery. After a hearing, the trial court denied the motion for continuance and granted the motion for summary judgment.

The Employees appealed and Division Three of the Court of Appeals affirmed on all grounds. Regarding summary judgment, the court held that the Employees had not engaged in concerted activities protected under RCW 49.32.020, because the Employees' concerns did not relate to a term or condition of employment. *Briggs v. Nova Servs*., 135 Wn. App. 955, 965-66, 147 P.3d 616 (2006). The court also held that the Managers were excluded

[2] We refer to the tort as "wrongful discharge in violation of public policy." *Korslund v. Dyncorp Tri-Cities Servs.*, *Inc*., 156 Wn.2d 168, 178, 125 P.3d 119 (2005).

from protection under RCW 49.32.020. *Id*. at 966. Chief Judge Dennis J. Sweeney dissented on grounds that the Employees' conduct was protected concerted activity, and that the managerial status of the Employees was a question of fact for the jury to determine. *Id*. at 967-69 (Sweeney, C.J., dissenting). Petitioners filed a petition for review with this court. We granted review of the summary judgment on the wrongful discharge claim. *Briggs v. Nova Services*, 161 Wn.2d 1022, 172 P.3d 360 (2007).

Analysis

We review an order granting summary judgment de novo. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008). Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Oltman v. Holland Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008). We must view all facts, and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005).

Employers and employees generally can terminate their employment relationship at any time for any reason without having to explain their actions

to a court. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226, 685 P.2d 1081 (1984). We have always made clear that the tort of wrongful discharge in violation of public policy is a narrow exception to this employment at-will doctrine.[3] *Sedlacek v. Hillis*, 145 Wn.2d 379, 385, 36 P.3d 1014 (2001). The exception should be applied cautiously so as to not swallow the rule. *Id*.

In order to prevail on a claim of wrongful discharge, a plaintiff must be able to show three things: (1) Washington has a clear public policy (the *clarity* element), (2) discouraging the conduct would jeopardize the public policy (the *jeopardy* element), and (3) that policy-protected conduct caused the dismissal (the *causation* element). *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). If these three elements are met, an employer will still prevail if it is able to offer an overriding justification for the termination decision (the *absence of justification* element). *Id.*

To determine whether a clear mandate of public policy is violated, we should "'inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.'" *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 668, 807 P.2d 830 (1991)

[3] We recently outlined the basic principles of wrongful discharge in violation of public policy in *Danny v. Laidlaw Transit Services, Inc*., 165 Wn.2d 200, 193 P.3d 128, 131-32 (2008).

(quoting *Thompson v. St. Regis Paper Co*., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)). We also examine prior judicial decisions that may establish a relevant public policy. *Id*. We have generally recognized the public policy exception when an employer terminates an employee as a result of his or her (1) refusal to commit an illegal act, (2) performance of a public duty or obligation, (3) exercise of a legal right or privilege, or (4) in retaliation for reporting employer misconduct. *Gardner*, 128 Wn.2d at 936.

The Employees argue that Washington has a clear public policy to engage in concerted activities. The Employees rely on RCW 49.32.020 and interpretative case law to support their conclusion. RCW 49.32.020 provides a limited but clear public policy on which a claim for wrongful discharge can be based. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 758, 888 P.2d 147 (1995). This statute states:

> WHEREAS, . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or

> in other concerted activities for the purpose of collective bargaining or other mutual aid or protections . . . .

RCW 49.32.020. Washington and federal law have recognized that nonunion employees have a right to engage in "concerted activities."[4] *See Bravo*, 125 Wn.2d at 751-52. To be protected, the concerted activities must relate to the "terms and conditions of employment," "collective bargaining" or for "other mutual aid or protections." RCW 49.32.020. As applicable to the present case, we have stated that the concerted activities must be for the purpose of improving "working conditions." *See Bravo*, 125 Wn.2d at 752 ("the court should have inquired whether the employees were alleging interference or retaliation because of activities the employees had undertaken action in concert — together — for the purpose of improving their working conditions."). The phrases "terms and conditions of employment" and "working conditions" include things like "better wages, improved medical coverage, better treatment from supervisors, [] lunch and rest breaks," *Id.* at 748; "layoffs and recalls, production quotas, and work rules," *First National Maintenance Corp. v. National Labor Relations Board*, 452 U.S. 666, 677,

[4] Because of the similarity between the text of RCW 49.32.020 and 29 U.S.C. § 157, federal law has been found persuasive by this court. *Bravo*, 125 Wn.2d at 754-55.

101 S. Ct. 2573, 69 L. Ed. 2d 318 (1981); on the job harassment, *Trompler, Inc. v. National Labor Relations Board*, 338 F.3d 747, 748 (7th Cir. 2003), and even food prices at in-plant dining rooms, *Ford Motor Co. v. National Labor Relations Board*, 441 U.S. 488, 497, 99 S. Ct. 1842, 60 L. Ed. 2d 420 (1979). The phrase does not, however, include "'managerial decisions, which lie at the core of entrepreneurial control.'" *Id.* at 498 (quoting *Fibreboard Paper Prods. Corp. v. National Labor Relations Board*, 379 U.S. 203, 223, 85 S. Ct. 398, 13 L. Ed. 233 (1964) (Stewart, J., concurring)). Managerial decisions include the choice of one's supervisor, *Trompler,* 338 F.3d at 749, and the wisdom of company practices, *cf. First National Maintenance Corp.*, 452 U.S. at 676 (the labor laws create "no expectation that the elected union representative would become an equal partner in the running of the business enterprise . . ."). Most importantly for this case, management rights continue to include the hiring and firing of management, such as the executive director here. *Abilities & Goodwill, Inc. v. National Labor Relations Board*, 612 F.2d 6, 8 (1st Cir. 1979) ("Traditionally, the interest of the employer in selecting its own management team has been recognized and insulated from protected employee activity.").

Once the policy is clearly defined, it is clear Nova's firing of two employees, and its recognition that six others had quit, did not jeopardize the public policy in the statute nor were the firings caused by protected activities. The Managers wrote to the board of directors complaining that Nova's executive director, Linda Brennan, left managers to do work in isolation, failed to delegate authority well, did not hire needed staff, failed to foster open communication, and was poor at managing finances.[5] The Managers were not complaining about wages and hours or supervisor harassment nor were they requesting better benefits, more breaks, or easier work rules. These complaints simply are not about terms and conditions of employment.

Making the point even clearer, the Managers began their letter with this summary: "There are six widely accepted key areas of responsibility for CEOs [(chief executive officers)] of non-profit corporations. We believe the Executive Director is deficient in each of these areas, as described below." CP at 73. This is near-perfect equivalent to the United States Supreme Court's references to complaints about "'managerial decisions, which lie at the core of entrepreneurial control,'" a category that Court held wholly

[5] They also complained that she improperly accrued sick leave in violation of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, but that would give rise to a complaint under that law, not one for wrongful discharge.

excluded from the definition of "terms and conditions of employment." *Ford Motor Co.*, 441 U.S. at 498 (quoting *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring)).

In response to the letter, Nova's board of directors acted reasonably. It hired a labor lawyer and then a professional mediator. After an investigation, the lawyer told the board that either director Brennan or two of the Managers would have to go because the three simply could not work together. The board decided that director Brennan was doing a fine job, and empowered her to make any personnel changes necessary to continue the important work of this nonprofit. Director Brennan fired two of the Managers who refused to work with her. This was reasonable and in no way jeopardized the employees' right to band together for better working conditions, since they were not complaining about working conditions.

After director Brennan fired the two managers, six other employees wrote a second letter, this time demanding director Brennan's removal and promising to "walk out of Nova Services" if the board did not comply. CP at 79. They promised they would "not return until these requests have been met." *Id.* When the board did not comply, they carried out their threat.

Faced with an empty office and a "non-negotiable" written promise that those employees would not return, director Brennan took reasonable action and hired new employees. Nova is, after all, a nonprofit corporation with a mission of helping disabled people. Even a minor delay in services would have major negative impacts on the lives of Nova's disabled clients.

Given all this, the six Employees cannot show that their termination was caused by protected activity, both because their actions did not relate to the terms and conditions of their employment, and because they were not in fact terminated. They voluntarily left and promised they would not return unless the board fired director Brennan. Since the board had just reviewed director Brennan's performance and made clear that she would remain, the condition for the Employees' promise was triggered.

The facts here are far different from those in one cited case to support the claim. In *National Labor Relations Board v. Martin*, 207 F.2d 655 (9th Cir. 1953), an employee, during a dispute over bonus pay, told his employer that if he failed to hear from management in 24 hours, he was quitting. *Id.* at 658. The employee then went back to work and actually showed up at the factory the next day. *Id.* In *Halstead Metal Products, Division of Halstead*

Industries, Inc. v. National Labor Relations Board, 940 F.2d 66 (4th Cir. 1991), two of nine employees who walked out of a plant to protest a change in work schedules said they "quit" when describing what they were doing. *Id.* at 71. The rest simply stood outside until management came and talked with them, at which point they all returned to work. *Id.* In neither of these cases did the employees demand their supervisor's firing on a nonnegotiable basis or give any real indication their absence was anything more than temporary.

Not so with the six Employees here. They wrote a letter to the board of directors stating their intentions clearly. They demanded director Brennan be fired and the two Managers reinstated or they would leave and not return.

Similarly, Shirley Bader was not discharged, and so was not discharged wrongfully. Bader told director Brennan she was quitting and gave two weeks notice. Director Brennan asked if Bader could work at Nova during those two weeks without undermining her authority. Bader said she could not, so director Brennan told her that she would be paid for the next two weeks but that she should not return. Bader quit rather than being discharged, much less discharged in violation of public policy.

Employees in Washington do have some statutory protection of rights to band together to improve their working conditions. However, these rights do not extend so far as to supersede the employer's right to hire and retain the leadership of a company and surely do not block an employee's ability to quit. Nova did not violate a clear public policy when it fired two employees based on an undeniable conflict of personalities and stated inability to work within the company. Nor did Nova violate a clear public policy when it accepted the resignation of the other six employees who would not work for Nova's choice of an executive director.

Conclusion

We conclude that Nova did not violate a clear public policy when it fired two employees and accepted the resignation of the other six. Even in the light most favorable to the employees, the record simply does not present a genuine issue as to any material fact and Nova is entitled to a judgment as a matter of law. Therefore, summary judgment was appropriate in this case. We therefore affirm the Court of Appeals decision upholding Nova Services' summary judgment motion relating to wrongful discharge and need not reach the issue of whether RCW 49.32.020 extends to protect managers who

engage in concerted activities.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Chief Justice Gerry L. Alexander

Justice Richard B. Sanders