No. 90975-0

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

CHARLES ROSE,

Petitioner,

v.

ANDERSON HAY & GRAIN CO.,

Respondent.

On Petition for Review from Division III
of the Washington State Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

ETHAN W. BLEVINS
(WSBA No. 48219)
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Attorney for Amicus Curiae
Pacific Legal Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

State Statute

Miscellaneous

Page

Page

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Respondent Anderson Hay & Grain Company (AHG). 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 free enterprise 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

Charles Rose drove trucks for AHG for about three years. Upon his termination in November 2009, he filed suit in federal district court, alleging that AHG had fired him for his refusal to violate federal trucking regulations by exceeding weekly hour limits and falsifying time sheets. *Rose v. Anderson Hay and Grain Co.*, 183 Wn. App. 785, 787, 335 P.3d 440 (2014). After the

federal court dismissed for lack of jurisdiction, Mr. Rose filed suit in state court, alleging the common law tort of wrongful termination in violation of public policy. *Id.*

The state trial court granted summary judgment to AHG based on this Court's decision in *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005). The trial court held that administrative remedies under the Commercial Motor Vehicle Safety Act already protected the public policy at stake. *Rose*, 183 Wn. App. at 787-88. The Division III Court of Appeals affirmed, and this Court granted Mr. Rose's petition for review. *Id.* at 788. The Court then remanded the case to Division III to reconsider its holding in light of *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013). Division III affirmed again. *Rose*, 183 Wn. App. 785. This Court granted Mr. Rose's second petition for review.

SUMMARY OF ARGUMENT

The default rule of at-will employment protects employers and employees, stimulates the job market, and reduces the costs of the legal system. This Court has long recognized that the public policy exception to this important workplace rule must remain narrow. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996) ("In creating a public policy tort action, . . . the exception should be narrowly construed in

order to guard against frivolous lawsuits."). Thus, in *Korslund*, this Court held that a claim for wrongful termination in violation of public policy fails where other state or federal remedies adequately protect the public policy. 156 Wn.2d at 183. This Court should hold that the similar federal remedies here preclude recovery under a state tort theory. An expansion of tort law that erodes the at-will rule undermines important policies that serve the interests of employers, employees, and the public.

ARGUMENT

I

THE AT-WILL RULE BENEFITS THE EMPLOYMENT RELATIONSHIP

A. At-will Employment Protects Against Arbitrary Dismissal

At-will employment offers security for both employer and employee. The employer is free to fire, and the employee is free to quit. *Korslund*, 156 Wn.2d at 178. Each party is protected by the self-interest of the other, as each will incur costs for exercising the right to fire or resign. The symmetry of rights thus ensures that "[e]ach obligation is held hostage to the other." Richard A. Epstein, *Simple Rules for a Complex World* 157 (1995); *see also id.* at 84 ("The worker's ability to withhold consent stands as a strong bulwark against any form of exploitation."); *Lonsdale v. Chesterfield*, 99

Wn.2d 353, 357, 662 P.2d 385 (1983) (The parties to an at-will contract, like any contract, have the same obligation to cooperate with each other, so that each may obtain the full benefit of performance).

The hefty price of firing an employee gives employers a compelling incentive to only terminate for good cause. First, the employer will lose the invested time and effort in training the terminated employee. And the redundant expense of training the next new hire deters termination. Epstein, *Simple Rules*, at 158 ("Employers who spend enormous amounts of money in training workers for particular jobs are not eager to see them depart."). In Washington, terminations also hike up an employer's tax rate for unemployment insurance. *See* Wash. Emp't Sec. Dep't, *Unemployment insurance taxes* (Jan. 2015)[1] ("[E]mployers who lay off workers more frequently generally will pay a higher unemployment tax rate."); RCW 50.29 (establishing unemployment tax rate formula); *see also* John P. Frantz, *Market Ordering Versus Statutory Control of Termination Decisions*, 20 Harv. J.L. & Pub. Pol'y 555, 569 (1997). Additionally, employers often face the costs of contractual severance benefits. *Id.* at 569. These numerous expenses protect employees from unjust termination.

---

[1] *Available at* http://www.esd.wa.gov/newsandinformation/factsheets/FS-0011.pdf#zoom=100.

Costs of termination to employers only increase when the termination is arbitrary or unjust. Perhaps most significant are "reputational losses that increase long-term labor costs." *Id.* at 570. Employers have an interest in "secur[ing] an orderly, cooperative and loyal work force." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 229-30, 685 P.2d 1081 (1984) (quoting *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 613, 292 N.W.2d 880 (1980)). Termination of co-workers that seems arbitrary or unjust undermines the essential workplace values of collaboration, trust, and loyalty. *See* Epstein, *Simple Rules*, at 158 ("Firing the first worker for reasons that other workers perceive as unfair will have powerful ripple effects throughout the firm.").

While employers enjoy significant economic power, their self-interest tends toward fair treatment of employees. Any dismissal imposes significant costs on an employer, and unfair or arbitrary dismissal only raises the price. Thus, courts should hesitate to expand exceptions to the at-will rule, which benefits both parties to an employment relationship.

B. The At-will Rule Ensures That Employers Can Exercise Discretion To Implement Their Business Plans

Good legal rules match discretion with knowledge. *See Smith v. Shannon*, 100 Wn.2d 26, 29, 666 P.2d 351 (1983)(a "necessary corollary" of the doctrine of informed consent "is that the individual be given sufficient

information to make an *intelligent* decision") (citations omitted). The at-will employment rule places control in the hands of the employees and employers in the best position to know how to wield it. *See Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 353, 27 P.3d 1172 (2001) (Employer's adoption of personnel policies did not evidence intent of employer to "surrender its power to determine whether an employee's misconduct warranted his or her termination."). As exceptions to the at-will rule grow, control over the workplace shifts from those possessing the knowledge necessary to exercise wise discretion to outsiders lacking the information vital to sensitive decisions. *See* Samantha Jean Cheng Chu, *The Workplace Bullying Dilemma in Connecticut: Connecticut's Response to the Healthy Workplace Bill*, 13 Conn. Pub. Int. L.J. 351, 371 (2014) (Contemplating workplace anti-bullying legislation and noting that "creating additional legal remedies for employees might come at the cost of diminishing the sustainability of businesses and employers.").

Individuals engaged in a business relationship enjoy the knowledge necessary to make the best choices regarding their own affairs. *See Estate of Kelly By and Through Kelly v. Falin*, 127 Wn.2d 31, 42, 896 P.2d 1245 (1995) (Promoting policy that favors "a rule that fosters individual responsibility" and allows individuals to make decisions based on their

personal assessment of their circumstances.). "By virtue of their privileged access to the personal and local knowledge pertaining to their situation, individuals and groups ought to be accorded a *presumption of competence* in exercising their discretion." Randy E. Barnett, *The Structure of Liberty* 52 (2nd ed. 2014). *Cf. State v. Breedlove*, 79 Wn. App. 101, 110-11, 900 P.2d 586 (1995)(A defendant's right to self-representation "is designed to respect individual autonomy" and a defendant's "free will to make his own choice, in his hour of trial, to handle his own case.") (citation omitted). This presumption ensures that the exercise of discretion remains as informed as possible. Social norms and local knowledge work together to ensure that group members stand in the best position to make decisions for the group. "The insistence on the autonomy of the person . . . is an effort not to promote greed and selfish behavior but to create many small separate domains in which informal norms can take over, at far greater precision and lower cost." Epstein, *Simple Rules*, at 46. Lodging discretion with individuals and small groups increases efficiency and respects personal choice.

Outside decision-makers do not have comparable access to the information that should guide discretion. Most individuals live in group settings "whose operations are governed by an elaborate set of informal norms that are difficult to articulate and to write down." *Id.* at 42. These

norms "are bound to particular contexts, circumstances, and situations." *Id.* Group dynamics do not translate well to outsiders. Thus, removal of decision-making authority from the group environment often harms the group and its members by overriding their priorities and interests. *See* Barnett, *supra*, at 152 ("Those who incur the costs of choice are in the best position to know what their alternative opportunities are and how they rank them. For this reason, their interests are likely to be harmed by having choices imposed upon them by others."); *see also Estate of Kelly*, 127 Wn.2d at 42 (expressing policy preference for "individual autonomy over paternalism"). Local and intuitive decisions should not face the risk "that the transaction is vetoed by a government agent who does not understand the full range of relevant costs and benefits and who has no incentive to presume their existence." Epstein, *Simple Rules*, at 79.

Expansion of Washington's wrongful discharge tort law will take firing decisions out of the environment where discretion is most likely to be used competently. *See Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 696, 254 Cal. Rptr. 373, 765 P.2d 373 (1988) ("In order to achieve [commercial] stability, it is . . . important that employers not be unduly deprived of discretion to dismiss an employee . . . ."). Each business operates under unique and powerful norms and practices that direct discretion away from

arbitrary or improper use and toward optimal exercise. "Employers and employees must be freed from outside interference to develop solutions appropriate to the many forms of industrial organization which coexist in the economy." Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 Tex. L. Rev. 1901, 1904 (1996). For example, corporations must make decisions on matters relating to the social, cultural, and economic concerns of its employees, to promote a harmonious workplace and employee loyalty. *See, e.g., Andersen v. King County*, 258 Wn.2d 1, 42 n.17, 138 P.3d 963 (2006) (Noting that 40 percent of Fortune 500 companies provide equivalent benefits to domestic partners because "[b]ottom-line, business decision-making explains it: Respected employees perform better and stay longer." (citing Howard Paster, *The Federal Marriage Amendment is Bad for Business*, Wall St. J., Oct. 5, 2004, at B2)). The complex idiosyncratic traits of each individual business and employee will thwart courts' efforts to second-guess employment decisions.

Employers enjoy access to personal and local knowledge that outside decision-makers struggle to grasp. *See White v. State*, 131 Wn.2d 1, 19-20, 929 P.2d 396 (1997) ("[T]he courts are ill-equipped to act as super personnel agencies.") (citation omitted). Business operations depend on the employer's ability "to make adjustments in the composition of the workforce that are

critical from the inside but almost impossible to explain to outsiders." Epstein, *Simple Rules*, at 160. Decisions based on legitimate considerations such as morale, attitudes, business culture, and the interactions between different personality types may not be understood outside the workplace context. Because these and many other critical concerns are difficult to articulate or amass in evidence, "all local and specialized knowledge is removed from the case." *Id.* Transfer of employment decisions to outsiders can force employers and employees to put up with unwanted employees—a sure recipe for increased tension and inefficiency in the workplace. *See, e.g.*, *Alaska Police Standards Council v. Parcell*, No. S-15364, 2015 WL 1743217 (Alaska Apr. 17, 2015) (chronicling how an arbitrator and court employing good cause standards blocked the firing of an employee who sexually harassed other employees and lied in a follow-up investigation).

The inability of courts to understand or corroborate the rationales for dismissal prejudices employers who face claims of wrongful termination in violation of public policy. Once a plaintiff makes an initial showing that a termination "may have contravened a clearly stated public policy," the employer must demonstrate that the dismissal was justified by a reason other than those alleged by the plaintiff. *Gardner*, 128 Wn.2d at 936. An alternate justification may ring hollow to a court or jury that cannot fully comprehend

the complicated dynamics of an employer's workplace. For instance, a legitimate personality conflict between employer and employee may seem like a self-serving excuse to a court or jury far removed from the work environment. *Cf. Boring v. Alaska Airlines, Inc.*, 123 Wn. App. 187, 199, 97 P.3d 51 (2004) (rejecting wrongful termination claim in case rife with personality conflicts); *Briggs v. Nova Services*, 166 Wn. 2d 794, 807, 213 P.3d 910 (2009) ("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."). The tendency for juries to favor employees in wrongful termination cases exacerbates this institutional weakness. Frantz, *supra,* at 566. Because employers are in the best position to know the proper decisions about who to fire for what reasons, a robust at-will rule with minimal exceptions is the best way to protect "[a]n employer's interest in running his business as he sees fit." *Thompson*, 102 Wn.2d at 227.

II

EXPANSION OF WRONGFUL TERMINATION TORT LAW DIMINISHES THE PREDICTABILITY OF THE LAW

A. Certainty in the Law Benefits All Washingtonians, Employees and Employers Alike

The legal system should strive to communicate clear rules from which parties can predict outcomes with comfortable certainty. The at-will

employment rule fills this role. However, the tort of wrongful termination in violation of public policy thrusts employers into a murky realm where they cannot predict when or how their employment decisions will result in liability. *See Foley*, 47 Cal. 3d at 696 ("[P]redictability of the consequences of actions related to employment contracts is important to commercial stability.").

A successful legal system relies on understandable rules. Courts should favor "rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." F.A. Hayek, *The Road to Serfdom* (1944), *reprinted in* 2 *The Collected Works of F.A. Hayek* 112 (Bruce Caldwell, ed. 2007). Indeed, a failure to make rules understandable to the ruled "does not simply result in a bad system of law; it results in something that is not properly called a legal system at all." Lon L. Fuller, *The Morality of Law* 39 (2nd ed. 1969).

The at-will rule employs an elegant simplicity. "[T]he phrase 'at will' is two words long and has the convenient virtue of meaning just what it says, no more and no less." Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. Chi. L. Rev. 947, 955 (1984). By contrast, wrongful discharge tort law breeds confusion. "Rather than being specific about what it bans and

what it leaves lawful, it takes refuge in feel-good generality." Walter Olson, *The Trouble with Employment Law*, 8 Kan. J.L. & Pub. Pol'y 32, 35 (1999). The specific tort of wrongful termination in violation of public policy compounds this problem. In Washington, to state a cause of action under the public policy exception, "the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened." *Thompson*, 102 Wn.2d at 232. The nature of the public policy tort's "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 (1992).

The tort befuddles litigants in two ways. First, the definition of public policy lacks firm contours that litigants can grasp. *Id.* This Court's lack of unanimity regarding how to define public policy underscores this difficulty. *See, e.g., Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 193 P.3d 128 (2008) (The Court split regarding whether an employee is protected from termination if she is absent from work due to domestic violence.); *Gardner*, 128 Wn.2d 931 (The Court split regarding whether an armored truck company can terminate a driver who left his vehicle in violation of company protocol to stop an attack.). Second, the amorphous connection between the

employer's actions and a recognized public policy does not mark the line between prohibited and permissible conduct. *See* Kenneth R. Swift, *The Public Policy Exception to Employment At-Will: Time to Retire a Noble Warrior?*, 61 Mercer L. Rev. 551, 580 (2010) ("[T]he maximum tether between public policy and an employer's actions is too difficult to determine [] to provide a discernible and fair law to govern the relations between employers and employees."). These dual sources of uncertainty justify continuing commitment to a narrow exception to at-will employment.

B. Unpredictable Wrongful Termination Torts Encourage Hiring and Firing Practices That Hurt Employers and Employees

Uncertain legal rules dampen the free movement of employees among employers. For example, the uncertainty created by rules regarding confidentiality agreements has led to some employers' reluctance to hire employees who have such agreements with their previous employers. *See* Miles J. Feldman, Comment, *Toward a Clearer Standard of Protectable Information: Trade Secrets and the Employment Relationship*, 9 High Tech. L.J. 151, 181 (1994) ("[A]n employee with a confidentiality agreement with Microsoft will not be an attractive hire to a company with a small litigation budget because Microsoft has a legal department of over 50 lawyers and has a reputation for aggressive litigation."). Similarly, unpredictable exceptions

to the at-will default rule entrench unwanted employees and encourage skittish hiring practices. For employers, this results in inefficient and contentious workplaces. Employees, on the other hand, will not have as many job prospects, and their leverage in the workplace will suffer.

Employers wary of wrongful discharge liability will hesitate to fire unwanted employees. "If the potential for vexatious suits by discharged employees is too great, employers will be inhibited in exercising their best judgment as to which employees should or should not be retained." Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404, 1428 (1967). Broad and unpredictable discharge torts thus help secure the positions of bad or unneeded employees that the employer would be better off without. *See* Olson, *supra*, at 38 (Wrongful discharge laws can entrench workers who perform poorly.); Frantz, *supra*, at 566 (Movement away from at-will employment will "hinder employers' ability to terminate inefficient employees.").

Expansion of unpredictable wrongful discharge torts also affects hiring decisions to everyone's detriment. Disadvantaged employees face the greatest peril. In a world of at-will employment, risky job candidates can convince some employers to give them a shot when employers know that they

can terminate the relationship at any time. Epstein, *In Defense*, at 969 ("'You can start Tuesday and we'll see how the job works out' is a highly intelligent response to uncertainty."). However, when hiring bears the risk of future liability, employers balk at hiring dicey candidates that they might otherwise take a chance on. *Id.* at 972. Wrongful discharge law thus disadvantages the most vulnerable job seekers—the uneducated, the unskilled, and those with backgrounds that carry a stigma, such as a prior dismissal.

Additionally, an uncertain legal regime means that employers will be less likely to respond to business upswings with a new round of hiring. Dynamic markets require "constant marginal and incremental adjustments" in staff. Epstein, *Simple Rules*, at 161. However, "[e]mployers are significantly less willing to create a job if they think they will find it very costly to eliminate it when the business cycle turns back down." Olson, *supra*, at 39. This not only keeps candidates out of a prospective job—it also creates a drag on the upside of the business cycle.

The at-will rule, by contrast, "permits the ceaseless marginal adjustments that are necessary in any ongoing productive activity conducted, as all activities are, in conditions of technological and business change." Epstein, *In Defense*, at 982. Indeed, economists have pointed to the erosion of at-will employment as a cause of declining labor market fluidity. *Fluid*

dynamics, The Economist, Aug. 30, 2014.[2] These arthritic labor markets in turn worsen unemployment rates. *See* Laurent Belsie, *The Link Between High Employment and Labor Market Fluidity*, NBER Digest (Nat'l Bureau of Econ. Research, Cambridge, MA) Jan. 2015, at 4 (Economists say the nation is unlikely to return to sustained high employment rates unless labor market fluidity is restored.).[3]

Harm to labor markets caused by erosion of employment at-will also reduces the bargaining power of employees. Employee exploitation comes about from employees' lack of other good job options to use as leverage. "The key element for exploitation is not wealth, but the absence of rivals." Epstein, *Simple Rules*, at 83. Professor Lawrence Blades' seminal attack on the at-will rule recognizes as much: "Obviously, if every employee could go from job to job with complete ease, there would be little need to provide other means of escape from the improper exertion of employer pressure." *Id.* at 1405. Thus, employee leverage increases when other job prospects are available. Inflexible labor markets make it harder for employees "to move to better jobs, change careers or win pay rises." *Fluid dynamics*, *supra*; *see*

---

[2] *Available at* http://www.economist.com/news/finance-and-economics/21614159-americas-famously-flexible-labour-market-becoming-less-so-fluid-dynamics.

[3] *Available at* http://www.nber.org/digest/jan15/jan15.pdf.

also Wanjiru Njoya, *Job Security in a Flexible Labor Market*, 33 Comp. Lab. L. & Pol'y J. 459, 460 (2012) (Employment law should "prioritize[] employment creation and the employability, mobility and adaptability of workers, rather than security of tenure in the particular job which the worker holds."). Thus, wrongful termination torts that encourage stingy hiring practices hurt employees' power to improve their situations.

C. Complicated Exceptions to At-will Employment Impose Grievous Administrative Costs

Simple rules are cheap. The movement away from simplicity imposes costs throughout society. "The more complicated the legal rule, the greater the likelihood that . . . administrative costs, including error costs, will be high." Epstein, *Simple Rules*, at 31. The costs imposed by intricate rules include the burden borne by private parties as they work to achieve and demonstrate compliance, as well as understand the law and its application. *Id.*; *see also* Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 Md. L. Rev. 89, 89 (2008) ("Deciphering the application and requirements of these laws require resources and skills that few employers, and even fewer employees, possess."). They also include the costs of error—harm caused by false charges or undeserved sanction. Epstein, *Simple Rules*, at 31.

Employers will also face increased litigation costs, against both meritorious and nonmeritorious claims. *See, e.g.*, *Hernandez v. Ignite Rest. Grp., Inc.*, 917 F. Supp. 2d 1086, 1091 (E.D. Cal. 2013) (Because California law lacks clarity as to whether a "manager's privilege" exists, or whether, if it does, it is an absolute or conditional privilege, court had no choice but to allow plaintiff's claim to move forward in state court.). These represent not only financial expenditures, but lost opportunity costs due to time invested in the litigation process. Where the law is unclear, as it is here, the likelihood of settlement of marginal claims also rises.[4] Thus, frivolous claims will still impose significance costs on employers. These costs are not justified by a commensurate benefit. Indeed, as discussed above, employers, employees, and the general economy suffer as the at-will doctrine erodes. Thus, "[o]nly the lawyers lose when the contract at will is fully respected." Epstein, *Simple Rules*, at 159.

---

[4] *See* Dain C. Donelson and Robert A. Prentice, *Scienter Pleading and Rule 10b-5: Empirical Analysis and Behavioral Implications*, 63 Case Wn. Reserve L. Rev. 441, 488 (2012) (Courts' inability to create an understandable scienter doctrine leaves auditors unable to judge the settlement value of a case and makes it difficult for plaintiff's attorneys "to gauge the wisdom of such a [high-cost] filing when it is unclear how courts will treat the known scienter evidence. For both plaintiffs and defendants, the uncertainty of scienter pleading doctrine has decidedly unsatisfactory consequences.").

CONCLUSION

The Court should affirm the Court of Appeals.

DATED: April 23, 2015.

Respectfully submitted,

ETHAN W. BLEVINS
(WSBA No. 48219)

Attorney for Amicus Curiae
Pacific Legal Foundation