NOTES & COMMENTS

DAMAGE CONTROL: TWO PROPOSALS TO LIMIT THE REACH AND EFFECT OF OREGON'S WRONGFUL DISCHARGE TORT

by
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The wrongful discharge tort is still a fairly new player on the employee rights legal scene. Generally speaking, the tort allows a discharged employee to sue his or her employer when the discharge violates public policy. Often, but not always, the public policy is expressed in a constitution, statute, regulation or other source of law. This Comment offers a brief history of Oregon's version of the wrongful discharge tort, then proposes that the Oregon Supreme Court and the Oregon Legislature each make an important change to the law that would narrow the tort's application. First, the Oregon Supreme Court should clarify the method by which employees can identify a public policy in legal text. Second, the Oregon Legislature should amend several of its employee rights statutes to preclude application of the tort where the employee has statutory equitable remedies. Ultimately, the author concludes that Oregon's wrongful discharge tort is worth preserving, but on more limited terms than current law provides.

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I. INTRODUCTION

Oregon's wrongful discharge tort has outgrown much of its usefulness. Originally conceived as a narrow exception to at-will employment, it has evolved into an amorphous legal theory that is all things to all discharged employees. An employer confronted with a wrongful discharge claim faces grave financial consequences: the tort allows unlimited compensatory[1] and punitive damages,[2] even if the employee has a separate statutory cause of action for equitable remedies.[3]

This Comment concludes that the Oregon Supreme Court and the Oregon Legislature must step in to limit the wrongful discharge tort's reach and effects. First, it proposes that the Oregon Supreme Court stem the tort's growth by requiring a wrongful discharge plaintiff to point to a statute, constitutional provision, or judicial decision that encourages the act that led to discharge. Second, the Comment proposes that the Oregon Legislature restrict the tort's financial consequences by amending the statutory employee-rights causes of action to legislatively abrogate the workplace rights application[4] of the tort where the statute limits the employee's recovery to equitable remedies.

[1] Dunwoody v. Handskill Corp., 60 P.3d 1135, 1141 (Or. Ct. App. 2003).

[2] Banaitis v. Mitsubishi Bank, Ltd., 879 P.2d 1288, 1301 (Or. Ct. App. 1994).

[3] Holien v. Sears, Roebuck & Co., 689 P.2d 1292 (Or. 1984).

[4] The courts distinguish between several varieties of the wrongful discharge tort. *See* discussion *infra* notes 50–62.

II. WHAT IS WRONGFUL DISCHARGE?

The wrongful discharge tort is a relatively new employee-rights doctrine. The California Court of Appeals announced the seminal wrongful discharge case, *Petermann v. International Brotherhood of Teamsters, Local 396*,[5] in 1959. In the decades following, roughly three-quarters of the states adopted the tort.[6] In general, the tort prohibits an employer from discharging an employee "for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn."[7] The basic wrongful discharge paradigm breaks down into four categories of employee conduct: (1) refusing to violate a statute or other law; (2) performing a statutory obligation; (3) exercising a statutory right; and (4) reporting an employer's violation of the law.[8]

Courts initially shied away from discharge cases and left termination solely to the employer's discretion. This view kept with a laissez-faire economic tradition under which governments rarely intruded into workplace issues like wage, hour, and safety regulations. Indeed, the U.S. Supreme Court prohibited Congress from regulating these issues for much of the early 20th century.[9] One commentary identified two factors that shifted courts away from an employer-deference perspective. First, the facts of some discharge cases were simply too offensive for the courts to swallow.[10] Second, the legal intrusion that began with employment discrimination statutes "ultimately spilled over into other aspects of employment."[11]

Although most state courts recognize wrongful discharge, they diverge on how to determine that a discharge offends public policy. Some states, such as Wisconsin, require that the public policy arise from a statutory or constitutional provision.[12] States in this group fear that wrongful discharge could replace at-will employment with something

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[5] 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

[6] MARK ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 1000 (5th ed. 2003).

[7] Gantt v. Sentry Ins., 824 P.2d 680, 684 (Cal. 1992). Professors Rothstein and Liebman include an edited version of *Gantt* in their excellent casebook.

[8] *Id.* Not all states categorize wrongful discharge the same way. For example, the Oregon court adopted its own three-part framework for wrongful discharge cases in *Delaney v. Taco Time International, Inc.*, 681 P.2d 114, 117–18 (Or. 1984), a point I will revisit *infra* notes 50–62.

[9] *See generally* Lochner v. New York, 198 U.S. 45 (1905) (declaring a state maximum-hour law for bakery employees unconstitutional on freedom of contract principles); Adair v. United States, 208 U.S. 161 (1908) (striking down a federal statute that made it illegal for an employer to discriminate against employees on the basis of union membership).

[10] ROTHSTEIN AND LIEBMAN, *supra* note 6, at 989. For a good example of this point, see *Petermann*, *supra* note 5.

[11] ROTHSTEIN AND LIEBMAN, *supra* note 6, at 989.

[12] Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983).

akin to a good-cause standard.[13] As the Wisconsin Supreme Court wrote, "[g]iven the vagueness of the concept of public policy, it is necessary that we be more precise about the contours of the [wrongful discharge tort]."[14] A second group of states will identify a public policy in a wider variety of legal and non-legal sources, including constitutional provisions, statutes, administrative rules, judicial decisions, and even professional codes of ethics.[15] For example, the Colorado Supreme Court held an employer liable for wrongful discharge when it fired an accountant for refusing to violate rules of professional conduct.[16] In another case, the New Jersey court recognized foreign law as the legal basis for a wrongful discharge claim.[17] Once a court decides which authorities may be the basis of a public policy, it still must determine whether the public policy addresses the facts presented. Many courts require that the public policy arise clearly, "with sharpness or vividness"[18] or under a "clear mandate."[19] Practically speaking, it is difficult to generalize about how courts read the relevant authorities to decide whether a discharge violates public policy.[20]

Oregon's requirements for finding a public policy are neither as strict as Wisconsin's nor as generous as New Jersey's. Oregon requires that the public policy arise from a constitutional provision, statute or judicial decision that either encourages the specific act that led to the discharge or otherwise demonstrates that the act enjoys great social value.[21] This Comment proposes that the Oregon Supreme Court eliminate the "great social value" prong and require an employee to show a specific constitutional provision, statute, or judicial decision that encourages the act that led to discharge before the court will recognize a wrongful discharge claim. To support this argument, the Comment begins with an examination of the methods Oregon courts used to find a public policy in *Nees v. Hocks*,[22] the Oregon court's first wrongful discharge case, and the cases that followed during the subsequent twenty years. It will then briefly examine two recent wrongful termination cases,

[13] In the same case, the Wisconsin Supreme Court declined to impose a contractual duty of good faith for at-will employment relationships. "[W]e feel it unnecessary and unwarranted for the courts to become arbiters of any termination that may have a tinge of bad faith attached. Imposing a good faith duty to terminate would unduly restrict an employer's discretion in managing the work force." *Id.* at 838.

[14] *Id.* at 840.

[15] Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980).

[16] Rocky Mountain Hosp. & Med. Serv. v. Mariani, 916 P.2d 519 (Colo. 1996).

[17] Mehlman v. Mobil Oil Corp., 707 A.2d 1000, 1014–16 (N.J. 1998).

[18] Sequoia Ins. Co. v. Superior Court, 16 Cal. Rptr. 2d 888, 893 (Cal. Ct. App. 1993).

[19] Dalby v. Sisters of Providence in Or., 865 P.2d 391, 394 (Or. Ct. App. 1993).

[20] I will discuss this point in greater detail *infra*, note 64.

[21] Babick v. Or. Arena Corp., 40 P.3d 1059, 1062 (Or. 2002). *See also* Eusterman v. Nw. Permanente, P.C., 129 P.3d 213, 217 (Or. Ct. App. 2006).

[22] 536 P.2d 512 (Or. 1975).

Babick v. Oregon Arena Corp.[23] and *Eusterman v. Northwest Permanente*,[24] which begin to narrow the court's "search"[25] for a public duty. This discussion clarifies the tort's progression and the benefits of a narrower wrongful discharge cause of action: better efficiency and predictability of outcomes for employers prior to discharging a problem employee.

The second part of the Comment proposes that the Oregon Legislature abrogate the wrongful discharge tort when an employee is discharged for asserting a workplace right and the statute limits an employee's recovery to equitable remedies.[26] If an employee can allege that the employer discharged him for asserting a statutory workplace right, the employee commonly pursues a statutory and a tort cause of action for the same discharge.[27] In *Holien v. Sears, Roebuck & Co.* the Oregon Supreme Court held that the statutory claim does not displace the wrongful discharge claim unless the legislature intended to legislatively abrogate it *and* the statute provided a damages remedy.[28] Since many violations of Oregon workplace rights law may only be redressed with equitable remedies,[29] *Holien* allows an employee who is fired for asserting a workplace right to ignore the statute's remedy limitation and bring a cause of action that provides compensatory and punitive damages. This conclusion runs counter to the explicit legislative intent that the right is only to be redressed with equitable remedies. The Oregon Legislature should reassert that intent by abrogating the wrongful discharge tort when the employee-rights statute limits itself to equitable remedies.

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[23] 40 P.3d 1059 (Or. 2002).

[24] 129 P.3d 213 (Or. Ct. App. 2006).

[25] Oregon courts distinguish between "creat[ing]" and "find[ing]" a public duty in the relevant legal source. *See Babick*, 40 P.3d at 1062.

[26] "Legislative abrogation" refers to the legislature's power to alter common law rules by statute. *See* Karson v. Or. Liquor Control Comm'n., 74 P.3d 1163, 1166 (Or. Ct. App. 2003); Lakin v. Senco Prods., Inc., 987 P.2d 463, 473 (Or. 1999).

[27] *Compare* Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1299–1300 (Or. 1984) (holding that an employee stated a wrongful discharge claim when her employer discharged her for resisting his unlawful sexual harassment) *with* Cross v. Eastlund, 796 P.2d 1214, 1216 (Or. Ct. App. 1990) (holding that although an employee stated a statutory claim for gender discrimination based on her supervisor's sexual harassment, she did not state a claim for wrongful discharge because the employer did not discharge her for pursuing the statutory right to be free from discrimination).

[28] *Holien*, 689 P.2d at 1300.

[29] *See* OR. REV. STAT. § 659A.885(2) (2005) for a complete list. *See also* discussion *infra* note 133.

III. OREGON WRONGFUL DISCHARGE: A BRIEF HISTORY

A. The Oregon Supreme Court Limited Recognition of Wrongful Discharge to Egregious Employer Conduct Where Clear Evidence from Legal Authority Supported the Public Policy.

The Oregon Supreme Court recognized wrongful discharge in *Nees v. Hocks*.[30] The case provides a starting point for analysis of Oregon's current wrongful discharge tort because the *Nees* court limited the wrongful discharge tort's scope by only adopting it for cases of profoundly offensive employer conduct and by requiring an employee to show that his discharge violated an important community interest, as evidenced by a statute or constitutional provision. As the discussion in Section C of Part II will show, subsequent Oregon courts lost track of the *Nees* requirements for finding a public duty.

In February 1973, Nees reported to jury duty after being excused from service a year earlier.[31] Nees presented the clerk with a letter from Hocks Laboratories stating that it could not spare her for a full month, but also told the clerk that she would not mind serving.[32] The clerk informed Nees that she would not excuse her and that she would have to serve for two weeks.[33] Hocks Laboratories learned of Nees's conversation with the clerk and terminated her because of her "request" to serve on jury duty.[34] Nees sued Robert Hocks individually in Multnomah County Circuit Court on a theory of prima facie tort[35] and won a small compensatory and punitive damage award.[36] Hocks appealed, and a unanimous Oregon Supreme Court affirmed the verdict but reversed on the theory of liability and the punitive damages award.[37]

The court began its analysis by asking rhetorically whether there were instances in which an employer's motive for discharging an employee was so harmful to a community interest that it justified awarding damages to the employee. It answered yes to its own question by citing cases in other jurisdictions where courts held employers liable for violations of the public good.[38] The court first pointed to *Petermann*, where the California Court of Appeals held that a plaintiff stated a claim against his employer after it discharged him for refusing to commit

[30] 536 P.2d 512, 515 (Or. 1975).
[31] *Id.* at 512.
[32] *Id.* at 513.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 517.
[37] *Id.* at 514, 517.
[38] *Id.* at 515.

perjury before a legislative committee.[39] The court also cited an Indiana case where an employee brought an unidentified cause of action against his employer, which allegedly discharged him for filing a workers' compensation claim.[40] With these cases in mind, the court concluded that "there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done."[41]

Finding the cause of action was the first step. The next step required the court to apply Nees' facts to the "elements" of the new cause of action to determine whether Hocks was liable. This analysis called for the court to examine whether citizen participation on jury duty was a sufficiently important community interest.[42] The court did not announce a standard of community interest, but nevertheless concluded that jury duty qualified based on provisions of the Oregon Constitution. The court wrote:

> Art. VII, § 3, of the Oregon Constitution provides that jury trial shall be preserved in civil cases. Art. I, § 11, provides a defendant in a criminal case has a right of trial by jury. Art. VII, § 5, provides: "The Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors."[43]

In reaching its conclusion that jury duty qualified as an important community interest, the court also pointed to provisions in chapter ten of the Oregon Revised Statutes, which in general allowed an individual to avoid jury duty for good cause or extreme hardship but also provided that an individual who neglected jury duty without cause was subject to a fine.[44] Thus, based on constitutional and statutory provisions, jury duty met the important community interest "standard" and Hocks was liable to Nees for discharging her for meeting the community obligation.

Nees established wrongful discharge in Oregon, but did so on limited terms. The *Nees* decision only reached egregious employer conduct that violated an important community interest. Further, *Nees* forced the employee to establish the community interest's importance with evidence from a statute or constitutional provision.

The court based its recognition of wrongful discharge on cases of highly offensive employer behavior. The court specifically pointed to *Petermann* as persuasive authority, a case where an employer made criminal perjury before a legislative committee a condition of

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[39] *Id.* (citing Petermann v. Int'l Bhd. of Teamsters, Local 396, 344 P.2d 25 (Cal. Dist. Ct. App. 1959)). The *Nees* decision does not indicate the plaintiff's cause of action in *Petermann*.

[40] *Id.* (citing Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973)).

[41] *Id.*

[42] *Id.* at 516.

[43] *Id.*

[44] *Id.*

employment.[45] The court also cited *Frampton*, where an employer was liable for discharging an employee who took advantage of a no-fault, on-the-job personal injury remedy.[46] *Nees* thus restricted the cause of action to terminations that demonstrated "a socially undesirable motive," not terminations that were merely unwise or personally offensive.[47]

Nees also required the employee to provide statutory or constitutional authority that tied the employer's conduct to an important public policy. The court found that the constitutional and statutory provisions on point "indicate that . . . jury duty [is] regarded as high on the scale of American institutions and citizen obligations."[48] Thus, an employer who discharged an employee in contravention of the institution must respond in damages.[49]

B. After Recognizing the Wrongful Discharge Tort, the Oregon Courts Organized it into Three Individual Categories.

In the decade that followed *Nees*, Oregon courts developed an institutional familiarity with the issues, policies and problems the tort presented. For ease of reference and application, the court in *Delaney v. Taco Time International*[50] organized Oregon wrongful discharge cases into three categories. Two categories share the idea that some discharges violate public policy (although for different reasons) and deserve a remedy; the third category reasons that in some instances, existing remedies are adequate to redress a wrongful discharge without additional tort liability. Oregon courts often refer to the *Delaney* categories because they provide a useful rubric for considering the different social harms an employee might allege.

In the first category of cases, an employer discharges an employee for conduct that fulfills a societal obligation. The court often refers to these as "public duty" cases. Not surprisingly, the court held out *Nees* as this category's prime example. It also included *Delaney*, where Taco Time fired a store manager after he refused to sign a defamatory statement regarding the reasons for an employee's discharge.[51] An employee

[45] *Id.* at 515.

[46] *Id.* (citing Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973)).

[47] *Id.*

[48] *Id.* at 516.

[49] The court's rejection of the prima facie tort theory is instructive on this point as well. The court wrote that it need not "adopt a broad principle of liability as a specific tort category in order to evade the rigidities of existing causes of action." *Id.* at 514. The prima facie tort would have allowed future courts to reach fact-based decisions without basis in legal touchstones and thus to redress a wider array of employer harm. Instead, the court rejected this view and adopted a narrow construction that required a firm grounding in legal text.

[50] 681 P.2d 114, 117 (Or. 1984).

[51] *Id.* at 116. The statement falsely asserted that Taco Time discharged an employee because of a sexual relationship with the plaintiff, when in actuality Taco Time discharged the employee because of her race. The court found a public duty

discharged under these circumstances has a wrongful discharge cause of action against the employer.[52]

In the second category, an employer discharges an employee for asserting a statutory right that is "related directly to the plaintiff's role as an employee."[53] A commonly cited example is *Brown v. Transcon Lines*, where an employee discharged for filing a workers' compensation claim brought a wrongful discharge suit against his employer.[54] Contrast *Brown* with the situation in which an employer fires an employee for exercising a non-workplace statutory right. In *Campbell v. Ford Industries* an employer discharged an employee who was also a stockholder in the company after the employee asked to inspect the business' records, as he was statutorily entitled to do.[55] An employee terminated on this basis has no cause of action in wrongful discharge because the discharge was based on the exercise of a private statutory right that is "not of great importance to society."[56] Although this distinction is on its face consistent with the underlying public purpose of the wrongful discharge cause of action, its premise is strange since both the "public" and "private" statutory rights are legislatively conferred and seek to regulate private behavior. Whatever the doctrinal infirmities, this distinction prevails in the current state of the Oregon law.[57]

The courts later made clear that an employee who resisted "discrimination or other conduct aimed at vindicating the statutory right" could bring a wrongful discharge action; however, an employee who simply claimed that his termination violated a statutory right against discrimination would not have a cause of action.[58] In other words, wrongful discharge treats the underlying statutory violation as a separately recognizable injury.[59]

Finally, in the third category of wrongful discharge cases, an employer discharges an employee for fulfilling an important social interest or exercising a work-related statutory right, but a separate and adequate statutory remedy precludes additional tort liability. The *Delaney*

not to defame a fellow citizen in Article I, section 8 and section 10 of the Oregon Constitution. *Id.* at 118.

[52] I will refer to this category as "wrongful discharge-public duty" cases. *See* Babick v. Or. Arena Corp., 40 P.3d 1059, 1062 (Or. 2002) ("Plaintiffs have pleaded this case as a 'public duty' . . . case.").

[53] *Delaney*, 681 P.2d at 118. I will refer to this category of cases as "wrongful discharge-workplace right" claims. *See Babick*, 40 P.3d at 1062.

[54] Brown v. Transcon Lines, 588 P.2d 1087 (Or. 1978).

[55] Campbell v. Ford Indus., Inc., 546 P.2d 141 (Or. 1976).

[56] Dunwoody v. Handskill Corp., 60 P.3d 1135, 1138 (Or. Ct. App. 2003) (citing *Campbell*, 546 P.2d at 145–46).

[57] Cross v. Eastlund, 796 P.2d 1214, 1216 (Or. Ct. App. 1990).

[58] *Id. See also* Kofoid v. Woodard Hotels, Inc., 716 P.2d 771 (Or. Ct. App. 1986).

[59] This distinction proved to be critical to the court's decisions on the issue of statutory abrogation of the wrongful discharge cause of action, a point I will revisit *infra* note 127.

court cited *Walsh v. Consolidated Freightways*, a case in which an employer discharged an employee who complained about unsafe working conditions.[60] Although the court concluded that the employer's decision to discharge an employee for raising concerns about safety conditions frustrated an important social interest, the employee did not have a wrongful discharge claim because he could file a complaint with the United States Department of Labor.[61] The Oregon Court of Appeals later wrote that this third category "is really a restriction of the other two."[62]

C. The Oregon Court of Appeals Struggled to Find a Discrete Method for Identifying a Public Duty.

Prior to June 12, 1975 when the Oregon Supreme Court decided *Nees*, there was no such thing as the wrongful discharge tort in Oregon. Within ten years, three distinct versions of the tort emerged, each with its own case law and doctrine.[63] During this precipitous ride, Oregon courts struggled to define how to read statutes and other legal authorities for evidence of a public duty. A group of Oregon Court of Appeals cases shows that the court used two methods to find a public duty: a case-comparison model and a statutory-interpretation model. Unfortunately, these models provided little clarity on how to approach the public duty question in subsequent cases. Many of the case-comparison opinions were highly fact-driven, while the statutory-analysis opinions tended to restate old law in slightly different terms. Thus, litigants still operated largely in the dark when they attempted to apply case law to define a public duty.

Under the case-comparison model, the court looked to a legal authority for evidence of a public policy, then examined an earlier wrongful discharge-public duty case[64] to determine whether the policy was of sufficient importance to be classified as a public duty. For example, in *McQuary v. Bel Air Convalescent Home*, the Oregon Court of Appeals held that a nursing home employee served a public duty when she told her employer she might report patient abuse to the state health

[60] Delaney v. Taco Time Int'l, Inc., 681 P.2d 114, 117 (Or. 1984) (citing Walsh v. Consol. Freightways, Inc., 563 P.2d 1205 (Or. 1977)). *Walsh* is not consistent with the court's subsequent decisions on the separate adequate remedy issue. In *Holien*, the court held that a statutory remedy only precluded the wrongful discharge cause of action if it provided damages relief to an injured plaintiff and the legislature specifically intended to preclude the tort action. Holien v. Sears, Roebuck & Co., 689 P.2d 1292 (Or. 1984). In *Walsh*, the court held that the employee had an adequate statutory remedy as a stand-in for the tort cause of action despite recognizing that the statute did not provide the employee with a damages remedy. *Walsh*, 563 P.2d at 1208.

[61] *Walsh*, 563 P.2d at 1208.

[62] *Kofoid*, 716 P.2d at 774.

[63] *See* discussion of *Delaney* categories *supra* notes 50–62 and accompanying text.

[64] In particular, *Nees* and *Delaney*.

division.[65] The *McQuary* court found that the Oregon Legislature's passage of a Nursing Home Patient's Bill of Rights indicated that the interest in protecting patient health and safety is "an important public policy analogous to the performance of jury duty or the avoidance of defamation, policies which the Supreme Court has found to justify wrongful discharge claims."[66] In *Hirsovescu v. Shangri-La Corp.* the Oregon Court of Appeals held that an employee of a care center for the developmentally disabled served a public duty when she made a good-faith report of unsafe conditions and patient abuse to Oregon's social services agency.[67] The *Hirsovescu* court based its holding primarily on a citation to the basic factual and legal conclusions in *McQuary*, with only a minimal effort to glean a public duty from Oregon's social services laws.[68]

The most striking example of the case-comparison model is *Anderson v. Evergreen International Airlines, Inc.*, where an airline mechanic alleged that his employer terminated him for his refusal to violate Federal Aviation Agency (FAA) regulations by installing defective parts in an airplane.[69] The court made no attempt to analyze the regulations at issue for evidence of a public duty. Instead, it simply pointed to *Delaney* as an example of a proper public duty.[70] With *Delaney* in mind, the court concluded that "[i]t is difficult . . . to imagine a more compelling example of a 'public policy or societal obligation' wrongful discharge" than the plaintiff's allegations.[71] In a footnote, the court quotes a case from the U.S. Court of Appeals for the Second Circuit where a concurring judge noted that "air safety ranks somewhere in pecking order between motherhood and the American flag."[72]

These cases illustrate the difficult position in which the Oregon Court of Appeals found itself following the vague public duty standards the Oregon Supreme Court enunciated in *Nees* and *Delaney*.[73] It faced several competing obligations. First, it had a duty to apply the law consistently with what little Supreme Court precedent it had.[74] Second, it had a duty as a common law court to develop the case law and provide future parties with guidance on how to determine whether a discharge

[65] McQuary v. Bel Air Convalescent Home, Inc., 684 P.2d 21, 22 (Or. Ct. App. 1984).

[66] *Id.* at 23.

[67] Hirsovescu v. Shangri-La Corp., 831 P.2d 73, 74 (Or. Ct. App. 1992).

[68] *Id.* at 75.

[69] Anderson v. Evergreen Int'l Airlines, Inc., 886 P.2d 1068, 1069 (Or. Ct. App. 1994).

[70] *Id.* at 1072.

[71] *Id.* at 1073.

[72] *Id.* at 1073 n.8 (citing F.A.A. v. Landy, 705 F.2d 624, 637 (2nd Cir. 1983), *cert. den.* 464 U.S. 895 (1983) (Van Graafeiland, J., concurring in part and dissenting in part)).

[73] *See* discussion *supra* notes 42 and 51 and accompanying text.

[74] The Court of Appeals' decisions in these cases did not incorrectly read *Delaney*, which itself failed to provide a static definition of what constituted a public duty.

violated a public duty.[75] Finally, the Court of Appeals had a duty to offer the parties in the case at hand an honest resolution to their dispute. As the result in *Evergreen* makes clear, this last interest carried the day: the court's case-comparison approach allowed it to reach the "right" conclusion on a specific set of facts without setting any firm precedent.

In another case, the court applied a statutory-interpretation model that called for a thorough examination of the relevant statutes for evidence of a public duty. In *Banaitis v. Mitsubishi Bank, Ltd.*, a former bank employee sued for wrongful discharge-public duty after the bank fired him for refusing to disclose confidential customer financial information to the bank's large parent company.[76] Banaitis argued that a host of federal and state civil and criminal statutes regulating the release of financial information created a public duty to refuse to disclose such information.[77] The bank argued that the statutes did not create such a duty because they primarily addressed limitations on government disclosure. Further, the statutes that did address private bank disclosure created private rights of action and thus could not be the source of Banaitis' "public" duty.[78] After a lengthy analysis, the court concluded that the statutes did not speak directly to Banaitis' situation but did conclusively reflect "a common concern for the protection of valuable commercial financial information, particularly when that information has been entrusted to a bank."[79] Thus, Banaitis had a public duty to refuse to disclose confidential financial information.

Oregon courts commonly cited *Banaitis* for the point that a legal authority need not relate precisely to the employee's conduct so long as the overall public policy is clear.[80] However, the *Banaitis* court candidly

[75] *Cf.* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 4 (1982) (noting that when common law courts develop law, changes tend "to be piecemeal and incremental . . . as courts sought to discover and only incidentally to make the ever-changing law"). *See also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 6 (1997): "Common-law courts performed two functions: One was to apply the law to the facts. All adjudicators—French judges, arbitrators, even baseball umpires and football referees—do that. But the second function, and the more important one, was to *make* the law."

[76] *Banaitis*, 879 P.2d 1288, 1292 (Or. Ct. App. 1994). The parent company was in fact a competitor of many bank customers. *Id.*

[77] *Id.* at 1294. Specifically, *Banaitis* pointed to the federal Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 (2000), which generally prohibits the disclosure of customer financial records to a government authority; to the federal Freedom of Information Act, 5 U.S.C. § 552 (2000), which exempts public agencies from disclosing confidential financial information; the Oregon Public Records Act, OR. REV. STAT. § 192.501 (2005), which similarly exempts certain financial information from disclosure; and to OR. REV. STAT. § 165.095(1) (2005), which provides criminal liability for the misapplication of property entrusted to a financial institution.

[78] *Banaitis*, 879 P.2d at 1295.

[79] *Id.*

[80] Love v. Polk County Fire Dist., 149 P.3d 199, 205 (Or. Ct. App. 2006); Babick v. Or. Arena Corp., 980 P.2d 1147, 1150 (Or. Ct. App. 1999). Oregon courts also cited the case for its statement that a court must find a public duty rather than create one.

noted that this was not a novel proposition. For example, the provision of the Oregon Constitution at issue in *Nees* did not precisely obligate the employee to serve on a jury; nor did either of the constitutional provisions in *Delaney* "prohibit[] a person from defaming another."[81]

Although the *Banaitis* decision stated the existing law in clear and concise terms, it did not represent a great leap forward in the court's wrongful discharge-public duty jurisprudence. Like the *McQuary, Hirsovescu,* and *Evergreen* decisions before it, it provided potential wrongful discharge-public duty litigants with no additional tools to judge a claim's merits prior to litigation or discharge.[82]

D. The Oregon Supreme Court's Babick *Decision Clarifies the Process for Finding a Public Duty by Narrowing the "Search" in the Legal Authority.*

Following *Nees,* wrongful discharge-public duty had evolved into a formless and unpredictable cause of action. The Oregon Supreme Court began to address this problem in *Babick v. Oregon Arena Corp.*[83] It held that that the public duty must arise from a constitutional provision, statute or judicial decision that either encourages the specific act that led to the employee's discharge or otherwise demonstrates that the act enjoys great social value.[84]

The case involved a group of Oregon Arena Corp.'s security guards. To prepare them for potentially unruly concertgoers, Oregon Arena Corp. instructed the security guards in defensive tactics and procedures to address drug possession and consumption of alcohol by minors.[85] During a Phish concert a group of audience members began to engage in "assaultive behavior and illegal drug and alcohol possession."[86] The security guards responded with arrests that were fully in accord with their training and with Oregon law. Approximately one week after the concert, Oregon Arena Corp. discharged the entire group of security guards, including those who were present at the concert but made no arrests and those who had not worked at the concert.[87] The security guards sued

Love, 149 P.3d at 204; Eusterman v. Northwest Permanente, P.C., 129 P.3d 213, 217 (Or. Ct. App. 2006). Once again this was not a novel proposition, as is clear from *Nees* and *Delaney*'s attempt to ground the public duty in legal text.

[81] *Banaitis*, 879 P.2d at 1294.

[82] *See also* Dalby v. Sisters of Providence in Or., 865 P.2d 391, 394 (Or. Ct. App. 1993). The court held that the societal obligation must arise from a "clear mandate" of existing law, but applied the public duty law no differently than it had under the apparently less stringent standards in *McQuary*, *Hirsovescu*, and *Evergreen*.

[83] 40 P.3d 1059, 1061 (Or. 2002).

[84] *Id.* at 1062.

[85] *Id.* at 1060.

[86] *Id.*

[87] *Id.*

Oregon Arena Corp. for wrongful discharge-public duty. The trial court dismissed the claim.[88]

The Oregon Court of Appeals reversed the trial court 2-1. The Court of Appeals found that the security guards served a public duty when they lawfully arrested or attempted to arrest the intoxicated concertgoers.[89] The decision is a straightforward application of the *Banaitis* rule that a legal authority need not obligate an employee to act in the manner that precipitated discharge in order to establish a public duty.[90] The Court of Appeals concluded that the security guards had a public duty to arrest the belligerent concertgoers based on ORS chapters 130–133, which it found promoted the prevention and deterrence of crime by authorizing private citizens to make arrests, [91] as well as ORS chapter 181, which paralleled the citizen-arrest provisions of ORS chapters 130–133 but specifically referenced licensed and trained security guards.[92] Citing both chapters, the court emphasized that its holding protected the public "concern" of keeping large social gatherings free from unrest.[93]

Given the vagueness of the term "important community interest," a decision like the Court of Appeal's in *Babick* was inevitable. Indeed, the Court of Appeals' analysis of the private law enforcement statutes is consistent with the fundamentals of the *Banaitis* methodology: reading legal text closely for evidence of an implicit public policy, then punishing an employer for terminating an employee under circumstances that frustrated the policy. Surely these statutes support the general proposition that the State of Oregon is opposed to criminal conduct and supports effective private security personnel; it follows that Oregon Arena Corp. was "wrongful" when it fired the security guards for effecting that policy, and that it should respond in damages.

But does an employer that terminates private security guards for responding to a hostile situation with what it deemed to be excessive zeal violate public policy to the same degree as an employer who terminates

[88] Babick v. Or. Arena Corp., 980 P.2d 1147, 1149 (Or. Ct. App. 1999).

[89] *Id.* at 1151.

[90] *Id.* at 1150; Banaitis v. Mitsubishi Bank, Ltd., 879 P.2d 1288, 1292 (Or. Ct. App. 1994).

[91] According to the Court of Appeals, "In empowering private citizens to make arrests, the public has tacitly recognized that peace officers may not be present in every situation where criminal laws are broken and has demonstrated a common concern for law enforcement in such situations." *Babick*, 980 P.2d at 1150 (citing OR. REV. STAT. § 133.220(3) and OR. REV. STAT. § 133.225(2)).

[92] *Babick*, 980 P.2d at 1150.

[93] *Id.* The Court of Appeals wrote, "In . . . large public gatherings, the potential for public disorder is increased. . . . [I]t is reasonable to infer from defendant's hiring of plaintiffs that [police officers] would not be present or not be present in sufficient numbers to ensure the preservation of public order. In those circumstances, Oregonians have expressed a common concern for reliable and effective private law enforcement, as demonstrated by ORS 181.870 through ORS 181.991, which regulate the licensing and training of persons who provide security services at such 'public activities.'" *Id.*

on the basis of attending jury duty or reporting a threat to patient safety? Does the statutory text indicate that the employer's conduct was so egregious and "socially undesirable"[94] that it should be liable for compensatory and punitive damages? As originally conceived in *Nees*, the answer is almost certainly "no." The context of the *Nees* decision, if not the precise public duty definition, requires a much stronger showing of societal obligation and employer offensiveness.[95] Yet two very capable judges of the Oregon Court of Appeals applied two decades of wrongful discharge-public duty law fairly and accurately and concluded precisely the opposite.

A unanimous Oregon Supreme Court reversed and dismissed the security guards' wrongful discharge-public duty claim.[96] It also announced a two-part rule for finding a public duty: the public policy must arise from a constitutional provision, statute or judicial decision that encourages the specific act that led to discharge, or that otherwise demonstrates the act's great social value.

The Supreme Court reasoned that the private criminal justice statutes the Court of Appeals relied upon were too general to provide a public duty under the first part of the new rule. It wrote "[w]e are concerned here with a duty to perform a specific act (the arrest of lawbreakers by private citizens or private security personnel), and the statutes cited have nothing to say about that kind of act."[97] Because the statutes did not "encourage"[98] the security guards to arrest the intoxicated and violent concertgoers, Oregon Arena Corp. was not liable under the first part of the new rule.

The security guards also failed to make the alternative showing that arresting concertgoers was of great social value.[99] The Supreme Court agreed that the statutes demonstrated the public's concern about effective private law enforcement. However, the statutes did not "suggest that that the activities of private security personnel enjoy any higher social value than the activities of employees in other professions to which the at-will rule applies."[100] Since the security guards could not establish that the statutory scheme encouraged their specific acts or that it indicated their great social value, Oregon Arena Corp. was not liable for wrongful discharge-public duty.

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[94] Nees v. Hocks, 536 P.2d 512, 515 (Or. 1975).

[95] *See* discussion of *Nees supra* note 30 and accompanying text.

[96] Babick v. Or. Arena Corp., 40 P.3d 1059, 1060 (Or. 2002).

[97] *Id.* at 1063.

[98] *Id. See* discussion of the term "encourage" *infra* note 102 and accompanying text.

[99] *Id.* at 1063.

[100] *Id.*

IV. THE OREGON SUPREME COURT SHOULD FURTHER NARROW THE WRONGFUL DISCHARGE-PUBLIC DUTY TORT

The Oregon Supreme Court should abandon the "great social value" part of the *Babick* public duty test in favor of a clear rule that a public policy must arise from a constitutional provision, statute or judicial decision that encourages the specific act that led to discharge. Such a rule would improve efficiency and predictability of outcomes for employers in discharge situations. In addition, the rule would not seriously undermine employee rights because existing statutory and case law provide adequate remedies for wrongfully discharged employees.

A. The Narrower Rule Would Make Discharges More Efficient and Would Improve Predictability of Outcomes for Employees and Employers.

Eliminating the *Babick* "great social value" rule would ease the burden discharge places on employers and would allow employers and employees to better predict a wrongful discharge-public duty claim's outcome in advance of litigation.

There is much to admire about the Supreme Court's decision in *Babick*. Requiring a wrongful discharge-public duty plaintiff to point to a legal authority that encourages the act that resulted in discharge clarifies the formless and subjective "important community interest" standard. Applying this first part of the rule, employers and employees are certainly in a better position to predict the claim's outcome prior to litigation.[101] Unfortunately, *Babick* does not define the term of art "encourage." However, some guidance emerges from the court's emphasis on specific acts and its rejection of Oregon Arena Corp.'s position that a public duty should exist only when a "source of law imposes a specific legal *obligation* on the employee to act in the way that precipitates discharge."[102] Applying this reasoning to the facts in *Babick*, presumably the security guards could have stated a wrongful discharge-public duty claim if the private law enforcement statute provided that "professional security personnel are privileged to effect lawful arrests of invitees who present a threat to public safety at a public event."[103] This hypothetical statute "encourages"[104] the security guards to arrest violent and intoxicated concertgoers because the concertgoers "pose a threat to public safety," but does not require them to do so. Assuming this is what the Supreme

[101] Or, in the case of an employer, prior to its decision to terminate an employee.

[102] *Babick*, 40 P.3d at 1062 (emphasis added).

[103] Or words to that effect.

[104] Webster's defines the term as "to spur on." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 747 (1986).

Court meant, *Babick* Part I is much clearer than any prior attempt at a public duty standard.[105]

Unfortunately, the Supreme Court undoes much of *Babick* Part I's good work with *Babick* Part II, which allows an employee to identify a public duty by showing that the act was of great social value.[106] The Supreme Court's analysis of the alternative showing in *Babick* consists of nothing more than a series of conclusory statements. For example, it writes that while a public duty "may arise out of some expression of a 'substantial public policy' . . . plaintiffs have failed to establish that predicate here."[107] *Babick* Part II is problematic because it is no different from the ambiguous *McQuary*, *Hirsovescu* and *Banaitis* "important community interest" cases, which the Supreme Court appeared to displace with its rule requiring a wrongful discharge-public duty plaintiff to point to a legal authority that encouraged his conduct. Changing the operative phrase from "important community interest" to "great social value" does not change the underlying methodology for finding a public duty. In either case the employee must identify a public policy in a legal authority, then convince the court that his conduct was sufficiently important to defeat the at-will employment presumption.[108] For example,

[105] A lengthy Court of Appeals decision applying the *Babick* "encourage" rule, *Eusterman v. Northwest Permanente, P.C.*, presented the question of whether a medical group has a public duty under Oregon medical-professional statutes to employ a doctor whose medical opinions were contrary to the reasonable medical opinions of the group's other doctors. 129 P.3d 213, 234 (Or. Ct. App. 2006). The Court of Appeals held the employer did not have such a duty because "the statutes at issue here contemplate an exercise of professional judgment that may be satisfied by a range of acts." *Id.*

[106] *Babick*, 40 P.3d at 1063.

[107] *Id.*

[108] A recent Oregon Court of Appeals case is instructive on how a plaintiff would make this showing. In *Love v. Polk County Fire District*, 149 P.3d 199, 201–02 (Or. Ct. App. 2006), an administrative employee of a local fire district alleged that her employer discharged her because of her intra-office complaints that her superiors planned to hide the details of a fatal training accident from National Institute for Occupational Safety and Health (NIOSH) investigators. Plaintiff brought suit for wrongful discharge-public duty, which the trial court dismissed on summary judgment. *Id.* at 200. The Oregon Court of Appeals reversed and held that, if true, the plaintiff's actions met an important societal obligation. First, the court examined the federal NIOSH statutes and found that "[i]n creating NIOSH, Congress declared that the purpose of NIOSH . . . was to reduce the 'substantial burden' caused by workplace injury," in part by using its investigatory power to root out unsafe practices in private employment. *Id.* at 210 (citing 29 U.S.C. § 651(a)). On that basis, and with an eye toward other public-safety wrongful-discharge public duty cases, the court reasoned that the plaintiff's quasi-whistle blowing activity "is at least as 'important' as that in *Dalby* (reporting pharmacy record-keeping inaccuracies), *Hirsovescu* (reporting nursing home patient abuse), and *McQuary* (same)." *Id.* at 210 (parenthetical references in the original). This methodology for establishing a public duty is virtually identical to the plaintiff's in *Hirsovescu*. In a separate holding that is critical to the development of the wrongful discharge-public duty tort in Oregon but subsidiary to the focus of this Comment, the court also held that the plaintiff need only show that her belief that the employer violated a public duty was objectively

in *Eusterman*, the doctor argued that Oregon's workers' compensation statutes established a duty to provide independent medical judgment when treating workplace injuries.[109] The Court of Appeals summarily rejected the doctor's argument, writing that the statute does not "otherwise demonstrate that a physician's actions under workers' compensation law enjoy a higher social value than the activities of employees in other professions to which the at-will rule applies, as required under *Babick*."[110]

Admittedly, the *Babick* and *Eusterman* courts have now rejected two attempts to argue for a public duty under the "great social value" alternative. Given the seeming importance of the policies presented (public safety and effective medical care, respectively) and the courts' unequivocal rejection of the public duty arguments, it is probably true that most claims will proceed under *Babick* Part I or not at all.

But why did the courts reach these conclusions? What is it about the workers' compensation statute, or the private law enforcement statute, that makes the public policy less critical? The *Babick* opinion's failure to define "great social value" leaves an employer in the same difficult position as did the *Banaitis* standard: diligently reviewing the facts of a discharge and volumes of constitutional provisions, federal and state statutes, administrative regulations and case law to determine whether a policy with "great social value" could plausibly apply to the employee's termination. Given the financial stakes of an incorrect guess that there is no public duty,[111] an employer can hardly be blamed for thoroughly contemplating the wrongful discharge-public duty implications of each termination. The review process erodes the employer's employment-at-will prerogative to eliminate problem employees who make the employer less efficient and less competitive in the marketplace.

A rule that the public policy must arise from a legal authority that encourages the specific act that led to discharge simplifies this problem. A certain amount of reflection and review before termination is good for everyone involved. However, this obligation should have a ceiling: it is both costly and inconsistent with the employer's rights under the at-will employment rule to force an employer to engage in an unlimited evaluation of the facts and law before each discharge.

On the other hand, it is relatively simple to determine whether a legal authority encourages an employee's specific act.[112] The *Babick* and

reasonable in order to survive summary judgment. *Id.* at 210. *See* discussion of *Hirsovescu supra* note 67 and accompanying text.

[109] *Eusterman*, 129 P.3d at 220.

[110] *Id.* at 220.

[111] Uncapped compensatory and punitive damages, plus any statutory equitable or attorney-fee remedies that might attach. *See* discussion of wrongful discharge remedies, *supra* note 3 and accompanying text.

[112] *See* discussion of *Babick supra* note 88 and accompanying text and *Eusterman supra* note 105 and accompanying text .

Eusterman decisions provide some insight into the employer's analysis. First, the employer considers the factual context of the discharge, with a particular emphasis on the specific employee action that resulted in termination. In *Babick*, the facts involved private security guards who conducted lawful arrests of concertgoers. In *Eusterman*, the factual setting was a doctor who made a medically appropriate diagnosis of a patient. The employer then looks up the statutes and other authorities on point with the factual context. In *Babick*, Oregon Arena Corp. turned to the statutes and case law on private law enforcement. The medical group in *Eusterman* reviewed the legal authority on professional medical care. Based on this assessment, the employer knows that a successful wrongful discharge-public duty claim is probable if the authority encourages[113] an employee to perform the specific act that precipitated discharge. However, if the authority does not suggest a duty to perform a specific act, the employer can terminate with confidence that the employee cannot challenge the decision on a wrongful discharge-public duty theory.

Thus, a rule requiring a wrongful discharge-public duty plaintiff to point to a legal authority that encourages the specific act that led to his discharge would reduce the costs and inefficiencies employers face when they make the difficult decision to discharge an employee.

B. A Narrow Wrongful Discharge-Public Duty Tort Will Not Significantly Upset Employee Rights Because Existing Statutory and Common Law Remedies are Adequate.

Eliminating the "great social value" rule will not appreciably alter employee rights in the workplace. As this Comment shows, two common applications of the wrongful discharge tort relate to employee whistleblowers and to employees who file workers' compensation claims.[114] Existing law amply protects employee whistleblowers and employees who file workers' compensation claims. Oregon statutes prohibit an employer from discriminating on either basis and provide compensatory and punitive damages for a violation.[115] In addition, eliminating the "great social value" rule will not thwart the rights of an employee fired for refusing to commit a tort because the *Delaney* holding

[113] *See* discussion of the term "encourage" *supra* note 102 and accompanying text.

[114] *See* discussion of *McQuary supra* note 65 and accompanying text and *Frampton supra* note 40 and accompanying text.

[115] The court would properly characterize a discharge on the basis of filing a workers compensation claim as a wrongful discharge-workplace right claim rather than a public duty claim. *See* discussion of *Delaney supra* note 53 and accompanying text. I discuss the workers' compensation statute here only to illustrate that the legislature has addressed one of the more common applications of the wrongful-discharge tort with a statutory remedy so that a change in the common law tort would have no effect on this important workplace right. For further discussion of the interplay between wrongful discharge-workplace right remedies and statutory causes of action, see discussion of *Holien infra* notes 129–34.

"encourages" such acts so that an employee fired on this basis could state a claim under the narrower wrongful discharge-public duty rule proposed here.

Oregon statue vigorously protects private sector employee whistleblowers. The statute provides:

> It is an unlawful employment practice for an employer to . . . discriminate [in any] . . . conditions or privileges of employment for the reason that the employee has in good faith reported criminal activity by any person, has in good faith caused a complainant's information or complaint to be filed against any person, has in good faith cooperated with any law enforcement agency conducting a criminal investigation, has in good faith brought a civil proceeding against an employer or has testified in good faith at a civil proceeding or criminal trial.[116]

Oregon law is similarly protective of employees who file workers' compensation claims. The statute states that:

> It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656 or has given testimony under the provisions of those laws.[117]

An employer who violates either law faces serious legal consequences. The whistleblower[118] and workers' compensation statutes[119] allow the employee to recover the full array of equitable and legal remedies.[120] This includes reinstatement, back pay, compensatory damages, and even punitive damages. The employee is also entitled to a jury trial.[121] The legislature has essentially codified two of the most common applications of the wrongful discharge-public duty tort[122] so that a change in the common law rule for finding a public duty will have no effect on employee whistleblowers and workers' compensation filers.[123] In

[116] OR. REV. STAT. § 659A.230(1) (2005).

[117] OR. REV. STAT. § 659A.040 (2005).

[118] § 659A.230(1).

[119] § 659A.040.

[120] OR. REV. STAT. § 659A.885 (2005).

[121] § 659A.885(3)(a)–(c).

[122] The Oregon Court of Appeals defined the whistleblower statute's policy in terms that are similar to the wrongful discharge tort's purpose. The court wrote, "[t]he statutory protection provided by the whistleblower statute advances the *public policy* of encouraging citizens to assist in the enforcement of state and federal laws." Jensen v. Medley, 11 P.3d 678, 688 (Or. Ct. App. 2000) (emphasis added), *review denied*, 42 P.3d 1244 (Or.), *rev'd on reconsideration*, 52 P.3d 436 (Or. 2002), *aff'd in part, rev'd in part*, 82 P.3d 149 (Or. 2003).

[123] Oregon law also protects civil whistleblowers in the health care industry. ORS Chapters 441 and 442 provide licensing and quality-of-care requirements for health care facilities like hospitals, long-term care facilities, and outpatient clinics. ORS

fact, the statute's remedial scheme is superior to the wrongful discharge-public duty tort's because the former provides attorney fees and equitable relief, while the latter does not provide attorney fees and only offers equitable relief if there is no adequate remedy at law.

An employee terminated for refusing to commit a tort is still protected by the narrower wrongful discharge-public duty tort. Consistent with *Babick*, this proposal requires that a wrongful discharge-public duty plaintiff point to a legal authority that encourages the act that led to discharge. Legal authority includes holdings from case law.[124] Thus, if the employee identifies a case that found liability for conduct similar to what led to his discharge, he states a claim for wrongful discharge-public duty. Consider the facts of *Delaney*, where Taco Time discharged a manager who refused to sign a false statement about a fellow employee's sexual propriety.[125] If the case arose under this proposal, the employee would argue that Oregon defamation law encouraged him to avoid making untrue and defamatory statements about a fellow employee by exposing such actions to intentional tort liability. If an employer required an employee to breach a tort duty to keep his job, the employee could bring a claim for wrongful discharge-public duty.

Thus, because existing Oregon law provides rights and remedies equivalent to the wrongful discharge-public duty tort's, a narrow public duty rule will not undermine the public policies of encouraging employee whistleblowers to report employer violations of the law, allowing injured workers to utilize the no-fault worker's compensation system without fear of reprisal, or protecting employees who refuse to commit torts at their employers' behest.

V. THE OREGON LEGISLATURE SHOULD ABROGATE THE WRONGFUL DISCHARGE-WORKPLACE RIGHT TORT FOR STATUTORY CAUSES OF ACTION THAT PROVIDE EQUITABLE REMEDIES ONLY

Oregon's lawmakers should abrogate the wrongful discharge-workplace right tort where the workplace right statute limits the employee's recovery to equitable remedies. In many cases, Oregon law allows an employer to be liable for wrongful discharge damages even when the employee has a statutory remedy in equity for the same discharge.[126] This result suffers from three problems: it ignores legislative

Chapter 443 provides a similar set of regulations for residential care facilities like nursing homes. An employer that retaliates against an employee for making a good faith report of possible violations of either chapter commits an unfair employment practice. OR. REV. STAT. § 659A.233 (2005). A statutory violation entitles the employee to equitable remedies. § 659A.885(1)–(2).

[124] Babick v. Or. Arena Corp., 40 P.3d 1059, 1062 (Or. 2002).

[125] Delaney v. Taco Time Int'l, Inc., 681 P.2d 114, 118 (Or. 1984). *See* discussion *supra* note 50 and accompanying text.

[126] *See* discussion of *Delaney supra* note 50 and accompanying text.

intent; it is inconsistent with the wrongful discharge tort's purpose; and it produces unfair results for employers. An abrogation amendment would affirm legislative control of the workplace, resolve doctrinal inconsistencies, and reassert employer rights under the at-will employment rule.[127]

A. Oregon's Statutory Preemption Jurisprudence Allows an Employer to be Liable for Substantially the Same Discharge Under Both Statutory and Tort Causes of Action.

The second *Delaney* category, where the employer discharges an employee for exercising a statutory workplace right, generally treats the underlying statutory violation and the termination as separate injuries.[128] Because the distinction allowed the possibility of separate statutory and tort liability based on substantially the same facts, the Oregon Supreme Court addressed the statutory abrogation issue in the early-middle period of the tort's evolution. *Holien v. Sears Roebuck & Co.* held that a statutory employee-rights cause of action did not abrogate a wrongful discharge-workplace right claim unless the statute provided a damages remedy and the legislature intended abrogation.[129]

Holien alleged that her supervisor repeatedly sexually harassed her before finally discharging her when she refused to submit to his advances.[130] She sued Sears for two separate injuries: the violation of her statutory right to be free from gender discrimination in the workplace; and for wrongful discharge based on asserting that right.[131] The Supreme Court concluded that Holien pleaded an adequate wrongful discharge-workplace right claim under the second *Delaney* category.[132]

The Supreme Court also concluded that Holien's statutory remedy did not abrogate her parasitic wrongful discharge-workplace right claim. The court reasoned that the statute's equity-only remedy did not adequately compensate the discharge injury because it failed "to capture the personal nature of the injury done to a wrongfully discharged employee as an individual."[133] The Supreme Court then engaged in a

[127] My proposal to limit the remedies available to a workplace rights wrongful-discharge plaintiff is not a proposal to limit the application of employee workplace rights. The exercise of these rights is essential to simple fairness to employees in the workplace, and to many socially important functions like caring for one's family and being present at judicial proceedings.

[128] *See* discussion of *Delaney supra* note 50 and accompanying text.

[129] Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1300 (Or. 1984).

[130] *Id.* at 1294.

[131] *Id.*

[132] *Id.* at 1299–1300.

[133] *Id.* at 1303. As discussed briefly *infra* note 147, an employee may seek a damages remedy for violation of a separate group of rights listed in section 659A.885(3) of the Oregon Revised Statutes. These rights include the right of a whistleblower and a workers' compensation filer to be free from discrimination. In a strange post-*Holien* decision, the Oregon Court of Appeals held that the presence of a damages remedy precluded the wrongful discharge tort even though there was no

lengthy review of the statute's legislative history and concluded that the legislature was not aware of the common law remedy's existence at the time it passed the law. As the court noted, "[i]t seems elementary that before a legislative body can intend to eliminate certain forms of remedy it must be aware that such remedies exist."[134]

The *Holien* decision allows serious consequences for an employer who discharges an employee for asserting a statutory workplace right. Section 659A.885 of the Oregon Revised Statutes provides the cause of action for violations of employee-rights statutes. Section 659A.885(1) stipulates that:

> Any individual claiming to be aggrieved by an unlawful practice specified in subsection (2) of this section may file a civil action in circuit court. In any action under this subsection, the court may order injunctive relief and such other equitable relief as may be appropriate, including but not limited to reinstatement or the hiring of employees with or without back pay.

The statutory cause of action allows an employee to redress these rights with equitable remedies, as well as attorney fees, but not with damages.[135] Part (2) of the statute refers to approximately two-dozen workplace rights.[136] Of particular importance are the statutory rights to be free from adverse employment action because a family member is also employed by the employer,[137] for asserting family-leave rights,[138] and for

indication that the legislature intended abrogation. Farrimond v. La.-Pac. Corp., 798 P.2d 697, 699 (Or. Ct. App. 1990). In fact, the opinion does not even mention the legislative intent element of the *Holien* decision.

[134] *Holien*, 689 P.2d at 1303.

[135] The statute's equitable relief includes back pay and reinstatement. It is questionable whether the statute's exclusion of compensatory damages also excludes front pay. The term "front pay" refers to money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. In *Tadsen v. Praegitzer Industries, Inc.*, the Oregon Supreme Court cast front pay as a compensatory damages award. 928 P.2d 980, 983 (Or. 1996). Under that holding, an employee could not seek front pay under the equity-only cause of action. However, in *Pollard v. E.I. du Pont de Nemours & Co.*, the United States Supreme Court held that front pay was not subject to Title VII's compensatory damages limitations. 532 U.S. 843, 845 (2001). Because Oregon patterned the state's discrimination laws after Title VII, federal decisions are persuasive authority for Oregon courts in construing the Oregon law. A.L.P. Inc. v. Bureau of Labor & Indus., 984 P.2d 883, 885 (Or. Ct. App. 1999). Thus, if the Oregon court believes that the state's anti-discrimination statute should be interpreted consistently with the federal statute, an employer that violates an equity-only Oregon statute might also be liable for a front pay award.

[136] This includes, among many others, the workplace rights to be free from discrimination on the basis of a protected classification (age, race, religion, color, sex, national origin, or marital status); to testify before a legislative committee; to object to the use of breathalyzer and polygraph tests; to be a volunteer firefighter; and to force the employer to pay for an employer-required medical examination.

[137] OR. REV. STAT. § 659A.309 (2005).

[138] OR. REV. STAT. § 659A.183 (2005).

taking leave to attend a criminal or civil proceeding.[139] Since the statute does not provide a damages remedy for a violation of these rights, *Holien* advises that it does not abrogate the wrongful discharge-workplace right tort.[140] An employer facing a discharge that presents any of these common issues must proceed with particular care to avoid significant equitable liability for the statutory violation and additional monetary liability for the discharge violation should the employee "assert" the right prior to discharge.

Holien can produce strange results. Consider the following hypothetical. Employee A is a longtime contracts drafting technician with XYZ Incorporated. Employee A's husband is the victim of a serious assault, and the prosecution calls her to testify at the ensuing criminal trial. Employee A asks her supervisor for two days off to testify at the proceeding, but the supervisor refuses the request.

As indicated above, Oregon law makes it an unfair employment practice for an employer to deny an employee leave to attend a criminal proceeding or to discharge an employee for her attendance,[141] and punishes a violation with back pay, attorney fees and (in the case of discharge) reinstatement.[142] Thus, Oregon law allows Employee A to ignore her supervisor's objections, testify at the trial and insist on getting her job back. If the supervisor fired her for failing to report to work, Employee A could sue to get her job back, with back pay and attorney fees, but could not seek compensatory or punitive damages.

However, suppose that Employee A reminded the supervisor of her statutory right to testify at the trial and the supervisor responded, "if you miss work to testify at that trial, you're fired." Employee A then misses work to testify and the supervisor fires her. Because Employee A "asserted" her workplace right to attend the criminal proceeding and was fired on that basis, she can state a claim for wrongful discharge-workplace right. The statutory cause of action will not abrogate the tort action because Employee A could not seek monetary damages.[143]

Holien is problematic because it ignores the legislature's directive that a discharge for attending a criminal proceeding may be redressed with equitable remedies only. It provides Employee A, or any other employee fired for asserting one of the equity-only rights in section 659A.885(2) of the Oregon Revised Statutes, with a compensatory and punitive damages remedy she could not otherwise access. Furthermore, the *Holien* decision not only prevents the employer from limiting its

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[139] OR. REV. STAT. §§ 659A.192, 659A.194 (2005).

[140] *See* discussion of *Holien supra* notes 129–34 and accompanying text.

[141] § 659A.192(1).

[142] OR. REV. STAT. § 659A.885(1)–(2) (2005).

[143] Perhaps recognizing the strange nature of the intersection of the wrongful discharge tort and statutory causes of action, the Oregon Court of Appeals admitted that "the distinction appears thin." Cross v. Eastlund, 796 P.2d 1214, 1216 (Or. Ct. App. 1990).

liability to the statutory equitable remedies, but provides the employee with a "super-sized" wrongful discharge-workplace right tort because it allows attorney fees and a right of reinstatement for the statutory violation, neither of which the employee could utilize under the basic wrongful discharge tort.

Finally, the result under *Holien* is incompatible with one of the wrongful discharge tort's essential policies. The Oregon Court of Appeals described wrongful discharge as "an *interstitial* tort, designed to fill a gap where a discharge in violation of public policy would otherwise not be adequately remedied."[144] Since a cause of action already protects the employee right with equitable remedies, the wrongful discharge-workplace right tort does not act "interstitially" or "fill a gap." Instead, the tort augments the statute with an extra-legislative set of rights and remedies: there is no gap to fill.

One possible justification for *Holien* is that the legislature intended to provide employees with access to two remedies: a statutory equitable recovery and a common law damages recovery. The analogy is to sexual harassment claims. A female employee whose male supervisor sexually harasses her with physical contact suffers two injuries. The supervisor has violated her statutory right to be free from discrimination on the basis of sex and her common law right to be free from unwanted physical touching. The employee's first injury is remediable with Title VII or the equivalent state anti-discrimination statute, her second with a tort action for battery. Since neither theory by itself could reach both injuries, one cause of action cannot preclude the other. Both are necessary to fully address the harm to the employee.[145]

However, the analysis changes in the wrongful discharge-workplace right context. First, the tort action does not reach an injury the statute leaves unaddressed. Whether the employee challenges the discharge with a purely statutory claim or with a hybrid statutory-common law action, the premise is the same: the employee loses her job because she exercised a workplace right. The employee's injury, the discharge, is identical under both theories; the only distinction is the expediency of the employee invoking the right prior to discharge.[146] There is no additional right to address unless we accept that the *threat* of discharge for exercising the workplace right is not only more offensive than the *actual* discharge, but so much so that it should be addressed with financial remedies that the simple discharge violation does not provide.

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[144] Dunwoody v. Handskill Corp., 60 P.3d 1135, 1140 (Or. Ct. App. 2003) (emphasis added).

[145] My advisor for this Comment, Professor Henry Drummonds, raised a similar argument in an amicus curiae brief he submitted to the *Holien* court on behalf of the AFL-CIO. He raised this counterargument with me during a conversation in his office in March of 2007.

[146] *See* discussion of *Delaney supra* note 50 and accompanying text and hypothetical *supra* notes 141–43 and accompanying text.

Additionally, the legislature is perfectly capable of creating a monetary remedy for a workplace right discharge. The legislature allows tort-style compensatory and punitive damages for discharges on the basis of asserting some workplace rights, but not for others.[147] If the legislature intended the exercise of all workplace rights to be protected with monetary remedies, it could have written the statutory cause of action to state as much. Whether the legislature *should* amend the statute is a topic outside the scope of this Comment. I offer this perspective merely for the legislative intent implications of *Holien*.

Two decades later, Oregon courts have shown no inclination to abandon the *Holien* decision. In fact, the Oregon Court of Appeals cited it in subsequent abrogation cases that involved public employees[148] and employees with a contractual right to good-cause discharge.[149] Thus, if the inconsistencies and inequities *Holien* produces are to be solved, the Oregon Legislature must amend section 659A.885(1) of the Oregon Revised Statutes to abrogate the common law wrongful discharge action where the statute limits an employee to equitable remedies for a violation of a workplace right.

VI. CONCLUSION: THE OREGON SUPREME COURT AND OREGON LEGISLATURE SHOULD HEED THE *NEES* COURT'S WISDOM AND LIMIT THE REACH AND EFFECT OF THE WRONGFUL DISCHARGE TORT.

The *Nees* court recognized that despite at-will employment's validity, some discharges were simply too distasteful to countenance.[150] For that reason, it found the wrongful discharge tort necessary as an exception to at-will employment. However, it also recognized the employer's legitimate interest in discharging problem employees.[151] The *Nees* court understood that if the tort expanded, it would intrude upon employers' legitimate business decisions instead of limiting its reach to discharges that caused significant social harm. For that reason, the Supreme Court

[147] Section 659A.885(3) of the Oregon Revised Statutes references the right to be free from discrimination on the basis of paying child support, for filing a workers compensation claim, because of a disability when the employee is qualified for the job, or because of whistleblower activity. *See* discussion of whistleblower and workers compensation rights *supra* notes 119–20 and accompanying text.

[148] Olsen v. Deschutes County, 127 P.3d 655, 661 (Or. Ct. App. 2006) (holding that statutory whistleblower action did not abrogate the wrongful discharge tort because the statute clearly expressed its intention not to supersede the common law action).

[149] *Dunwoody*, 60 P.3d at 1141 (holding that an employment contract did not supersede a wrongful discharge claim because contract damages did not redress the "personal nature" of the employee's injuries).

[150] *See* discussion of the egregious employer conduct cited by the *Nees* court *supra* note 45 and accompanying text.

[151] *See* discussion of *Nees* dicta about non-tortious discharge on similar facts *supra* note 49 and accompanying text.

in *Nees* limited the tort to cases of egregious employer conduct where the employee could point to strong statutory evidence of a societal obligation in constitutional or statutory text.[152]

Subsequent Oregon courts lost track of *Nees'* good advice. They allowed employees to state claims for wrongful discharge-public duty based on cursory analysis of legal text and only the vaguest notions of an "important community interest."[153] They allowed employers to be liable for wrongful discharge damages even when a separate statutory action addressed the employee's discharge with significant remedies.[154] They forced employers to expend significant time, money, and resources when discharging an employee for fear of accidentally stumbling into a wrongful discharge claim.

The two proposals presented here address many of these problems. A rule requiring a wrongful discharge-public duty plaintiff to point to a legal authority that encourages his conduct allows an employer to better predict a termination's wrongful discharge implications before the damage is done. Legislatively abrogating the wrongful discharge-workplace right tort when the employee has a separate equitable remedy reasserts the employer's ability to make discharge decisions free from the specter of unlimited financial liability.

Ultimately, the wrongful discharge tort is worth preserving. It provides a needed remedy for employees faced with the difficult choice between maintaining employment and disobeying the law or ignoring a socially critical function. But the wrongful discharge exception should not overtake the at-will employment rule. This Comment's proposals thus seek to preserve the cause of action and the policy goals it stands for, but to limit its application to the original understanding in *Nees*.

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[152] *See* discussion of *Nees* requirements for wrongful discharge claim *supra* notes 45–49 and accompanying text.

[153] *See* discussion of *McQuary*, *Hirsovescu*, and *Banaitis supra* notes 65–82 and accompanying text.

[154] *See* discussion of *Holien supra* note 133 and accompanying text.