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No. 70128-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LARRY CURRIER, LARRY CURRIER DBA AMERICAN CONTAINER EXPRESS, and AMERICAN CONTAINER EXPRESS, INC.

Plaintiffs/Respondents,

v.

NORTHLAND SERVICES, INC.,

Defendant/Appellant.

BRIEF OF RESPONDENTS

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I. Statement of the Case

A. List of Individuals

For ease of reference, Plaintiffs provide the following list of the primary individuals involved in this matter:

- Plaintiff Larry Currier ("Currier") – An independent contractor/truck driver who worked for Defendant Northland Services, Inc. ("NSI") from 2005-2008.
- Plaintiff Larry Currier DBA American Container Express – The name under which Plaintiff Larry Currier was known, and paid, when he worked for Defendant NSI from 2005-2008.
- Plaintiff American Container Express, Inc. – At all relevant times, a Washington corporation when Plaintiff Larry Currier, and Plaintiff Larry Currier, DBA American Container Express, worked for Defendant NSI from 2005-2008.
- Judi McQuade – NSI Quality Assurance Manager in August 2008.
- James "Jim" Sleeth – NSI Dispatcher, who supervised the drivers, in August 2008.
- Patrick Franssen – NSI Dispatcher, who supervised the drivers, in August 2008.
- Larry Graham – NSI Terminal Manager in August 2008.

- Bill Howell – A Caucasian independent contractor/truck driver for NSI.
- Marcos Martinez – A Mexican independent contractor/truck driver for NSI.

B. Facts

Plaintiff Larry Currier owned a truck and hauled loads for NSI from 2005 through August 14, 2008. RP 129:12-21; 167:10-18. He had a contract with NSI to do so under the name: Larry Currier, DBA American Container Express (also a plaintiff here). RP 124:24-126:6. He was paid as "Larry Currier, DBA American Container Express." RP 122:16-123:18; 169:24-174:1. Currier was the only employee, agent, proprietor, decision-maker, operator, and shareholder of Plaintiff American Container Express, Inc.

Throughout his time at NSI, Currier witnessed numerous incidents of what he reasonably believed to be illegal discrimination, and illegal terms and conditions of employment, on the basis of race, national origin and gender – illegal conduct that was known or witnessed, tolerated, and unopposed by dispatchers and other management from NSI. *See, e.g.,* RP 152:4-153:1; 158:6-166:3.

Even before he worked for NSI, he had been at NSI's terminal and had been offended by "a lot of hate speech – there was always racism and

sexism" on NSI's citizens ban ("CB") channel. RP 127:21-128:4. Because of his disgust at his prior CB experience, he removed the CB from his truck when he was hired by NSI, so he would not have to be subjected to such treatment on a daily basis. RP 146:23-147:18. In 2005, Currier refused to install a CB radio in his truck when he was requested to do so by NSI Yard supervisor Tom Vires. RP 147:9-17. Currier told Vires he would not do so because he did not want to be involved in the frequent racist and sexist banter that took place on the company's radio frequency. *Id.*

On or about August 19, 2007, very shortly after Vires subsequently told Currier it was required, Currier purchased and installed a CB in his truck. RP 147:10-148:22 (Currier); Trial Ex. 4 (*see* Plaintiffs'-Respondents' Supplemental Designation of Exhibits, filed contemporaneously with this brief). NSI did not require all drivers to have CB's. RP 796:22-797:6; 810:14-19 (Vires). As a driver, before he became a dispatcher, Jim Sleeth heard discriminatory banter on the CB radio, which led him to choose to keep his CB radio off at NSI. RP 677:17-678:5; 679:3-16.

In 2008, Currier witnessed Terry Mock, another independent contractor/driver for NSI, in the dispatch office one morning verbally abusing two Mexican drivers named Victor and Julio. Mock stated, in

front of Currier and NSI dispatchers: "Hey F'ing Mexicans, what do you got for sale? I know you got something for sale because all Mexicans are thieves. Come on, what have you guys got for sale?" RP 158:12-159:8 (Currier). When no dispatcher protested this language, Currier told Mock he could not talk like that. Currier then apologized to Victor and Julio about what had just happened, and told them they did not have to put up with being treated like that. *Id.*

On August 12, 2008, Currier was working for NSI at Seattle Terminal 115. RP 162:19-163:6 (Currier). About noon, he witnessed another NSI contractor named Bill Howell yell across six truck lanes to another trucker, a Mexican man named Marcos Martinez, who was speaking with Currier at the time. Howell yelled: "Hey, F'ing Mexican, you know why you have to go to Portland and I don't? Because F'ing Mexicans are good at crossing borders." RP 163:7-165:11. Currier was disturbed by Howell's comment, and he proceeded to complain to NSI Quality Assurance Manager, Judy McQuade (RP 347:7-14), instead of to dispatch (which he viewed as a big part of the problem). *See* RP 163:13-167:13 (Currier); 348:23-349:17 (McQuade). McQuade heard Currier's complaint, and asked if he came to her because he felt dispatch was also involved in racial discrimination: he answered yes. RP 167:4-9 (Currier). She said they may need a class. *Id.*

McQuade immediately reported Currier's complaints to Sleeth, and to Franssen the next day. RP 351:21-352:10; 353:14-16 (McQuade). She testified she and Sleeth met with Martinez and Howell, and McQuade told them such comments or jokes would not be tolerated at NSI. RP 353:25-354:7; 359:13-18 (McQuade). In prior answers to interrogatories, she stated that on August 13 she, Franssen, and Sleeth spoke separately with each driver – Martinez and Howell. RP 358:1-359:10.

On August 14, 2008, NSI dispatcher Jim Sleeth called Currier into the dispatch office and reported that McQuade had interviewed Howell and Martinez, and determined that Howell was "just joking" with Martinez and therefore his comments were acceptable. RP 167:10-168:4 (Currier). Sleeth then advised Currier that he was fired. When Currier asked why, Sleeth responded he "was (Currier's) customer and that he was not happy with (Currier's) customer service." RP 168:5-9 (Currier); RP 661:12-25; 685:20-686:2 (Sleeth). The other decision-maker, Patrick Franssen, agreed. RP 605:8-15 (Franssen). Their actions also terminated the contract between NSI and Plaintiff Larry Currier, DBA American Container Express, Inc., and any relationship between NSI and Plaintiff American Container Express, Inc. *See* RP 650:1-8; 696:23-697:14.

Sleeth testified at trial he'd learned about an argument that concerned Larry Currier involving other drivers, but received no details,

and claims he learned about it from Patrick Franssen, not Judy McQuade. RP 671:21-672:16. He denied he had spoken to either driver (Marco Martinez or Billy Howell) about anything related to Larry Currier's concerns involving racist comments. RP 672:20-24. At trial, Sleeth denied he knew the substance of Larry Currier's August 12, 2008 complaint before he terminated Mr. Currier on August 14. RP 698:4-700:11. That testimony was consistent with his interrogatory answers. RP 700:12-701:18; Trial Ex. 76 (*see* Supp. Desig. of Ex.). At trial, he denied he had spoken to Judy McQuade regarding Currier's concerns about the two drivers before Currier was terminated. RP 701:19-702:13. He denied that he ever spoke to McQuade, Martinez, Howell, or Currier about the August 12 incident. RP 701:23-702:1; 705:12-24.

Franssen denies he attended a meeting with McQuade, Marcos Martinez, and Billy Howell on August 13, 2008. RP 596:15-22. He recalled something regarding "... Marco being Hispanic and Billy saying he was going south of the border," RP 597:17-23, but they were "just joking," RP 597:24-598:14; 599:21-600:11. He claims he only learned of Currier's complaint from McQuade after she had been in a meeting with Martinez and Howell. RP 359:9-20. He was involved in Currier's termination on August 14, the day after he claims to have learned about Currier's August 12 complaint. RP 601:19-602:3.

The dispatchers consulted with terminal operations manager Larry Graham on August 14, 2008, for guidance on how to terminate Currier's contract. RP 766:21-2; 769:24-770:8 (Graham). They did not tell Graham customer complaints were part of their reasons for wanting to terminate Currier, or about Currier allegedly agitating other drivers. RP 769:223-23; 774:9-11; 769:6-15 (Graham). They mentioned nothing to Graham on August 14 about Currier's two-day old complaint about Martinez and Howell. RP 774:12-20 (Graham). Graham only learned of Currier's August 12 complaint during the course of litigation, and would not have approved of Currier's contract termination if the dispatchers had told him they wanted to terminate Currier's contract because of his complaint. RP 775:9-15; 776:21-777:8 (Graham).

Currier filed a retaliation charge with the Seattle Office of Civil Rights (SOCR), which was handled by SOCR Investigator Chenelle Love. RP 931:1-933:4. She typed contemporaneous notes on May 11, 2008 as she interviewed McQuade in person, and Sleeth and Franssen separately by phone, with defense counsel on the line. *See* RP 936:1-4; 952:17-25; 936:21-937:13; 937:22-938:4; 938:13-16. McQuade told Love that after she met with Larry Currier, she "called or emailed Denise, my boss, and talked to Jim [Sleeth] and Patrick [Franssen]," and then "[w]e ended up talking to Marco [Martinez] and Billy [Howell]. I never talked to Larry

again." RP 949:19-25. Franssen told Love he learned of Currier's August 12, 2008 complaint from McQuade, and had participated in the August 13 meeting with Martinez and Howell. RP 950:19-951:3. Sleeth told Love that he, Franssen, and McQuade had spoken with Martinez and Howell. RP 951:20-25.

II. Argument

A. Standard of Review

For an appeal of a bench trial, appellate review of findings of fact are limited to determining whether substantial evidence supports the trial court's findings of fact and, if so, whether the findings support the trial court's conclusions of law. *Keever & Assocs. v. Randall*, 129 Wn.App. 733, 737, 119 P.3d 926 (2005). Substantial evidence exists when there is a sufficient quantity of evidence in the entire record to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *accord Bering v. Share*, 106 Wn.2d 212, 220, 721 P. 2d 918 (1986); *In re Welfare of Snyder*, 85 Wn.2d 182, 188, 532 P. 2d 278 (1975) (reviewing the entire record to determine whether substantial evidence existed).

An appellate court views the evidence in the light most favorable to the prevailing party and defers to the trial court regarding witness credibility and conflicting testimony. *Weyerhaeuser v. Tacoma-Pierce*

County Health Dep't, 123 Wn.App. 59, 65, 96 P.3d 460 (2004). Factual findings to which an appellant assigned no error are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

Conclusions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

B. Law of Retaliation

Currier brought his claim of retaliation under RCW 49.60.210(1), which provides:

> It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

C. Three-step Shifting Burden of Proof[1]

A retaliation claim involves a three-step, shifting burden of proof. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). First, the plaintiff must make out a prima facie case of retaliation – establishing a rebuttable presumption of retaliation. This prima facie case requires proof

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[1] Once a case has been tried on the merits, the Court can focus on the discriminatory or retaliatory conduct without review of the three-step analysis. *See Hollingsworth v. Wash. Mutual*, 37 Wn. App. 386, 392, 681 P. 2d 845 (1984) (citing *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 75 L.Ed.2d 403, 103 S.Ct. 1478 (1983)). Nevertheless, Plaintiff finds the framework to be a useful and straightforward way to address the evidentiary issues and burdens here.

that (a) the plaintiff engaged in statutorily protected activity, (b) suffered an adverse employment action, and (c) retaliation was a substantial factor for it. *Kahn v. Salerno*, 90 Wn.App. 110, 129, 951 P.2d 321, *review denied*, 136 Wn.2d 1016 (1998).

Second, the employer has a burden of producing admissible evidence of a legitimate, non-retaliatory reason for the adverse action.

Third, if the employer produces such evidence, the burden shifts back to the plaintiff to create a genuine issue of material fact that the stated non-retaliatory reason is pretext. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 618-19, 60 P.3d 106 (2002).

D. Currier established a prima facie case.

1. Currier engaged in statutorily-protected conduct.

An individual is protected under RCW 49.60.210(1)'s opposition clause if he or she opposes conduct he or she reasonably believed to be discriminatory, even if the conduct is not actually legally actionable or even discriminatory. The trial court addressed this issue in its Fourth Conclusion of Law on Liability as follows:

> Plaintiff's Complaint described conduct Plaintiff reasonably believed was discriminatory. RCW 49.60.210(1); *Graves v. Dept. of Game*, 76 Wn.App. 705, 712, 887 P.2d 424 (1994)(citing *Gifford v. Atkinson, Topeka & Santa Fe Ry.*, 685 F.2d 1149, 1157 (9th Cir. 1982)) ("[A]n employee who opposes employment

> practices reasonably believed to be discriminatory is protected by the 'opposition clause' whether or not the practice is actually discriminatory."); *Estevez v. Faculty Club*, 129 Wn.App. 774, 798, 120 P.3d 579 (2005) (citing *Kahn v. Salerno*, 90 Wn.App. 110, 130, 951 P2d 321, *review denied*, 136 Wn.2d 1016 (1998)) (A plaintiff "need only prove that her complaints went to conduct that was at least arguably a violation of the law, not that her opposition activity was to behavior that would actually violate the law against discrimination.")
>
> F&C re: Liab., CP 396:10-22.

On August 12, 2008, Larry Currier witnessed Billy Howell, an NSI contractor, yell across six truck lanes to Marcos Martinez, another NSI contractor, "Hey, F'ing Mexican, you know why you have to go to Portland and I don't? Because F'ing Mexicans are good at crossing borders." Currier reported the incident to NSI Quality Assurance Manager, Judi McQuade. RP 162:24-167:9; F&C re: Liab., CP 390:25-391:5.

NSI claims that Martinez – who NSI did not call to testify – thought the highly offensive statement was a "joke" and therefore permissible. *See* RP 167:21-168:4 (Currier). The nature of the statement, and Currier's testimony as to Martinez's physical reaction, strongly indicate otherwise. *See* RP 165:14-15 ("I could just kind of see the blood draining from out of [Martinez's] face.")

But regardless of how Martinez felt about the statement, the material issue is whether Currier reasonably believed the statement was discriminatory. *See Graves*, 76 Wn.App. at 712 (citing *Gifford*, 685 F.2d at 1157). Currier did not need to prove a discrimination claim to assert a retaliation claim. *See Kahn*, 90 Wn.App. at 130.

The trial court concluded that Currier "reasonably believed" that the statements above were discriminatory. Howell's comments were highly offensive, targeted at Martinez's ethnicity, and stated Martinez was receiving less favorable routes because of his ethnicity. Currier's testimony about the incident, RP 162:24-167:9, confirmed in the testimony of McQuade that Currier reported it, RP 348:23-349:17, is substantial evidence that Currier reasonably believed the incident to be discriminatory.

Furthermore, Currier's belief was formed in the context of ongoing racist and sexist remarks at NSI. *See* F&C re: Liab., CP 389:14-390:24. These included: sexist and racist language on the NSI CB channel, heard by Currier, RP 127:21-128:11; 146:23-147:17 (Currier), and then-driver, now-NSI-dispatcher James Sleeth, RP 677:17-678:5; 679:3-16; a comment by Sleeth, when he was a driver, asking Currier if he thought it was a good idea for Sleeth to put on white sheets to scare an African-American driver, RP 149:19-21; 150:13-22; 151:20-152:4 (Currier); Terry Mock, another

driver, asking two drivers of Mexican descent, "Hey F'ing Mexicans, what do you got for sale? I know you got something for sale because all Mexicans are thieves. Come on, what have you guys got for sale?" RP 158:12-17 (Currier); and Billy Howell, another driver, whispering to Currier while they were in the NSI dispatch officer, within a couple of weeks of plaintiff's termination, "Hey, F'ing N[] lover, you're just a piece of sh_t," RP 160:10-12 (Currier). NSI did not call Howell to testify.

In light of this backdrop, NSI's assertion that the latest of such comments was just a "joke" and Currier should, and a reasonable person would, have viewed it as such is not supported by the evidence.

2. Currier suffered an adverse employment action.

Two days after Currier reported to NSI the conduct he reasonably believed to be discriminatory, NSI terminated his contract. RP 163:2-3; 167:10-13 (Currier).

3. Retaliatory motive was a substantial factor in terminating Currier's contract, and the non-retaliatory reasons NSI alleged for the termination did not remove the retaliatory motive.

a. "Substantial factor" defined.

To prove retaliation, a plaintiff need prove that retaliatory motive was a "substantial factor" motivating the adverse employment decision.

Allison v. Housing Authority of City of Seattle, 118 Wn.2d 79, 96, 821 P.2d 34 (1991). The "substantial factor" element establishes causation: a discriminatory motive caused an adverse employment action if that motive was a *substantial factor* in bringing about that action, even if the action would have occurred without that motive. *See* WPI 15.02.

The retaliatory motive can be a substantial factor in the adverse employment decision "even if the result would have occurred without it." *See Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186-87, 23 P.3d 440 (2001) (applying the "substantial factor" test in the context of a discrimination claim). The substantial factor test is used in discrimination and retaliation cases because (a) causation is difficult to prove in cases where the offense is a motivation, found in the actor's mind, and (b) an accessible standard is appropriate because "public policy considerations strongly favor eradication of discrimination." *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn.App. 383, 420, 161 P.3d 406 (2007). The legislature codified these sentiments in RCW 49.60.020: "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."

In meeting this burden, the existence of direct evidence is unnecessary, and very unlikely: "Ordinarily, proof of the employer's motivation must be shown by circumstantial evidence because 'the

employer is not apt to announce retaliation as his motive.'" *Kahn*, 90 Wn.App. at 130 (citing *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991)). The improper motives of a retaliation claim are inferred from the surrounding facts and circumstances. In *Hill*, the Washington Supreme Court held:

> Direct, "smoking gun" evidence of discriminatory animus is rare, since there will seldom be eyewitness testimony as to the employer's mental processes, and employers infrequently announce their bad motives orally or in writing. Consequently, it would be improper to require every plaintiff to produce direct evidence of discriminatory intent. Courts have thus repeatedly stressed that circumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden. Indeed, in discrimination cases it will seldom be otherwise.
>
> 144 Wn.2d at 179-180 (quotations and citations omitted).

b. There is substantial evidence in the record that retaliation was a substantial factor in NSI terminating Currier's contract, regardless of any non-retaliatory reason NSI alleged.

The trial court concluded:

> Plaintiff need not prove that his opposition was the main factor or the determinative factor in the termination. WPI 330.05. A plaintiff need only prove that his opposition conduct was a factor, a "reason which tip[ped] the scale one way or another." *Wilmot* [*v. Kaiser Aluminum and Chem. Corp.*], 118 Wn.2d [46] at 72 [1991]. Plaintiff's Complaint tipped the scales toward termination, and this

> Court finds Plaintiff has so proven by a preponderance of the evidence.

F&C re: Liab., CP 398:1-6.

The following Findings of Fact support the trial court's conclusion, and are supported in the record. In reviewing the trial court's factual findings and the record on appeal, this Court views the evidence in the light most favorable to the prevailing party and defers to the trial court regarding witness credibility and conflicting testimony. *Weyerhaeuser*, 123 Wn.App. at 65.

The trial court found that NSI's claims that Currier's complaint had no effect on the decision to terminate his contract were not credible. F&C re: Liab., CP 394:13-395:11. The trial court based this finding on the following substantiated observations, as supported throughout the record:

(1) NSI did not document any of Currier's alleged performance complaints, even alleged customer complaints. The only "customers" who testified were Sleeth and Franssen. *See* F&C re: Liab., CP 393:12-13. The court did not find NSI's claim credible that no complaints, even ones as serious as external customer complaints, would be documented for independent contractors. *See* F&C re: Liab., CP 394:14-19.

(2) NSI alleged Currier had various performance issues and other problems for a significant period of time, including: customer complaints the previous spring (prior to termination), RP 635:16-636:15 (Sleeth); continuous driver complaints for an extended period, leading up to shortly before termination, RP 632:14-18; 633:25-635:15; 643:10-645:13 (Sleeth); and an angry confrontation between Currier and Sleeth over a CB, RP 628:21-631:2. NSI did not call any drivers to testify about any problems or issues they had with Currier. *See* F&C re: Liab., CP 393:12-13. Yet despite these alleged numerous and longstanding problems with Currier, NSI did not terminate Currier until two days after he reported the racist comments. RP 167:10-168:4 (Currier). Proximity of time between the report and adverse action is a factor that indicates causation, *see Kahn*, 90 Wn.App. at 130, and the court found the timing here – particularly in light of the claims of long-standing problems – suspicious, F&C re: Liab., CP 394:19-24.

(3) Dispatchers Sleeth's and Franssen's testimony made it clear they saw Currier's complaint of discriminatory conduct as more unwanted "drama" they had to deal with. RP 642:25-643:21; 646:1-12; 647:12-16 (Sleeth). F&C re: Liab., CP 394:24-27.

(4) Indeed, Franssen testified he did not take Currier's complaint seriously because the comments were a "joke," and it was unacceptable

that Currier was trying to create a "golden parachute" for himself, which Franssen was not about to tolerate. RP 598:15-25. F&C re: Liab., CP 394:27-8:9.

The trial court made other supported findings of fact, and the record contains further evidence, that provides a basis for the trial court's conclusion that retaliation was a substantial factor in Currier's termination:

(5) Dispatchers Sleeth and Franssen contradicted themselves when providing a non-retaliatory basis to terminate Currier. *See* F&C re: Liab., CP 393:24-7:9. They testified that they had made the decision to terminate Currier days or weeks before Currier made his complaint, but wanted to meet with Larry Graham, the NSI terminal manager, to confirm it. RP 647:25-648:14 ("at least a week") and 672:25-673:6. (Sleeth); 557:19-558:1 (between two and three weeks before termination) (Franssen).

Yet in their interrogatory answers, they did not claim they had already made the decision to terminate when meeting with Graham. *See* Trial Ex. 76 (Interrog. of Sleeth) (*see* Supp. Desig. of Ex.); RP 592:7-24 (no mention in interrogatory answers); 592:25-593:2 (no mention in deposition testimony) (Sleeth); Trial Ex. 75 (Interrog. of Franssen) (*see* Supp. Desig. of Ex.)

The dispatchers did not tell Graham customer complaints were part of their reasons for wanting to terminate, nor about Currier allegedly agitating other drivers. RP 769:223-23, 774:9-11; 769:6-15 (Graham). Tellingly, they mentioned nothing to Graham on August 14 about Currier's two-day old complaint about Martinez and Howell. RP 774:12-20 (Graham). Graham only learned of Currier's August 12 complaint during the course of litigation, and would not have approved of Currier's contract termination if the dispatchers had told him they wanted to terminate Currier's contract because of his complaint. RP 775:9-15; 776:21-777:8 (Graham).

(6) The testimony of Sleeth and Franssen contradicted that of McQuade, NSI's Quality Assurance Manager. McQuade, to whom Currier reported the comment, testified she reported Currier's complaint to Sleeth that day, and to Franssen the same day or the next. RP 351:21-352:10; F&C re: Liab., CP 391:3-5. McQuade testified she and Sleeth, and possibly Franssen, met and spoke with Howell and Martinez the day after Currier's complaint. RP 353:25-354:7; 387:21-23; and F&C re: Liab., CP 391:6-9.

Contrary to McQuade's testimony above, both Sleeth and Franssen testified they were not at the meeting with the drivers. RP 701:23-702:1; 705:12-24 (Sleeth); RP 596:15-22 (Franssen); F&C re: Liab., CP 391:10-

17. Indeed, Sleeth testified he never spoke to McQuade about the complaint and knew nothing about it prior to terminating Currier. RP 701:19-702:13.

(7) Futhermore, NSI's reasons for the termination changed. In their *individual* interrogatories, both Sleeth and Franssen swore under penalty of perjury:

> The reasons for terminating ACE's contract were predominantly performance problems, including Larry Currier performing his dispatched jobs extremely slowly relative to other drivers and having a poor work ethic, yelling at a Northland dispatcher in front of other drivers, causing tension among other independent contractor drivers, and refusing to have a C.B. radio.

Trial Ex. 75 (Franssen Interrogatory #5); Trial Ex. 76 (Sleeth Interrogatory #5).

By the time of trial, Sleeth and Franssen added customer complaints as grounds for the termination, which had not appeared in the interrogatories. RP 536:22-23 (Franssen); 604:4-15 (Sleeth).

Furthermore, Sonal Collins, Human Resources Manager for NSI (RP 891:21-892:1), reported in an earlier investigation that Currier was terminated in part for equipment issues, then recanted it at trial. RP 925:9-19. Before Sleeth's August 20, 2008 "discovery" of defects with Currier's truck, he never "inspected" any driver's truck – nor did he inspect any driver's truck after his August 20, 2008 inspection of Currier's equipment.

RP 586:21-587:9 (Sleeth).

(8) The one driver NSI did call, Percy Dankers, testified that Currier was doing as good a job as he was. RP 817:12-14, 21-23; F&C re: Liab., CP 392:18-21.

(9) The trial court found it indicative of retaliatory intent that Currier was the only driver to report racist conduct at NSI, and was the only driver whose contract NSI terminated. F&C re: Liab., CP 397:25-28.

NSI assigns error to that finding on appeal, because there was evidence that NSI terminated another driver. Appellant's Br. 16. The second terminated driver, Terry Mock, was terminated (after Currier) for stealing equipment from NSI. RP 585:16-586:17 (Franssen). Because Mock's subsequent termination was not for any of the reasons NSI's alleged it terminated Currier, it had no relevance to the trial court's finding.

On appeal, NSI ignores the evidence listed above and the credibility determinations and reasonable inferences the trial court made in favor of Currier, and recasts the evidence and testimony as if its witnesses were credible and conflicts in evidence were resolved in NSI's favor. *See, e.g.,* Appellant's Br. 8-16 (Statement of the Case). Such arguments failed at trial, and are not relevant under the appellate standard of review. *See Weyerhaeuser*, 123 Wn.App. at 65.

In light of the evidence above, and accepting on appeal the credibility determinations and reasonable inferences the trial court made in favor of Currier, a fair-minded, rational judge as fact-finder could have concluded, by a preponderance of the evidence, that retaliation for reporting what Currier reasonably believed to be discrimination was a substantial factor – one that tipped the scale – in favor of terminating Currier.

E. Currier reported conduct he reasonably believed to be racist and discriminatory.

NSI argues that, to prevail on a retaliation claim against NSI, he must have opposed a practice forbidden by the Washington State Civil Rights Act, 49.60 RCW. Because the forbidden, discriminatory conduct Currier opposed was conduct between two independent contractors who worked for NSI, the forbidden conduct could not fall under RCW 49.60.180 – which deals with unfair practices of employers. *See* Appellant's Br. 20-23.

NSI'S "straw man" argument fails to conform to the law for three primary reasons:

(1) There is no reason that the forbidden practice Currier opposed need be a practice prohibited under RCW 49.60.180. RCW 49.60.030(1) broadly prohibits discrimination – and has been applied by

does Washington provide broader protection than Federal law based upon different statutory language – *see* RCW 49.60.010 – but also because the Washington statute mandates liberal construction to achieve the purpose of deterring and eradicating discrimination and retaliation, *see* RCW 49.60.020. *Marquis*, 130 Wn.2d at 110-111.

NSI also cites a Human Rights Commission regulation, WAC 162-16-230(1), to argue that independent contractors have no protection against retaliation. *See* Appellant's Br. 22. That regulation relates to the scope of the *Human Rights Commission*, not RCW 49.60. Once again, NSI fails to cite the very next section:

> Rights of independent contractor. While an independent contractor does not have the protection of RCW 49.60.180, the contractor is protected by RCW 49.60.030(1). The general civil right defined in RCW 49.60.030(1) is enforceable by private lawsuit in court under RCW 49.60.030(2) but not by actions of the Washington State Human Rights Commission.
>
> WAC 162-16-230(2).

The Human Rights Commission thus concludes that an independent contractor *can* file a lawsuit under the RCW 49.60. And, interestingly enough, Currier *did* report his case to the Human Rights Commission through the Seattle Office for Civil Rights – who exercised jurisdiction over the matter. *See* RP 931:11-932:6 (Love).

In sum, Currier opposed a forbidden practice under the broad language and liberal construction of RCW 49.60.030(1).

(2) In addition to ignoring the broad language and scope of the conduct the Washington State Civil Rights Act prohibits, NSI ignores the board language, and statutorily-mandated liberal construction, of the retaliation statute itself: RCW 49.60.210(1). That provision prohibits an employer *or "other person"* from discharging or otherwise discriminating against *"any person"* because he or she opposed any forbidden practice. Nowhere does the retaliation statute require an employer-employee relationship, nor does it require that an employer committed the discrimination or other forbidden practice. Currier is not required to prove a discrimination claim against NSI before he can sue for NSI retaliation.

The crux of a retaliation claim is reporting forbidden conduct, then being punished for doing so. NSI addressed a report of racist, discriminatory conduct at its facilities by terminating a three-year employee within 48 hours of his report. The trial court concluded retaliation for protected speech is what occurred here, and substantial evidence supports that conclusion.

(3) A retaliation claim is not predicated on also proving a discrimination claim. If it were, the retaliation protection would be redundant, and its purpose to embolden people to report what they

perceive to be discriminatory would not be met. To be protected against retaliation, a plaintiff does not need to prove the conduct was actually discriminatory or would actually violate the law against discrimination. *See Estevez*, 129 Wn.App. at 798 (citing *Kahn*, 90 Wn.App. at 130). A plaintiff need only show that he or she reasonably believed it was discriminatory. *Graves*, 76 Wn.App. at 712 (citing *Gifford*, 685 F.2d at 1157).

As discussed above, the trial court concluded that Currier reasonably believed a Caucasian telling a Mexican, "Hey, F'ing Mexican, you know why you have to go to Portland and I don't? Because F'ing Mexicans are good at crossing borders" was discriminatory.

The Washington State Civil Rights Act, and its protection against retaliation, are broadly worded, *see* RCW 49.60.210(1), and liberally construed, *see* RCW 49.60.020, to achieve their purpose: to prevent and eradicate discrimination. Discrimination is "a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. NSI's argument – that it can terminate any independent contractor, and presumably any employee, who reports blatantly racist conduct to it as long as the racist conduct is between two of NSI's independent contractors on NSI property – would

gut the protections under the Washington State Civil Rights Act and undermine its very purpose.

F. Substantial evidence supports the trial court's conclusion that after-acquired evidence would not have resulted in NSI terminating Currier.

At trial, NSI sought to limit the damages by arguing that Sleeth and Franssen would have terminated Currier had they known prior to his termination that he had expired license tags on his truck and had they known the condition of his tires, a condition established only based upon discovery by Sleeth six days after retaliatory termination. The crux of NSI's defense was testimony by Sleeth and Franssen. The trial court did not adopt NSI's proposed limitation on damages.

To clarify, after-acquired evidence does not affect non-economic damages, but can limit remedies such as front pay and reinstatement. *See, e.g., McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 361-62 (1995); *Kanhoye v. Altana, Inc.*, 686 F. Supp. 2d 199, 212 (ED NY 2010) (citations omitted). Defendant's argument of after-acquired evidence has no effect relevant to the trial court's award of $25,000 for non-economic damages. *See* Findings and Conclusions Re: Damages, CP 482:19-21.

To limit the economic damage award of $301,604 here, *see id.*, CP 482:17-18, NSI needed to prove, by preponderance of the evidence, that the expired tags and tire conditions were a legally-sufficient basis to

terminate Plaintiffs' contract, and NSI *would have actually terminated* Plaintiffs' contract on that basis alone. *See Janson v. North Valley Hosp.*, 93 Wn.App. 892, 901-902, 971 P.2d 67 (1999) (before an employer can limit a damage award based on after-acquired evidence, it must establish that the wrongdoing was severe enough to warrant termination on that ground alone); *McKennon*, 513 U.S. at 362. "[P]roving that the same decision would have been justified…is not the same as proving that the same decision would have been made." *McKennon*, 513 U.S. at 360 (citation omitted); *see also, Holland v. Gee*, 677 F.3d 1047, 1065 (11th Cir. 2012) ("Under the doctrine of after-acquired evidence, the burden is on the employer to prove that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone.") (quotation and citation omitted).

The evidence did not show, by preponderance of the evidence, that NSI would have terminated Currier based upon the after-acquired evidence:

(1) The expired license tags was an offense subject to a ticket – a traffic infraction. RP 757:20-23 (Temple). NSI presented no evidence it terminated drivers for other offenses subject to a ticket, such as speeding.

(2) Currier testified that his tires were in compliance with the CFRs, so not subject to the Out-of-Service Criteria, and thus would not

have resulted in him being deemed unsafe to drive on the road. RP 266:18-269:25; 272:3-22. Indeed, Currier had driven over 5 million miles in his career, and had a clean driving record – no tickets or accidents – for over 20 years. RP 126:24-127:20.

(3) NSI's own tire expert, Dave Temple, testified that he could not determine from the photographs whether the tread would require the truck to be placed out of service. RP 749:21-755:1; F&C re: Damages, CP 481:19-22.

NSI claims that three defective conditions – a gouged tire, a bald tire, and expired Washington state license tags – discovered from Currier's truck a week after he was terminated would have justified his termination, if known earlier. *See* Appellant's Br. 36-43. Defense expert Dave Temple's testimony negates each of the three rationales for NSI's reliance on the after-acquired evidence theory.

Temple relied, in part, on the Code of Federal Regulations (CFR), and state law, such as the Revised Code of Washington (RCW). RP 755:2-6. Part of the CFR incorporates the North American Standard Out-of-Service Criteria, April 1, 2011, for the Commercial Vehicle Safety Alliance. RP 746:14-18; Trial Ex. 79 (North American Standard Out-of-Service Criteria). Temple never saw Currier's tires: he only saw photographs the dispatchers took a week after Currier was terminated. RP

753:25-754:16, 755:2-15; Trial Ex. 56 (photographs) (*see* Supp. Desig. of Ex.).

When dealing with a dual set of tires, the CFR requires both tires must be out of compliance individually, or else a vehicle cannot be taken out of service. RP 752:7-753:16. Under the CFR, §10(A)(2), a gouged *front* tire is a sufficient basis to take a vehicle out of service. RP 751:6-15. Mr. Currier's single, gouged tire was half of the dual tires on the drive axle, not the front steering axle. RP 751:24-752:3; *see* Trial Ex. 56 (photograph #2).

Temple testified he had no reason to believe both dual tires had deficient tread sufficient to make an out-of-service determination, as he could only see one allegedly bald tire in the photos he reviewed. RP 752:20-753:16; *see* Trial Ex. 56 (photographs). Temple testified that he could not determine from the photographs whether the tread would require the truck to be placed out of service. RP 749:21-755:1; F&C re: Damages, CP 481:19-22.

While Currier's license tags were expired, failure to have current tags was merely a traffic infraction under state law (*see* RCW 46.16A.030(5)), but could not be the basis to take a vehicle out of service. RP 757:20-758:20. The remedy for such a condition would have been to get new tags. *Id.*

(3) Sleeth took the pictures of Currier's tires, upon which NSI's tire experts relied, six days after he and Franssen terminated Currier. He took those pictures from various angles, cropping out or blurring the surroundings – including the neighboring dual tire, which was relevant to determinations of safety and compliance. *See* Trial Ex. 56 (photographs). When discussing the pictures, Temple noted that he was unable to tell if it met out-of-service criteria because the picture did not have both paired tires clear and visible. RP 753:2-16.

(4) In one of the pictures, the penny Sleeth used to attempt to illustrate the depth of the tread did not appear to actually be inserted into the tread groove, thus making it appear as though the groove was less deep than it was. RP 273:3-22 (Currier); Trial Ex. 56 (photograph #6).

(5) In one of the pictures, there was a cord showing because there was a gouge out of the rubber of the tire. *See* Trial Ex. 56 (photograph #2). Had the gouge occurred while driving, the cord would have been dirtied from the road. Instead, the cord was a bright white – appearing as though the gouge had been made after the truck had been parked there. RP 268:5-17 (Currier). Sleeth had full access, alone, to the truck when he took the photographs.

(6) NSI's tire experts relied entirely upon the photographs Sleeth took. RP 743:23-744:4 (Temple); 472:23-473:6 (Grill).

(8) Currier had not received any tickets for the condition of his tires. *See* RP 127:1-5.

(9) The testimony of dispatchers Sleeth and Franssen, that they would have terminated Currier's contract based solely upon the condition of his tires and expired tags, was not credible. RP 670:24-671:3 (Sleeth). As previously discussed, Sleeth and Franssen contradicted their own previous responses given under penalty of perjury, each other, other NSI witnesses, and Currier on several matters. Furthermore, their testimony concerning after-acquired evidence was incredibly self-serving – another credibility consideration. The trial court determined they were not credible witnesses on this issue. F&C re: Damages, CP 482:1-3.

(10) NSI produced no evidence indicating it had any interest in the condition of its driver's equipment:

(a) NSI did not inspect other drivers' equipment. RP 586:21-587:9 (Sleeth); F&C re: Damages, CP 481:21-23.

(b) NSI provided no evidence it had ever terminated, punished, or even talked to any driver about the condition of his or her equipment. F&C re: Damages, CP 481:26-28. The only other driver who was terminated (Mock) lost his job as a result of theft of NSI property, totally unrelated to equipment condition. RP 585:16-586:17 (Franssen).

(c) Although NSI's Subcontractor Agreement, Page 2, Items 3 and 7, would have permitted NSI to take action for breach of contract, it does not specify that termination is the response. *See* Trial Ex. 53. Indeed, that would seem very unlikely in light of NSI's historic disinterest in the condition of its drivers' equipment.

(d) The trial court held: "There was no evidence that NSI had any policy *of ensuring that the trucks complied with* federal, state and local laws." F&C re: Damages, CP 481:23-24 (emphasis added). NSI's assertion that it placed substantial importance on the condition of its drivers' equipment was undermined by its lack of any evidence or efforts to monitor or police the same.

NSI assignment of error to this finding fails to appreciate the distinction between having no policy to monitor, investigate, or confirm compliance with regulations – which the trial court held it did not present evidence of – and having one sentence in the Subcontractor Agreement that says the driver is responsible for compliance. *See* Appellant's Br. 7; Trial Ex. 53.

(e) The reasonable inference in the light most favorable to Currier is: NSI did not care about the condition of its drivers' equipment. *See Weyerhaeuser*, 123 Wn.App. at 65. Any Doomsday argument that NSI, applying "common sense," *see* Appellant's Br. 40, would care about

the drivers' equipment if the condition were so bad a crash or explosion was imminent, is irrelevant to whether it concerned itself with a potential regulation violation that would not render a truck unsafe to drive (i.e. put the truck out of service) or may result in a traffic ticket.

(11) With regard to Currier's expired tags, in three years of working for NSI – *see* RP 128:13-16, 163:5-6, NSI never spoke with Currier about his expired tags nor asked for evidence of those tags, as provided for in the Subcontractor Agreement, Page 2, Item 3. *See* Trial Ex. 53. Again, the reasonable inference in the light most favorable to Currier is: NSI did not care.

Viewing the credibility determinations and reasonable inferences in the light most favorable to Currier, there was substantial evidence for the trial court to conclude that NSI did not meet its burden, by a preponderance of the evidence, that it would have terminated Currier for offenses that might have resulted in him incurring a traffic ticket – although they hadn't.

NSI's self-serving aggrandizing of the condition of his tires, or the apocalyptic danger NSI attributes to tires its own expert couldn't determine would be placed out of service – *see* RP 749:21-755:1, is no more persuasive now on appeal than it was when the trial court rejected it.

Whether a company *would have actually terminated* based upon after-acquired evidence is a fact-specific inquiry, which requires a trial court to view the totality of the circumstances. NSI's near-exclusive reliance on the facts and outcome of *O'Day v. McDonnell Douglas Helicopter Co.* provide no meaningful parallel here because the facts are not materially similar. *See* Appellant's Br. at 38-42 (citing 79 F.3d 756, 762 (9th Cir. 1996)). In *O'Day*, the employer discovered, through after-acquired evidence, that its employee snuck into his supervisor's office, stole sensitive documentation pertaining to employment matters, and showed it to one of the people affected by it. 79 F.3d at 762. O'Day's theft and dissemination of privileged documents and information is not comparable to conduct that might result in a traffic ticket.

In *O'Day*, the proof the company supplied that it would have terminated was presented as an affidavit from the company's Human Resources Representative, who also explained – under the established company rules – the conduct amounted to two "Group I infractions," which established company policy defined as "extremely serious" and normally would result in discharge absent extenuating circumstances. *Id.* at 762.

In contrast, NSI's "company policy" consisted of vague language in the Subcontractor's Agreement, which didn't clearly set forth the

severity to NSI of a ticketable offense, nor did it delineate the consequence.

Furthermore, the testimony NSI provided was not from an HR professional distanced from the circumstances, but dispatchers Sleeth and Franssen, who were the very orchestrators of the retaliatory conduct. They consulted terminal operations manager Graham, not HR, about how to get rid of Currier. The bulk of NSI's evidence was from individuals whom not only had every reason to try to mitigate the damages their actions had caused, but also had credibility issues throughout their testimony.

The law does not allow a company to cut off damages from its own wrongdoing by putting someone on the stand whom will say the magic, "get out of jail" phrase: "yes, we would have terminated for that." A fact-finder looks to the circumstances for weight and credibility of that evidence.

For example, in *Kanhoye*, when viewed in light most favorable to the plaintiff, a company failed to prove as a matter of law it was company policy to terminate an employee for misleading information on an employment application, *even though* the company produced evidence that it didn't hire several applicants and fired one employee previously for misleading employment application information. 686 F.Supp.2d at 213.

Kanhoye based its conclusions on other cases that rejected judgment as a matter of law for false application information, even where: (a) a company produced affidavits that it would not have hired or would have fired an employee for failing to state he was asked to resign from his last job, and (b) a company printed on its applications that false statements would be grounds for dismissal. *See id.*

For additional examples, in *Smith v. Berry Co.*, the court sustained a jury's rejection of an after-acquired evidence defense even where the employee violated company policy by attempting to audio-record a meeting, and by taking unapproved travel while on medical leave. 165 F. 3d 390, 395 (5th Cir.), *rehearing on other grounds denied*, 198 F.3d 150 (5th Cir. 1999).

In *Thomas v. iStar Financial, Inc.*, the court refused to disturb a jury verdict that rejected an after-acquired evidence defense, even though the employee worked in the accounts payable department and had lied about having an accounting degree (he had no degree). 508 F. Supp. 2d 252, 259 (2007), *aff'd* 629 F.3d 276 (2d Cir. 2010).

Ultimately, NSI's strategy to repeat the trial facts in the light most favorable to it is not the appellate standard, nor does it alter the fact that substantial evidence exists in the record for rejection of its after-acquired evidence defense.

G. The trial court did not err in granting attorneys' fees and costs.

Pursuant to RCW 49.60.030(2), the trial court awarded Plaintiffs' counsel attorneys' fees and costs as the prevailing parties. *See Blair v. Wash. State Univ.*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987).

In response to Appellant's argument, *see* Appellant's Br. 43, even if Defendant/Appellant had prevailed on the after-acquired evidence rule, Plaintiffs still would have been the prevailing party, and a full attorneys' fee award, with costs, would have been appropriate. Washington has taken a strong stance against discrimination in all its forms, viewing it as a matter of state concern that "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. The fulfillment of this task is not assigned solely to the Human Rights Commission; through the provision of the award of attorneys' fees, the state has enlisted private attorneys to act as "private attorney generals." *See* RCW 49.60.030(2). As private attorney generals, the benefit of enforcing discrimination and retaliation law is not limited to what is conferred upon the plaintiff, but extends to the benefits of that enforcement which is shared by all society when a civil rights claimed is championed. As such, the recovery of attorneys' fees is not strictly limited by the amount recovered by the

plaintiff. *See McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805, 810 (9th Cir. 1994).

III. Request for Attorneys' Fees

Counsel for Plaintiffs/Respondents seeks an attorneys' fee and cost award from this Court on appeal, pursuant to RAP 18.1 and RCW 49.60.030(2), with this request to be supplemented within 10 days of this Court filing its decision, RAP 18.1(d).

IV. Conclusion

The law does not provide a "free pass" for an employer to retaliate against an independent contractor for reporting racist language by a Caucasian independent contractor against a Mexican independent contractor. Plaintiffs have a right to be protected against retaliation here, and that right was violated.

The record contained substantial evidence to establish NSI's liability and Plaintiffs' damages, and the attorneys' fees and costs, in this case. The trial court did not err in its findings of fact or conclusions of law in holding in favor of Plaintiffs.

DATED September 23, 2013.

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Certificate of Service

I hereby certify that a true and correct copy of Brief of Respondent was served on counsel for Appellant by placing it today in the United States mail, first class postage prepaid, addressed to:

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