No. 30545-7-III

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

CHARLES ROSE, APPELLANT

v.

ANDERSON HAY & GRAIN CO., RESPONDENT

SUPPLEMENTAL BRIEFING OF RESPONDENT

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I. INTRODUCTION

Pursuant to Washington State Supreme Court Order filed on April 2, 2014, this case was remanded to this Court for reconsideration in light of *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013). By letter dated June 9, 2014, this Court requested that all parties provide supplemental briefing regarding the application of *Piel* to this case. Pursuant to this directive, Respondent Anderson Hay and Grain Company ("AHG") respectfully submits the following supplemental briefing.

In a Published Opinion dated May 22, 2012, this Court found that, in accordance with *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 182, 125 P.3d 119 (2005), dismissal of Mr. Rose's claim of wrongful discharge in violation of public policy was proper because the remedies available in the applicable federal statute provide adequate protection of the public interest. The *Piel* decision did not overturn or otherwise modify *Korslund*. Instead, the Supreme Court's decision in *Piel* reaffirmed that the statutory scheme and administrative remedies of the Public Employment Relations Commission ("PERC") did not adequately protect the public interest at issue. In contrast, the statute at issue in the present case, the Commercial Motor Vehicle Act ("CMVA"), 49 U.S.C. § 31105, is analogous to the statutory scheme of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851(b)(2)(B), which *Korslund* found to

adequately protect the public interest. Not only does the CMVA track the language of the ERA in relevant parts, but also provides more robust remedies; the CMVA provides for punitive damages up to $250,000, while the ERA does not authorize punitive damages. *See* 49 U.S.C. § 31105(b)(3)(C).

Since the public interest is adequately protected by the CMVA, as it is by the less robust remedies of the ERA, Mr. Rose cannot satisfy the jeopardy prong of a claim for wrongful discharge in violation of public policy. This Court's decision should be affirmed on reconsideration.

II. STATEMENT OF THE CASE

This Court has requested supplemental briefing. Accordingly, Anderson Hay and Grain ("AHG") incorporates by reference its previous briefing in this case and, in the interest of judicial economy, provides only a brief recitation of the facts.

Mr. Rose worked as a commercial truck driver for AHG from March 2006 through November 13, 2009. (CP 113.) Mr. Rose was terminated from AHG on November 13, 2009. (CP 113.) In September 2010, Mr. Rose filed a complaint in the Kittitas County Superior Court alleging wrongful termination in violation of public policy arising from claimed violations of 49 U.S.C. § 31105. (CP 1-5.) On April 18, 2011,

the trial court granted AHG's Motion for Summary Judgment and entered Judgment dismissing Mr. Rose's complaint for failure to satisfy the jeopardy element of a claim for discharge in violation of public policy. (CP 117-121.) By published opinion on May 22, 2012, this Court affirmed the trial court's grant of summary judgment. *Rose v. Anderson Hay and Grain Co.*, 168 Wn. App. 474, 276 P.3d 382 (2012). By order dated April 2, 2014, the Washington State Supreme Court remanded the case back to this Court for reconsideration in light of *Piel v. City of Federal Way*.

III. ARGUMENT

A. *Piel v. City of Federal Way*

The *Piel* decision analyzed a single issue: "[a]re the remedies available to a public employee under RCW 41.56 adequate as a matter of law, such that the employee may not assert a tort claim for wrongful discharge in violation of public policy?" 177 Wn.2d at 609. The *Piel* Court found that the "limited statutory remedies under chapter 41.56 RCW do not foreclose more complete tort remedies for wrongful discharge." *Id.* at 616.

Crucial to the analysis here, the *Piel* Court specifically held that its decision "does not require retreat from" *Korslund* or *Cudney v. ALSCO,*

Inc., 172 Wn.2d 524, 259 P.3d 244 (2011). *Piel*, 177 Wn.2d at 616. The *Piel* Court noted that the administrative schemes at issue in *Korslund* and *Cudney* were not previously found to be inadequate to protect public policy and, unlike PERC, did not include a provision stating that the "provisions of this chapter are intended to be additional to other remedies and shall be liberally construed." *Id.* at 617 (quoting RCW 41.56.905). The *Piel* Court recognized that *Korslund* found the ERA to have "comprehensive remedies," including back pay, compensatory damages, and attorney and expert witness fees. *Id.* at 613 (citing *Korslund*, 156 Wn.2d at 182). *Piel* further recognized that *Cudney* found the remedies available under the Washington Industrial Safety and Health Act of 1973 ("WISHA") to be "more comprehensive than the ERA and ... more than adequate." *Id.* (citing *Cudney*, 172 Wn.2d at 533).

Accordingly, if a statutory scheme has language and remedies analogous to those at issue in *Korslund* or *Cudney*, the scheme is distinguished from *Piel* and has comprehensive remedies to protect the public interest.

B. CMVA is analogous to the ERA at issue in *Korslund*

In *Korslund*, the Court found the ERA "provides comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs." *Korslund*, 156 Wn.2d at 182. The remedies available under the

ERA include back pay, compensatory damages, and attorney and expert witness fees. 42 U.S.C. § 5851(b)(2)(B). The ERA serves as a proper "guidepost by which [the Court] can measure [the statutory scheme at issue] to see if it is adequate to protect the public policy of workplace safety and protection of workers who report safety violations." *Cudney*, 172 Wash. 2d at 532. The *Piel* Court did not retreat from the *Korslund* or *Cudney* decisions. *Piel*, 177 Wn.2d at 616.

Similar to the statute at issue in *Korslund*, the remedies available under the CMVA in this matter include reinstatement, compensatory damages, backpay with interest, litigation costs, witness fees, and attorney fees. 49 U.S.C. § 31105(b)(3)(A). In addition, the CMVA provides for punitive damages, making its remedies more comprehensive than the ERA. 49 U.S.C. § 31105(b)(3)(C); *see Cudney*, 172 Wn.2d at 533 (WISHA remedies more comprehensive than the "guidepost" remedies of ERA and, therefore, more than adequately protect the public policy of protection of workers who report safety violations). Accordingly, the remedies available under the CMVA more than adequately protect the public interest in commercial motor vehicle safety at issue in this matter.

In making its decision, the *Piel* Court emphasized that PERC specifically stated it was intended as a supplement to other remedies, which was the "strongest possible evidence that the statutory remedies are

not adequate to vindicate a violation of public policy." *Piel*, 177 Wn.2d at 617. Acknowledging the continued viability of *Korslund*, the *Piel* Court specifically found that the ERA did not include similar defining language. *Id.* Likewise, the CMVA does not include such language. Accordingly, the language of the CMVA does not diminish the adequacy of the remedies available under the CMVA as the PERC provision did in *Piel*.

IV. CONCLUSION

For the foregoing reasons, the *Piel* decision supports this Court's analysis in affirming the dismissal of Mr. Rose's claim for wrongful discharge in violation of public policy. Reconsideration should, therefore, be denied.

Dated this 9th day of July, 2014.

Respectfully submitted,

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