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No. 70128-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

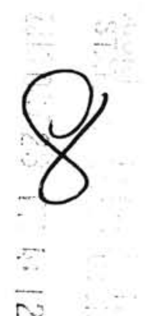
LARRY CURRIER, LARRY CURRIER DBA AMERICAN CONTAINER EXPRESS, and AMERICAN CONTAINER EXPRESS, INC.,

Respondents,

v.

NORTHLAND SERVICES, INC.,

Appellant.



REPLY BRIEF OF APPELLANT

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INTRODUCTION

It is undisputed by Currier that a discriminatory remark solely between independent contractors is not a practice forbidden anywhere in the Washington Law Against Discrimination (WLAD). It is neither employment discrimination prohibited by R.C.W. §49.60.180 nor a practice prohibited by the general rights statute, R.C.W. §49.60.030.

Currier concedes that R.C.W. §49.60.180 does not prohibit discriminatory statements between independent contractors. But Currier's arguments on R.C.W. §49.60.030 would effectively convert it into a catch-all provision prohibiting discriminatory statements between everyone, and would improperly transform it into a general civility code. Currier also argues he reasonably believed he opposed illegal discrimination, but the record lacks any evidence of any such reasonable belief and Currier cannot reasonably believe he was opposing discrimination unless what he complained about were illegal as a matter of substantive law. Otherwise, every purely subjective belief would suffice for a retaliation claim.

Currier has failed to show why the judgment should not be reversed. He never opposed a practice forbidden by the WLAD as required by the retaliation statute, R.C.W. §49.60.210(1), therefore the termination of his contract was not protected by that statute.

The trial court's judgment should be reversed.

REBUTTAL STATEMENT OF THE CASE

A. Rebuttal Statement of Facts

Currier asserts that discrimination at Northland was "known or witnessed, tolerated, and unopposed by dispatchers and other management from NSI," Brief of Respondents at 7, but the record is devoid of any such evidence.

Currier's citations to the record only show that he alone—and no one from Northland—heard derogatory statements made between other independent contractor truck drivers at the Northland terminal. RP 152-53, 158-166. Currier either heard them whispered privately, anonymously over a CB radio, or outside of Northland's dispatch office in a separately partitioned room. RP 160, 210, 249. There is no evidence that anyone at Northland ever heard or was aware of those statements, RP 364, 552, 574, 584, 674, 689-91, 700, and Currier admitted he had no such knowledge. RP 211, 250. It is also an undisputed fact that Currier never told Northland about any of them until the single statement between Howell and Martinez for which he is claiming retaliation. Court's Findings of Fact and Conclusions of Law Regarding Liability, Finding of Fact No. 9. Northland could not have tolerated or not opposed what it didn't know about or witness, and there is no evidence in the record to the contrary.

Currier's testimony that Northland dispatch supervisor Patrick Franssen was in the dispatch office when independent contractor driver Terry Mock made derogatory statements to independent contractor drivers Victor Meza and Julio Pereira fails to demonstrate Northland's awareness or knowledge of those statements, as that conversation occurred outside of the dispatch office, in a room partitioned from the dispatch office and separated by a wall with a window. RP 249. Currier contends that "no dispatcher protested this language," Brief of Respondents at 9, but that is clearly misleading as Currier admitted he did not know whether anyone at Northland ever heard it, RP 250, and it is undisputed that Franssen never did, RP 584, nor did dispatcher Jim Sleeth. RP 674. What Northland did hear was Currier saying in the dispatch office that he wanted to fight with Howell. RP 160-62, 638-39, 689-90; Ex. 57.

Currier also asserts he did not want a CB radio in his truck because of alleged racist talk on the airwaves which he attributed to Northland. Brief of Respondents at 8. However, Currier admitted that CB radio channels are open to the public and anyone has access to them, and that the only voice on the CB radio he recognized was that of independent contractor driver Mock. RP 210-11. Currier mischaracterizes the evidence when he asserts that Northland told him to install a CB radio, Brief of Respondents at 8, as it was Currier who asked Northland for

advice how to improve his own performance and a supervisor suggested he install a CB radio so he could provide faster service. RP 799.

Currier further claims, without citation to the record, that Howell said "Martinez was receiving less favorable routes because of his ethnicity," Brief of Respondents at 17, but Howell never said or implied going to Portland was less favorable, only that it was "south of the border." Northland pays independent contractor truck drivers by the hour along with a fuel surcharge, RP 687, which makes a trip to Portland economically desirable. Martinez never complained about being dispatched there, and at least two other independent contractor drivers for Northland go two to three times a month to Portland. RP 129, 673. There is no evidence of any discrimination by Northland.

Lastly, Currier refers to a report he made to the state Human Rights Commission, Brief of Respondents at 29, but no evidence was ever admitted with regard to that commission because that agency did not exercise jurisdiction over Currier's complaint.

Currier's factual assertions are not supported by any evidence in the record.

B. Undisputed Facts

It is undisputed that Currier only complained about a single derogatory comment made between independent contractors Howell and

Martinez. Court's Findings of Fact and Conclusions of Law Regarding Liability, Finding of Fact No. 9. Currier never said or testified that the comment between those independent contractors was discriminatory or unlawful, only that it was inappropriate. RP 162-63, 167, 358. Currier also never testified that he opposed a discriminatory Northland employment practice. In fact, Currier explicitly admitted on summary judgment that "Plaintiffs' retaliation claim *isn't* based upon NSI's discrimination" at all, CP 253 (italics in original), an admission that warrants reversal of the judgment. Because Currier admittedly did not oppose any discriminatory employment practice by Northland, as a matter of law he cannot have reasonably believed he opposed any practice forbidden by the WLAD. There is also no evidence in the record demonstrating that Currier had a reasonable belief that he opposed any unlawful employment practice or illegal discrimination. RP 165-67, 358.

It is further undisputed that both of the drivers involved in the derogatory statement on August 12, 2008—Howell and Martinez—were independent contractors working under a standard form Subcontractor Agreement for Northland, as was Currier. Brief of Respondents at 6-7; RP 198, 521-22, 619-20; Ex. 53. Finally, it is undisputed that no one else other than Currier was present at the time of Howell's comment to Martinez, and no one at Northland heard it. RP 163-65, 574, 698.

SUMMARY OF ARGUMENT

Currier never opposed a practice forbidden by the WLAD, including any discriminatory employment practice by Northland. The language of R.C.W. §49.60.210(1) is clear and unambiguous.

Currier had no objectively reasonable belief he was opposing any practice forbidden by the WLAD, and he failed to prove he did. Currier's purely subjective belief that a single racially inappropriate comment made solely between two independent contractors was illegal discrimination does not rise to the level of an objectively reasonable belief that he was opposing a discriminatory practice forbidden by the WLAD. Currier thus failed to prove a prima facie case of retaliation.

The trial court found that Northland had legitimate and non-discriminatory reasons for Currier's contract termination, and "[a] single unauthorized act of discrimination by a co-worker has never been held to justify 'opposition' in the sense of protecting a protesting employee from employer discipline." *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978). This applies with equal if not greater force to a discriminatory statement solely between two independent contractors. Northland also met its burden of proof that it would have terminated Currier's contract based on its discovery of his truck's dangerously bald tires.

The judgment must therefore be reversed.

ARGUMENT

A. <u>Currier failed to establish that he opposed a practice forbidden by the WLAD.</u>

When a statute such as the WLAD is clear and unambiguous, it is not subject to judicial construction and its meaning is to be derived from the language of the statute alone. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 28, 50 P.3d 638 (2002). The anti-retaliation statute, R.C.W. §49.60.210(1), is clear and unambiguous. It prohibits discrimination against any person because he or she opposed any "practices forbidden by this chapter," the WLAD. To come within the protection of that statute, a person "must oppose practices forbidden by the statute, *i.e.*, the laws prohibiting employment discrimination." 16A Wash. Prac., Tort Law and Practice §24.16 (3d ed.). "[O]pposition to a practice not forbidden by the statute is not protected activity." *Id.* (citing *Coville v. Cobarc Services*, 73 Wn.App. 433, 440, 869 P.2d 1103 (1994)). Currier only claimed retaliation for opposing discrimination in employment, CP 34, 131, 341, but on summary judgment he admitted he was not opposing <u>any</u> discrimination by Northland. CP 253. There is no also evidence in the record of any discrimination by Northland.

Currier argues that the statute should be liberally construed to allow his retaliation claim, Brief of Respondents at 19, but even under a

broad and liberal interpretation of the WLAD opposition activity must be related to an employment practice of the employer. *See Kilian*, 147 Wn.2d at 27 ("[e]ven under liberal construction of chapter 49.60 RCW, this court will not adopt a strained or unrealistic interpretation of the statutes in that chapter").

This is also not a "straw man" argument, Brief of Respondents at 17. It is an explicit requirement of the statute that cannot be avoided. *See Kilian*, 147 Wn.2d at 23 (age is not a protected class as defined in the WLAD despite the "not limited to" language of R.C.W. §49.60.030); *Jenkins v. Palmer*, 116 Wn.App. 671, 675-76, 66 P.3d 1119 (2003) ("[e]ven a liberal interpretation must have a basis in the text") (construing RCW §49.60.220, prohibiting aiding and abetting unfair practices under the WLAD, not to cover acts of harassment committed by a co-worker acting alone).

The only practice forbidden by the WLAD alleged by Currier in his complaint was discrimination in employment, R.C.W. §49.60.180, but Currier explicitly admitted on summary judgment that his retaliation claim was not based upon any discrimination by Northland. Currier's claim does not constitute protected activity, whether under R.C.W. §49.60.210(1) or under analogous Title VII caselaw. *See, e.g.*, *Silver*, 586 F.2d at 141 (to constitute protected activity under Title VII, "[t]he

opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual"); *Washington v. Nat'l R.R. Passenger Corp.*, 2003 WL 21305354 *3 (S.D.N.Y. June 5, 2003) *opinion amended on reconsideration*, 2003 WL 22126544 (S.D.N.Y. Sept. 12, 2003) ("The few federal courts that have considered this issue in a similar situation have held that an objection to a derogatory or racist remark by a co-worker does not constitute protected activity for purposes of a retaliatory discharge claim because the remark could not be attributed to the employer, and thus the plaintiff could not be opposing an unlawful employment practice.") (citing *Little v. United Techs., Carrier Transciold Div.*, 103 F.3d 956, 959-60 (11th Cir. 1997) ("Little's opposition to the racial remark uttered by Wilmot, a co-worker ... did not constitute opposition to an unlawful employment practice."); *Silver*; *Braham v. State of New York Unified Court System*, 1998 WL 107117 (S.D.N.Y. Mar. 11, 1998) (employee who claimed that she was fired because she complained about religious discrimination in the workplace after overhearing anti-Semitic remarks of a co-worker failed to state a retaliation claim, as the retaliation complained of must relate to an unlawful employment practice by the employer)).

Currier argues that *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996), rejected interpretations of Title VII for determining the

scope of the WLAD. Brief of Respondents at 28.[1] That is incorrect. The WLAD is modeled after Title VII, so cases interpreting Title VII provide persuasive authority. *Lodis v. Corbis Holdings, Inc.* 172 Wn.App. 835, 849, 292 P.3d 779 (2013) (citing *Oliver v. Pac. Nw. Bell Tel. Co.,* 106 Wn.2d 675, 678, 724 P.2d 1003 (1986)). *Marquis* only stated that federal law was not helpful in interpreting RCW §49.60.030, the general declaration of rights statute. But the Supreme Court in *Marquis* explicitly relied on analogous cases under federal law in analyzing the prima facie case of discrimination. *Marquis*, 130 Wn.2d at 113. Furthermore, *Marquis* did not address the plaintiff's retaliation claim or the applicable standards for such a claim.[2]

When concluding that discriminatory remarks by one co-worker to another are not an unlawful employment practice of the employer, courts apply the common law principles of agency. *See Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) ("Congress' decision to define 'employer' to include any 'agent' of an employer ... surely evinces an intent to place some limits on the acts of

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[1] Currier argues that federal law is not instructive in interpreting the anti-retaliation statute "by extension" of *Marquis* and RCW §49.60.030. Brief of Respondents at 28. However, Currier cites no authority for not interpreting the opposition clause of RCW §49.60.210(1) in accordance with analogous Title VII opposition clause caselaw.

[2] Footnote 1 of *Marquis* explicitly notes that plaintiff's retaliation claim was not involved in the appeal. "Only the claims relating to sex discrimination are involved in this appeal." 130 Wn.2d at 91, n.1.

employees for which employers under Title VII are to be held responsible."); *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1180 (2d Cir. 1996) ("In order to impute to an employer liability for the actions of an employee, we are expected to apply common law principles of agency.") (citing *Meritor*). Although the definition of "employer" in the WLAD, R.C.W. §49.60.040, is not the same as in Title VII, the effect for this case is the same. *See Marquis*, 130 Wn.2d at 110 ("The common law distinguishes between employees and independent contractors, based primarily on the degree of control exercised by the employer/principal over the manner of doing the work involved. *Fardig v. Reynolds,* 55 Wash.2d 540, 544, 348 P.2d 661 (1960); *Phillips v. Kaiser Aluminum & Chem. Corp.,* 74 Wash.App. 741, 749 n. 23, 875 P.2d 1228 (1994). We read the statute [R.C.W. §49.60.040] with that distinction in mind."); *Phillips*, 74 Wn.App. at 749 ("Generally, a principal is not vicariously liable for the acts of an independent contractor.")

There is no evidence in the record that independent contractor Howell was acting in the interest of Northland or that Howell had any ability to affect independent contractor Martinez's contract. Moreover, as Currier has admitted that Howell and Martinez were both independent contractors, the racially derogatory statement by Howell to Martinez

cannot be attributable to Northland or for which Northland is vicariously liable or responsible as the contracting principal.

Currier's further argument, that *Marquis* interpreted R.C.W. §49.60.030 to protect independent contractors, is also misplaced. The protection provided by that statute only barred discriminatory practices directly between the independent contractor and the contracting principal. *Kilian*, 147 Wn.2d at 27. In *Marquis*, the claimed practice was sex discrimination by the City of Spokane against independent contractor golf professional Patricia Marquis—her own claim of sex discrimination in the city's performance of its contract with her. Here, there was no contractual relationship whatsoever between Howell and Martinez, two admittedly independent contractor truck drivers working under separate contracts to Northland. *Marquis* does not help Currier, as it does not bar discriminatory statements solely between two independent contractors.

Currier next argues that he opposed a forbidden practice under the broad language of RCW §49.60.030, Brief of Respondents at 27; however, that statute is a general declaration of rights and does not enumerate any forbidden practices. The legislature explicitly defined such forbidden practices in specific sections of the WLAD.[3] Even if R.C.W. §49.60.030

[3] *See, e.g.*, R.C.W. §49.60.175-.176 (discrimination in credit transactions); R.C.W. §49.60.178 (discrimination in insurance transactions); R.C.W. §49.60.180 (discrimination in employment); R.C.W. §49.60.190 (discrimination in public accommodations); R.C.W.

somehow prohibited discriminatory employment practices, it is undisputed that Currier only opposed a statement between two independent contractors, not Northland. R.C.W. §49.60.030 is not a catch-all statute barring discriminatory statements between private citizens. *See Kilian*, 147 Wn.2d at 28-29 (rejecting the argument that R.C.W. §49.60.030 includes a prohibition against age discrimination because "'age' is not included" in the language and "[t]his court will not add language to an unambiguous statute").

Currier's argument to the contrary would effectively hold an employer liable for all discriminatory statements of all of its independent contractors or sales and supply vendors that happen to be on the employer's property. There is no precedent or basis for such an expansion of the law. *See Blackford v. Battelle Mem'l Inst.*, 57 F.Supp. 2d 1095, 1099 (E.D. Wash. 1999) ("The State of Washington does not bar all forms of retaliation in the workplace. Rather, RCW 49.60.210(1) makes "[i]t is an unfair practice for any employer ... to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter...."); *Coville,* 73 Wn.App. at 400 ("the opposition *must* be directed toward 'practices forbidden by this chapter' ... [o]nly opposition directed toward such practices is protected") (italics

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§49.60.218 (discrimination with respect to service animals); R.C.W. §49.60.222-.224 (discrimination in real estate transactions).

by the court). There is simply no evidence in the record to support Currier's argument that he opposed a discriminatory employment practice or any other practice forbidden by the WLAD.

B. **There is no evidence in the record that Currier reasonably believed he opposed any practices forbidden by the WLAD.**

Currier also failed to show there was any evidence in the record that he had an arguable or reasonable belief that he opposed any practice forbidden by WLAD, as required. *Ellis v. City of Seattle*, 142 Wn.2d 450, 460, 13 P.3d 1065 (2000). The doctrine requiring a reasonable belief includes both subjective and objective components, and:

> The rationale for the doctrine is simple and sensible. While the Human Rights Law's (and Title VII's) anti-retaliation provision sweeps broader than the law's substantive prohibitions, the provision's reference to "practice[s] forbidden under this chapter" is naturally read to require some relationship between the actions an employee complains about those which are illegal as a matter of substantive law. Were it otherwise, the law's anti-retaliation provision would prohibit retaliation for an employee's opposition to *anything*, rather than retaliation for an employee's opposition to discrimination on the basis of a protected characteristic. ...The doctrine thus gives effect to controlling statutory language and serves as the broader purpose of preventing anti-discrimination law from "expanding into a general civility code."

Riscili v. Gibson Guitar Corp., 605 F.Supp.2d 558, 565-67 (S.D.N.Y. 2009) (italics by the court) (referencing New York City's Human Rights

Law; quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998)).

There is no evidence in the record showing that Currier had an objectively reasonable belief he was opposing any practice forbidden by the WLAD. Currier did not even testify at trial that the statement between Howell and Martinez was unlawful discrimination or that he believed it was an unlawful employment practice of Northland. Even if he had, without any provision of the WLAD expressly forbidding discriminatory statements between independent contractors or private citizens, Currier's brief is only subjective and not objectively reasonable or arguable. A purely subjective belief is insufficient to come within the protection of R.C.W. §49.60.210(1).

Currier's further argument that to be engaged in protected activity he need not have actually opposed any specific practices forbidden by the WLAD, Brief of Respondents at 27-31, would have the effect of converting the WLAD into a general civility code, which was never intended by the legislature. Currier's interpretation would protect any employee or independent contractor from termination who complains about any inappropriate behavior by any other person, virtually any time or any place. The courts have explicitly declined to extend the protections of the WLAD to such a degree. *See Adams v. Able Bldg. Supply, Inc.* 114

Wn.App. 291, 297, 57 P.3d 280 (2002) ("a civil rights code is not a 'general civility code'") (quoting *Faragher v. City of Boca Raton,* 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)).

The dire scenario painted by Currier, that unless the judgment stands the result would be to "gut" the protections of the WLAD, Brief of Respondents at 31-32, and give a "free pass" to Northland, *id.* at 44, is simply wrong. R.C.W. §49.60.210(1) only protects persons who oppose practices that the legislature has specifically forbidden. *Kilian*; *Blackford.* The legislature has not chosen to forbid two independent contractors—effectively strangers—from making discriminatory statements to each other. Northland would have no free pass, as it had legitimate, non-discriminatory reasons for terminating Currier's contract. Court's Findings of Fact and Conclusions of Law Regarding Liability, Conclusion of Law No. 8.

C. Northland met its burden of proof that it would have terminated Currier's contract based on the discovery of his dangerously bald truck tires and long expired license.

Even if Currier were to have somehow proved he engaged in protected opposition, it is undisputed that Currier's truck tires failed to meet the minimum thickness and condition required by federal safety law, 49 C.F.R. §393.75, and that his license had been expired for more than six

years. The record contains unrebutted evidence that when Northland discovered Currier's dangerously bald tires and expired license, Ex. 56, it would have terminated Currier's contract.

Currier erroneously argues that even though his truck tires violated federal law, because they did not meet industry "out of service" criteria Northland could not have terminated his contract. However, it is undisputed that under the Subcontractor Agreement, Currier was required to comply with all federal, state, and local laws. Ex. 53. An undisputed violation of the Federal Motor Carrier Safety Regulations in the CFRs and state licensing statutes is an undisputed violation of federal law and state law. It makes no difference whether Northland had never terminated another independent contractor for the same reasons in the past, as there is no evidence in the record that any other independent contractor's truck had also violated federal and state law. Lack of comparator evidence is therefore not probative or determinative. The Court erred in concluding that Northland failed to meet its burden of proof. Any damages should have been limited to six days of contract income, $420.

CONCLUSION

Currier's opposition falls squarely outside of the protection of the statute. R.C.W. §49.60.210(1) is clear and unambiguous. It only protects persons who oppose practices expressly forbidden by the WLAD. The

legislature has not forbidden discriminatory statements solely between two independent contractors. Currier also cannot have an arguable or objectively reasonable belief he was opposing employment discrimination or illegal discrimination in general as the statement he opposed was simply not a forbidden practice. No reasonable judge or jury could find otherwise. The judgment therefore cannot stand and should be reversed to respect the statutory limits established by the legislature.

RESPECTFULLY SUBMITTED this 23rd day of October, 2013.

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CERTIFICATE OF SERVICE

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

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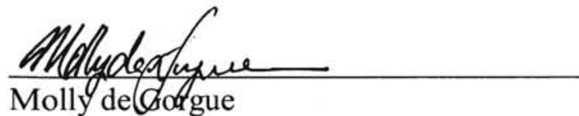

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