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WASHINGTON STATE SUPREME COURT

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CERTIFICATION FROM
THE UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF WASHINGTON

IN

MATTHEW CUDNEY,

Plaintiff,

v.

ALSCO, INC., a Nevada corporation,

Defendant.

PLAINTIFF'S OPENING BRIEF

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I. INTRODUCTION

Plaintiff Matthew Cudney was fired after almost four and one-half years of stellar employment with Defendant ALSCO, Inc. because he reported to his supervisors that he had observed the company's Northwest Regional Manager and Spokane Branch General Manager intoxicated in the workplace, and driving off drunk in a company-provided vehicle.

Mr. Cudney filed a lawsuit against Defendant alleging a claim of Wrongful Discharge in Violation of Public Policy. Cross motions for Summary Judgment were filed before the U.S. District Court. The U.S. District Court has certified two (2) questions to this Court pertaining to the Jeopardy element of Mr. Cudney's claim of Wrongful Discharge in Violation of Public Policy. As set forth in the certified record submitted by the U.S. District Court, Defendant ALSCO has conceded that Mr. Cudney has satisfied the Clarity element of his claims.

II. ASSIGNMENTS OF ERROR

This case is before the Court on certification of two questions from the U.S. District Court for the Eastern District of Washington.

III. STATEMENT OF THE CASE

Plaintiff incorporates by reference Plaintiff's Statement of Material Facts in Opposition to Defendant's Motion for Summary Judgment (hereinafter referred to as "PSMF"), Section B at pages 6 through 24. That pleading is part of the certified record being provided by the U.S. District Court. It sets forth Plaintiff Matthew Cudney's material facts and supporting documents relevant to his position in this case.

A. Mr. Cudney's Employment With ALSCO

Plaintiff Matthew Cudney was employed as the Service Manager at Defendant ALSCO, Inc.'s Spokane Branch for approximately four and one-half years before his termination of employment on August 5, 2008. (PSMF ¶ 1) Mr. Cudney was recruited by ALSCO's Spokane Branch Assistant General Manager Marty Siebe, who had previously worked with Mr. Cudney at another company. (PSMF ¶ 1) Mr. Siebe was Mr. Cudney's direct supervisor at ALSCO's Spokane Branch. (PSMF ¶ 1) Mr. Siebe's direct supervisor was Spokane Branch General Manager and Regional Manager John Bartich. (PSMF ¶ 1)

B. Mr. Cudney's High Level Performance As Service Manager

During his four and one-half years of employment with Defendant, Mr. Cudney was never issued any negative performance evaluations, performance counseling or any disciplinary action. (PSMF ¶ 2) In fact, for at least 14 consecutive months before his termination of employment in August 2008, Mr. Cudney received monthly performance bonuses based upon his Service Department exceeding the corporate sales goals set by Defendant ALSCO. (PSMF ¶ 2)

Several weeks before Mr. Cudney was terminated on August 5, 2008, he was the No. 1 ranked Service Manager in the Northwest Region of Defendant, which consists of eight branches in four states. (PSMF ¶ 3) ALSCO's Spokane Branch is one of ALSCO's top 10 branches in sales volume in the entire country. (PSMF ¶ 3) Mr. Cudney received a substantial bonus just weeks before his termination of employment as a result of his Service Department winning Defendant ALSCO's Annual Spring Sales Contest. (PSMF ¶ 3)

Mr. Cudney was never informed during his four and one-half years of employment with Defendant ALSCO that any employee ever had any complaint against him for any reason that placed his job in jeopardy, or that he was being given any formal or informal disciplinary warning for any such reason. (PSMF ¶ 4) Mr. Cudney was never informed about, counseled or disciplined as a result of any customer account leaving Defendant ALSCO as a result of any actions by Mr. Cudney, and Mr. Cudney denies that any customer account left Defendant for any reason pertaining to Mr. Cudney. (PSMF ¶ 4) Mr. Cudney is aware through discovery in the pending lawsuit of three customer accounts that Defendant purports to believe Mr. Cudney was the reason for losing at the Spokane branch, but the three customer accounts were actually lost as a result of ineptness and inappropriate customer relations by higher officials within Defendant ALSCO, not any actions of Mr. Cudney. (PSMF ¶ 4)

C. **Mr. Cudney's Observations Of Regional Manager John Bartich Intoxicated On June 10, 2008**

On June 10, 2008, Mr. Cudney personally observed that the Spokane Branch's General Manager, John Bartich, who is also the

Regional Manager for Defendant's Northwest Region, appeared to be intoxicated while on the premises of Defendant's Spokane Branch. (PSMF ¶ 5) Mr. Bartich is the highest ranking manager at the Spokane Branch. (PSMF ¶ 5) Mr. Bartich had difficulty standing without weaving back and forth, his speech was slurred, his eyes were glazed over, and he smelled of alcohol. (PSMF ¶ 5) Mr. Cudney had observed Mr. Bartich on more than one occasion previously in which Mr. Bartich smelled of alcohol and appeared to be under the influence of alcohol while in the workplace and conducting business on behalf of ALSCO. (PSMF ¶ 5) In fact, the subject had come up in discussions between Mr. Cudney and his immediate supervisor, Spokane Assistant General Manager Marty Siebe, as both had smelled alcohol on Mr. Bartich before June 10, 2008. (PSMF ¶ 5) Assistant General Manager Marty Siebe and Human Resources Manager Doug Meyers even had discussions prior to June 10, 2008 about concerns that Regional Manager John Bartich had been intoxicated in the workplace. (PSMF ¶ 5)

Based on his observations on June 10, 2008, Mr. Cudney became very concerned because Mr. Bartich appeared to be

intoxicated in the workplace. (PSMF ¶ 6) Mr. Cudney intended to report his observations to Assistant General Manager Siebe to have someone drive Mr. Bartich home, but before Mr. Cudney could report what he observed, Mr. Bartich drove away in his company vehicle in an intoxicated condition. (PSMF ¶ 6)

D. Mr. Cudney's Reporting Of His Observations Of Mr. Bartich

Mr. Cudney first reported on June 10, 2008 his observations of Mr. Bartich's intoxicated condition to the Spokane Branch's Human Resources Manager, Doug Meyers, out of concern for the safety of the public, Mr. Bartich, the Spokane Branch employees, and because of concerns about potential liability of ALSCO while Mr. Bartich was driving intoxicated. (PSMF ¶ 7) Mr. Cudney was also concerned about his own personal liability if Mr. Bartich hurt or killed someone after Mr. Cudney had observed him intoxicated in the workplace. (PSMF ¶ 7) HR Manager Meyers identified himself as a person Mr. Cudney should have come to with the report. (PSMF ¶ 7) Mr. Cudney became uncomfortable talking to Mr. Meyers, and Mr. Cudney asked Mr. Meyers whether his job was in jeopardy for reporting what he had witnessed concerning Mr.

Bartich's intoxication. (PSMF ¶ 7) Human Resources Manager Meyers confirmed that Mr. Cudney should in fact be worried about losing his job for bringing that issue up. (PSMF ¶ 7)

Mr. Cudney then informed Spokane Branch Assistant General Manager Marty Siebe on June 10, 2008 that Mr. Cudney had just witnessed Mr. Bartich under the influence of alcohol in the workplace and driving a company vehicle while drunk. (PSMF ¶ 8) Mr. Cudney also reported to Mr. Siebe that Human Resources Manager Meyers had stated that Mr. Cudney's job was in jeopardy because he reported the information. (PSMF ¶ 8) Mr. Cudney feared that his job was in jeopardy, and he informed several trusted co-workers in confidence what he had reported about Mr. Bartich because Mr. Cudney feared losing his job based on the fact that HR Manager Meyers had told Mr. Cudney that he should fear for his job. (PSMF ¶ 8)

Assistant Branch Manager Siebe was also concerned about Mr. Bartich driving a company vehicle while intoxicated before Mr. Cudney's report about Mr. Bartich on June 10, 2008. (PSMF ¶ 8) But Mr. Siebe did nothing to address the fact of Mr. Bartich being under the influence of alcohol in the workplace at any time. (PSMF

¶ 8) Mr. Siebe did nothing to determine if Mr. Bartich was actually intoxicated on the job because Mr. Siebe considered it a unique situation in that Mr. Bartich was his boss, General Manager and Regional Manager. (PSMF ¶ 8) Mr. Siebe failed to do anything even though (1) Defendant ALSCO's policies provided for an alcohol test for Mr. Bartich (PSMF ¶ 8); (2) Defendant's Employee Handbook provided that any employee at work under the influence of alcohol mandatorily would be subject to discipline or termination (PSMF ¶ 8); (3) Mr. Siebe stated that alcohol use creates unsafe conditions at work (PSMF ¶ 8); and (4) Defendant's Vehicle Safety Manual provided that any employee driving a vehicle after having consumed alcohol would automatically be reviewed for disciplinary action. (PSMF ¶ 8)

Defendant's Spokane Branch Human Resources Manager Meyers, rather than dealing with the fact that a high level company official had driven away intoxicated in a company vehicle, asked Mr. Cudney what he would be doing about it. (PSMF ¶ 9) Mr. Cudney thought about calling 911, but he was fearful that if he did, Mr. Bartich as Regional Manager would terminate Mr. Cudney's employment. (PSMF ¶ 9) Mr. Cudney was very fearful about being

fired based on HR Manager Meyers telling him that he should be worried about losing his job. (PSMF ¶ 9)

HR Manager Meyers testified by deposition that he did nothing about Mr. Cudney's report of Mr. Bartich driving off in a company vehicle while intoxicated other than talking to Assistant Branch Manager Marty Siebe about it. (PSMF ¶ 10) Mr. Meyers testified that he did nothing else in response to Mr. Cudney reporting Mr. Bartich's intoxicated condition while driving a company vehicle, including the fact that no investigation was ever conducted on Mr. Cudney's report. (PSMF ¶ 10) Mr. Cudney received no further contact from HR Manager Meyers, Assistant Branch Manager Siebe, or anyone from Defendant's corporate office about what he reported concerning Mr. Bartich's intoxicated condition on June 10, 2008. (PSMF ¶ 10)

E. Mr. Cudney's Firing

Just a few weeks after reporting Mr. Bartich's intoxication and driving a company vehicle in that condition, Mr. Cudney was out of the office on a scheduled vacation from July 25 through August 4, 2008. (PSMF ¶ 11) Prior to commencing vacation, Mr. Cudney had inquired of Mr. Siebe about the status of the alcohol

concerns Mr. Cudney had raised about Mr. Bartich on June 10, to which Mr. Siebe had nothing to offer. (PSMF ¶ 11) When Mr. Cudney returned from vacation on August 5, 2008, Mr. Siebe in the presence of HR Manager Meyers notified Mr. Cudney that he was terminated effective immediately. (PSMF ¶ 11) Mr. Siebe declined to give Mr. Cudney any reasons for his termination other than he was an "at-will employee". (PSMF ¶ 11) After Mr. Cudney pushed Mr. Siebe on that issue, Mr. Siebe indicated that the reason for Mr. Cudney's termination was that employees in his department did not want to work for him, and he had lost his ability to lead effectively. (PSMF ¶ 11) This was Mr. Siebe's explanation even though Mr. Cudney had never received any counseling or notification from Defendant that his job was in jeopardy because any employee in his department did not want to work for him, or that he had lost his ability to lead effectively. (PSMF ¶ 11) Mr. Cudney was never afforded any of the three step disciplinary process HR Manager Meyers testified was used by Defendant with all ALSCO employees. (PSMF ¶ 11) Mr. Cudney ~~was not afforded~~ Defendant's three step disciplinary process despite the fact that

Defendant's Employee Handbook stated it was intended to improve an employee's performance, not punish them. (PSMF ¶ 11)

Mr. Cudney was fired on the day he returned from vacation despite the fact that he had never received a negative performance evaluation or disciplinary action of any kind during four and one-half years of employment with ALSCO, he was the number one Sales Manager in the Northwest Region, he had been paid regular and substantial bonuses based on good performance, and his termination occurred only a few short weeks after he had reported his observations and concerns about Mr. Bartich and his alcohol use. (PSMF ¶ 12)

Contrary to ALSCO's suggestion in its summary judgment brief filed with the U.S. District Court, ALSCO's Spokane Branch management team consisting of Assistant General Manager Marty Siebe and Human Resources Manager Doug Meyers, were well aware that Mr. Bartich was showing up at work under the influence of alcohol long before Mr. Cudney reported his observations that Mr. Bartich was intoxicated on June 10, 2008. (PSMF ¶ 13) Both Mr. Siebe and Mr. Meyers admit that they did nothing to address the alcohol issues involving Mr. Bartich at any time prior to Mr.

Cudney reporting on June 10 Mr. Bartich's intoxicated condition, nor after Mr. Cudney raised the issue with them on June 10, 2008. (See Plaintiff's Fact No. 7, supra) (PSMF ¶ 13) Mr. Siebe admitted that ALSCO's drug and alcohol policies clearly required disciplinary action to be considered against Mr. Bartich any time that he showed up under the influence of alcohol, yet Mr. Siebe did nothing to report Mr. Bartich's condition to the company's Salt Lake City headquarters, or to talk about it with Mr. Bartich himself. (See Plaintiff's Fact No. 7, supra) (PSMF ¶ 13)

F. Mr. Bartich's Testimony

Regional Manager Bartich returned from a vacation on August 6, 2008, and learned for the first time that Mr. Cudney had made a report about Mr. Bartich on June 10, 2008 being under the influence at work and driving a company vehicle intoxicated, and Mr. Bartich also learned on August 6 that Mr. Cudney had been fired the day before, August 5, 2008. (PSMF ¶ 15) Mr. Bartich admitted in his deposition that no one from ALSCO in any manner attempted to contact or discuss with him any of the alcohol concerns pertaining to Mr. Bartich that Mr. Cudney had reported to Mr. Siebe and Mr. Meyers on June 10, 2008. (PSMF ¶ 15) Mr.

Bartich admitted in his deposition that he had never had any problems with Mr. Cudney prior to June 10, 2008 in which Mr. Bartich in any manner felt that Mr. Cudney had some kind of ax to grind with him. (PSMF ¶ 15) Mr. Bartich admitted that he is unaware of any reason that Mr. Cudney would make up a story that Mr. Cudney believed Mr. Bartich was intoxicated at work. (PSMF ¶ 15) Mr. Bartich testified that it would be the duty of an employee at ALSCO to report alcohol use on the part of another employee without fear of retaliation. (PSMF ¶ 15)

At his deposition, Mr. Bartich also admitted that he had been working at ALSCO's headquarters after consuming alcohol during work hours prior to Mr. Cudney's complaint about Mr. Bartich on June 10, 2008. (PSMF ¶ 14) Mr. Bartich admitted in his deposition that he had been arrested and charged with driving under the influence of alcohol several years ago while driving an ALSCO company vehicle. (PSMF ¶ 14) Regional Manager Bartich is provided a company car, and insurance for the car is paid by Defendant ALSCO. (PSMF ¶ 14) Mr. Bartich admitted at his deposition on January 14, 2009 that he had driven his company car after drinking alcohol as recently as three days before his

deposition. (PSMF ¶ 14) Mr. Bartich admitted at his deposition that prior to Mr. Cudney's termination of employment, Mr. Bartich had consumed alcohol unrelated to business purposes oftentimes once or more per week between 8:00 a.m. and 5:00 p.m. on workdays, and then had gone back to Defendant's premises to work. (PSMF ¶ 14) Mr. Bartich testified that as of the date of his deposition, January 14, 2009, he had never reported his previous arrest for DUI and Deferred Prosecution to his supervisors at Defendant ALSCO. (PSMF ¶ 14) It was only after Mr. Cudney's firing, and papers had been served on Defendant, that Mr. Bartich contacted his supervisor to confess that he had been at work after consuming alcohol. (PSMF ¶ 14)

Mr. Bartich, after confessing to his supervisor once Mr. Cudney's papers were served in this lawsuit that he had been under the influence of alcohol on the job, was given the consideration of a verbal warning which provides that he must not consume alcohol again and go back to the plant and work. (PSMF ¶ 16) However, Mr. Bartich was not even warned by ALSCO that if he did come back to work under the influence of alcohol at the plant that he would be fired. (PSMF ¶ 16)

Regional Manager Bartich testified that he would expect, if Mr. Cudney was going to be subject to potential termination because of performance issues, that Mr. Cudney's supervisor would talk to Mr. Cudney about the performance issues. (PSMF ¶ 17) Regional Manager Bartich also testified that he would expect Mr. Cudney's supervisor to warn Mr. Cudney that if he did not improve his performance, his employment would be terminated. (PSMF ¶ 17) Mr. Bartich confirmed that Mr. Cudney earned performance bonuses consecutively from April 2007 through June of 2008. (PSMF ¶ 17) Mr. Bartich confirmed that the reason an employee is given bonuses at ALSCO is because things are going well. (PSMF ¶ 17)

G. ALSCO's Reasons For Terminating Mr. Cudney Are A Subterfuge

Contrary to the suggestion in ALSCO's summary judgment brief submitted to the U.S. District Court, there was never any documentation or record of 53 employees complaining about Mr. Cudney while he was a Service Manager for four and one-half years at Defendant ALSCO's Spokane branch. (PSMF ¶ 18) Assistant Manager Siebe admitted in his deposition that the

company had no documentation of many alleged complaints about Mr. Cudney before his termination of employment by any employees, and that it was not until the first week in January 2009 for the purpose of answering Mr. Cudney's discovery requests that the company actually began to attempt to contact present and former employees to see if ALSCO could find any complaints about Mr. Cudney since Mr. Siebe could not remember any. (PSMF ¶ 18) Mr. Siebe admitted that for many of the 53 employees that the company attempted to contact, Defendant was unable to come up with any specific reasons to put in their answers to Mr. Cudney's discovery request that asked for the details of the alleged complaints. (PSMF ¶ 18) In contradiction to ALSCO's assertion that employees did not want to work for Mr. Cudney, he has received various calls from ALSCO employees in which Mr. Cudney learned that the company had attempted only recently in January 2009 to get them to come up with complaints about Mr. Cudney that existed before his termination in August 2008, but that the employees had no complaints about Mr. Cudney. (PSMF ¶ 18)

Contrary to the suggestion in ALSCO's summary judgment brief submitted to the U.S. District Court, a July 17, 2008 incident

with an employee Mr. Cudney supervised, Jason Haight, was not a factor in Mr. Cudney's termination of employment as Mr. Siebe admitted that he made the decision to terminate Mr. Cudney prior to the Jason Haight incident, and Mr. Siebe made that decision within two or three weeks after Mr. Cudney had reported on June 10, 2008 that Mr. Bartich was intoxicated in the workplace and driving his company vehicle while drunk. (PSMF ¶ 19) Defendant's Human Resources Director also testified that the Jason Haight incident was not the reason for terminating Mr. Cudney. (PSMF ¶ 19) Mr. Siebe did not discuss the alleged Jason Haight incident with Mr. Cudney. (PSMF ¶ 19) Mr. Haight was insubordinate to Mr. Cudney, and Mr. Haight had a reputation as a hot-head and immature employee. (PSMF ¶ 19)

H. **Other ALSCO Managers Were Subject Of Complaints But Not Fired**

One of Defendant's Spokane Branch employees whose deposition was taken in this case, Direct Products Sales Manager Ken Zink, stated at the beginning of his deposition that he was uncomfortable to be testifying in this case because he felt that he risked being terminated like Mr. Cudney. (PSMF ¶ 20) Mr. Zink

had smelled alcohol on Regional Manager John Bartich prior to the date Mr. Cudney reported his concerns to Defendant on June 10, 2008. (PSMF ¶ 20) However, Mr. Zink did not report his observations to Defendant about Mr. Bartich because he was fearful his job would be placed in jeopardy. (PSMF ¶ 20)

Mr. Cudney informed Mr. Zink that he had reported observing Regional Manager John Bartich under the influence of alcohol to Defendant's Human Resource Manager Doug Meyers, and that HR Manager Meyers had told Mr. Cudney that he should be worried about his job for reporting the alcohol use by Mr. Bartich. (PSMF ¶ 20) Mr. Zink testified that many of Defendant's managers have been the subject of criticism at Defendant's Spokane Branch regarding being difficult to work with, including Assistant Manager Marty Siebe and Regional Manager John Bartich, none of whom were fired for such reasons as occurred with Mr. Cudney. (PSMF ¶ 20) Mr. Zink worked well with Mr. Cudney during his tenure of employment with the company. (PSMF ¶ 20)

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IV. ARGUMENT

A. Certified Questions

The following questions have been certified to this Court by the United States District Court for the Eastern District of Washington:

Question No. 1: Does the Washington Industrial Safety and Health Act (WISHA), in particular RCW 49.17.160, and accompanying Washington Administrative Code (WAC) regulations (WAC 296-360-005 et seq. and WAC 296-800-100 et seq.), adequately promote the public policy of insuring workplace safety and protecting workers who report safety violations so as to preclude a separate claim by a terminated employee for wrongful discharge in violation of public policy?

Question No. 2: Do the DUI laws of the State of Washington, in particular RCW 9.91.020, RCW 46.61.504, and RCW 49.61.502, adequately promote the public policy of protecting the public from drunken drivers so as to preclude a separate claim by a terminated employee for wrongful discharge in violation of public policy?

B. Legal Elements For Claim Of Wrongful Discharge In Violation Of Public Policy

Absent a contract to the contrary, Washington employees are generally terminable "at will." Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 935, 913 P.2d 377 (1996). The common law tort of wrongful discharge is a narrow exception to the terminable-at-will doctrine. Id. at 935-36.

The tort of wrongful discharge applies when an employer terminates an employee for reasons that contravene a clearly mandated public policy. Id. As this Court has stated, the tort of wrongful discharge "operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy." See Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 313, 96 P.3d 957 (2004).

To prove the tort of wrongful discharge in violation of public policy, a plaintiff must establish:

- (1) the existence of a clear public policy (the clarity element);
- (2) that discouraging the conduct in which [he] engaged would jeopardize the public policy (the jeopardy element);

- (3) that the public-policy-linked conduct caused the dismissal (the causation element); and
- (4) the employer must not be able to offer an overriding justification for the dismissal (the absence of justification element).

Gardner, supra, 128 Wn.2d at 941.

Here, Defendant ALSCO has conceded that Mr. Cudney has satisfied the Clarity element of his claims. The certified questions before this Court focus on the Jeopardy element.

This Court has held that the question of whether a clear mandate of public policy exists is a question of law. Sedlacek v. Hillis, 145 Wn.2d 379, 388, 36 P.3d 1014 (2001). This Court may decide the existence of a public policy despite factual inquiries that must be made at trial to determine whether the Plaintiff has proven a violation of public policies. See Danny v. Laidlaw Transit Services, Inc., 165 Wn.2d. 200, 193 P.3d 128 (2008).

To determine whether a clear public policy exists, a court must ask whether the policy is demonstrated in a “constitutional, statutory or regulatory provision or scheme.” See Danny v. Laidlaw Transit Services, Inc., 165 Wn.2d at 207, 193 P.3d at 131, citing Thompson v. St. Regis Paper Company, 102 Wn.2d 219, 232, 685

P.2d 1081 (1984). "Public policy concerns what is right and just and what affects the citizens of the state collectively." Id. at 131.

Washington courts have generally recognized the public policy exception when an employer terminates an employee as a result of his (1) refusal to commit an illegal act, (2) performance of a public duty or obligation, (3) exercise of a legal right or privilege, or (4) in retaliation for reporting employer misconduct. Dicomes v. State, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989). Mr. Cudney's claim arises from the second and fourth bases for wrongful termination.

C. The DUI Statutes State A Clear Public Policy

Defendant ALSCO also conceded in its summary judgment papers filed with the U.S. District Court that the DUI statutes satisfy the Clarity element of Mr. Cudney's claims.

Taken to its logical conclusion, Defendant ALSCO's position as argued to the U.S. District Court is that an employee who reports to his supervisors that a crime (here, DUI) was committed by a supervisor can be fired for making the report with no recourse by the reporting employee.

RCW 49.61.502 addresses the consequences for a person who is found guilty of driving while under the influence of intoxicating liquor in the state of Washington. In addition, RCW 46.61.504 addresses the consequences for a person who is found guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor within the state of Washington. Further, RCW 9.91.020 provides "Every person who, ... being the driver of any ... vehicle upon any public highway, street, or other public place, is intoxicated while engaged in the discharge of any such duties, shall be guilty of a gross misdemeanor."

As set forth above, Washington's law prohibits and punishes a person for driving a vehicle or being in physical control of it while under the influence of alcohol. Mr. Cudney's report to ALSCO about Mr. Bartich's intoxicated condition, and that Mr. Bartich was driving a company vehicle while drunk in violation of this Washington statutory scheme, clearly implicates a public policy set forth in the DUI statutes.

There can be no question that the DUI statutes are designed to address a clear public policy of keeping intoxicated drivers off the

road, which certainly must include employees who are intoxicated while driving the company's vehicles as expressly provided in RCW 9.91.020.

Washington courts have repeatedly recognized the danger drunk drivers pose to the public. Frank v. Washington State Dept. of Licensing, 94 Wn.App. 306, 972 P.2d 491 (1999)(The automobile is both a useful machine and a potentially deadly weapon); State v. McClendon, 131 Wn.2d 853, 935 P.2d 1334 (1997)("Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage."); State v. Bostrom, 127 Wn.2d 580, 902 P.2d 157 (1995)(few crimes have received more public attention than that of driving while intoxicated. "The carnage caused by drunk drivers is well documented and needs no detailed recitation here." In the last decade, the citizens of this state and citizens around the nation have sought to combat the menace of drunk driving); City of Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988)(This court takes judicial notice "there is no denying the fact that there is a very strong societal interest in dealing effectively with the problem of

drunken driving.”); State v. Day, 96 Wn.2d 646, 638 P.2d 546 (1981)(Drunk drivers do indeed create a menace to the public); State v. Moore, 79 Wn.2d 51, 483 P.2d 630 (1971)(The intoxicated driver is undoubtedly an increasing public menace of alarming proportions); State ex rel. Ralston v. State Dept. of Licenses, 60 Wn.2d 535, 374 P.2d 571 (1962)(Drunk driving is, under any reasonable interpretation, a serious violation of the traffic laws of this state).

D. The Statutes Provide Sufficient Notice Of A Public Policy

Defendant argued before the U.S. District Court that the Jeopardy element is not satisfied under the DUI statutes because (1) the statutes do not give employers sufficient notice of a public policy that would make it unlawful to terminate an employee for reporting a supervisor driving a company vehicle while drunk, and (2) Mr. Cudney possessed adequate means to address the public policy concerns underlying the DUI statutes by calling 911.

Defendant is correct in noting that the DUI statutes do not specifically state that an employer is precluded from firing an employee who reports a co-worker’s alleged drunk driving violation.

However, it surely is a fair statement to say that criminal statutes generally do not specifically address termination of employees for reporting crimes, and, as a practical matter, there are many public policies in which there is no specific expression of a prohibition of retaliation against an employee. See e.g. Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 913 P.2d 377 (1996)(finding existence of public policy concerning public safety under Good Samaritan theory).

In a persuasive opinion, Chilson v. Polo Ralph Lauren Retail Corporation, 11 F.Supp.2d 153 (D. Mass. 1998), an employee claimed she was terminated in reprisal for complaining, in part, about her supervisor's criminal behavior. The plaintiff in Chilson reported her concerns to defendant's Human Resources Department, including the fact that her supervisor had a practice of serving alcohol to staff, including minors, as an inducement to work extra hours, and displaying herself naked to employees and customers in the defendant's retail store. The Chilson court held that the plaintiff had a viable cause of action for wrongful termination in violation of public policy because, "***An at will employee has a cause of action if discharged for complaining***

about criminal conduct, even if the complaint is made internally to the employer rather than to public authorities." 11 F.Supp. 153 at 157. It is irrelevant whether an employer knows it is unlawful to fire an employee after reporting a crime to the employer --- the public policy underlying the law is what matters. See Kelly v. Bass Pro Outdoor World, LLC, 245 S.W. 3d 841 (Mo. App. 2007)(employee protected under public policy for reporting to employer crime by supervisor).

Defendant argued to the U.S. District Court that Mr. Cudney could have called 911 to report his observations of Mr. Bartich driving a company vehicle while drunk, apparently suggesting that is the only right Mr. Cudney has under the DUI statutes. It is irrelevant to the pending lawsuit that Mr. Cudney did not call 911. Mr. Cudney submits that the issue in this case is whether it violates the public policy of Washington to terminate him for **reporting** to his employer that he observed a supervisor drunk in the workplace, and then observed him driving while drunk in a company vehicle.

Another issue which certainly must be considered in this case is the knowledge by Defendant's managers that the Regional Manager had been under the influence of alcohol while in the

workplace well before Mr. Cudney reported his observations on June 10, 2008. Defendant cannot legitimately argue that it had exercised any ordinary care that a prudent person would do in keeping the workplace reasonably safe in view of the fact Defendant was well aware its Regional Manager had been showing up at work under the influence long before Mr. Cudney's report, and did nothing to correct or prevent it. (PSMF ¶¶ 5-10)

E. WISHA And Its Regulations State A Clear Public Policy

The Washington legislature has enacted statutes addressing workplace safety under RCW 49.17, et seq. These workplace safety laws are known as the "Washington Industrial Safety and Health Act of 1973." (hereinafter referred to as "WISHA") See RCW 49.17.900.

The Washington State Court of Appeals has previously held that WISHA, by referring in broad terms to the protection of the workplace health and safety of every citizen in the state, sets forth a clear mandate of public policy. Smith v. Employment Security Department, 100 Wn.App. 561, 569, 997 P.2d 1013 (2000).

RCW 49.17.010 describes the purpose of WISHA:

“The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses and payment of benefits under the Industrial Insurance Act. Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards described by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).”

RCW 49.17.040 provides that the Washington State Department of Labor and Industries (“L&I”) has rulemaking authority to enact regulations governing safety and health standards for conditions of employment in the state of Washington. The director of L&I has the duty and power to adopt and amend rules and regulations for safety and health standards of general and special application in all workplaces. See RCW 49.17.050.

The WISHA statute and WACs clearly provide that WISHA applies to any employer who hires someone to work for them as an employee. See RCW 49.17 et seq.; WAC 296-800-100.

Included within the regulations that have been enacted by L & I under the Washington Administrative Code is a set of workplace safety rules titled "The WISHA Core Rules: Your Foundation For A Safe And Healthful Workplace." See WAC 296-800-100, et seq.

These workplace rules contain a regulation which imposes significant duties upon **employers** in Washington concerning alcohol in the workplace. WAC 296-800-11025 states in relevant part:

You [**employer**] must:

- Prohibit alcohol . . . from your workplace, except in industries and businesses that produce, distribute, or sell alcohol and narcotic drugs.
- Prohibit employees under the influence of alcohol . . . from the worksite.

The WACs also impose significant responsibilities upon **employees** regarding safety in the workplace. Specifically, WAC 296-800-120 provides as follows:

"Employee's responsibility: To play an active role in creating a safe and healthy workplace and comply with all applicable safety and health rules.

WAC 296-800-12005 also specifically delineates an **employee's** responsibilities in the workplace in Washington.

Employees must:

- Study and follow all safe practices that apply to their work.
* * *
- Apply the principles of accident prevention in their daily work. . .
* * *
- Do everything reasonably necessary to protect the life and safety of employees.

The WAC addresses discrimination against employees for discussing and participating in any WISHA Health and Safety related practice:

Note: Employees may discuss and participate in any WISHA safety and health-related practice . . . without the fear of discrimination. Discrimination includes: Dismissal, demotion, loss of seniority, denial of a promotion, harassment, etc.” (See Chapter 296-360 WAC, Discrimination) pursuant to RCW 49.17.160 for a complete description of discrimination and the department’s responsibility to protect employees. [Sic: there appears to be a parentheses out of place in the actual WAC as published.] (Emphasis added) WAC 296-800-120.

It is Mr. Cudney’s position that these statutes and regulations set forth clear public policies which encourage employees to participate in workplace safety, and protect

employees from discharge from employment for reporting to management that another employee is intoxicated in the workplace. As set forth above, it has already been previously determined by the Washington Court of Appeals that WISHA --- RCW 49.17 et seq. --- sets forth a “clear mandate of public policy.” Smith v. Employment Security Department, 100 Wn.App. 561, 569, 997 P.2d 1013 (2000).

Defendant argued before the U.S. District Court that WISHA, RCW 49.17.160, provides a comprehensive statutory remedy like the federal ERA in Korslund v. Dyncorp, 156 Wn.2d 168, 125 P.3d 119 (2005). In Korslund, this court held that the **comprehensive remedies** under the federal Energy Reorganization Act (ERA) were adequate to protect the public policy under ERA that prohibited the termination of nuclear industry employees for reporting safety and fraud issues. Because the ERA remedies were adequate, the court held that the plaintiffs could not satisfy the Jeopardy element of their public policy claims.

Defendant argued to the U.S. District Court based on Korslund that RCW 49.17.160 also provides adequate remedies to safeguard the clear public policy of WISHA that protects Mr.

Cudney from termination for reporting that his Regional Supervisor was intoxicated on the job, and was driving a company vehicle while drunk.

But in a key opinion not cited or discussed by Defendant ALSCO in its opening brief to the U.S. District Court, Wilmot v. Kaiser Aluminum, 118 Wn.2d 46, 821 P.2d 18 (1991), the court took a close look at an almost identical statute to the one at issue in this case, RCW 49.17.160. The statute at issue in Wilmot, RCW 51.48.025, prohibited retaliation against employees who filed worker compensation claims. Because that statute and the one at issue here, RCW 49.17.160, are virtually identical in both procedure and remedies, Wilmot provides significant guidance.

Although ALSCO does not make it a direct issue in its defense, the Wilmot court clearly held that an employee is not required to file a claim under the worker comp retaliation statute as a condition precedent to initiation of a public policy discharge claim against his employer. This is important because while ALSCO argues that RCW 49.17.160 provides an adequate remedy to protect the public policy at issue in this case under Korslund, an employee is not required to file a claim under the statute or exhaust

its procedures before filing a lawsuit alleging wrongful discharge in violation of public policy. If RCW 49.17.160 is not exclusive, yet filing a claim pursuant to its provisions is the only remedy an employee has to assert a public policy protection, then it is hard to see how the statute exists as an adequate alternative means to promote a public policy.

Equally importantly, the Wilmot court held that in reviewing adequacy of remedies under the worker comp retaliation statute, it is not simply the presence or absence of a remedy that is significant. 118 Wn.2d at 61. Instead, the ***comprehensiveness of the remedy*** provided is a factor which courts must consider. Id. In reviewing the worker comp retaliation statute, the Wilmot court came up with a long list of serious doubts about the adequacy of remedies available under RCW 51.48.025 compared to those available under the tort claim for wrongful discharge in violation of public policy.

First, the Wilmot court stated that it was not clear whether the reference in the worker comp retaliation statute to “all appropriate relief” would allow for the recovery of emotional distress damages. Significantly, the statute being used here as a shield by

Defendant ALSCO, RCW 49.17.160, uses the same phrase “all appropriate relief”, and also makes no reference to emotional distress damages being available to an employee terminated for reporting safety violations.

Second, the Wilmot court noted that the worker comp retaliation statute’s list of available remedies --- rehiring or reinstatement with back pay --- appeared to be only equitable in nature, adding to the court’s doubt that the Legislature intended that “all appropriate relief” under the statute means all damages normally available in a tort action. The statute at issue here, RCW 49.17.160, sets forth virtually identical limited equitable relief as the worker compensation retaliation statute; namely, rehiring or reinstatement of the employee to his former position with back pay. These remedies fall far short of the remedies available in a common law action for wrongful discharge in violation of public policy.

Third, the Wilmot court continued listing its doubts about the adequacy of remedies under the worker comp statute by discussing the fact that the worker comp retaliation statute, like RCW 49.17.160, uses the words “for cause shown” as the threshold that

must be met for a court to enter any remedy in favor of an employee. 118 Wn.2d at 61-62. The Wilmot court stated that a “for cause shown” standard implies equity, and is an unusual term to use in the context of a trial in Superior Court where general damages can be awarded in a claim for public policy discharge. On this point, the Wilmot court summarized its strong doubts that the worker comp retaliation statute provided an adequate remedy in lieu of a public policy discharge claim by stating **“The statute is unclear as to whether it allows for the possibility of a general damages award. We think such damages are necessary to constitute an adequate remedy.”** 118 Wn.2d at 62 (emphasis added).

Fourth, the Wilmot court raised the question of who would control a lawsuit if an action in Superior Court were to be brought by the Director of L&I, a possible option under both the worker comp retaliation statute and RCW 49.17.160. In that regard, the Wilmot court questioned whether the worker comp retaliation statute even allowed an employee to personally assert a claim for general damages, assuming general damages are even authorized by the statute in the first place.

Fifth, the Wilmot court pointed out in its discussion of the worker comp retaliation statute that a significant question existed as to whether an employee is entitled to a jury trial --- a valuable right available to an employee asserting a public policy discharge claim.

Clearly, a simple comparison of RCW 49.17.160 and its sister statute addressed in Wilmot, RCW 51.48.025, to the **comprehensive** ERA statute in Korslund reveals significant and compelling differences. Unlike RCW 49.17.160, the ERA provides **comprehensive remedies** that serve to protect the specific public policy identified by the plaintiffs in Korslund. The ERA provides a comprehensive administrative adjudication process that actually allows for the issuance of orders made on the record after “notice and opportunity for public hearing.” 42 U.S.C. § 5851(b)(2)(A). Indeed, a complaining employee under ERA is entitled to a full evidentiary hearing before an Administrative Law Judge governed by the federal Administrative Procedures Act, 5 U.S.C. § 706. See Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984)(reviewing ALJ findings and decision on employee termination under ERA).

The ERA contains provisions for the issuance of orders to

the violator to “take affirmative action to abate the violation”; reinstatement of the complainant to his or her former position with the same compensation, terms and conditions of employment; back pay; compensatory damages; and attorney and expert witness fees. 42 U.S.C. § 5851(b)(2)(B); Korslund, 156 Wn.2d at 182. While compensatory damages are available under ERA, it is doubtful such damages are available under RCW 49.17.160 as clearly pointed out by the court in Wilmot. This is a critical point, as Wilmot unequivocally held it is necessary to be able to recover general damages in order to constitute an adequate remedy for wrongful discharge in violation of public policy. Wilmot, 118 Wn.2d at 62. There can be no doubt that RCW 49.17.160, on its face, does not provide for full range of recoverable damages as the ERA statute at issue in Korslund.

The ERA statute at issue in Korslund also contains other substantial provisions which are not present in RCW 49.17.160. As noted above, the ERA allows for a public evidentiary hearing under the federal APA --- but RCW 49.17.160 and its accompanying WACs do not provide for any such procedure. The ERA contains comprehensive provisions which allow any person adversely

affected or aggrieved by an order issued under ERA to obtain review in the United States Court of Appeals for the Circuit in which the violation allegedly occurred. 42 U.S.C. § 5851(c)(1). In contrast, RCW 49.17.160 contains no provisions identifying any right to appeal to any court from a determination of the Director of L&I.

F. **RCW 49.17.160 Does Not Adequately Protect The Public Policy Because It Leaves Public Policy Enforcement Up To Chance**

Assuming an employee has any reason to even be aware of its existence, which is questionable, RCW 49.17.160 contains a strict time frame an employee must satisfy if he chooses to pursue this non-exclusive remedy and file a complaint with the Department of Labor and Industries. Specifically, an employee has only 30 days after being terminated or discriminated against to file a complaint with the Director of L&I alleging discrimination. See RCW 49.17.160(2). In contrast, the statute of limitations for bringing a wrongful discharge claim is three years. RCW 4.16.080(2); Douchette v. Bethel Sch. Dist. No. 403, 117 Wn.2d 805, 818 P.2d 1362 (1991).

Mr. Cudney contends that the 30-day complaint period is

clearly too restrictive on an employee compared to what is available under the normal timelines for asserting the remedy of a public policy wrongful discharge claim in court. This restrictive 30-day time frame does not lend itself to promoting the enforcement of an important public policy. The 30-day limitations period leaves it up to chance that an employee, after being fired, would even know to file a claim in such a short period of time. Even the comprehensive ERA addressed in Korslund had a 6-month period to file a complaint.

There can be no doubt that restrictive time frames for taking action are not viewed favorably in Washington when the issue involves a public policy wrongful discharge claim. In a public policy discharge case, Hubbard v. Spokane County, 146 Wn.2d 699, 50 P.3d 602 (2002), the court held that a statute that required an aggrieved citizen to receive notice of a zoning action, and to then act within a relatively short time frame of 20 days of notice, would result in it being left purely up to chance whether a public policy was enforced. 146 Wn.2d at 717. The same is true here in that it would be left up to chance as to whether an employee would even know that he must act within 30 days of discrimination in order to

seek redress for a public policy violation under RCW 49.17.160.

This 30-day time frame is a trap for the unwary employee, and is far too restrictive on an employee when the public policy at stake in this case is of the highest order --- protecting human life. See Gardner v. Loomis Armored Car, 128 Wn.2d 931, 944, 913 P.2d 377 (1996).

G. RCW 49.17.160 Puts An Employee In An Untenable Position

Unlike the ERA statute and federal APA that provided a ***comprehensive remedial scheme*** in Korslund, neither RCW 49.17.160 and its accompanying WACs provide for a right to an evidentiary hearing under the state APA. There is no indication that the Director is required or allowed under 49.17.160 to take depositions, propound discovery requests or obtain documents, or to do anything other than merely speaking to the complaining employee. While the Director has the right to bring an action in Superior Court if the Director finds merit to the complaint, the flip side is extremely harmful to the employee. Namely, if the Director determines there is no violation, the employee is in the untenable position of having a negative finding by the Director, and a time

frame of only 30 days to bring a lawsuit. To expect an employee to find a lawyer to file a lawsuit within 30 days despite a 3-year statute of limitations for asserting a public policy wrongful discharge claim, and to obtain a lawyer's assistance in the face of a negative finding of no violation after what may have been only a superfluous investigation by the Director, does not lend itself to adequately safeguarding a public policy. While the comprehensive ERA at issue in Korslund ensures certainty for an opportunity to fully and completely litigate a claim --- RCW 49.17.160 does not.

H. **Defendant's Position That Plaintiff Must Exhaust Available Administrative Remedies Is Baseless**

Defendant argued before the U.S. District Court a confusing position which seems to suggest that Mr. Cudney was not relieved from "exhausting administrative remedies unless he can first establish a violation."

Defendant's position is baseless under Wilmot, supra. This court in Wilmot clearly held that a worker is not required to file a complaint with the Director of Labor and Industries if the worker believed he was discharged or discriminated against because he had filed a worker comp claim. The worker comp retaliation statute

in Wilmot essentially mirrors the contents of RCW 49.17.160.

Defendant also suggested to the U.S. District Court that Mr. Cudney cannot establish a violation by Defendant ALSCO of WAC 296-800-11025. However, the actual facts from the depositions of Defendant's own managers submitted in the summary judgment proceedings confirm that ALSCO and its operation managers in Spokane were fully aware that the company's Regional Manager had been present in the workplace under the influence of alcohol **well before** Mr. Cudney made the mistake of stepping in front of the train, so to speak, by reporting Mr. Bartich being drunk on the job and driving his company car in that condition. (PSMF ¶¶ 5-10).

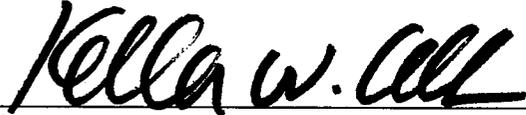
V. CONCLUSION

For the reasons stated above, the Court should answer the Certified Questions in a manner that provides Mr. Cudney with causes of action under the theories asserted before the U.S.

District Court, as well as any other theories this Court finds appropriate.

DATED this 22 day of June, 2009.

LAW FIRM OF KELLER W. ALLEN, P.C.

A handwritten signature in black ink that reads "Keller W. Allen". The signature is written in a cursive style and is positioned above a horizontal line.

Keller W. Allen, WSBA No. 18794
Attorney for Plaintiff Matthew Cudney

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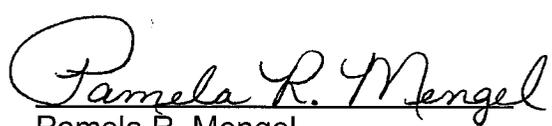
BY DONALD R. GARDNER

I HEREBY CERTIFY that on the 23 day of June, 2009 I

caused to be served a true and correct copy of the foregoing on the

following in the manner indicated:

Bryce J. Wilcox	<input checked="" type="checkbox"/>	U.S. Mail
Lukins & Annis, P.S.	<input type="checkbox"/>	Hand Delivery
1600 Washington Trust Financial Center	<input type="checkbox"/>	Facsimile
717 W. Sprague Avenue	<input type="checkbox"/>	Overnight Mail
Spokane, WA 99201-0466		


 Pamela R. Mengel