

NO. 83124-6

WASHINGTON STATE SUPREME COURT

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

IN

MATTHEW CUDNEY,

Plaintiff,

v.

ALSCO, INC., a Nevada corporation,

Defendant.

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STATE OF WASHINGTON
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PLAINTIFF'S REPLY BRIEF

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I. STATEMENT OF THE CASE

Mr. Cudney believes that the Statement of the Case provided in his opening brief adequately sets forth the facts that he believes will be proven at trial.

It is worthy of comment that ALSCO suggests in its Statement of the Case that Mr. Cudney suddenly lost his ability to lead after four and one-half years of stellar employment with ALSCO. It is difficult to believe ALSCO's stated reasons for Mr. Cudney's termination in view of the fact that he was the number one ranked Service Manager in sales in the Northwest Region for ALSCO, and he continued to receive performance bonuses right up to the point where the decision was made to fire him.

No matter how ALSCO spins the story of why it fired Mr. Cudney, the fact is inescapable that Mr. Cudney's fall from being the top ranked Service Manager after four and one-half years --- to a person not worthy of employment in ALSCO's eyes --- occurred only days after he reported Mr. Bartich driving drunk in a company vehicle. It certainly does not seem to promote and protect any public policy if an employee in this state faces the consequence of being fired for having the courage to report a drunk supervisor at

work who gets behind the wheel of his company car in that condition.

II. ARGUMENT

There is little new discussion in ALSCO's Response Brief that was not provided to the U.S. District Court in the summary judgment briefing. Mr. Cudney believes that his briefing before the U.S. District Court, and in his opening brief to this Court, adequately addresses the primary issues in this case.

In summary, it is Mr. Cudney's position that ALSCO's reliance on Korslund v. Dynacorp Tri-Cities Servs., Inc. 156 Wn.2d 168, 125 P.3d 119 (2005) stretches that decision far beyond the ERA statute at issue in that case, which protects whistleblowers at nuclear power plants and facilities.

As set forth in Mr. Cudney's opening brief, this Court in Wilmot v. Kaiser, 118 Wn.2d 46, 821 P.2d 18 (1991) clearly set forth a long list of serious doubts about the adequacy of remedies, and procedural issues, available under an almost identical statute to the WISHA statute at issue here.

In a case cited by ALSCO which is actually supportive of Mr. Cudney's position, Blinka v. Washington State Bar Association, 109

Wn.App. 575, 36 P.3d 1094 (2001), the court concluded that the already existing protections of RCW 49.60, et seq., the comprehensive statute containing Washington's Law Against Discrimination ("WLAD"), provided adequate protection to Ms. Blinka to address her wrongful termination and retaliation claims. However, while RCW 49.60 specifically identifies a broad range of remedies available to an employee who is subjected to unlawful discrimination or retaliation --- essentially the same kind of specific remedies identified in the ERA at issue in Korslund --- the same is not true of RCW 49.17.160 or the DUI statutes. RCW 49.60.030 provides an employee who believes he or she has been discriminated or retaliated against in violation of the WLAD with the absolute right to file a lawsuit (with a jury available under the Civil Rules) without exhausting any administrative remedies, and to specifically recover actual damages (including emotional distress damages), the costs of the lawsuit, including reasonable attorney fees, and the WLAD specifically provides for the recovery of any other appropriate remedy authorized by the United States Civil Rights Act of 1964 as amended. The remedies specifically delineated in the Civil Rights Act of 1964, as amended by the Civil

Rights Act of 1991, include: back pay, lost benefits, injunctions, hiring, promotion, reinstatement, front pay, attorneys' fees, expert witness fees, and court costs. See 42 U.S.C. § 2000e-5(g)-(k); 42 U.S.C. § 1981a. It would be difficult to imagine a Washington statute that sets forth a more comprehensive set of remedies to address employment matters than the WLAD, similar to the range of remedies provided by the ERA at issue in Korslund. But there is no specific reference to those kinds of damages in RCW 49.17.160, and certainly there are none specifically identified as available to an employee under the DUI statutes.

In short, ALSCO is apparently asking this Court to disregard its criticisms in Wilmot of the sister statute to RCW 49.17.160, and to conclude that there is no protection in this state for an employee who reports to his or her employer a supervisor's criminal activity that endangers public safety. But ALSCO does not explain how any public policy is promoted or protected if employees in this state are subject to being fired for coming forward to report the things Mr. Cudney observed about his Regional Manager. Mr. Cudney submits that ALSCO's position is not supported or warranted under Washington law.

III. CONCLUSION

For the reasons stated, the Court should answer the certified questions in favor of allowing Plaintiff Matthew Cudney to proceed to trial to prove his claims of wrongful discharge in violation of public policy.

DATED this 22 day of July, 2009.

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

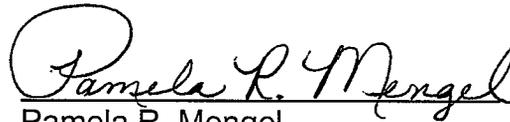


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of July, 2009 I
caused to be served a true and correct copy of the foregoing on the
following in the manner indicated:

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