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SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,

Respondent,

v.

PORT OF SEATTLE,

Petitioner.

On Appeal from the Court of Appeals,
Division I
of the State of Washington
No. 64545-5-I

**ANSWER OF PETITIONER PORT OF SEATTLE TO BRIEF OF
AMICUS CURIAE DEPARTMENT OF LABOR & INDUSTRIES**

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I. ARGUMENT

A. Under the Facts of the *Afoa* Case, STIA is Not a Multi-Employer Worksite as that Expression is Used in OSHA Cases.

The principal issue addressed in the amicus curiae brief by the Department of Labor & Industries (“L&I”) concerns the coined expression “multi-employer worksite”. This coined expression has been labeled a “doctrine” when its reference is the legal principles surrounding the interpretation of 29 U.S.C. Sec. 654(a), the OSHA counterpart to RCW 49.17.060.¹ The gist of L&I’s argument in its brief is that because there are multiple employers working at Seattle-Tacoma International Airport (“STIA”) the so-called “multi-employer worksite” doctrine as applied in OSHA cases should be applied to the facts of the *Afoa*² case.

In 1985, when this Court rendered its decision in *Goucher*³, it was persuaded by the rationale set forth in the *Teal*⁴ case for its interpretation of RCW 49.17.060. However, since this Court’s decision in *Goucher*, which did not make mention of the existence of a multi-employer worksite

¹See note 4 to Br. of L&I at 7.

²*Afoa v. Port of Seattle*, 160 Wn. App. 234, 247 P.3d 482 (2011).

³*Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 672, 709 P.2d 774 (1985).

⁴*Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984).

doctrine, this Court rendered its decisions in *Adkins*⁵, *Stute*⁶, and *Kamla*⁷. As this Court's decision in *Kamla* clearly holds, it is no longer the case that just because a landowner hires, or employs, an independent contractor to perform work for or on its behalf that it is *per se* considered an "employer" for purposes of compliance with RCW 49.17.060(2) with respect to the employees of its independent contractor.⁸

Consequently, L&I's use of the phrase multi-employer worksite doctrine as a reflection of Washington law as expressed by this Court in *Kamla* is a misnomer to the extent that the principles incorporated in this doctrine are different than this Court's holding in *Kamla*. The use of this phrase also is a misnomer when applied to the facts of the *Afoa* case. At least one reason why this coined expression is a misnomer with respect to the *Afoa* case is that although there are many different employers working at STIA, the Port of Seattle does not have a contract with these employers,

⁵*Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 750 P.2d 1257 (1988).

⁶*Stute v. P.B.M.C.*, 114 Wn.2d 454, 788 P.2d 545 (1990).

⁷*Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002).

⁸*Id.*, at 124-125.

including EAGLE and the airlines, the essence of which is the personal labor thereof for or on behalf of the Port.⁹

In the absence of such a personal labor contract between the Port and these employers, the Port cannot be considered an “employer” thereof and does not owe the employees thereof any specific duty under RCW 49.17.060(2) to comply with rules, regulations, and orders promulgated under Chapter 49.17 RCW. Under the facts of the *Afoa* case, and in accordance with the specific language of RCW 49.17.020(4) and (5) and RCW 49.17.060, the only employees to whom the Port owes such a duty are the Port’s direct employees.¹⁰

⁹In every case cited by the parties and amici addressing the duties under either WISHA or OSHA, an employment contract existed between the landowner/jobsite owner and an independent contractor, including subcontractors thereof, the essence of which was the personal labor of the independent contractor and/or its subcontractor. Because the expression “multi-employer worksite” as used in the OSHA cases encompasses only this factual scenario, it is an incorrect application of the phrase to include within it the factual scenario of the *Afoa* case. In the *Afoa* case, the Port of Seattle does not have a contract with either EAGLE or its clients, the airlines, the essence of which is the personal labor thereof for or on behalf of the Port. The contracts that the Port of Seattle have therewith are a license agreement and a lease operating agreement, respectively.

¹⁰For a detailed construction of RCW 49.17, see Answer of Petitioner Port of Seattle to Brief of Amicus Curiae Washington State Association for Justice Foundation at 4-13.

In its decision in the *Afoa* case, the Court of Appeals incorrectly rejected the foregoing construction of Chapter 49.17 RCW without any analysis whatsoever of the specific language of the pertinent statutes.¹¹ Instead, the Court of Appeals, like L&I in its amicus brief, improperly focused upon whether a landowner, such as the Port, might have “the greater practical opportunity and ability to insure compliance with safety standards” or whether the Port had “innate supervisory authority.”¹² In doing so, however, the Court of Appeals, and now L&I, completely ignored the holding in *Kamla* that whether such factors may or may not exist as to a particular landowner is immaterial as to whether the landowner owes employees other than its own direct employees a specific duty under RCW 49.17.060(2).¹³ Instead, this Court held that the determinative test is whether the landowner retained the right to control the performance of the work of its independent contractor.¹⁴

As has been explained throughout its briefing to this Court, the Port did not have a contract with EAGLE whereby EAGLE agreed to use

¹¹*Afoa v. Port of Seattle*, 160 Wn. App. at 247.

¹²*Id.* (Citations omitted.)

¹³*Kamla v. The Space Needle Corporation*, 147 Wn.2d at 124-125.

¹⁴*Id.*, at 125.

the personal labor of its employees to do something for or on behalf of the Port. As such, there was no work to be done for or on behalf of the Port over which the Port could retain control. Because under these undisputed facts there was no personal labor of EAGLE to be undertaken for or on behalf of the Port over which control could be retained by the Port, RCW 49.17.060(2) did not impose upon the Port the obligation to comply with the rules, regulations, and orders promulgated under Chapter 49.17 RCW for the benefit of EAGLE's employees, including Mr. Afoa.

B. The Port's Rules and Regulations Are the Expression by the Port of Seattle Commissioner of the Port of Seattle's Regulatory Authority.

Because STIA is not a multi-employer worksite as that expression is used in OSHA cases, and therefore this phrase is a misnomer when applied to the facts of the *Afoa* case, the remainder of the L&I amici brief actually supports the position of the Port of Seattle in the *Afoa* case. Specifically, the Department of Labor & Industries believes the law is as follows:

Regulatory agencies [insert Port of Seattle] may require compliance with the law as conditions for a license. L&I agrees

that merely asserting regulatory authority to require compliance with the law, without more, does not create a WISHA liability.¹⁵

L&I further states its belief as follows:

But L&I's exercise of its regulatory authority does not subject it to WISHA liability, because in enforcing WISHA in a workplace, L&I is not acting as an employer in the workplace but is instead exercising its authority as a sovereign. Similarly, a city [insert Port of Seattle] would not become liable under WISHA for merely asserting its regulatory authority for public safety in requiring a contractor to meet all applicable city ordinances for a license to perform work on a city street. (Footnote omitted.)¹⁶

L&I then states in its footnote thereto its belief as follows:

In addition, control that justifies liability must be one over the details of work performance. "It is one thing to retain a right to oversee compliance with contract provisions and a different matter to so involve oneself in the *performance* of the work," and only the latter justifies the WISHA controlling employer liability. *Kamla*, 147 Wn.2d 120-21 (citation omitted). "The retention of the right to inspect and supervise to insure the proper completion of the contract" does not constitute the control that justifies an employer liability. *Id.* (citation omitted).¹⁷

There is no evidence whatsoever in this case that in issuing a license to EAGLE and a lease to its airline clients the Port hired EAGLE or its airline clients to perform work for or on behalf of the Port. As has

¹⁵Br. of Wash. State Dept. of Labor & Industries at 16.

¹⁶*Id.*

¹⁷*Id.*, at 17.

been asserted by the Port from the very beginning of this case, the STIA Schedule of Rules and Regulations No. 4 does not amount to an expression by the Port that it intended to retain the right to control the performance of the work performed by EAGLE for its airline clients. Likewise, these Rules and Regulations do not in any way amount to an expression by the Port that it intended to retain a right to control the performance of the work of the airlines or any other employer that conducts business at STIA. To the contrary, the Rules and Regulations are in fact an undertaking by a governmental entity, i.e., the Port of Seattle, designed to govern the use of its property in order "to provide for the safety and proper conduct of persons and property using [STIA]." (CP 140) The forward to the Rules and Regulations states in pertinent part as follows:

1. The Seattle-Tacoma International Airport is owned and operated by the Port of Seattle, a municipal corporation, organized under statutory authority of the state of Washington.
2. The Port of Seattle is governed by five elective commissioners who have adopted the following rules and regulations with respect to the Seattle-Tacoma International Airport to provide for the safety and proper conduct of persons and property using the said Airport. The following rules and regulations are to be construed in conformity with all Federal, State, or local laws.

(CP 140)

Like the Department of Labor & Industries, the Port believes that “exercising its authority as a sovereign” is not the same as an employer of an independent contractor retaining the right to control the performance of work undertaken by the contractor for or on behalf of the employer. And, like the Department of Labor & Industries, the Port also believes that it does not become liable under WISHA for merely asserting its regulatory authority for public safety by requiring all employers and the employees thereof performing work at STIA to comply with all laws and the Port’s rules and regulations.

II. CONCLUSION

This Court should reject the notion that the coined expression “multi-employer worksite”, whether used as a doctrine or otherwise, applies to the facts of the *Afoa* case. This Court should adopt the belief of the Department of Labor & Industries that a regulatory authority, such as the Port, is not liable under WISHA for merely asserting its regulatory authority by requiring compliance with the terms of its Rules and Regulations as a condition to conducting business at STIA.

RESPECTFULLY SUBMITTED, this 6th day of February, 2012.

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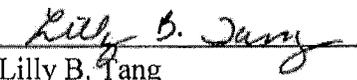
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