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ETTER, McMAHON, LAMBERSON,
CLARY & ORESKOVICH, P.C.

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SUPREME COURT
STATE OF WASHINGTON
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No. 30545-7-III

**SUPREME COURT
OF THE STATE OF WASHINGTON**

CHARLES ROSE, APPELLANT

v.

ANDERSON HAY AND GRAIN, RESPONDENT

APPELLANT'S REPLY TO *Brief*

RESPONDENT'S STATEMENT OF CASE

GREGORY G. STAEHELI

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TABLE OF CONTENTS

I. REPLY.....1
II. CONCLUSION.....5

TABLE OF AUTHORITIES

Cases

Cudney v. AlSCO, Inc., ___ Wn.2d ___, 259 P.3d 244 (2011).....2,3,4,5

Korslund v. Dyncorp Tri-cities Services, Inc.,
156 Wn.2d 168, 125 P.3d 119 (2005).....2

Wilmot v. Kaiser Aluminum & Chem. Corp.,
118 Wn.2d 46, 821 P.2d 18 (1991).....3

Ellis v. City of Seattle, 142 Wn.2d 450, 460, 10 P.3d 1065 (2000).....4

REPLY

Respondent asserts in their statement of the case that the Federal Secretary of Labor had exclusive jurisdiction over Appellant's termination complaint. This is clearly not the Federal Statutory Law. It is clearly not the Federal Common Law. The Federal Statute clearly sets out three separate alternatives, which are a Federal Administrative Claim, a Federal Court Claim, and a State Court Claim. I implore the Court to read the Federal law. An Administrative Claim is not a prerequisite to a Federal or State Court Claim. Despite the new Federal law, the new Federal Court Judge ruled that the Administrative Remedy was the exclusive remedy to filing for a Federal Claim despite the clear wording of the Federal Statute. Rather than appeal the ruling that the Secretary of Labor had exclusive jurisdiction, Plaintiff chose not to appeal this clearly erroneous ruling only to not have the same Judge make later critical rulings on evidence.

Appellant took the clear alternative of filing a State Court Claim allowed under the Federal Statute and allowed under State

Law prior to the *Cudney v. AlSCO, Inc.*, ___ Wn.2d ___, 259 P.3d 244 (2011) but now at issue with the Supreme Court.

On September 1, 2011, the Washington Supreme Court decided *Cudney v. AlSCO, Inc.*, ___ Wn.2d ___, 259 P.3d 244 (2011). In this 5/4 decision, the facts showed at page 245-246 that an employee alleged he was fired because he reported to his employer that his supervisor was drunk and was driving a company vehicle. The Supreme Court ruled in a 5/4 decision that *Cudney* failed to file a complaint within 30 days of his termination with Washington Industrial Safety and Health Act (WISHA) and this failed to show that other means of promoting public policy are inadequate to remedy his damages.

Appellant took the clear alternative of filing a State Court Action allowed under Federal Law and further consistent with *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005). Again, Appellant and his attorney did not sit idly by while an administrative remedy expired. We justifiably relied on the clear reading of the Federal Statute. To punish the Appellant under these circumstances is the equivalent of creating a fog-bound minefield for workers and their attorneys.

The two month old decision in *Cudney*, supra, now overturns prior case law based upon *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 51, 821 P.2d 18 (1991).

In addition, every notice posted in nearly all employments notes that RCW 49.17.160 (2) states as follows:

Any employee who believes he or she has been discharged...MAY WITHIN 30 DAYS after such violation occurs file a complaint with the director. (RCW 49.17.160(2))

Now, the *Cudney* decision expects that truck drivers and attorneys are expected to know that “MAY FILE” means “MUST FILE BECAUSE THIS IS YOUR ONLY REMEDY.”

Assuming Appellant sought out an attorney under 30 days from his termination, the *Cudney* decision stands for the proposition that “MAY” means “MUST” and the truck driver can interpret the English language to mean something other than the dictionary definition of “may”.

If a truck driver contacted an attorney before *Cudney*, supra, how is it that the attorney should be able to interpret *Wilmot*, supra, which held at page 66 that such a truck driver could assert a wrongful discharge claim independently of the so called

administrative remedy. See also, *Ellis v. City of Seattle*, 142, Wn.2d 450, 13 P.3d 1065, (2000).

This decision in *Cudney*, supra, is not just a terrible blow against workmen in the state of Washington; it is an encouragement to companies which provide by law a misleading poster saying a worker may file a claim within 30 days.

It should be incumbent on the Courts and the Legislature to clearly advise workers. If 20 years of common law is to be wiped out in a single isolated Supreme Court decision in September 2011, how can it be applied before it ever came out.

Five Supreme Court Judges agreed with the *Cudney* decision. I do not expect any employer will be rushing to inform its truck drivers, that when the poster for employees states “may file”, what the two words really mean to truck drivers is “this is your only remedy, so see a lawyer ASAP because you’re got thirty days to figure out that “may” means “must” and “Remedy” means “Your only remedy” because those pesky juries are long gone.

The *Cudney* decision is an undeserved boon to employers and devastating blow to working men and woman in the State of Washington. Further, because the deterrent value of twelve citizen

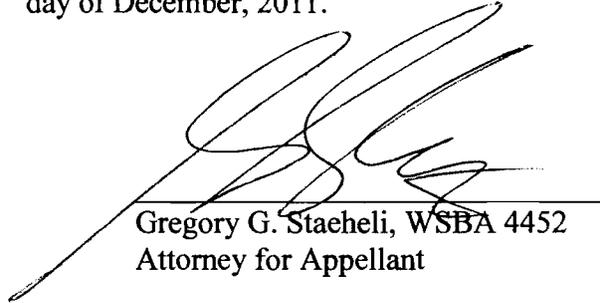
jurors is eliminated, the real and present danger to motoring public in this case goes up not down. Finally, the common law in employment issues should be clear and steady. The more it is made a minefield for lawyers the more workers like Charlie Rose will hear from lawyers, "I have nothing to offer you."

CONCLUSION

Since Respondent failed to note in his brief that *Cudney*, surpa, is subject to a motion for reconsideration. I do ask that the Supreme Court delay its ruling in this case until the reconsideration is decided. If the Supreme Court holds that the only remedy for Rose under State Law is an Administrative Action with a 30 day time limit (Statute of Limitations) such a ruling for employers should also be followed up by a clear and unmistakable ruling that "all appropriate relief be deemed all general damages suffered or words to that effect.

We respectfully ask this Court to reverse the trial court Judge's ruling dismissing this case.

Dated this 1st day of December, 2011.



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