No. 90858-3

WASHINGTON SUPREME COURT

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

Plaintiffs/Respondents,

v.

NORTHLAND SERVICES, INC.,

Defendant/Petitioner.

Respondents Currier et al.'s Answer to WTA's Amicus Brief Re: Petition for Review

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The Washington Trucking Associations ("WTA") filed amicus briefing in support of the Petition for Review of Northland Services, Inc. ("NSI"). Respondents Larry Currier et al. answer:

I. For retaliation, the reasonably-perceived discrimination need not be perpetrated by NSI and, regardless, the facts here support a reasonable belief NSI supervisors were involved.

Contrary to WTA's legal position, the issue here is not whether there was actionable discrimination, but whether a *layperson* could have formed a reasonable belief that she or he witnessed prohibited discrimination. *See Ellis v. City of Seattle*, 142 Wn.2d 450, 461, 13 P.3d 1065 (2000); *Estevez v. Faculty Club*, 129 Wn.App. 774, 798, 120 P.3d 579 (2005) (citing *Kahn v. Salerno*, 90 Wn.App. 110, 130, 951 P.2d 321, *review denied*, 136 Wn.2d 1016 (1998)); *Graves v. Dept. of Game*, 76 Wn.App. 705, 887 P.2d 424 (1994) (*citing Gifford v. Atkinson, Topeka & Santa Fe Ry.*, 685 F.2d 1149 (9th Cir. 1982)); *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994).

Whether NSI was part of the discrimination is not dispositive here.[1] If NSI was not, it would still be liable for retaliating against

[1] WTA asserts retaliation claims are limited to reports of *employer's* discrimination. WTA Br. 8. None of its citations support that, or even address independent contractors: *Hollenback v. Shriners Hosps. for Children* involved an employer *conceding* an employee engaged in statutorily-protected activity. 149 Wn.App. 810, 821, 206 P.3d 337 (2009). In *Coville v. Cobarc Servs., Inc.*, the court concluded there was no

Currier. *See*, under federal law, *Trent v. Valley Electric Assoc. Inc.*, 41 F.3d 524, 526 (9th Cir. 1994) (imposing liability for retaliation based upon the acts of independent contractors and others); *Galdamez v. Potter*, 415 F. 3d 1015, 1022 (9th Cir. 2005) (*citing Folkerson v. Circus Circus Enters., Inc.*, 107 F. 3d 754, 756 (9th Cir 1997)) (imposing liability for the conduct of a private patron where the company failed to take corrective action against impermissible conduct of which it knew or should have known). The actual state of the law is irrelevant here: the above case law at least provides grounds for a layperson to form a reasonable legal belief the discriminatory conduct here was prohibited.

As a separate and sufficient alternative, liability also attaches here because Currier had a reasonable factual belief that NSI was involved. There were several instances of racist conduct at NSI, at least one instance involving Jim Sleeth and another with Patrick Franssen present – both NSI dispatchers. *See* RP 149:19-21; 150:13-22; 151:20-152:4; RP 158:6-159:8. Currier reported his reasonable belief of their involvement to Judy McQuade, NSI's Quality Assurance Manager. RP 163:13-167:13.

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deliberateness for constructive discharge nor statutorily-prohibited activity where an employee reported her supervisor for masturbating in a seldom-used, locked basement room. 73 Wn.App. 433, 440, 869 P.2d 1103 (1994). *Matson v. United Parcel Serv., Inc.* addresses a female employee who avoided summary judgment challenging an employer's gender discriminatory policies. 872 F.Supp.2d 1131, 1142 (W.D.Wash. 2012).

Ultimately, WTA's argument that the law requires NSI to be involved in the discrimination: (a) conflicts with the law; (b) is irrelevant, because a reasonable layperson could have believed that NSI did not need to be involved under current law; and (c) ignores the fact that Currier had a reasonable factual belief that NSI was involved.

II. Changing the facts also changes the reasonable belief analysis.

WTA attempts a Straw Man Argument, asserting that the Court of Appeals' decision would make NSI responsible for discriminatory conduct between its independent contractors which occurred thousands of miles away from the NSI facility. WTA Br. 3, 10. It wouldn't. Substituting false, hypothetical NSI-friendly facts – e.g. what if the three truckers were 1,000 miles away from the NSI facility instead of the speaker yelling from the NSI dispatch porch – weighs against a fact-finder concluding the reporter had a *reasonable belief* of prohibited discrimination. With different facts, a fact-finder might reach a different conclusion.

But that has no relevance here. The issue is whether Currier had a *reasonable belief* that the discriminatory conduct *here* was prohibited. The trial court concluded he did, where there was a history of discriminatory conduct at NSI, with some instances involving NSI dispatchers; the comment was yelled from the NSI dispatch porch; and it implied NSI assigned Latino drivers less favorable routes.

This case stands for nothing more than a factual finding of a reasonable belief under the present facts.

III. The legislature not only used broad language in providing protection against retaliation, but mandated that language be liberally construed.

WTA argues the statutory language for retaliation prevents an independent contractor from suing the business that hired her or him. WTA Br. 4-8. Creating a loophole so a business can retaliate against an independent contractor at will is inconsistent with the statutory language, its statutorily-mandated broad construction, and case law.

RCW 49.60.210(1), the retaliation provision, states:

> It is an unfair practice for any employer, employment agency, labor union, or *other person* to discharge, expel, or otherwise discriminate against *any person* because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.
>
> (Emphases added).

It is difficult to imagine broader, more inclusive language. The hiring party includes an employer or any "other person," and the victim can be "any person."

WTA argues "other person" "does not embrace the principal of an independent contractor." WTA Br. 6 n.7. But "person" under the statute expressly includes NSI in a multitude of ways:

> "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.
>
> RCW 49.60.040(19).

NSI was a corporation, proprietor, and lessee, which acted through its managers (the NSI dispatchers who retaliated against Currier).

The statute's inclusive language flows from the legislature's intent to provide robust protection against discrimination and retaliation, finding they "threaten not only the rights and proper privileges of its inhabitants but menace the institutions and foundation of a free democratic state." RCW 49.60.010. The legislature mandated the statute be construed liberally to combat discrimination and retaliation. RCW 49.60.020.

The Court of Appeals in *Malo v. Alaska Trawl Fisheries, Inc.* considered the RCW 49.60.210(1) language – "any employer, employment agency, labor union, or other person" – in the context of whether the retaliating party was a co-worker or acting on behalf of the company as its manager. There, the Court held "entities functionally similar to employers who discriminate by engaging in conduct similar to discharging or expelling a person who has opposed practices forbidden by

RCW 49.60" qualify as an "other person" for the purposes of retaliation liability. *See* 92 Wn. App. 927, 931, 965 P.2d 1124, 1126 (1998), *review denied*, 137 Wn.2d 1029 (1999).

Here, NSI had the power to end Currier's contract, terminating him as an independent contractor. NSI dispatchers Sleeth and Franssen, acting as and on behalf of NSI, terminated Currier, substantially motivated by a desire to punish him for reporting conduct Currier reasonably believed to be prohibited discrimination, and to avoid having to address the discriminatory conduct and racist bullying occurring at NSI. To the extent an employment-type relationship is required, the entity hiring (and firing) an independent contractor has the employer-type powers to qualify as an "other person" under RCW 49.60.210(1). *See id.*

WTA turns to WAC 162-16-230 for support. The Human Rights Commission ("HRC") asserts that independent contractors do not have protection under RCW 49.60.180 ("Unfair practices of employers"). WAC-162-16-230(1-2). That is irrelevant here. Currier sued under the *retaliation* statute (RCW 49.60.210), and had a reasonable belief Martinez had a right to hold his job without discrimination (RCW 49.60.030(1)). Currier, as an independent contractor, is afforded that protection – which is why HRC exercised jurisdiction over his claim. *See* RP 931:11-932:6.

If an individual reports conduct she or he reasonably believes to be discriminatory, she or he is protected from a retaliatory termination from the person or entity with the power to terminate. That is what the statute and case law provide; that is the protection Currier received here.

IV. The Court of Appeals' decision does not create a Hobson's Choice or "Doomsday Scenario."

There is no Hobson's Choice here, no "take it or leave it" situation. The original Hobson's Choice involved a stable owner who allowed those who wished to use his horses to either take the horse closest to the door, or to not take one at all. The "choice" was effectively a command; there was no real choice or alternative.

What WTA asserts NSI and other businesses hiring independent contractors face is a false dilemma: (Option 1) micromanage the way an independent contractor conducts her or his work assignments (and thus risk rendering the independent contractor an employer under the law), or (Option 2) be sued for the discriminatory conduct of the independent contractor. *See* WTA Br. 9.

No business faces this dilemma, because neither option posed actually flows from the Court of Appeals' decision.

Option 1: NSI is not being told to micromanage the way in which its independent contractors complete their assignments. Bullying

minorities on NSI property is not one of the decisions an independent contractor makes in determining how to complete her or his assignment. WTA provides a list of the type of discretion independent contractors retain: "owner/operators have the right to select their own delivery route, and [sic] take rest breaks, make meal stops, and decide where to end their day's work at their discretion." WTA Br. 2-3. These are all decisions that relate to completing the assignment – the choices independent contractors need to make. Whether the independent contractor bullies and yells at a minority on NSI property, right outside NSI dispatch, is not a method an independent contract chooses to complete his assignment.

There is no legal threat that NSI telling independent contractors not to be openly racist and hostile on NSI property will turn the independent contractors into employees because NSI is micromanaging how they do their jobs. If there were, the independent contractors here would already be employees: NSI alleged it told the speaker, Billy Howell, that such language and conduct was inappropriate at NSI. *See* RP 354:2-3. When Judi McQuade, an NSI manager, informed the independent contractors they could not use such language on NSI property, NSI did not even arguably turn those independent contractors into employees for the purpose of this litigation. *Id.* No business with independent contractors

actually risks turning independent contractors to employees by requiring them not to engage in racist bullying at its facility.

And that non-existent risk is not at issue in this case. This case is not based upon discrimination, but retaliation. The question here isn't whether NSI must or can change the behavior of its independent contractors. The issue here is whether NSI can fire someone who reports conduct he reasonably believes to be prohibited discrimination. This litigation is about NSI's retaliatory action.

WTA's Option 1 neither flows from this litigation, nor would a business telling an independent contractor not to engage in racial bullying turn that individual into an employee under agency law.

Option 2: Nor does this case subject businesses to the false dilemma's second prong: the business sued for discrimination based solely upon the independent contractor's discriminatory behavior. This case addresses NSI's retaliation against Currier for reporting what he reasonably believed, both legally and factually, was prohibited discriminatory conduct. Businesses are not faced with a difficult choice: they can easily avoid the situation NSI is currently in by not firing and retaliating against its independent contractors for reporting discrimination.

WTA hints at a "Doomsday Scenario" where independent contractors will frivolously report discrimination so the business cannot

fire her or him. False reports occur; they are not endemic, nor will they be. Anyone who believes that discrimination and retaliation claims are easy to prove, and easy to win, does not practice this area of law. This case, spanning years of motions, a trial, and two appeals, is a prime example.

Furthermore, an independent contractor is already covered against direct discrimination by *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996). If this "Doomsday Scenario" of false reporting were going to occur, it would have already occurred with frivolous reports of direct discrimination after *Marquis*. That never happened.

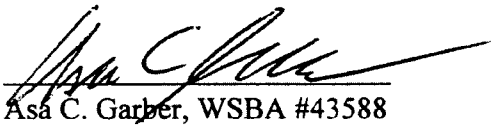
V. Fee Request

Counsel for Respondents request their costs and attorneys' fees for answering the amicus briefing of WTA regarding the Petition for Review, pursuant to RAP 18.1(j).

VI. Conclusion

Nothing in WTA's briefing supports review under RAP 13.4.

DATED November 3, 2014.



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Certificate of Service

I hereby certify that a true and correct copy of Respondents Currier et al.'s Answer to WTA's Amicus Brief Re: Petition for Review was served on counsel below by placing it today in the United States mail, first class postage prepaid, addressed to:

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Please find attached for filing: Plaintiffs/Respondents Larry Currier et al.'s Answer to the Amicus Briefing of Washington Trucking Associations regarding Northland Services, Inc.'s Petition for Review.

Thank you for your time and attention,

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