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No. 70128-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents,

v.

NORTHLAND SERVICES, INC.,

Appellant.

BRIEF OF APPELLANT

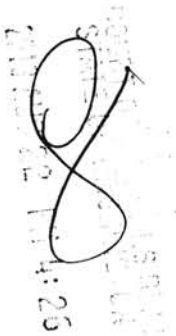

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TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (CONT.)

CASES (CONT.)

TABLE OF AUTHORITIES (CONT.)

CASES (CONT.)

TABLE OF AUTHORITIES (CONT.)

STATUTES

REGULATIONS

I. INTRODUCTION

A fundamental issue in this appeal is whether a racially derogatory joke made solely by one independent contractor to another independent contractor can constitute employment discrimination. The pivotal issue before this Court is whether a person who complains about that derogatory joke between those two independent contractors can make a claim for retaliation under R.C.W. §49.60.210(1) merely for believing he was opposing employment discrimination.

A trucking services contract between appellant Northland Services, Inc. (Northland) and respondents Larry Currier, Larry Currier DBA American Container Express, and American Container Express, Inc. (collectively, Currier) was terminated by Northland for poor contract performance and behavior disruptive to its operations. Currier claimed the termination was retaliation for opposing employment discrimination under R.C.W. §49.60.210(1), but Currier admittedly complained only about a joke made by one independent contractor truck driver to another independent contractor truck driver, and not about any employment discrimination by Northland. Although Currier's complaint fell outside the reach of the anti-retaliation statute, the trial court nevertheless entered a $600,000 judgment against Northland.

The anti-retaliation statute is clear and unambiguous. R.C.W. §49.60.210(1) prohibits retaliating against a person who opposes "practices forbidden by this chapter," R.C.W. Ch. 49.60, the Washington Law Against Discrimination (WLAD). "Only opposition directed toward such practices is protected." *Coville v. Cobarc Services, Inc.*, 73 Wn.App. 433, 440, 869 P.2d 1103 (1994) (emphasis added). Currier alleged that he opposed employment discrimination when he complained about a joke between two independent contractors but not, as Currier admitted, any discriminatory employment practice by Northland. Applying R.C.W. §49.60.210(1) according to its terms, Currier's complaint falls squarely outside of the scope of the anti-retaliation statute and Northland's termination of his contract is not actionable under that statute.

Furthermore, the record lacks substantial evidence to support the trial court's finding that Currier reasonably believed he was opposing employment discrimination, and Currier's belief that he was opposing employment discrimination cannot be reasonable when he admitted he was not opposing any discriminatory employment practice by Northland. Finally, any damages should have been limited to six days of contract income under the after-acquired evidence rule, when Northland discovered that Currier's truck violated federal and state law in default of his contractual obligations. The trial court's judgment should be reversed.

II. ASSIGNMENTS OF ERROR

1. The record lacks substantial evidence to support the trial court's finding that Currier reasonably believed he was opposing discrimination. (Conclusion of Law Regarding Liability No. 4)

2. The trial court erroneously concluded that Currier reasonably believed he was opposing discrimination in employment. (Conclusion of Law Regarding Liability No. 5)

3. The trial court clearly erred when it refused to grant summary judgment against Currier, and abused its discretion when it refused to reconsider its denial, when both Currier admitted and the undisputed facts established that he never opposed any discriminatory employment practice by Northland within the meaning of R.C.W. §49.60.210(1), and thus Currier failed to establish his prima facie case. (Order Denying Motion for Summary Judgment and Order Denying Motion for Reconsideration)

4. The trial court erroneously concluded that Northland retaliated against Currier within the meaning of R.C.W. §49.60.210(1) when it terminated his contract for opposing what he reasonably believed was illegal discrimination. (Conclusion of Law Regarding Liability No. 7)

5. The trial court erroneously concluded that Currier was protected against retaliation under R.C.W. §49.60.210(1). (Conclusion of Law Regarding Liability No. 6)

6. The record lacks substantial evidence to support the trial court's finding that Currier complained of racist conduct in the workplace. (Conclusion of Law Regarding Liability No. 9)

7. The trial court erroneously concluded that Northland acted with retaliatory intent when it terminated Currier's contract. (Conclusion of Law Regarding Liability No. 9)

8. The record lacks substantial evidence to support the trial court's finding that retaliation against Currier was a significant factor in Northland's decision to terminate Currier's contract. (Conclusion of Law Regarding Liability No. 8)

9. The record lacks substantial evidence to support the trial court's finding that Currier's contract is the only trucking services contract that Northland terminated. (Finding of Fact Regarding Liability No. 22 (page 7) [1] and Conclusion of Law Regarding Liability No. 9)

10. The record lacks substantial evidence to support the trial court's finding that there is no evidence that Northland had any policy of

[1] There are two Findings of Fact Regarding Liability No. 22 and two Findings of Fact Regarding Liability No. 23.

ensuring that trucks complied with federal, state and local laws. (Finding of Fact Regarding Damages No. 4)

11. The trial court erroneously concluded that Northland failed to prove by a preponderance of the evidence that it would have terminated Currier's contract on the basis of after-acquired evidence. (Finding of Fact Regarding Damages No. 2)

12. The trial court erroneously concluded that Currier was the prevailing party and that the fees and costs he requested were properly recoverable under R.C.W. §49.60.030(2). (Finding of Fact and Conclusion of Law Regarding Damages No. 10 and Conclusion of Law Regarding Attorneys' Fees No. 5)

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a complaint about a single joke made by one independent contractor to another independent contractor, without any presence, involvement or participation by the contracting principal, constitute opposition to an employment discrimination practice? (Assignments of Error No. 1-5)

2. Under *Marquis v. City of Spokane*, 130 Wn.2d 97 (1996), construing the meaning of the term "employee" in the WLAD to be distinct from that of an independent contractor, may a person claim

opposition to discrimination in employment when it is undisputed that the derogatory statement complained about was only made by one independent contractor to another independent contractor, and when the person admits he is not complaining about any employment discrimination by the contracting principal? (Assignments of Error No. 1-5)

3. Does a person come within the protection of R.C.W. §49.60.210(1) for opposing an employment discrimination practice forbidden by the WLAD by merely contending he had a reasonable belief that he was opposing discrimination? (Assignments of Error No. 1-5)

4. Should a clear and unambiguous statute be given effect according to its terms as enacted by the legislature, without interpretation or construction by the court? (Assignments of Error No. 1-5)

5. Should the trial court have dismissed Currier's complaint when he failed to establish a prima facie case by admittedly not opposing any employment discrimination by Northland, the only claimed basis for his retaliation lawsuit? (Assignments of Error No. 1-5)

6. Does substantial evidence exist in the record to support the trial court's finding that Currier complained of racist conduct in the workplace when the only complaint he made to Northland was about a single derogatory statement from one independent contractor to another independent contractor in the freight yard of a public port terminal,

without any knowledge, involvement or presence of any Northland employee or manager? (Assignment of Error No. 6)

7. Did the trial court err in concluding that Northland acted with retaliatory intent and does substantial evidence exist in the record to support the trial court's finding that retaliation was a significant factor in Northland's termination decision, when the trial court found that Northland had legitimate, non-discriminatory reasons for terminating Currier's contract? (Assignments of Error No. 7-8)

8. Does substantial evidence exist in the record to support the trial court's finding that Currier's contract is the only trucking services contract that Northland terminated when the undisputed evidence was that Northland had previously terminated another trucking services contract for unlawful conduct? (Assignment of Error No. 9)

9. Does substantial evidence exist in the record to support the trial court's finding that there is no evidence that Northland had any policy of ensuring that trucks complied with federal, state and local laws when Currier's contract and the contracts of the other independent truck drivers providing drayage services to Northland expressly required those drivers to operate in conformity with federal, state and local laws? (Assignment of Error No. 10)

10. Did the trial court err in concluding that Northland did not satisfy its burden of proof on the defense that it would have terminated Currier's contract based on the after-acquired evidence of the condition of his truck tires and license, when Northland's dispatchers testified they would have terminated his contract, when it was undisputed that Currier's truck tires did not comply with federal safety law, and when the photographs admitted into evidence showed the tires were dangerously bald and his truck license had expired more than six years before, all in default of his contractual obligations? (Assignment of Error No. 11)

11. When a plaintiff fails to prove his prima facie case of retaliation or that he reasonably believed he was opposing employment discrimination, or when a plaintiff proves only a trivial amount of damages, is he a prevailing party or entitled to reasonable attorneys' fees? (Assignment of Error No. 12).

III. STATEMENT OF THE CASE

A. Procedural History

Currier was a commercial truck driver and independent contractor providing drayage services to Northland to transport cargo to and from its terminal between 2005 and 2008. RP 128, RP 198. In August 2008, Currier's contract was terminated because his performance had seriously

declined and was markedly substandard relative to other independent truck drivers also on contract to Northland, and his behavior was highly disruptive to Northland's freight operations. RP 554-555; RP 565. After being warned by Northland, shortly before termination he began yelling at another driver in Northland's dispatch office and attempted to start a fight there, prompting an ultimatum by Northland. Ex. 57; RP 552-553. When Currier's performance and behavior did not improve, his contract was terminated. Ex. 55; RP 561. Six days after termination, Northland discovered that Currier's truck tires were dangerously bald and his truck license had been expired for more than six years, RP 660; RP 666-667, plain grounds for termination of his contract for being in default of his obligation to operate in compliance with federal and state law. RP 671; Ex. 53.

In his lawsuit, Currier alleged his contract was terminated in retaliation for opposing employment discrimination, CP 396, but it is undisputed that he merely complained about a single joke made by one independent contractor driver to another independent contractor driver outside in Northland's freight yard. RP 594-595. Although Currier admitted the two drivers were independent contractors and that he was not opposing any employment discrimination by Northland, CP 253, he claimed retaliation under R.C.W. §49.60.210(1), the opposition clause,

merely by asserting he reasonably believed he was opposing employment discrimination. CP 396.

Before trial, Northland moved for summary judgment, demonstrating that Currier's complaint did not fall within the retaliation statute as he was admittedly not opposing employment discrimination at all, the only basis for his lawsuit, and therefore he could not establish his prima facie case. The trial court erred in refusing to grant Northland summary judgment and again erred in denying reconsideration.

At trial, Currier failed to prove that he reasonably believed he opposed employment discrimination and failed to even testify that he reasonably believed he opposed employment discrimination. The court nevertheless found in favor of Currier on his retaliation claim despite finding the following facts: (1) Currier only reported to Northland a single derogatory statement by independent contractor driver Howell to independent contractor driver Martinez, CP 389-391 (Findings of Fact Regarding Liability No. 9, 12, 13); (2) the evidence was that the statement by Howell to Martinez was only a joke and that Martinez took no offense to it, CP 391, CP 394 (Findings of Fact Regarding Liability No. 15, 22); (3) Northland had legitimate, non-discriminatory reasons for terminating Currier's contract, CP 392-393, CP 397 (Finding of Fact Regarding Liability No. 18; Conclusion of Law Regarding Liability No. 8); (4)

Currier's truck tires were nearly bald and his truck license was expired, CP 395 (Finding of Fact Regarding Liability No. 23 (page 8)); and (5) Currier was obligated to operate in compliance with federal and state law, and his contract could be terminated immediately for default, CP 389 (Finding of Fact Regarding Liability No. 7). The trial court also erroneously concluded that Northland failed to prove it would have terminated Currier's contract based on after-acquired evidence, and entered a $600,969 judgment against Northland.

B. Northland's Contract with Currier.

Larry Currier was the sole owner of respondent American Container Express, Inc. ("ACE"), which contracted with Northland to provide trucking services to move Northland's cargo to and from Terminal 115 at the Port of Seattle. CP 388-389. The terms and conditions of ACE's agreement with Northland are set forth in their Subcontractor Agreement, which Currier signed as President of ACE. Ex. 53. The terms of the Subcontractor Agreement required Currier to comply with all federal, state and local laws. Ex. 53; CP 389; RP 671. The Subcontractor Agreement could be terminated by either party on 30 days' notice or immediately upon default in performance. Ex. 53. Under the explicit terms of the contract Currier was solely an independent contractor, not an employee of Northland. *Id.*

C. Currier's Poor Performance and Disruptive Behavior.

Beginning in 2008, Currier's contract performance began to seriously decline. RP 635-636; RP 531-532. Currier performed much more slowly than other drivers for the same drayage work. CP 392, RP 532. Northland dispatchers Jim Sleeth and Patrick Franssen observed him hiding from Northland's forklift operators who were responsible for loading Currier's truck with cargo so he could get paid without doing work. RP 624; RP 556. Currier engaged in shouting matches with other drivers, causing morale problems among them, CP 635; RP 552, and even argued loudly with Northland's dispatch supervisor, Patrick Franssen, in the dispatch office. CP 392; RP 536. One of Northland's receiving office personnel, Shannon Gould, also observed Currier sitting in his truck and not working in a secluded spot in the north end of the terminal for extended periods of time during work hours while he was paid. RP 714. When Gould raised that issue with him, Currier verbally intimidated her, telling her in sexist terms he "wasn't going to take any BS from a little girl at the back gate." RP 713. Currier's interaction with Gould was so threatening and intimidating that she told him not to come into her work area again while she was alone, and she alerted other drivers to his behavior. *Id.*

Northland's dispatchers also began receiving complaints about Currier's performance from other drivers and Northland's customers. RP 432-433; RP 536-540; RP 635-637. Currier acted as the self-appointed behavior police in the terminal yard and dispatch office, which was highly disruptive to Northland's operations. RP 643. Currier repeatedly complained to Northland's dispatchers about how the other drivers were not doing their jobs correctly, which was an apparent smoke screen to cover up his own performance problems. RP 533; RP 644. His attitude was so disruptive that one of the drivers asked Northland's dispatchers to keep Currier away from him. CP 393; RP 645.

Northland's dispatchers then met with Currier about his behavior before his contract was terminated, RP 541; RP 640, warning him about complaints made by the other drivers, his job performance, his unpredictability, and his anger management issues. RP 546; RP 640-641. After Currier yelled at another driver and tried to start a fight with him in the Northland dispatch office, RP 551-552; RP 637-639, Northland's dispatchers gave Currier an ultimatum that if his attitude did not improve, they would terminate his contract. RP 554, RP 641.

D. Currier's Complaint About a Driver's Joke.

Shortly thereafter, on August 12, 2008, Currier was outside in Northland's freight yard when he overheard a joke made by one

independent contractor truck driver, Billy Howell, to another independent contractor truck driver, Marco Martinez, CP 390-391; RP 163-165, that Martinez had to drive his truck "south of the border" to pick up a load in Portland, Oregon, because he was Mexican. *Id.* Currier knew they were both independent contractors, not employees of Northland. RP 198. No one from Northland was present or heard the joke. RP 573-574; RP 774.

Currier decided to tell Northland's Quality Assurance manager, Judi McQuade, about it, RP 349. McQuade then spoke with both Howell and Martinez and told them that that kind of humor was not tolerated at Northland and to stop making those kinds of jokes. RP 535. Currier had never previously complained to Northland about any of the other derogatory comments he said he had heard made by independent contractor drivers about Mexicans at Northland's terminal, RP 161; RP 199-200; RP 212, and no one from Northland had ever heard anyone make any discriminatory statement. RP 199-200; RP 675; RP 774.

E. Northland's Termination of Currier's Contract.

Within a few days of the ultimatum but before Currier's complaint to McQuade, other drivers again started complaining about Currier, RP 643; therefore, Northland's dispatchers concluded they needed to terminate Currier's contract. RP 646. Because it was the height of Northland's busy season, a week or so passed before Northland's

dispatchers met with Northland's terminal manager, Larry Graham, to discuss the termination procedure and to get his approval. CP 557; RP 646. In the meeting with Graham on August 14, 2008, Northland's dispatchers explained the various complaints they had received about Currier, including complaints from customers. RP 651; RP 769-770. Graham advised them that because Currier was a contractor and not an employee, his contract could be terminated at any time. RP 769-770. Northland's dispatchers met with Currier later that day and terminated his contract. Ex. 55; RP 561; RP 652.

F. Northland's Discovery of Currier's Dangerous Tires.

After his contract was terminated, Currier left his truck in Northland's freight yard. RP 660. Six days later, Sleeth called Currier to ask him to remove his truck from the yard, but Currier said it wasn't safe to do so at that time because the roads were slick from recent rains. RP 660-661; RP 241. Walking through the freight yard later that day, Sleeth discovered that Currier's truck tires were nearly bald and its license had expired six years earlier. RP 666-667. Sleeth was shocked by its condition and photographed it. RP 667. The photographs showed badly worn, nearly bald tires with a large piece of rubber missing from the tread and the underlying tire cord exposed and visible. Ex. 56; RP 668.

Under the Federal Motor Carrier Safety Act regulations, commercial truck tires such as Currier's must have a minimum of 2/32 of an inch of tread on non-steer axles, Ex. 68; RP 405, which Currier's truck clearly lacked. RP 413, RP 669. Any cord visible on a commercial truck tire is a violation of federal law, RP 414, because it is in danger of blowout failure. *Id.* Currier's truck license had also expired in 2001, more than six years earlier, Ex. 56; RP 667, which was illegal under state law. RP 428. Had Northland's dispatchers known of the dangerous and unlawful condition of Currier's truck, they would have terminated his contract immediately for safety reasons and because Currier was obligated under the contract to operate in compliance with federal and state law. RP 583-584; RP 671. Contrary to the trial court's finding, CP 481, the Subcontractor Agreement was an obligation, and more than a policy, to ensure Currier's truck complied with federal and state law, Ex. 53, and contrary to its finding, CP 481; CP 397, one other independent contractor driver's contract has been terminated by Northland. RP 585-586.

IV. SUMMARY OF ARGUMENT

The trial court erred in concluding that Northland retaliated against Currier under R.C.W. §49.60.210(1) for reasonably believing he opposed employment discrimination, when it is undisputed that he complained

merely about a joke from one independent contractor to another and not about any discrimination by Northland. Currier failed to establish a prima facie case of retaliation under R.C.W. §49.60.210(1) because his claimed opposition fell squarely outside the reach of the statute.

The trial court also erred in finding that Currier reasonably believed he opposed employment discrimination because the record lacks substantial evidence of any such reasonable belief and Currier admitted he wasn't opposing any discriminatory employment practice by Northland.

In addition, the record lacks substantial evidence to support the trial court's finding that retaliation was a significant factor in Northland's decision to terminate Currier's contract and the trial court erroneously concluded that Northland failed to show it would have terminated Currier's contract under the after-acquired evidence rule, which would have limited any damages to six days of contract income, $420, one-fifth of a month's income of $2,100, for which Currier would not have been a substantially prevailing party. RP 849-850; Ex. 81

V. ARGUMENT

A. Standards of Review

Statutory construction is a question of law reviewed *de novo* under the error of law standard. *Wenatchee Sportsmen Ass'n v. Chelan County*,

141 Wn.2d 169, 175-76, 4 P.3d 123 (2000). Conclusions of law involving the interpretation of statutes are also reviewed *de novo*. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 876, 215 P.3d 162 (2009).

The standard of review of a trial court's findings of fact and conclusions of law is a two-step process. First, the Court must determine whether the trial court's findings of fact are supported by substantial evidence in the record. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence requires "a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill,* 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Second, even if the findings are supported by substantial evidence, the Court must determine whether those findings support the trial court's conclusions of law. *Id.* Whether a trial court's findings support its conclusions of law is reviewed *de novo*. *State v. Vasquez*, 109 Wn.App. 310, 318, 34 P.3d 1255 (2001), *aff'd* 148 Wn.2d 303, 59 P.3d 648 (2002); *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007). A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law, and a finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

Where the evidence on a central issue in the case is undisputed, the Court has the duty to determine for itself the proper conclusion of law to be drawn from that evidence, as the issue is purely one of law. *Peeples v. Port of Bellingham,* 93 Wn.2d 766, 772, 613 P.2d 1128 (1980) (overruled on other grounds in *Chaplin v. Sanders*, 100 Wn.2d 853, 862, 676 P.2d 431 (1984)). An undisputed fact is one disclosed in the record that the party against whom the fact is to operate either has admitted or has conceded to be undisputed. *Heriot v. Lewis*, 35 Wn.App. 496, 502, 668 P.2d 589 (1983).

While, generally speaking, a denial of a motion for summary judgment is not appealable, *Sea-Pac Co., Inc. v. United Food & Commercial Workers Local Union 44,* 103 Wn.2d 800, 801-02, 699 P.2d 217 (1985), this Court may review an order denying summary judgment after a full trial on the merits where the order is premised on a question of law. *McGovern v. Smith,* 59 Wn.App. 721, 735, 801 P.2d 250 (1990). A summary judgment order is reviewed *de novo. York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008). A trial court's denial of a motion for reconsideration is reviewed for a manifest abuse of discretion. *Wagner Dev. Inc. v. Fidelity & Deposit Co. of Maryland,* 95 Wn.App. 896, 906, 977 P.2d 639, *review denied,* 139 Wn.2d 1005, 989 P.2d 1139 (1999). A trial court abuses its discretion "when it exercises it

in a manifestly unreasonable manner or bases it upon untenable grounds or reasons." *Id.* A court's decision is manifestly unreasonable when it is outside the range of acceptable choices, given the facts and the applicable legal standard. *State v. Rundquist,* 79 Wn.App. 786, 793, 905 P.2d 922 (1995), *review denied,* 129 Wn.2d 1003, 914 P.2d 66 (1996). A decision based on a misapplication of law rests on untenable grounds. *Ausler v. Ramsey*, 73 Wn.App. 231, 235, 868 P.2d 877 (1994).

B. The Trial Court Erroneously Concluded that Northland Retaliated Against Currier Within the Meaning of R.C.W. §49.60.210(1) When It Terminated His Contract for Opposing What He Reasonably Believed was Illegal Discrimination.

1. R.C.W. §49.60.210(1) is Clear and Unambiguous.

In construing a statute, the Court's objective is to determine legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). "Where the language of a statute is clear, legislative intent is derived from the language of the statute alone." *Rothwell*, 166 Wn.2d at 876. The plain meaning of a statutory provision is to be determined "from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, the related provisions, and the statutory scheme as a whole." *Id.* at 876-77. A statute that is clear on its face is not subject to judicial interpretation. *In re Marriage of Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993). Once a statute has been

construed by the state's highest court, that construction operates as though it were originally written into it. *Delahunty v. Cahoon*, 66 Wn.App. 829, 841, 832 P.2d 1378 (1992) (citing *In re Moore,* 116 Wn.2d 30, 37, 803 P.2d 300 (1991)).

The anti-retaliation section of the Washington Law Against Discrimination provides as follows:

> 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.

RCW §49.60.210(1) (emphasis added). Practices forbidden by R.C.W. Ch. 49.60 include discrimination in credit transactions (R.C.W. §49.60.175-.176), insurance transactions (R.C.W. §49.60.178), public accommodation (R.C.W. §49.60.190), service animals (R.C.W. §49.60.218), and real estate transactions (R.C.W. §49.60.222-.224). Practices forbidden by R.C.W. Ch. 49.60 also include discrimination in employment, R.C.W. §49.60.180. Currier only claimed retaliation for opposing discrimination in employment. CP 397.

The term "employee" in the WLAD does not mean, and is distinct from, independent contractor. *Marquis v. City of Spokane,* 130 Wn.2d 97, 110, 922 P.2d 43 (1996) ("The common law distinguishes between employees and independent contractors, based primarily on the degree of

control exercised by the employer/principal over the manner of doing the work involved. We read the statute with that distinction in mind.") (citations omitted); *id.* at 117 ("I agree with the majority that an independent contractor is not an 'employee' within the meaning of R.C.W. Ch. 49.60") (Madsen, J., dissenting). Furthermore, "R.C.W. §49.60.180 defines unfair practices in employment. A person who works or seeks work as an independent contractor, rather than as an employee, is not entitled to the protection of RCW 49.60.180." W.A.C. 162-16-230(1).

Under R.C.W. §49.60.210(1), statutorily protected opposition activity is opposition directed only toward practices forbidden by the WLAD. *Coville,* 73 Wn.App. at 440 ("the statute requires, additionally, that the opposition must be directed toward 'practices forbidden by this chapter ...'. RCW 49.60.210(1). Only opposition directed toward such practices is protected."); *Blackford v. Battelle Mem'l Inst.*, 57 F.Supp.2d 1095, 1099 (E.D. Wash. 1999) ("The State of Washington does not bar all forms of retaliation in the workplace. Rather, RCW 49.60.210(1) makes '[i]t is an unfair practice for any employer ... to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter...'").

R.C.W. §49.60.210(1) is clear and unambiguous. It makes unlawful discrimination against a person who opposes practices forbidden

by the WLAD, R.C.W. Ch. 49.60, and only those practices. Practices forbidden by the WLAD have been specified by the legislature, and include discriminatory practices in employment by employers, R.C.W. §49.60.180, the sole basis claimed by Currier for retaliation. CP 397. As the Washington Supreme Court has held that the meaning of "employee" in the WLAD does not include an independent contractor, *Marquis*, *supra*, the prohibition against discrimination in employment in the WLAD does not include discrimination either in independent contracting or discrimination between independent contractors.

2. Currier Failed to Establish a Prima Facie Case of Retaliation.

To establish a prima facie case of retaliation, Currier was required to show: (1) he engaged in statutorily protected opposition activity; (2) an adverse contract action was taken; and (3) a causal link between the two. *Delahunty v. Cahoon*, 66 Wn.App. 829, 839, 832 P.2d 1378 (1992).

The only practice forbidden by the WLAD that Currier claimed he was opposing was discrimination in employment. Therefore, Currier could not claim retaliation for opposing a discriminatory statement solely between two independent contractors. This is a crucial distinction that the trial court misunderstood. Currier knew and admitted that both Howell and Martinez, whose racially derogatory joke he opposed, were

independent contractors, RP 198, and the trial court found as such. CP 390 (Findings of Fact Regarding Liability No. 12 and 13). As it is also undisputed that he did not oppose discrimination in employment, CP 297, Currier failed to establish the first element of his prima facie case. As a matter of law, Currier is barred from claiming retaliation under R.C.W. §49.60.210(1).

This conclusion is fully consistent with federal and state court decisions construing similar anti-retaliation statutes. The WLAD closely parallels Title VII of the Civil Rights Act of 1964, therefore Washington courts look to interpretations of that law when construing R.C.W. Ch. 49.60. *Graves v. Dep't of Game*, 76 Wn.App. 705, 712, 887 P.2d 424 (1994). Courts construing the opposition clause of Title VII [2] have held that opposition to employment discrimination does not include opposition to discriminatory actions by private individuals, including non-supervisory co-workers, customers and visitors. *See, e.g., Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978) ("The opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual"); *Little v. United Technologies,*

[2] The anti-retaliation provision of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), is remarkably similar and comparable to R.C.W.§49.60.210(1). That statute provides in relevant part: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter..."

Carrier Transicold Div., 103 F.3d 956, 959-60 (11th Cir. 1997) ("Little's opposition to the racial remark uttered by Wilmot, a co-worker ... did not constitute opposition to an unlawful employment practice."); *Dempsey v. Harrison*, 387 F.Supp.2d 558, 562 (E.D.N.C. 2005) ("Plaintiff alleges that the offensive behavior was exhibited by Mr. Sawyer only, who was identified by plaintiff as neither a superior nor an employee of Carolina Mat ... Consequently, [the] report of Mr. Sawyer's behavior was not protected activity and plaintiff fails to make out a prima facie case for retaliation in violation of Title VII."); *Kunzler v. Canon, USA, Inc.*, 257 F.Supp.2d 574, 581-82 (E.D.N.Y. 2003) ("Because Hartman's alleged harassment was directed toward a customer, who was neither an employee of Hartman, Canon, or, for that matter, anyone else ... the court concludes that Hartman's harassment of Whitman is not 'an unlawful employment practice' prohibited by Title VII and, therefore, cannot satisfy the protected activity prong of a retaliation claim."); *Cooper v. Postmaster Gen.*, 59 F.Supp.2d 256, 259 (D.N.H. 1998) ("The conduct Cooper claims he was seeking to oppose in this case, like the conduct at issue in *Little*, consisted of isolated statements by a single non-supervisory co-worker. No reasonable person could conclude that such comments could support a Title VII claim against the Postmaster General. Therefore, Cooper's

alleged effort to oppose Saxby's statements is not protected by Title VII's opposition clause.").

In *Silver v. KCA, Inc.*, plaintiff sued her employer for retaliatory termination for opposing a single racist remark made by a white employee about an African-American co-worker. The Ninth Circuit affirmed the trial court's dismissal of her claim, holding that Silver's complaint only involved the comments of one employee about another employee and did not involve a practice of any kind by the employer. Her opposition was not protected by the anti-retaliation statute: "The specific evil at which Title VII was directed was not the eradication of all discrimination by private individuals, undesirable though that is, but the eradication of discrimination by employers against employees." 586 F.2d at 141. To allow a retaliation claim under such facts would plainly exceed the scope of the anti-retaliation statute:

> Were we to follow Silver's argument, however, and extend the protection of the statute to the situation in which no employment practice of an employer was involved, but only an isolated incident between co-workers, we would clearly exceed the intent of Congress and the plain language of the statute. This we cannot do.

Id.

Directly on point for this appeal, the federal courts have also clearly held that opposition to employment discrimination does not apply to "[d]iscriminatory comments or actions directed at persons who are not

employees, such as independent contractors or subcontractors." *Martin v. Kroger Co.*, 65 F.Supp.2d 516, 556-57 (S.D. Tex. 1999) *aff'd*, 224 F.3d 765 (5th Cir. 2000) (complaints about racist and sexist comments made by subcontractors in a construction project; "Martin's opposition to nondiscriminatory or non-protected practices does not qualify as a protected activity under the opposition clause.") (citing *Wimmer v. Suffolk County Police Dep't*, 176 F.3d 125, 135-36 (2d Cir. 1999), *cert. denied*, 528 U.S. 964; *Crowley v. Prince George's County*, 890 F.2d 683, 687 (4th Cir. 1989); *Little*; *Silver*).

As Currier only claimed opposition to a racially derogatory statement made by one independent contractor to another, without any employment relationship to or involving any employment practice by Northland, Currier failed to prove his prima facie case, warranting judgment as a matter of law in favor of Northland. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001); *Coville*, 73 Wn.App. at 440.

Furthermore, there was no genuine issue of material fact on this point in the trial court. The essential question on summary judgment, on reconsideration, and again at trial is whether the termination of Currier's contract could be in violation of the WLAD if the only basis for Currier's complaint of retaliation was opposition to a racially derogatory comment

solely made between two independent contractors and not an unlawful employment practice by Northland. CP 141-156; CP 344-352. The answer to this question at summary judgment, on reconsideration, and at trial is unequivocally no. Summary judgment and reconsideration should have been granted by the trial court, and this Court should reverse the trial court's judgment.

3. There Is No Evidence of any Discriminatory Employment Practice by Northland and Currier Admittedly Did Not Oppose any Discrimination by Northland.

In addition to Currier's failure to prove his prima facie case, there is also no evidence in the record of any discriminatory employment practice by Northland. It is undisputed that Currier knew both Howell and Martinez were independent contractors and not employees at the time Howell made the derogatory joke to Martinez. RP 198. There is no evidence in the record that any employee of Northland was present, heard or was involved in the joke at the time it was made, which was outside in the freight yard of a public terminal; nor is there any evidence in the record that anyone else ever complained about discrimination at Northland. CP 394 (Finding of Fact Regarding Liability No. 22). While Currier witnessed what theoretically could be described as discriminatory

conduct between two independent contractors [3], it was certainly not discriminatory conduct approved, condoned, or made by any employee or manager of Northland such that it could constitute employment discrimination.

Furthermore, there is no evidence that Martinez was ever discriminated against by Northland. When questioned by McQuade about the incident complained of by Currier, both Martinez and Howell told her that they were just joking with each other. RP 354; CP 391 (Finding of Fact Regarding Liability No.13). Martinez himself never complained to Northland about the joke, RP 673, and Martinez is still an independent contractor truck driver providing drayage services to Northland who, since 2008, has received an increase in his contract rate. CP 148-149.

More importantly, Currier admitted that his claimed opposition was not to any employment discrimination by Northland at all. CP 253 (Currier's retaliation claim "isn't based upon NSI's discrimination."). Currier's admission precludes a retaliation claim under R.C.W. §49.60.210(1).

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[3] But this is not reasonable or even plausible, as a single derogatory joke between two independent contractors does not rise to the level of unlawful discrimination. *See Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 271, 121 S.Ct. 1508, 1510, 149 L.Ed.2d 509 (2001) (no reasonable person could have believed that a single sexually derogatory remark between two employees violated Title VII for purposes of an opposition clause retaliation claim); *see also Silver*, 586 F.2d at 142 ("A single unauthorized act of discrimination by a co-worker has never been held to justify 'opposition' in the sense of protecting a protesting employee from employer discipline.").

Similar to Currier's claim, in *Blackford* the plaintiff had a history of communication and productivity problems, and he was counseled to improve his performance. Blackford complained to Congressman Hastings that his last performance evaluation was retaliation for his efforts to support equal employment in the workplace. *Id.* at 1097. Blackford's performance continued to decline and his employment was eventually terminated. He sued his employer, Battelle, for retaliatory discharge, but the court found that because Blackford submitted no admissible evidence that Battelle arguably discriminated against anyone, he could not sustain his claim of retaliation under R.C.W. §49.60.210(1). *Id.* at 1099-1100. Likewise, as there is no evidence that Northland discriminated against anyone, Currier failed to prove retaliation under R.C.W. §49.60.210(1).

In the analogous case *Coville*, plaintiff was a female janitor at the federal courthouse in Yakima who witnessed a co-worker engaged in inappropriate sexual behavior in the courthouse basement. She complained to her manager who told her that they were not going to take action against her co-worker and they warned her that she must return to work. After a period of leave for mental stress over what she witnessed, Coville eventually turned in her keys and the employer assumed she resigned. Coville filed suit against her employer for retaliatory

termination. The Court held that the trial court did not err in directing a verdict against her retaliation claim and stated:

> Even viewed in a light most favorable to Mrs. Coville, the evidence in this case was not sufficient to sustain a jury verdict that she was engaged in *protected* opposition activity. Admittedly, there is evidence that Mrs. Coville refused to return to work because she opposed Cobarc's handling of the basement room incident. However, the statute requires, additionally, that the opposition *must* be directed toward "practices forbidden by this chapter ...". RCW 49.60.210(1). Only opposition directed toward such practices is protected.
>
> As discussed above, there is no competent evidence or reasonable inference that Mr. Leiferman's activity in the basement room was a practice forbidden by the Law Against Discrimination, RCW 49.60. Hence, Mrs. Coville's opposition to his conduct was not protected opposition activity. She failed to produce a prima facie case; therefore, the court did not err in directing a verdict against her retaliation claim.

Id. at 440 (italics by the court). Similarly, as there is no evidence or reasonable inference in the record that the statement between the two independent contractors constituted employment discrimination by Northland, and as Currier admitted his opposition was not based upon any discrimination by Northland. Currier failed to prove his prima facie case of retaliation.

4. There is No Evidence that Currier Reasonably Believed He was Opposing Discrimination Forbidden by the WLAD.

Currier claimed that, even though he admitted he was not opposing any discrimination by Northland, all that he needed for a claim of

retaliation was a reasonable belief that he was opposing discrimination. The trial court clearly erred when it agreed and found that Currier reasonably believed he was opposing illegal discrimination. CP 396.

To support a retaliation claim, although an employee does not have to prove an actual unlawful employment practice, an employee must have "an objectively reasonable belief an employer has violated the law." *Ellis v. City of Seattle*, 142 Wn.2d 450, 460-61, 13 P.3d 1065 (2000) (emphasis added). This standard requiring an objectively reasonable belief "has an analog in federal antidiscrimination law, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a)." *Id.* at 461. As made clear by the federal courts, "it is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component." *Little*, 103 F.3d at 960. In other words,

> A plaintiff must not only show that he subjectively (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was objectively reasonable in light of the facts and record presented. *It thus is not enough for a plaintiff to allege that his belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief,* though perhaps mistaken, *was objectively reasonable.*

Id. (emphasis added). Furthermore,

> Although claims brought under the opposition clause "are viewed in the context of the ordinary business environment," *Total Sys. Servs., Inc.*, 221 F.3d at 1176, the objective reasonableness of plaintiff's belief is "measured

> against existing substantive law." *Clover,* 176 F.3d at 1351; *see also Harper,* 139 F.3d at 1388 n. 2 (failure to charge the employee who opposes an employment practice with substantive knowledge of the law "would eviscerate the objective component of our reasonableness inquiry"); *Bythewood v. Unisource Worldwide, Inc.,* 413 F.Supp.2d 1367, 1374 (N.D.Ga. 2006) (same).

McNorton v. Georgia Dep't of Transp., 619 F.Supp.2d 1360, 1377 (N.D. Ga. 2007) (citing *E.E.O.C. v. Total Sys. Servs., Inc.*, 221 F.3d 1171 (11th Cir. 2000); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346 (11th Cir. 1999); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385 (11th Cir. 1998)). An objectively reasonable belief therefore must be based on a violation of the WLAD.

Construing a state anti-retaliation law similar to R.C.W. §49.60.210(1), the Minnesota Supreme Court has made it clear that for an opposition clause claim, "the reasonableness of a party's belief must be connected to the substantive law," *Bahr v. Capella Univ.*, 788 N.W.2d 76, 83 (Minn. 2010), explaining as follows:

> If a practice is not unlawful under the plain terms of the MHRA, a party's belief that the practice is unlawful cannot be reasonable. Bahr's position that the basis for reasonable belief need not be tied to substantive law, in some way, would allow a plaintiff to rely entirely on the plaintiff's own reasoning and sense of what is discriminatory. A basis as subjective as this would defeat any attempt to analyze whether a plaintiff had a reasonable belief.

Id. at 84 (reversing the Minnesota Court of Appeals, which had reversed the trial court's dismissal).

In cases where a court has found that an employee had no objectively reasonable belief that the employee was opposing an employer's unlawful discrimination, there is an absence of evidence connecting the employer to the alleged act of discrimination. *See*, *e.g.*, *Silver*; *Little*; *Dempsey*; *Kunzler*; *Cooper*. For example, in *Dempsey*, the court found that the plaintiff had no objectively reasonable belief that the employer had illegally discriminated because the offensive behavior plaintiff complained of was only exhibited by a friend, Sawyer, of the employer's President, Harrison, and who was neither a supervisor nor an employee of the employer, Carolina Mat. The court found that even viewing the facts in the light most favorable to plaintiff, "it is not reasonable to attribute the actions of a visiting individual to the employment actions of Mr. Harrison and Carolina Mat. Consequently, report of Mr. Sawyer's behavior was not protected activity and plaintiff fails to make out a prima facie case for retaliation in violation of Title VII." 387 F.Supp.2d at 562.

Here, it is undisputed that Currier never made any complaint to Northland about any statement he believed to be discriminatory other than the one complaint he made to McQuade on August 12, 2008. Currier testified he observed at least three other incidents he believed involved discriminatory conduct and yet despite his belief he did not report any of

them, CP 389; RP 212; RP 266, nor were any of those statements made by a Northland employee. RP 198. While Currier also testified he complained about racist and sexist remarks he heard on his Citizens Band radio, he also admitted that CB radio channels are open to the public and that he didn't know who was making them. RP 210-211. The only voice he recognized was that of yet another independent contractor truck driver, Terry Mock. RP 211. There is thus no evidence in the record that Currier complained of any racist conduct in the workplace, because his complaint did not involve any Northland employee. *See Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 57, 169 P.3d 473 (2007) ("A 'workplace' is simply a setting in which an employee performs his principal work at the behest of the employer.").

There is no evidence in the record that Northland heard or condoned the derogatory joke between Howell and Martinez on August 12, 2008, who Currier knew were merely independent contractors. Without an objectively reasonable belief that he was opposing conduct under the WLAD, Currier failed to prove he opposed any employment discrimination, and there is simply no evidence of any discriminatory employment practice by Northland. As the record lacks substantial evidence that Currier reasonably believed he opposed illegal discrimination, and as such a conclusion is legally erroneous, Northland

did not retaliate against Currier or act with retaliatory intent, nor could retaliation be a significant factor within the meaning of R.C.W. §49.60.210(1), particularly when Northland terminated Currier's contract for, as the trial court found, legitimate, non-discriminatory reasons. CP 397 (Conclusion of Law Regarding Liability No. 8). *Cf. Blinka v. Washington State Bar Ass'n,* 109 Wn.App. 575, 583, 36 P.3d 1094 (2001), *review denied* 146 Wn.2d 1021 (2002) (substantial evidence existed in the record to support the finding that retaliation was not a significant factor in termination). The trial court's judgment should be reversed.

C. The Trial Court Erroneously Concluded that Northland Failed to Meet its Burden of Proof on its After-Acquired Evidence Defense.

The trial court also erroneously concluded that Northland failed to meet its burden of proof that it would have terminated Currier's contract had it known that Currier's truck tires were nearly bald and his license had been expired for more than six years. CP 481 (Findings of Fact and Conclusions of Law Regarding Damages No. 2). Northland discovered those facts six days after termination, as Currier had left his truck in Northland's freight yard after his contract was terminated because the roads were too slippery and were not safe for his truck to operate with its nearly bald tires. RP 665-666.

The after-acquired evidence rule limits any damages to the period of time between the termination of employment and the discovery of facts that would have resulted in lawful termination, even if the actual termination was found to have been unlawful. *Jansen v. North Valley Hosp.*, 93 Wn.App. 892, 900, 971 P.2d 67 (1999). Under this rule,

> Once an employer learns about serious employee wrongdoing that would have led to legitimate discharge, it makes little sense to require the employer to ignore the information, even if it is acquired during the course of discovery and even if the information might have gone undiscovered absent the lawsuit. In such a case, the award for back pay should be calculated from the date of the unlawful discharge to the date the lawful basis for discharge was discovered. ... We agree with the superior court and hold that *McKennon* applies to claims brought under RCW 49.60."

Id. (citing *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 362, 115 S.Ct. 879, 886, 130 L.Ed.2d 852 (1995)). Under this rule, an employer must evaluate the wrongdoing and determine whether it was of such severity that the employee would have been terminated on those grounds alone once the employer discovered the wrongdoing. *Jansen,* at 901.

At trial, Northland's commercial vehicle inspection officer expert, Dave Temple, and its trucking expert, Lew Grill, both testified that Currier's truck tires violated the Federal Motor Carrier Safety Act regulations. CP 481 (Findings of Fact and Conclusions of Law Regarding Damages No. 4). Northland's dispatchers testified that because Currier's

nearly bald tires with visible cord showing, which violated federal law in default of the Subcontractor Agreement, posed serious safety concerns both to other drivers on the roads and to Northland's cargoes, Northland would have immediately terminated his contract had they been aware of it. RP 671, RP 583-584. Photographs of Currier's truck tires admitted at trial patently show the unsafe condition of the tires. Ex. 56.

It should be clear to any reasonable trier of fact that Currier's tires were in dangerous condition and that no contracting principal such as Northland would want its cargoes transported by a truck on the state highways in such an unsafe condition, for both public safety and its responsibility as a motor carrier that had subcontracted to Currier. The trial court reviewed the evidence admitted at trial and nevertheless erroneously found that Northland would still not have terminated Currier's contract. CP 481. In weighing the evidence, the trial court failed to correctly apply Northland's burden of proof.

In *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996), the Ninth Circuit reviewed the standard of proof required of an employer to successful assert an after-acquired evidence defense. In *O'Day*, after an employee was denied a promotion, he searched his supervisor's office and discovered highly sensitive documents relating to his employer's planned promotions and layoffs. When his employment

was terminated, the plaintiff sued his employer for age discrimination. In discovery, the employer learned for the first time that the plaintiff had copied and shared the sensitive documents in violation of company policy while he was an employee. The employer argued that any damages should be precluded under the after-acquired evidence rule because it would have terminated him for that violation alone. *Id.* at 758.

The employer, McDonnell Douglas, submitted an affidavit from its human resources representative, Olinda Willis, in support of a motion for summary judgment. The representative testified that the employee violated company policy and that had the employer been aware of the employee's misconduct he would have been terminated immediately. The plaintiff argued that the affidavit was self-serving, speculative testimony and that it should be discredited, but the court disagreed:

> But the fact that Willis' testimony might be thoroughly impeached does not render it incompetent, and *McDonnell Douglas is entitled to rely on sworn affidavits from its employees in proving that it would have discharged O'Day for the alleged misconduct*. We could hardly require employers in these cases to come forward with proof that they discharged other employees for the precise misconduct at issue as often the only proof an employer will have is that adduced in this case – a company policy forbidding the conduct and the testimony of a company official that the conduct would have resulted in immediate termination.

Id. at 761 (emphasis added). The court also considered the circumstances of the misconduct, finding it "significant" that the testimony was

corroborated both by company policy, which plausibly could be read to require discharge for the employee's misconduct, "and by common sense." The court noted that nothing in the employer's assertion that it would have terminated the employee lacked credibility, and upheld the application of the after-acquired evidence rule. *Id.* at 762. Citing *McKennon,* the court found that the employer met its burden of proving by a preponderance of the evidence that it would have terminated the employee for violating the company's policy. *Id.*

As McDonnell Douglas was able to meet its evidentiary burden by submitting a single affidavit, corroborated by company policy and common sense, Northland clearly met its burden to prove it would have terminated Currier's contract had it been aware of Currier's bald truck tires and long-expired license. The testimony of Northland's dispatchers, along with the corroborating evidence of the Subcontractor Agreement (allowing immediate termination for default for failure to operate in compliance with federal and state law), unrebutted expert testimony, the photographs of the nearly bald and obviously unsafe tires, and common sense, shows that nothing in the record lacked competence or credibility and Northland established its defense by a preponderance of the evidence.

The trial court misapplied this standard by finding that the dispatchers' testimony was not credible because there was no evidence

that Currier's truck would have been considered out-of-service, Northland did not regularly inspect its independent contractors' trucks and had no policy of ensuring compliance with federal and state law, and Northland had not previously terminated another independent contractor driver's contract for equipment issues, but nothing in the record supports such a conclusion and misconstrues the preponderance of evidence standard for the after-acquired evidence defense.

First, in *O'Day*, the Ninth Circuit made it clear that a lack of evidence of another termination for the same violation is not relevant, as the employer will rarely, if ever, have such evidence. *Id.* at 761. Second, an out-of-service determination is also irrelevant, as it presupposes a violation of Federal Motor Carrier Safety Act regulations, which is undisputed in this case. RP 225-226; RP 734-735. Third, Northland's policy of ensuring compliance with federal and state law is Currier's contract itself, which explicitly places the burden on Currier to operate in compliance with those laws and allows Northland to immediately terminate for default in performance. The trial court's credibility finding thus has no basis in the record and misapplies the correct standard. Northland submitted sworn testimony that it would have terminated Currier's contract had it known of those violations, and that testimony is fully corroborated by the Subcontractor Agreement, unrebutted supporting

expert testimony, the photographs admitted into evidence, and plain common sense. That is more than enough evidence to meet the preponderance standard.

The trial court's conclusion that Northland did not meet its burden of proof for its defense because it found Northland's testimony not credible also approaches improperly acting as a super-personnel department by rendering its own judgment instead of deferring to Northland's decisionmaking based on the information available to it. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) ("[f]ederal courts 'do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior.'") (citations omitted).

Even if the trial court's credibility finding is not subject to challenge, *see Morse v. Antonellis,* 149 Wn.2d 572, 574, 70 P.3d 125 (2003), as a matter of law Northland still proved its defense by a preponderance of evidence. It is undisputed that Currier's tires violated federal safety law and his license violated state law. The Subcontractor Agreement obligated Currier to operate in conformity with federal and

state law, and allowed Northland to immediately terminate the contract for default. Ex. 53. The photographs show tires that were so bald that no reasonable motor carrier such as Northland would have allowed such equipment to transport its cargo on the state highways, with the clear risk of tire blowout and danger to the public. Ex. 56. Lew Grill, the only trucking expert at trial, testified that Northland could not dispatch Currier's truck with its tires violating federal safety law. RP 484. Currier was in default of his contract. The trial court's conclusion that Northland did not prove its after-acquired evidence defense is erroneous. Any damages should have been limited to six days of contract income, $420, one-fifth of a month's income of $2,100. RP 849-850; Ex. 81.

D. The Trial Court Erroneously Concluded that Currier Was the Prevailing Party and Was Entitled to Recover Attorneys' Fees and Costs.

As Currier failed to meet his prima facie case of retaliation and failed to prove that he reasonably believed he was opposing unlawful discrimination, and as Northland met its burden of proof on its after-acquired evidence defense, Currier was not the prevailing party or the substantially prevailing party under R.C.W. §49.60.030. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 231, 137 P.3d 844 (2006). Consequently, the trial court erred in awarding Currier reasonable attorneys' fees and costs. The trial court's judgment should be reversed.

VI. CONCLUSION

Currier's complaint about a racially derogatory statement solely by one independent contractor to another is not opposition to any practice forbidden by the WLAD, and therefore Northland's termination of his contract was not retaliation within the meaning of R.C.W. §49.60.210(1). Currier also failed to establish that he reasonably believed he was opposing illegal discrimination, as he could not reasonably believe he was opposing employment discrimination by Northland under the WLAD. Northland also proved its after-acquired evidence defense by a preponderance of the evidence, limiting any damages to six days of contract income, thus Currier was not the prevailing party entitled to recover reasonable attorneys' fees or costs. The Court should reverse the trial court's judgment and render judgment in favor of Northland.

RESPECTFULLY SUBMITTED this 22nd day of August, 2013.

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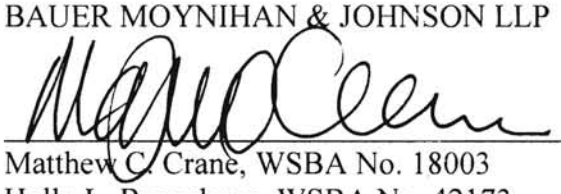

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Brief of Appellant was served on counsel for Respondents by placing it today in the United States mail, first class postage prepaid, addressed to:

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