90858-3

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.,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Northland Services, Inc. ("Northland") asks this Court to accept review of the published Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its published decision on August 4, 2014. A copy of this decision is in the Appendix pages A-1 through A-18.

C. ISSUE PRESENTED FOR REVIEW

As a matter of first impression, under RCW 49.60.210(1) does an independent contractor have a claim for retaliation when the sole basis for the person's complaint was overhearing a derogatory statement made by a fellow independent contractor to another independent contractor, and thus the contractor could have no objectively reasonable belief that contracting principal engaged in any practice prohibited by the Washington Law Against Discrimination, RCW ch. 49.60 ("WLAD")?

D. STATEMENT OF THE CASE

The recitation of the facts in the Court of Appeals opinion omits numerous facts relevant to the resolution of this case. Northland offers these additional relevant facts.

Larry Currier was an owner/operator of trucks, as that term is understood in the trucking industry. *See* 49 C.F.R. § 376. Owner/operators are independent contractors. Currier operated his independent business of leasing his trucks in a corporate form – American

Container Express.[1] Currier was himself a commercial truck driver providing drayage services to Northland to transport cargo to and from its terminal between 2005 and 2008. RP 128, 198.

Beginning in 2008, Currier's contract performance began to seriously decline. RP 531-32, 635-36. Currier performed much more slowly than other drivers for the same drayage work. CP 392; RP 532. Northland dispatchers observed him hiding from Northland's forklift operators who were responsible for loading Currier's truck with cargo, allowing Currier to get paid without doing work. RP 556, 624. 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. Currier was observed sitting in his truck in a secluded spot in the north end of the terminal and not working for extended periods of time, although he was being paid. RP 714. Currier was verbally intimidating and sexist toward a Northland employee. RP 713. Currier's interaction

[1] 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 388-89. 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 that Agreement required Currier to comply with all federal, state and local laws. Ex. 53; CP 389; RP 671. The 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.*

was so threatening and intimidating that the employee 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 432-33, 536-40, 635-37. Currier repeatedly complained to Northland's dispatchers about how the other drivers were not doing their jobs correctly despite his own performance problems. RP 533, 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 met with Currier about his behavior before his contract was terminated, RP 541, 640, warning him about complaints made by the other drivers, his job performance, his unpredictability, and his anger management issues. RP 546, 640-41. After Currier yelled at another driver and tried to start a fight with him in the Northland dispatch office, RP 551-52, 637-39, Northland's dispatchers gave Currier an ultimatum that if his attitude did not improve, they would terminate his contract. RP 554, 641.

After his near fight, Currier was outside in Northland's freight yard when he overheard a comment made by one independent contractor truck driver to another independent contractor truck driver. CP 390-91; RP 163-

65. Apparently, the contractor thought the offensive comment was funny. *Id.* The offensive comment related to the contractor's national origin, Mexican. *Id.* Currier knew the two drivers were both independent contractors, not employees of Northland. RP 198. No one from Northland was present or heard the comment. RP 573-74, 774.

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

Ultimately, in August 2008, Currier's contract was terminated because of his declining work performance, his substandard work relative to other independent owner/operators, and his behavior that was highly disruptive to Northland's freight operations. RP 554-55, 561, 565; Ex. 55.

Six days after termination, Northland also discovered that Currier's truck tires were dangerously bald and his truck license had been expired for more than six years, RP 660, 666-67, additional grounds for

termination of Currier's contract as he was not operating in compliance with federal and state law. RP 671; Ex. 53.

Currier alleged his contract was terminated in retaliation for opposing employment discrimination. CP 396. Before trial, Northland moved for summary judgment, arguing Currier's complaint did not fall within RCW 49.60.210(1) as he was not opposing a practice prohibited by WLAD, specifically employment discrimination by Northland. Northland argued Currier therefore could not establish a prima facie case. CP 297. On summary judgment, Currier *admitted* his retaliation claim was not based on discrimination by Northland. CP 253. Nevertheless, the trial court denied Northland's motion. CP 336-37.

In a bench trial, the trial court found in favor of Currier on his retaliation claim but it made a number of critical findings: (1) Currier only reported to Northland a single derogatory statement made by independent contractor/driver Howell to independent contractor/driver Martinez, CP 389-91; (2) the Mexican contractor took no offense to the comments, CP 391, 394; (3) Northland had legitimate, non-discriminatory reasons for terminating Currier's contract, CP 392-93, 397; (4) Currier's truck tires were nearly bald and his truck license was expired, CP 395; and (5) Currier was obligated to operate in compliance with federal and state law, and his contract could be terminated immediately for failure to

comply, CP 389. However, the trial court still found in favor of Currier on his retaliation claim. Op. at 4-5.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED[2]

Review is merited here under RAP 13.4(b)(1), (2), and (4). The published Court of Appeals decision is contrary to decisional law on the prima facie elements of an action under RCW 49.60.210(1), as well as this Court's treatment of independent contractors under the WLAD. RAP 13.4(b)(1) and (2). The Court of Appeals opinion also represents a vast expansion of RCW 49.60.210(1), making the WLAD into, in effect, a "general civility code," which the Court of Appeals has warned courts against doing. *Alonso v. Qwest Communications Co., LLC*, 178 Wn. App. 734, 747, 315 P.3d 610 (2013). This important issue of first impression merits review under RAP 13.4(b)(4).

(1) The Court of Appeals Opinion Is in Conflict with This Court's Authority Regarding What Constitutes Protected Opposition Activity

[2] This Court is fully familiar with the criteria set forth in RAP 13.4(b) governing acceptance of review of a Court of Appeals decision.

At its core, this case involves the appropriate construction of the plain language[3] of a statute, RCW 49.60.210.[4] That statute 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.*[5]

RCW 49.60.210(1) (emphasis added).

As the unambiguous language of the statute states, the referenced opposition activity must be directed toward practices forbidden by the WLAD. *Coville v. Cobarc Services, Inc.,* 73 Wn. App. 433, 440, 869 P.2d 1103 (1994). RCW 49.60.210(1). *Blackford v. Battelle Mem'l Inst.*, 57 F.Supp.2d 1095, 1099 (E.D. Wash. 1999).

(a) The Court of Appeals Decision Conflicts With Decisions of This Court and of the Court of Appeals Holding the Complaining Party Must Have an Objectively Reasonable Belief the Defendant Violated the Law

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[3] 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). The Court looks first to the plain language and ordinary meaning of the words to ascertain the Legislature's intent. *Eubanks v. Brown*, 180 Wn.2d 590, 597, 327 P.3d 635 (2014). When the language of the statute is unambiguous, it is the expression of the Legislature's intent. *Id.* The language of RCW 49.60.210(1) is unambiguous.

[4] The definitive interpretation of a statute is certainly an important reason why this case merits review.

[5] Practices forbidden by RCW Ch. 49.60 include discrimination in credit transactions (RCW 49.60.175-.176), insurance transactions (RCW 49.60.178), public accommodation (RCW 49.60.190), service animals (RCW 49.60.218), and real estate transactions (RCW 49.60.222-.224). Practices forbidden by RCW Ch. 49.60 also include discrimination in employment, RCW 49.60.180. Currier only claimed retaliation for opposing discrimination in employment. CP 397.

The Court of Appeals did correctly observe that to sustain a claim for retaliation, the complaining party need not prove that an actual violation of the law occurred. Op. at 10; *Ellis v. City of Seattle*, 142 Wn.2d 450, 460, 13 P.3d 1065, 1071 (2000); *Kahn v. Salerno,* 90 Wn. App. 110, 130, 951 P.2d 321 (1998); *Graves v. Department of Game,* 76 Wn. App. 705, 712, 887 P.2d 424 (1994). Even if the actions reported do not actually violate the WLAD, the complaining party may still have a retaliation claim if that person has "an objectively reasonable belief" that he is opposing a forbidden practice. *Ellis*, 142 Wn.2d at 460.

However, this Court has also made clear that in a retaliatory discharge claim, the complaining party must reasonably believe another party "has *violated the law*." *Id.* at 460 (emphasis added). Citing cases including *Graves* and *Kahn* that involve everything from state whistleblower statutes to federal civil rights laws, this Court in *Ellis* held that a retaliation cause of action exists for opposing conduct that the person objectively reasonably believes violates the law. *Id., citing Kahn,* 90 Wn. App. at 130*; Graves*, 76 Wn. App. at 712.

Relying on three Court of Appeals cases, including *Graves* and *Kahn,* the Court of Appeals here misstated and contradicted the standard this Court set in *Ellis.* Op. at 11 n.29. The court said that "Washington

cases have likewise held that a plaintiff...need only show that he or she reasonably believed [the conduct] was *discriminatory.*" *Id.* at 10-11 (emphasis added). The court *did not affirm* this Court's holding that a party needs to have an objectively reasonable belief that conduct violated the law. *Id.*

Applying this incorrect standard – that a retaliation claim may be based on a belief an act is generally "discriminatory" – the Court of Appeals went on to hold that Currier met the standard. Op. at 11. It held that Currier had a reasonable belief that one independent contractor's racist statement to another independent contractor "was a discriminatory practice." Op. at 11. The court did not address how one statement could be objectively reasonably believed to constitute a "practice." The court also did not address the fact that this "practice" was not engaged in *by Northland*, but by an independent contractor who was not Northland's employee. The court also did not address how Currier had an *objectively* reasonable belief that Northland had violated the WLAD.

It was not objectively reasonable, even for a layperson unfamiliar with the specifics of WLAD, to believe that Northland violated the law when it had no involvement in the independent contractor's statement. In fact, Currier admitted that he knew Northland had not engaged in employment discrimination. CP 253. 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. Currier could not claim retaliation for opposing a discriminatory statement solely between two fellow independent contractors unless he had an objectively reasonable belief that the statement constituted employment discrimination by Northland. Thus, his alleged opposition activity was unrelated to any violation of law by Northland, or any subjective or objective belief in such a violation, and his retaliation claim should have been dismissed as a matter of law. CP 297.

The opinion here contradicts the standard this Court set in *Ellis*, meriting review under RAP 13.4(b)(1). To prevail on his claim, Currier could not simply assert – as the Court of Appeals held – that he observed generalized "discrimination." Op. at 11. He had to show he had an objectively reasonable belief that *Northland violated the law.*[6] *Ellis*, 142 Wn.2d at 460.

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[6] Federal law has made this distinction very clear. In *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978), a 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. The court reasoned that to allow a retaliation claim under such facts would plainly exceed the scope of the anti-retaliation statute. *Id.*

(b) The Court of Appeals Opinion Conflicts With Decisions of This Court and the Court of Appeals that Isolated Statements by Independent Contractors Do Not Constitute Employment Discrimination under RCW 49.60.030

In holding that Currier had a reasonable belief he was opposing "a discriminatory practice," the Court of Appeals cited RCW 49.60.030, which "guarantees the right to obtain and hold employment without discrimination." Op. at 11.

The plain language of RCW 49.60.030 does not prohibit one independent businessperson from making a discriminatory statement to another independent businessperson. It certainly does not hold businesses accountable for the isolated discriminatory statements of unrelated third parties that happen to take place on their premises.

Cases arising under the WLAD have applied this plain language to conclude that in order to sustain an employment discrimination retaliation claim, there must be some evidence that actual *employment* discrimination has occurred. In *Coville*, the 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. The employer assumed she resigned. But Coville filed suit for retaliatory termination. The Court of Appeals upheld a directed verdict against her retaliation claim because "the evidence ... was not sufficient to sustain a jury verdict that she was engaged in *protected* opposition activity." *Id.* at 440 (court's emphasis). *See also, Alonso*, 178 Wn. App. at 753-54 (no retaliation claim where employee called company hotline to complain about conduct not prohibited under WLAD).

Federal courts applying WLAD reach the same conclusion. The plaintiff in *Blackford* had a history of communication and productivity problems, and he was counseled to improve his performance. *Blackford,* 57 F. Supp.2d at 1097. Blackford complained to a congressman that his last performance evaluation was retaliation for his efforts to support equal employment in the workplace. *Id.* 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 RCW 49.60.210(1). *Id.* at 1099-1100.

Other federal courts have specifically 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.").

A single derogatory joke between two independent contractors is not unlawful employment 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.").

There was 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. Similarly, there is no evidence in the record that anyone else ever complained about discrimination at Northland. CP 394. While Currier witnessed what theoretically could be described as discriminatory conduct between two fellow independent contractors, it was certainly not discriminatory conduct approved, condoned, or made by any employee or manager of Northland such that it could constitute employment discrimination.

Martinez was never discriminated against by Northland. 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 148-49.

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.") (emphasis in original). 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. CP 389; RP 212, 266. However, none of those

alleged statements was 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 did not know who was making them. RP 210-11. 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 and admitted were merely his fellow independent contractors. Without an objectively reasonable belief that he was opposing conduct forbidden under the WLAD, i.e. discriminatory conduct *by Northland,* Currier failed to prove he opposed any employment discrimination.

The Court of Appeals treatment of WLAD contravenes *Coville* and *Alonso*, meriting review under RAP 13.4(b)(2).

(2) *Marquis* Does Not Compel the Result Reached by the Court of Appeals in Broadening RCW 49.60.030 Beyond Its Express Terms to Independent Contractors

The Court of Appeals relied on this Court's decision in *Marquis v. City of Spokane,* 130 Wn.2d 97, 922 P.2d 43 (1996), op. at 9, but, in doing so, the court missed the importance of this Court's narrow treatment of independent contractors. In *Marquis,* this Court found that an independent contractor golf professional stated a claim for sex discrimination in her relationship with her principal under RCW 49.60.030(1), the WLAD's general declaration of rights, 130 Wn.2d at 115. Relying heavily on a regulation promulgated by the Human Rights Commission, WAC 162-16-230(2), the *Marquis* court believed that section .030 was sufficiently broad to allow a *direct* cause of action for discrimination by an independent contractor against the principal.[7]

But this is not a RCW 49.60.030(1) direct action for discrimination. Currier is explicitly not suing for prohibited discrimination *by Northland* in the making or performance of his contract. Unlike *Marquis*, which was explicitly not an employment discrimination case, 130 Wn.2d at 106 n.4 (alleged violations of RCW 49.60.180 not at

[7] There has been no further appellate extension of the WLAD to cover independent contractors in any other aspect of their activities.

issue) the lynchpin of Currier's suit against Northland turns on RCW 49.60.180. Op. at 11. Currier alleged that he was opposing a prohibited *employment* practice, which only applies to an employment relationship, not an independent contractor relationship. Indeed, the Human Rights Commission interprets RCW 49.60.180 to exclude independent contractors, and therefore claims no jurisdiction over them.[8] To the extent that the Court of Appeals improperly interpreted this Court's *Marquis* decision, review is necessary under RAP 13.4(b)(1).

In an employment matter, if there is no violation of RCW 49.60.180, there is no violation of RCW 49.60.210(1). Here, there are no facts or argument to be made that one comment by an independent contractor to another constitutes a violation of RCW 49.60.030 by Northland. RCW 49.60.180 manifestly does not apply to independent contractors. To whatever extent *Marquis* extended RCW 49.60.030 to cover independent contractors from direct discrimination by their principal in the making and performance of a service contract, it does not compel a distortion of the plain provisions of the anti-retaliation statute, RCW

[8] WAC 162-16-230(1) ("RCW 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.").

49.60.210.[9] To the extent that the Court of Appeals improperly interpreted this Court's *Marquis* decision, review is merited under RAP 13.4(b)(1).

(3) The Court of Appeals Opinion Raises a Substantial Issue of Public Interest Under RAP 13.4(b)(4) Because It Improperly Converts WLAD Into a General Civility Code

Civil rights codes are not "general civility code[s]." *Faragher v. City of Boca Raton,* 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L.Ed.2d 662 (1998) (quoting *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81, 118 S. Ct. 998, 140 L.Ed.2d 201 (1998)); *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297, 57 P.3d 280, 284 (2002); *Alonso*, 178 Wn. App. at 747 ("The WLAD is not intended as a general civility code").

Federal[10] and state court decisions construing similar anti-retaliation statutes require that alleged opposition relate to actual discriminatory practices, not simply isolated comments by private

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[9] Any further extension of the WLAD's provisions to independent contractors should only be done, if at all, by the Legislature, not by a judicial amendment of the statute. *See, e.g., Kilian v. Atkinson*, 147 Wn.2d 16, 29, 50 P.3d 638 (2002) (noting, while refusing to read "age" into the list of protected classes in section .030, "[t]his court will not add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it.").

[10] The anti-retaliation provision of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) 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..." Because the WLAD closely parallels Title VII of the Civil Rights Act of 1964, Washington courts look to interpretations of that law when construing RCW Ch. 49.60. *Graves*, 76 Wn. App. at 712.

individuals, including non-supervisory co-workers, customers and visitors.[11]

Businesspersons cannot and should not be held responsible for isolated comments – however offensive – that take place on their premises. Nor should a businessperson be forced to continue doing business with an independent contractor who has violated his contract and performed in an unsatisfactory manner, simply because that contractor happened to overhear an offensive comment between other independent contractors. Neither WLAD nor any civil rights law mandates that result.

F. CONCLUSION

Review of the Court of Appeals' published decision is merited under RAP 13.4(b). Currier's complaint about a racially derogatory statement solely by one fellow independent contractor to another is not opposition to a discriminating practice *by Northland* so that Northland's termination of his contract was not retaliatory under RCW 49.60.210(1), particularly where Northland had legitimate, non-retaliatory reasons for terminating Currier's contract. The public policy implications of the

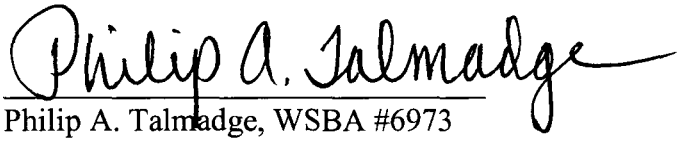
[11] *See, e.g., Silver*, 586 F.2d at 141 ("The opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual"); *Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956, 959-60 (11th Cir. 1997) (Opposition to racially offensive remark did not constitute opposition to unlawful employment practice); *Dempsey v. Harrison*, 387 F.Supp.2d 558, 562 (E.D.N.C. 2005); *Kunzler v. Canon, USA, Inc.*, 257 F.Supp.2d 574, 581-82 (E.D.N.Y. 2003); *Cooper v. Postmaster Gen.*, 59 F.Supp.2d 256, 259 (D.N.H. 1998).

Court of Appeals decision are important enough for this Court to render its own decision on the subject.

This Court should grant review of the Court of Appeals' published decision, and reverse the Court of Appeals opinion and the trial court's judgment and remand the case to the trial court for entry of judgment in favor of Northland.

DATED this 2d day of September, 2014.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LARRY CURRIER, individually; LARRY CURRIER, DBA AMERICAN CONTAINER EXPRESS, as sole proprietor and agent; and AMERICAN CONTAINER EXPRESS, INC., a Washington corporation,	)	NO. 70128-2-I
	)	DIVISION ONE
Respondent,	)	PUBLISHED OPINION
v.	)	
NORTHLAND SERVICES, INC., a Washington corporation,	)	FILED: August 4, 2014
Appellant,	)	
JUDI McQUADE, in her individual capacity; JAMES "JIM" SLEETH, in his individual capacity; PATRICK FRANSSEN, in his individual capacity; and LARRY GRAHAM, in his individual capacity,	)	
Defendants.	)	

LEACH, J. — Northland Services Inc. (NSI) appeals a trial court decision holding NSI liable for the retaliatory discharge of independent contractor Larry Currier, dba American Container Express, under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. NSI terminated Currier's contract two days after Currier reported to an NSI employee racially discriminatory comments directed at a Latino driver by another contractor driver. Because the WLAD applies to this case and substantial evidence supports the trial court's

findings and conclusions that retaliation was a substantial factor in NSI's termination of Currier, we affirm the trial court's judgment. And because substantial evidence supports the trial court's damages award as well as its finding that NSI did not meet its burden of proof for an after-acquired evidence defense, we also affirm the court's award of damages, costs, and attorney fees. Finally, we award Currier, as the prevailing party, his appellate fees and costs under RAP 18.1 and RCW 49.60.030(2).

FACTS

Larry Currier worked as an independent contractor truck driver for NSI from 2005 until August 14, 2008. Their subcontractor agreement required Currier to comply with all local, state, and federal laws. Either party could terminate the agreement on 30 days' notice or immediately upon default.

Yard supervisor Tom Vires advised Currier to install a citizens band (CB) radio in his truck to facilitate communication with NSI dispatchers and forklift operators. Currier told Vires he hated and did not want to hear the "obscene" racist and sexist speech routinely heard on CB, including over the company's radio frequency.[1] Later, at Vires's request, Currier installed a radio.

Around 2007, Currier heard Jim Sleeth, a contractor driver who later became an NSI dispatcher, say in the terminal, "Let's go put on the white sheets and scare Fred!" Fred Morris was an African American driver for NSI.[2] In 2008,

[1] Vires testified that Currier referred to "obscene" or "explicit" speech but that he did not remember Currier referencing sexist or racist speech.

[2] Sleeth denied making this statement.

Currier witnessed driver Terry Mock verbally abuse two Latino drivers named Victor and Julio: "Hey, f**ing Mexicans, what do you got for sale? I know you got something for sale because all Mexicans are thieves." Currier did not report either of these incidents.

In spring or summer 2008, Currier had a confrontation in the receiving office with Billy Howell, another driver. Howell whispered to Currier, "Hey, f**ing N** lover, you're just a piece of s**t. You're ripping these people off here by not working hard enough." Currier became angry, and a loud argument followed.

On August 12, 2008, Currier heard Howell yell across the yard to a Latino driver, Marco Martinez, "Hey, f**ing Mexican, you know why you have to go to Portland and I don't? Because f**ing Mexicans are good at crossing borders." Currier was upset and reported Howell's comment to Judith McQuade, NSI quality assurance manager. He did not report it to dispatch because he believed dispatch was involved. McQuade immediately reported the incident to dispatcher Sleeth and reported it to dispatcher Patrick Franssen the next day.

On August 14, 2008, Sleeth and Franssen met with Larry Graham, NSI terminal operations manager, for guidance on how to terminate Currier's contract. Graham told Sleeth and Franssen that because Currier was a contractor and not an employee, they "could just terminate the contract if he was not performing," and recommended they do so. Sleeth and Franssen did not tell

Graham about the August 12 incident or Currier's complaint, which Graham only learned of "much later."[3]

On August 14, 2008, Sleeth and Franssen called Currier into a meeting room and told him they would no longer be using his services—that "the reasons were for his customer service issues that we had with him. Us—customer being Northland Services, Patrick and I."[4] They also told him that they had talked with McQuade and the drivers and that "they had decided that the joke was funny."

After the termination of his contract, Currier left his truck in NSI's freight yard. When Sleeth walked by Currier's truck, he noticed several bald tires and expired license tags. He took photos of the truck.

In 2009, Currier filed a complaint with the Seattle Office of Civil Rights, which conducted an investigation. In 2011, Currier commenced suit against NSI for retaliation under the WLAD, RCW 49.60.210 and .030.

NSI moved for summary judgment, arguing that "the Washington Law Against Discrimination (WLAD) simply does not apply to alleged discrimination solely between two independent contractors, therefore there can be no retaliation as a matter of law and plaintiffs' case should be dismissed." The court denied NSI's motion, and a bench trial followed. On February 21, 2013, the court entered findings of fact and conclusions of law that held NSI liable for retaliation

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[3] Graham testified on cross-examination that if Franssen and Sleeth had told him about the incident and said, "[A]nd because of that, we've had enough of Currier and we want to fire him," Graham would not have advised termination because "the issue is not Currier, it's Billy Howell."

[4] This also terminated the contract and any relationship between NSI and Currier, dba American Container Express Inc..

within the meaning of RCW 49.60.210. The court awarded Currier economic loss damages of $301,604.00, noneconomic damages of $25,000.00, attorney fees of $265,500.00, and costs of $8,864.69.

NSI appeals.[5]

STANDARD OF REVIEW

This court reviews a trial court's findings and conclusions to determine if substantial evidence supports them and if those findings support the court's conclusions of law.[6] Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the matter asserted.[7] The trial court is in a better position to make credibility determinations, and if substantial evidence exists, this court will not substitute its judgment for that of the trial court on appeal.[8]

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[5] Though NSI's notice of appeal to this court lists five orders, NSI only assigns error to and argues four: the court's denial of NSI's motion for summary judgment, judgment, findings and conclusions on liability, and findings and conclusions on damages. NSI appears to have abandoned its appeal of the court's order denying NSI's motions to dismiss Currier's first amended and original complaints, and we decline to review it. An issue not briefed is deemed waived. Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992). And because we conclude that Currier established a prima facie case of retaliation, we do not address NSI's appeal of the trial court's denial of summary judgment.

[6] State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).

[7] State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

[8] Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990).

ANALYSIS

RCW 49.60.030 and .210

The Washington Supreme Court has repeatedly said that the WLAD expresses a "'public policy of the highest priority.'"[9] The legislature enacted the WLAD to eliminate and prevent discrimination in Washington.[10] The legislature has directed that the provisions of the WLAD "shall be construed liberally for the accomplishment of the purposes thereof."[11]

RCW 49.60.030 is entitled "Freedom from discrimination—Declaration of civil rights" and states in relevant part,

> (1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> (a) The right to obtain and hold employment without discrimination.

The WLAD also extends broad protections to "any person" engaging in statutorily protected activity from retaliation by an employer or "other person." RCW 49.60.210(1) provides,

> (1) 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

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[9] Int'l Union of Operating Eng'rs, AFL-CIO, Local 286 v. Port of Seattle, 176 Wn.2d 712, 722, 295 P.3d 736 (2013) (internal quotation marks omitted) (quoting Antonius v. King County, 153 Wn.2d 256, 267-68, 103 P.3d 729 (2004)).

[10] RCW 49.60.010.

[11] RCW 49.60.020.

> filed a charge, testified, or assisted in any proceeding under this chapter.

To establish a prima facie case of retaliation under RCW 49.60.210(1), a plaintiff must show that (1) he or she engaged in statutorily protected activity, (2) he or she suffered an adverse employment action, and (3) there was a causal link between his or her activity and the other person's adverse action.[12] The first element describes opposition to "any practices forbidden by" RCW 49.60.[13] When a person reasonably believes he or she is opposing discriminatory practices, RCW 49.60.210(1) protects that person whether or not the practice is actually discriminatory.[14] A plaintiff proves causation by showing that retaliation was a substantial factor motivating the adverse employment action.[15] If the plaintiff establishes a prima facie case, then the defendant may rebut the claim by presenting evidence of a legitimate nondiscriminatory reason for the adverse action.[16] This shifts the burden back to the plaintiff to prove that the employer's reason is pretextual.[17] The trier of fact must then "choose between inferences

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[12] Estevez v. Faculty Club of the Univ. of Wash., 129 Wn. App. 774, 797, 120 P.3d 579 (2005).

[13] Coville v. Cobarc Servs., Inc., 73 Wn. App. 433, 440, 869 P.2d 1103 (1994).

[14] Ellis v. City of Seattle, 142 Wn.2d 450, 460-61, 13 P.3d 1065 (2000); Graves v. Dep't of Game, 76 Wn. App. 705, 712, 887 P.2d 424 (1994) (citing Gifford v. Atchison, Topeka & Santa Fe Ry., 685 F.2d 1149, 1157 (9th Cir. 1982)).

[15] Allison v. Hous. Auth., 118 Wn.2d 79, 96, 821 P.2d 34 (1991).

[16] Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 70, 821 P.2d 18 (1991); Estevez, 129 Wn. App. at 797-98; Kahn v. Salerno, 90 Wn. App. 110, 129 n.5, 951 P.2d 321 (1998).

[17] Wilmot, 118 Wn.2d at 70; Estevez, 129 Wn. App. at 798; Kahn, 90 Wn. App. at 129 n.5.

when the record contains reasonable but competing inferences of both discriminatory and nondiscriminatory actions."[18]

Currier's Prima Facie Case for Retaliation

Statutorily Protected Activity

NSI contends that Currier may not bring this action for two reasons: (1) as an independent contractor, he is not an "employee" within the meaning of the statute and (2) because he did not oppose a specific employment practice of his employer, he did not engage in statutorily protected activity. Therefore, Currier cannot assert a claim for retaliation under RCW 49.60.210(1), and the trial court erred in denying NSI's motion for summary judgment.

To show that chapter 49.60 RCW does not protect an independent contractor, NSI notes that WAC 162-16-230, a rule promulgated by the Washington Human Rights Commission, excludes independent contractors from the protections of RCW 49.60.180.[19] This rule, however, provides only that independent contractors may not enforce the civil right guaranteed in RCW 49.60.030(1) by actions of the Washington Human Rights Commission. It does not prevent independent contractors from enforcing the broad protections of

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[18] Burchfiel v. Boeing Corp., 149 Wn. App. 468, 483, 205 P.3d 145 (2009) (citing Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 186, 23 P.3d 440 (2001), overruled on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006)).

[19] **"Purpose of section.** RCW 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 protections of RCW 49.60.180." WAC 162-16-230(1).

RCW 49.60.030(1) by private lawsuit.[20] And in Marquis v. City of Spokane,[21] the Washington Supreme Court held that "under the broad protections of RCW 49.60.030, an independent contractor may bring an action for discrimination in the making or performance of contract for personal services where the alleged discrimination is based on sex, race, creed, color, national origin or disability." The broad language of RCW 49.60.210(1) likewise supports the conclusion that the WLAD does not limit claims to those brought by employees against employers.[22] We hold that RCW 49.60.030 and .210(1) protect Currier as an independent contractor.

NSI next argues that because the racially derogatory statement came from Howell, an independent contractor, it cannot be imputed to NSI. Therefore Currier did not oppose a specific employment practice of NSI, and WLAD does not protect his objection to the statement.

NSI relies on certain federal cases including Silver v. KCA, Inc.,[23] in which the Ninth Circuit held that a plaintiff could not maintain a retaliation claim under Title VII of the Civil Rights Act of 1964[24] because she was opposing a racially

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[20] **Rights of independent contractors.** While an independent contractor does not have the protection of RCW 49.60.180, the contractor is protected by RCW 49.60.030(1). The general civil right defined in RCW 49.60.030(1) is enforceable by private lawsuit in court under RCW 49.60.030(2) but not by actions of the Washington state human rights commission.
WAC 162-16-230(2).

[21] 130 Wn.2d 97, 100-01, 112-13, 922 P.2d 43 (1996); see also Galbraith v. TAPCO Credit Union, 88 Wn. App. 939, 949-50, 946 P.2d 1242 (1997).

[22] Galbraith, 88 Wn. App. at 951.

[23] 586 F.2d 138, 140-41 (9th Cir.1978).

[24] 42 U.S.C. § 200e-3(a).

discriminatory act not of her employer but of a co-worker. That court held, "The opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual."[25]

Since the Ninth Circuit decided Silver in 1978, however, it has clarified that a plaintiff need not prove that the employment practice at issue was in fact unlawful but must show only a "reasonable belief" that the employment practice he or she protested was prohibited under Title VII.[26] Other Ninth Circuit cases have held that an employee's complaints about the treatment of others "is considered a protected activity, even if the employee is not a member of the class that he claims suffered from discrimination, and even if the discrimination he complained about was not legally cognizable."[27] The reasonableness of a plaintiff's belief is "an objective standard—one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims."[28] Washington cases have likewise

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[25] Silver, 586 F.2d at 141; see also Little v. United Techs., Carrier Transicold Div., 103 F.3d 956, 959-60 (11th Cir. 1997) ("Based on the facts of this case, we conclude that Wilmot's racially offensive comment alone is not attributable to Carrier and, accordingly, Little's opposition to the remark did not constitute opposition to an unlawful employment practice.").

[26] Trent v. Valley Elec. Ass'n, 41 F.3d 524, 526 (9th Cir. 1994) (concluding that plaintiff's reasonable belief that it was unlawful for her to be subjected to a series of sexually offensive remarks at a seminar her employer required her to attend would support a finding that she engaged in "protected activity" for purposes of a prima facie case of retaliatory discharge).

[27] Ray v Henderson, 217 F.3d 1234, 1240 n.3 (9th Cir. 2000); see also Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994) (finding black prison guard's belief that inmates were entitled to Title VII protection reasonable).

[28] Moyo, 40 F.3d at 985. The Moyo court also noted that "it has been long established that Title VII, as remedial legislation, is construed broadly." 40 F.3d at 985.

held that a plaintiff need not prove the conduct opposed was in fact discriminatory but need show only that he or she reasonably believed it was discriminatory.[29]

RCW 49.60.030(1)(a) guarantees "[t]he right to obtain and hold employment without discrimination." The trial court found that Currier reasonably believed that a white driver telling a Latino driver, on the job, that "f**ing Mexicans are good at crossing borders" was a discriminatory practice and that he opposed this practice by reporting it to an NSI employee. Substantial evidence supports the trial court's findings, and these findings support the court's conclusion that Currier was engaging in statutorily protected conduct.

Causal Link

The final element of a prima facie case of retaliation requires proof of a causal link between the opposition and the adverse employment action. To prove a causal link between his opposition and NSI's termination of his contract, Currier must provide evidence that his complaints about Howell's remarks were a "substantial factor" motivating NSI's decision.[30] Thus, retaliation need not be the main reason behind the discharge decision but instead need only be the reason which "tips the scales" toward termination.[31]

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[29] Estevez, 129 Wn. App. at 798; Kahn, 90 Wn. App. at 130; Graves, 76 Wn. App. at 712 (citing Gifford, 685 F.2d at 1157).

[30] Allison, 118 Wn.2d at 96; Estevez, 129 Wn. App. at 800.

[31] Wilmot, 118 Wn.2d at 72.

"'Because employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose.'"[32] Proximity in time between the protected activity and the discharge, as well as satisfactory work performance and evaluations before the discharge, are both factors suggesting retaliation.[33] And if an employee establishes that he or she participated in statutorily protected opposition activity, the employer knew about the opposition activity, and the employee was then discharged, a rebuttable presumption of retaliation arises that precludes summary dismissal of the case.[34]

NSI maintains that it terminated Currier's contract because of poor performance and disruptive behavior. According to Sleeth and Franssen, Currier's performance declined in 2008. At trial, they testified that Currier performed more slowly than other drivers, avoided work, and instigated conflicts with other drivers. They claimed that customers complained about Currier. According to Sleeth, he and Franssen met with Currier soon after his quarrel with Howell to "put him on notice, just tell him that we have some major issues with his overall demeanor, the way he treats the other drivers, the way he performs his job, his efficiency issues, his unpredictability. He seemed to anger very easily over very small things." Currier denied that this meeting took place and denied

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[32] Estevez, 129 Wn. App. at 799 (quoting Vasquez v. State, 94 Wn. App. 976, 985, 974 P.2d 348 (1999)).

[33] Wilmot, 118 Wn.2d at 69; Estevez, 129 Wn. App. at 799; Vasquez, 94 Wn. App. at 985, Kahn, 90 Wn. App. at 130-31.

[34] Estevez, 129 Wn. App. at 799; Vasquez, 94 Wn. App. at 985; Kahn, 90 Wn. App. at 131; Graves, 76 Wn. App. at 712.

that Sleeth and Franssen ever spoke to him about agitating other drivers, his temper, customer complaints, or slow performance.

NSI produced no documentation of complaints about Currier's performance. No driver or customer who reportedly complained to Sleeth or Franssen testified at trial. NSI called one other driver to testify at trial. When questioned about Currier's work ethic, the driver testified that he believed Currier was doing "as good a job as me." The trial court noted that even Currier's status as an independent contractor does not explain the "total absence of any writings about the numerous problems to which the dispatchers testified."

The trial court found inconsistencies in the nonretaliatory bases Sleeth and Franssen provided for their termination of Currier's contract, as well as the timing of the termination decision. At trial, Sleeth and Franssen testified that they had made the decision to fire Currier at least a week before Currier's complaint and waited for their meeting with Larry Graham only to confirm their decision. In earlier answers to interrogatories, however, they made no mention of having already made this decision. Larry Graham testified at trial that Sleeth and Franssen cited Currier's slow performance and safety and compliance issues with his truck. Graham did not recall anything about Currier agitating other drivers or that there had been customer complaints. While Sleeth and Franssen testified that customer complaints were a reason for Currier's termination, they did not cite this reason in earlier interrogatory answers.

There were also inconsistencies among the accounts of McQuade, Sleeth, and Franssen about the meetings that occurred after Currier complained about Howell's racist remarks. McQuade testified that she reported Currier's complaint to Sleeth that day and to Franssen that day or the next. She testified that she, Sleeth, and possibly Franssen met with Howell and Martinez the day after Currier's complaint. Sleeth and Franssen, however, testified they did not meet with the drivers. Sleeth testified he did not speak to McQuade about the complaint and did not know about it before terminating Currier.

"Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."[35] Here, the trial court found a lack of documentation for NSI's purported nondiscriminatory reasons for terminating Currier's contract. The court also found inconsistencies in Sleeth's and Franssen's explanations of those reasons and in their accounts of the events surrounding Currier's complaint. The court found a close proximity in time between the complaint and the termination. The court did "not find credible the claim that Plaintiff's [c]omplaint had no effect on the decision to terminate Plaintiff's contract." Substantial evidence supports the court's conclusion that Currier's complaint "tipped the scales toward termination."

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[35] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

NSI argues that the trial court's decision "would effectively hold an employer liable for all discriminatory statements of all of its independent contractors or sales and supply vendors that happen to be on the employer's property."[36] But this argument begins with a faulty premise—that NSI is being held liable for Billy Howell's racially discriminatory speech. This completely misrepresents the basis for liability. The trial court held NSI liable for its own retaliatory conduct against an independent contractor after he complained to NSI. The trial court's decision does not make the law "a general civility code" beyond the original intent of the legislature;[37] it holds NSI accountable for the exact type of retaliatory conduct the legislature sought to prevent with RCW 49.60.210(1). We affirm the trial court's finding of liability for retaliation.

Damages and NSI's After-Acquired Evidence Defense

RCW 49.60.030(2) provides remedies for a prevailing party, including recovery of actual damages, costs, and reasonable attorney fees. "Actual damages are 'a remedy for full compensatory damages, excluding only nominal, exemplary, or punitive damages,' that are 'proximately caused by the wrongful

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[36] The Association of Washington Business filed an amicus curiae brief in support of this argument.

[37] See Alonso v. Qwest Communications Co., 178 Wn. App. 734, 747, 315 P.3d 610 (2013), and Adams v. Able Building Supply, Inc., 114 Wn. App. 291, 297, 57 P.3d 280 (2002), for the proposition that "[t]he WLAD is not intended as a general civility code." These cases are distinguishable as involving disparate treatment or a hostile work environment, where the degree of abusive conduct by co-workers is the disputed fact. The issue in this case is not Howell's (undisputed) offensive behavior, which by itself would likely not support such a claim. Rather, the issue here is the alleged retaliatory conduct of NSI in response to Currier's complaint about it.

action, resulting directly from the violation of RCW 49.60.'"[38] A court may limit economic damages if the employer shows evidence of the employee's wrongdoing that it discovered only after the discharge.[39] Under this after-acquired evidence rule, an award for back pay is calculated from the date of the unlawful discharge to the date the employer discovered a lawful basis for discharge.[40] To establish an after-acquired evidence defense, an employer must prove that the wrongdoing was of such severity that had the employer discovered the misconduct earlier, it would have terminated the employee on those grounds alone.[41]

NSI assigns error to the trial court's conclusion that NSI failed to prove an after-acquired evidence defense. Sleeth and Franssen both testified at trial that had they not already terminated Currier's contract, they would have done so immediately upon discovering the condition of his truck. However, the trial court found that "NSI would not have learned of the condition of Plaintiff's truck had NSI not terminated his contract, because it was undisputed that NSI did not perform regular truck inspections." NSI's subcontractor agreement required contractor drivers to comply with all local, state, and federal laws and regulations, and thus Currier arguably breached his contract. But NSI did not show that its

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[38] Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 216, 87 P.3d 757 (2004) (citation omitted) (quoting Martini v. Boeing Co., 137 Wn.2d 357, 368, 371, 971 P.2d 45 (1999)).

[39] McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 362-63, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995); Janson v. N. Valley Hosp., 93 Wn. App. 892, 900-01, 971 P.2d 67 (1999).

[40] Janson, 93 Wn. App. at 900.

[41] Janson, 93 Wn. App. at 901 (citing McKennon, 513 U.S. at 362-63).

response would have been termination, especially given the lack of evidence that NSI had any policy to ensure its contractors' compliance.

NSI's tire expert, Dave Temple, testified that Sleeth's photographs showed "there was [a] violation of the Code of Federal Regulations." Temple also testified, however, that he could not determine from the photographs whether the tread on Currier's tires would require that the truck be placed out of service. Currier's operation of his truck with expired license tabs was a civil infraction subject to a citation. NSI presented no evidence that it ever terminated any driver's contract because of equipment or licensing issues or traffic infractions. The trial court did not find the testimony of Sleeth and Franssen credible.

This court will not disturb a damages award unless the award falls outside the range of substantial evidence in the record, shocks the conscience of the court, or appears to be the result of passion or prejudice.[42] And this court strongly presumes the trial court's verdict is correct.[43] Because substantial evidence supports the trial court's findings, we affirm the court's award of damages, attorney fees, and costs.

Appellate Costs and Attorney Fees

Currier requests attorney fees and costs on appeal. Under RAP 18.1 and RCW 49.60.030(2), the prevailing party is entitled to appellate fees and costs.[44]

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[42] Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005); Burchfiel, 149 Wn. App. at 484.

[43] Bunch, 155 Wn.2d at 179; Burchfiel, 149 Wn. App. at 484.

[44] Allison, 118 Wn.2d at 98.

We award Currier appellate costs and reasonable attorney fees, subject to his compliance with RAP 18.1(d).

CONCLUSION

Because substantial evidence supports the trial court's findings of fact regarding liability and damages and those findings support the court's conclusions of law, we affirm and award Currier his costs and reasonable attorney fees on appeal.

Leach, J.

WE CONCUR:

Cox, J.

Becker, J.

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the Petition for Review in Court of Appeals Cause No. 70128-2-I to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: September 2, 2014 at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick