No. 30545-7-III

SUPREME COURT

OF THE STATE OF WASHINGTON

CHARLES ROSE, APPELLANT

v.

ANDERSON HAY AND GRAIN, RESPONDENT

APPELLANT'S OPENING BRIEF

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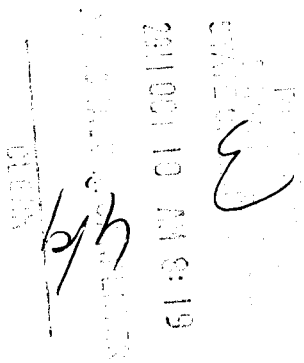

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I. INTRODUCTION

This appeal related to the application of the case of *Korslund v. Dyncorp Tri-Cities SBRUS*, 156 Wn.2d 168, 125 P.3d 119 (2005). Appellant, a truck driver for Respondent, Anderson Hay and Grain, (hereinafter AHG) refused to drive a load of hay to Seattle on the basis that he would exceed his Federal driving limits by doing so. He then refused an order to falsify his driving time records to show falsely that he could take the load.

He was fired. He filed a Federal Claim in US District Court under an amended 49 USC 31105 which allowed the filing of a Federal Court action, a State Court action, or in the alternative an administrative claim. The Federal statue prominently notes that the administrative action does not preempt (take away) a Federal or State Court action, nor does the Federal Statute state in anyway that the administrative claim is a precondition to filing a Federal or State claim. Despite the new Federal statute and without any case law on the new statute, AHG moved for dismissal contending all complaints under 49 USC 31105 are under the exclusive jurisdiction of the Secretary of Labor. (CP 8, L 14-22)

A new Federal Judge ignored the applicable amended Federal law, followed the prior law and dismissed the Federal Court action on the unsupported idea that Appellant was required to file an administrative claim first. Her ruling coincidentally was rendered three months after the deadline to file for an administrative remedy.

Appellant then filed a State Court action in Kittitas County where the State Court Judge dismissed the claim because, "It was determined that (Appellant) should have initiated his claim administratively..." when the language in 49 USC 31105 (b)(amended 2007) does not say this and in fact notes that the administrative alternative "does not preempt" the State and Federal remedies. In fact, 31105 merely states the employee may file, not must file with the Secretary of Labor. To avoid any confusion, "nothing in this section (31105) preempts (takes away) or diminishes any other safeguards against...discharge...provided by State or Federal law." Respondent's claim that there is an adequate administrative remedy despite the fact that the Federal administrative claim filing deadline passed three months before the Federal District Court Judge dismissed the Federal Court action.

The State Court Judge ignored the same amended statute and adopted the decision of the Federal Judge.

Further, Appellant contends that Federal Administrative remedies are not the adequate remedies available in Federal or State Court action.

II. ASSIGNMENT OF ERROR

The Kittitas Superior Court erred in concluding, under these facts, and under the law set out below, that Appellant was required under Federal law to initiate his claim administratively (CP 114) Appellant followed Federal Law and chose a Federal Court action which was not "preempted" by the administrative alternative and which was wrongly dismissed after the administrative alternative was time barred.

III. STATEMENT OF CASE

Appellant, Charlie Rose, (hereinafter Rose) was employed by Respondent, Anderson Hay & Grain, (hereinafter AHG) as a truck driver transporting hay from Ellensburg, Washington. (CP 95, L 18-19)

Rose was a 58 year old truck driver for 35 years when hired by AHG. (CP 95, L 18) Under Federal Law, Rose is required to

record his hours of driving and abide by a time limit for driving at no more than 60 hours in a 5 day period. (CP 95, L 19-22) He drove a semi-truck with a trailer loaded with hay weighing 100,000 to 105,000 lbs. (CP 96, L 1-2)

Rose knew the drive time limits were appropriate because when he approached the 60 hour limit, his coordination and reaction time was slowed and he had to fight the potential to fall asleep at the wheel (CP 96, Line 10-13) He abided by the time limit also because, if he failed to abide by the limit, he could lose his license to drive and he could pose a threat to oncoming traffic or traffic next to him on multilane roads. (CP 96, L 17-22) He also notes that his own experience as a truck driver on the time limit is backed up by Department of Transportation publications. (CP 96, L 20-25)

When his supervisor asked him to take another load of hay to Seattle, he informed the supervisor if he did, he would be over the 60 hour limit. He was told that he would have to adjust his record of hours on the company forms to hide what his actual hours were (CP 97, L 4-9) He refused and was fired. (CP 97, L 9)

Joe Peak was also a truck driver for AHG and was deposed on 10/12/10 and testified that, at the time of the deposition that, he had liver cancer and had six months to live (CP 102, L 14-18) He died shortly thereafter.

When Peak informed his supervisor that, he did not have enough hours (driving time limit) to complete a load, he contacted his supervisor, Tina (CP 109, L 2-6) In response, Tina told Peak, "You got to go...you got to make it work out...this can (container of hay) has to go" (CP 110, L 7-25) (CP 111, L 1-11)

His employment at AHG as a truck driver ended on 8/13/10 for the stated reason of AHG that he could not get along with other drivers. (CP 104, L 12-21) Peak testified this was not true. (CP 104, L 21-23)

Rose contacted his attorney, was aware he could, under Federal law, file a Federal administrative claim or a Federal Court claim or a State Court claim. On the advice of his attorney, he chose to file a Federal Court claim. (CP 97, L 10-12)

The Federal law amended in 2007 left the choice to the Plaintiff as set out below.

AHG, through their attorney, filed a motion to dismiss based upon case law interpreting a prior limited version of Federal law. The new Federal District Court Judge dispensed with oral argument and granted the motion to dismiss on the unsupported theory that Rose was required to file administratively despite the new Federal Law spelling out that the administrative remedy did not preempt the right to a Federal or State Court claim.

The District Court Judges decision came three months after the expiration of the time limit for filing for administrative relief. Appellant then filed this matter in Kittitas Superior Court which dismissed the case pursuant to what it considered was dictated by the *Korslund* case described below.

Under an older Federal Statute, 49 USC 31105, only a Federal Administrative remedy was available.

> ...an employee may file a Complaint with the Secretary of Labor...60 days later the Secretary of Labor shall conduct an investigation...include findings and a preliminary order...30 days later (either party may object)...a hearing shall be

conducted...a person adversely affected can Petition for Review...in the Court of Appeals (July 5, 1994)

Access to the Court was limited to a review of the Administrative decision. In 2007, 49 USC 31105 was amended in pertinent parts as follows:

(F) (b) an employee may file a Complaint with the Secretary of Labor not later than 180 days after the ...violation

(f) No preemption. Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, supervision, threat, harassment, reprimand, retaliation or any other manner of discrimination provided by Federal or State Law.

(g) Rights retained by Employee. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any

employee under and Federal or State Law.

(Emphasis added)

It is clear, the new Federal law 49 USC S 31105, amended in 2007, provided three separate avenues for such an employee to follow. Those remedies were an administrative remedy, a Federal Court action, or a State Court action.

The Defense has cited the unpublished decision of the new Federal Judge in State Court which decision has no basis for precedence. The Defense has cited no case law in State or Federal Court as a precedent under the new Federal Law. The Federal Court decision has no precedential value. (CP 77)

We cite the Federal Judge's decision for a different reason. The law, amended in 2007, clearly provides new and alternative remedies for such action which would be consistent with the public policy recognizing the danger of employers threatening to fire employees to hide and encourage safety violations. (CP 77)

We also cite the amended law to establish that Rose and his attorney did not sit idly by. A claim was reasonably filed in U.S. District Court. The District Court rendered its decision after first denying any oral argument and then dismissed the Federal Court

action. (CP 84) The administrative remedy, now claimed by the Defense as an existing remedy, expired three months before her decision, and, it expired before the State Court actions was filed. Therefore, there is no administrative remedy for Plaintiff. (CP 78)

Preempt is defined as follows in Webster's New Collegiate Dictionary 1980:

2: to seize upon to the exclusion of others

3: to take the place of: Replace

The amended Federal law specifically states that nothing in 31105 preempts (takes away) or diminishes any other safeguards against discharge, suspension...retaliation or in any manner provided by Federal law or State law. The Federal law also does not diminish the right or remedies of any employee under any Federal or State law. Charles Rose filed a Federal Court claim under Federal law. (CP 78)

Additionally, it is clear the remedies under the administrative alternative were severely limited. In *Briones v. Ashland, Inc.*, 164 F.Supp. 228 (D. Mass. 2001) the facts showed that 164 F.Supp. 228 that an employee sued his employer under the

1994 version of the same act. It was amended in 2007 but the remedies stayed the same. (CP 78) (emphasis added)

In *Briones*, supra, the Federal Court ruled as follows at 164 F.Supp. 232:

> Finally, the remedies available under the STAA's remedial provisions are not coextensive with the State law remedies. As indicated above, the remedies afforded by the STAA do not include emotional distress damages. Faced with the question to whether a similar provision of the ERA preempted an employee's action under Massachusetts common law for wrongful discharge, the Court of Appeals found the State claim was not preempted. *Norris v. Lumbermen's Mutual Casualty Co.,* 881 F.2d 1144 (1st Cir. 1989). More importantly, the Court of Appeals expressly championed the need for the supplemental State remedy of punitive damages to protect whistle

> blowers and deter violators. See *Norris*, 881 F.2d at 1151. "Allowing whistle blowers to proceed in State Court indirectly promotes...safety by subjecting the employer to the threat of a substantial jury award if it retaliates against a whistle blower by wrongfully discharging him." *Norris*, 881 F.2d at 1151. Indeed, the Court of Appeals emphasized the importance of the supplemental State remedy holding that availability of a State law action strengthened and expanded the public policy of protecting whistle blowers.

In the instant case, Appellant alleged damages for mental distress, anguish, humiliation and loss of enjoyment of life. (CP 1-5) By the Federal Court decision cited above, these remedies are not available under the administrative alternative. If the Supreme Court rules that these remedies are adequate, the point of this appeal is that, Appellant chose to file a Federal Court action which is patently in the new law. The dismissal of the Federal Court

claim came after the time limit for filing an administrative claim. (CP 79)

Respondent cites *Korslund v. Dyncorp Tri-Cities SBRUS*, 156 Wn.2d 168, 125 P3d 119 (2005) as support.

In *Korslund*, supra, the fact showed that employees, Korslund, Miller and Acosta made a series of reports and complaints relating to health and safety issues at their employment, (156 Wn.2d 173) and, as a result, they allege retaliating actions, hostile work environment and threats of termination. (156 Wn.2d 175) (CP 80)

In *Korslund,* supra, our Supreme Court noted that the "Employment Security Department" found that ... Korslund had quit work with good cause and he was awarded unemployment benefits... Miller (worker) was placed on disability leave and Acosta remained at work but suffered from depression, nervousness, sleeplessness and anxiety (156 Wn.2d 175-176). The Washington Supreme Court in Korslund noted that the Federal administrative remedy included "compensatory damage" citing 42 USC 5851 (b)(2)(B)(Korslund 156 Wn.2d 182) The three

employees then sued Dyncorp for wrongful discharge in violations of public policy (156 Wn.2d 176). (CP 80)

The Respondent Corporation, in this case, relies on the fiction that there is an adequate alternative means of promoting the public policy to stop termination of drivers who refuse to file false time reports. The Supreme Court in *Korslund* ruled as follows at 156 Wn.2d 181-182:

> Here, we need not consider whether either Korslund or Miller has presented sufficient evidence to take the issue of constructive discharge to a trier of fact because the public policy cause of action is otherwise foreclosed in this case. As a matter of law, the plaintiffs have not satisfied the jeopardy element of the tort of wrongful discharge in violation of public policy because there is an adequate alternative means of promoting the public policy on which they rely...
> In order to establish jeopardy, "a plaintiff must show that he or she 'engaged in

particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy.;" *Hubbard*, 146 Wn.2d at 713 (quoting *Gardner*, 128 Wn.2d at 945). The plaintiff has to prove that discouraging the conduct that he or she engaged in would jeopardize the public policy. *Ellis v. City of Seattle*, 142 Wn.2d 450, 460, 10 P.3d 1065 (2000). And, of particular importance here, the plaintiff also must show that other means of promoting the public policy are inadequate. *Hubbard*, 146 Wn.2d at 713; *Gardner*, 128 Wn.2d at 945.

While the question whether the jeopardy element is satisfied generally involves a question of fact, *Hubbard*, 146 Wn.2d at 715, the question whether adequate alternative means for promoting the public policy exist may present a question of law,

> i.e., where the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy. See id. at 716-17. (Emphasis added)

Please note in *Korslund* at 156 Wn.2d 181, supra the Supreme Court dismissed *Korslund* because "there is an adequate alternative remedy (156 Wn.2d 181-182)" At the time the District Court Judge made her ruling, there was no administrative remedy. Even if there was, it was inadequate. (CP 82)

Further, in *Briones v. Ashland*, dealing with the same remedies, the Federal Court noted as follows about the remedies at 164 F.Supp. 228 (D. Mass. 2001) at P. 232;

> Finally, the remedies available under the STAA's remedial provisions are not coextensive with the State law remedies. As indicated above, the remedies afforded by the STAA do not include emotional distress damages. Faced with the question to whether a similar provision of the ERA

preempted an employee's action under Massachusetts common law for wrongful discharge, the Court of Appeals found the State claim was not preempted. *Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144 (1st Cir. 1989). More importantly, the Court of Appeals expressly championed the need for the supplemental State remedy of punitive damages to protect whistle blowers and deter violators. See *Norris*, 881 F.2d at 1151. "Allowing whistle blowers to proceed in State Court indirectly promotes...safety by subjecting the employer to the threat of a substantial jury award if it retaliates against a whistle blower by wrongfully discharging him." *Norris*, 881 F.2d at 1151. Indeed, the Court of Appeals emphasized the importance of the supplemental State remedy holding that availability of a State law action

strengthened and expanded the public policy of protecting whistle blowers. (emphasis added)

Therefore, even if there is an administrative remedy, it does not include the only significant damages available in a State action. (CP 83)

The Federal law applicable to Plaintiff states in pertinent part as follows at 49 USCS section 31105 Employee Protections (Transportation Vehicle and Driver Protection):

a) Prohibitions

(1) A person may not discharge an employee ...because...

b) The employee refuses to operate a vehicle because:

(1) The operation violates a standard or order of the United States related to commercial motor vehicle safety, health or security...

c) The employee accurately reports hours of duty.

(b) An employee alleging discharge... may file a complaint with the Secretary of Labor no later than 180 days after the alleged violations occurred...

(f) NO PREEMPTION. Nothing in this section (31105) preempts or diminishes any other safeguards against...discharge...provided by State or Federal law.

(g) RIGHTS RETAINED BY EMPLOYEE Nothing in this section shall be deemed to diminish the rights, privileges or remedies of any employee under any Federal or State law... (As amended August 3rd 2007)

A Federal District Court Judge dismissed the trial remedy distinctly pleaded and sought by the Plaintiff in Federal Court despite the language cited above which leaves the option of remedy to the Plaintiff. (CP 84) The Federal law does not qualify the choice of filing in Court with any language to the effect that filing an administratively is a precondition to filing a Court action.

The Federal Court's ruling came three months beyond the time for filing an administrative claim effectively removing the argument that "there is" (*Korslund* P.181) an adequate alternative means of promoting public policy. (CP 84)

We respectfully ask the Court to review the Federal Law along with the unpublished opinion cited by the Defense.

Charles Rose did not sit on his hands. He hired an attorney. Similar to what the *Korslund* panel noted and considered, the Employment Security Department in this case noted that Charles Rose did not violate a reasonable rule of the employer by refusing to drive the load and he was entitled to Unemployment benefits. (CP 93-94) Specifically, we ask this Court to find that, at the time of the State Court filing, there was no adequate administrative remedy. (CP 84) Further, based on the Federal Court ruling in *Briones*, supra, and as distinguished by Korslund, there are no emotional distress damages available under the administrative remedy (164 F.Supp. 228 at page 232) and the Federal Court of Appeals "championed" the need for supplemental State remedies. We therefore ask the Court to note this in its opinion and ruling

that under these unique facts and law there is no adequate administrative remedy pursuant to *Korslund*, supra. (CP 85)

The Employment Security Department, in this case, also found in a contested hearing that there was no good cause to fire Charles Rose and he too was awarded unemployment benefits. (CP 85) Please note *Korslund* was cited by the Respondent in its Superior Court brief and the Washington Supreme Court considered the outcome in the Employment Security Department. (CP 85)

IV. SUMMARY OF ARGUMENT

In Summary, Charlie Rose relied upon the Federal Law that, by a reasonable interpretation provided for three separate remedies; an administrative remedy or any other Federal or State remedy.

We filed in Federal Court under a recognized Federal Remedy. A Motion to Dismiss could only have been granted on an old version of the Federal Law that limited remedies to Administrative Law.

The new amended Federal Law allowed the Administrative remedies but prominently noted that other Federal or State

remedies were not preempted (taken away) by the administrative alternative. The Federal Law does not, in anyway, require an administrative action before a Court action. We cannot explain the decision of the new Federal Judge, but it is uncontested that her decision came after the time expired for filing for administrative relief. Therefore there is no adequate remedy as required by *Korslund*, supra, for a dismissal of the State claim.

In Summary, we alleged a termination of Charles Rose because of his refusal to falsify a form on a significant element of safety for anyone on the roads in Washington State. We reasonably relied on a new Federal Statute. The U.S. District Court Judge's decision has no precedential value but was cited by the Defense for precedential purposes.

Just as the *Korslund* Court chose to consider the outcome of the contested unemployment hearing. We attached the decision of the Employment Security Division as Exhibit 3, to show that the Plaintiff's actions in refusing the load were reasonable. (CP 94)

We respectfully ask this Court to please not be confused and read both versions of 49 USC 31105 which in its current

version provided a choice to an employee for a remedy, which included administrative or Court actions.

We reasonably filed the Court action in Federal Court. We did not sit idly by while the time for the administrative remedy passed. It did by the time of the District Court Judge's decision. As noted in *Korslund*, the question is whether there is an adequate administrative remedy when this was filed in State Court which is the key to the Respondent's Motion to Dismiss this case. The Respondent asks this Court to expand the ruling in *Korslund* beyond whether there is an adequate administrative remedy to whether there was or could have been, if we had not filed for a Federal Court remedy which was not "preempted" by the Federal Law.

Also, if there was an administrative remedy, it is not the same remedy available at trial. In a Federal or State Court action, in a wrongful termination, Plaintiff is entitled to recover damages for mental distress, anguish, humiliation, and loss of enjoyment of life.

However, the administrative remedy claimed by the Defense does not allow such damages. Even, if Appellant could

file for an administrative claim, the administrative remedy was far from the adequate remedy available at common law or in Federal Court. We also ask the Court to conclude that there was no an adequate administrative remedy by the time the new Federal Judge's decision which lacks any basis for precedence. Further, we ask the Court to conclude, based upon *Briones v. Ashland*, that had the remedy been available, it was not adequate.

IV. CONCLUSION

The trial Court's order granting a summary judgment dismissal should be reversed and this case should be remanded for trial. On behalf of the Appellant, we apologize for repetition in the zeal of making a point.

Dated this 5 day of October, 2011.

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