

ORIGINAL

NO. 36413-1-II

WASHINGTON STATE COURT OF APPEALS

DIVISION TWO

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KARI LEE VENNES,  
Plaintiff-Appellant,

vs.

ACE PAVING CO., INC., et al.,

Defendants-Appellees.  
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FILED  
COURT OF APPEALS  
DIVISION II  
08 FEB 20 PM 1:11  
STATE OF WASHINGTON  
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT FOR KITSAP COUNTY

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THE HONORABLE THEODORE SPEARMAN, Judge  
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BRIEF OF APPELLANT  
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TABLE OF CONTENTS

	<u>Page</u>
1. ASSIGNMENTS OF ERROR.....	1
2. STATEMENT OF THE CASE.....	2
A. SUBSTANTIVE FACTS.....	2
B. PROCEDURAL FACTS.....	9
3. ARGUMENT.....	10
A. SUMMARY JUDGMENT REVIEW STANDARD....	10
B. THE SUPERIOR COURT ERRED IN FINDING THAT ACE PAVING WAS NOT VICARIOUSLY LIABLE FOR MR. CAMPBELL'S SEXUAL ASSAULT UPON MS. VENNES.....	11
C. THE SUPERIOR COURT ERRED IN FINDING THAT MS. VENNES WAS NOT WRONGFULLY DISCHARGED IN CONTRAVENTION OF PUBLIC POLICY.....	12
D. THE SUPERIOR COURT ERRED IN FINDING THAT MS. VENNES DID NOT HAVE A VALID CLAIM UNDER BOTH TITLE VII AND THE WASHINGTON STATE LAW AGAINST DISCRIMINATION.....	14
E. THE SUPERIOR COURT ERRED IN FINDING THAT MS. VENNES DID NOT HAVE A VALID CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.....	15
4. CONCLUSION.....	17

TABLE OF CASES

	<u>Page</u>
<u>Birklid v. Boeing Co.</u> , 127 Wn. 2d 853 (1995).....	15
<u>Dickinson v. Edwards</u> , 105 Wn. 2d 457 (1986).....	11
<u>Hubbard v. Spokane County</u> , 146 Wn. 2d 699, 50 P. 3d 602, (2002).....	13
<u>Jones v. Allstate Ins. Co.</u> , 146 Wn. 2d 291, 45 P. 2d 1068, (2002).....	10
<u>Moyo v. Gomez</u> , 32 F. 3d 1382 (9 <sup>th</sup> Cir., 1994).....	14
<u>Smith v. Safeco Ins. Co.</u> , 150 Wn. 2d 478, 78 P. 3d 1274, (2003).....	10
<u>Stegall v. Citadell Broadcasting Company</u> , 350 F. 3d 1061 (9 <sup>th</sup> Cir., 2003).....	14-15
<u>Thompson v. Everett Clinic</u> , 71 Wash. App. 548 (Div. I 1993).....	11
<u>Wilson v. Steinbach</u> , 98 Wn. 2d 434, 656 P. 2d 1030, (1982).....	10

1.           **ASSIGNMENTS OF ERROR.**

A.       The Superior Court erred in finding that defendant Ace Paving should be dismissed due to lack of vicarious liability on Ms. Vennes' assault claim. Issue Pertaining to Assignment of Error A: Whether the defendant should be held vicariously liable for the assault upon plaintiff by their employee while the employee was acting as the supervisor of plaintiff.

B.       The Superior Court erred in finding that Summary Judgment should be granted to defendant Ace Paving on Ms. Vennes' Wrongful Discharge claim because the Court found that she was not actually terminated. Issue Pertaining to Assignment of Error B: Whether the defendant did, in fact, constructively discharge Ms. Vennes due to her complaints of sexual assault by her supervisor in contravention of public policy.

C.       The Superior Court erred in finding that Summary Judgment should be granted on Ms. Vennes' Title VII and WLAD claims because it found that she was not discriminated against or retaliated against for her complaints regarding her supervisor's sexual assault upon her. Issue Pertaining to Assignment of Error C: Whether Appellee Ace Paving did, in fact, refuse to return Ms. Vennes to work due to the fact that she complained of her supervisor's criminal and outrageous

behavior.

**2. STATEMENT OF THE CASE.**

A. SUBSTANTIVE FACTS.

Appellant, Kari Lee Vennes, began working for appellee Ace Paving Co., Inc. ("Ace") in June of 1998 as a Traffic Controller, and eventually became a Journeyman Laborer. CP 42, Exhibit A p. 11-19; p. 221. In the Fall of 2002, Jack Campbell, became Ms. Vennes' foreman, or supervisor at Ace and she worked on his crew. Id. p. 25-26.

On November 12, 2002, Ms. Vennes went to a work site on Ridgetop Boulevard in Silverdale, Washington to do shoulder rocking prior to heading to another job site with Mr. Campbell's crew. Id. p. 45-54. After working at Ridgetop Boulevard for a couple of hours, the crew was headed to West Kingston in Kitsap County, Washington to another job site. Id. Although Ms. Vennes would normally drive her own vehicle to job sites, Mr. Campbell insisted that she drive with him in the Ace company truck which Ace allowed Mr. Campbell to drive. Id.

On the way to the West Kingston job site, Mr. Campbell turned right on Gunderson Road in Poulsbo, Washington, in lieu of continuing on Bond Road, which would have been a more direct path to the job site. Id. p. 53-58. After turning right on Gunderson Road, Mr. Campbell undid his

pants, exposing his erect penis, and forced Ms. Vennes to perform oral sex upon him for four and one half miles while driving down Gunderson Road until they reached the West Kingston job site, when he pulled the truck over and ejaculated in her mouth. Id. p. 53-76; p. 283-284. Mr. Campbell accomplished this by grabbing Ms. Vennes by her hip, pulling her towards him, then grabbing her by the back of the head and forcing his erect penis into her mouth. Id. The truck had no seat-belts, and Ms. Vennes was not belted in. Id. p. 264.

Although the truck Mr. Campbell was driving was a stick shift, he was able to shift gears while also forcing Ms. Vennes to continue performing oral sex on him. Id. p. 53-76; p. 283-284. The actions of Mr. Campbell were so quick and shocking to Ms. Vennes that she had no opportunity to resist. Id. Ms. Vennes was so shocked by the experience, was afraid of Mr. Campbell, and also in fear of losing her job, that she did not tell anyone about the ordeal immediately. Id. p. 77-92. Due to the sexist nature of the paving industry, Ms. Vennes knew that nobody would believe that Mr. Campbell had done this. Id. p. 38-39; p. 83-92.

Of course, Mr. Campbell claims that, although Ms. Vennes performed oral sex on him during working hours, it was a consensual act. CP 42, Exhibit B p. 26-28. Mr. Campbell

also claims that he had had prior sexual relations with Ms. Vennes at her home. Id. Ms. Vennes absolutely disputes this self-serving and arrogant assertion by Mr. Campbell. CP 42, Exhibit A p. 50-82.

Ms. Vennes only worked at Ace for a few days after the incident on Gunderson Road. Id. p. 286-289. Although Ms. Vennes was experiencing some minor medical problems at the time of the incident in the truck, they were not severe enough to prevent her from working at Ace. Id. November 15, 2002 was Ms. Vennes last day of working at Ace Paving, when she was working with asphalt. Id. p. 228-230. Ms. Vennes, through her years of working for Ace was well aware that business generally slowed down during the winter months, but would pick up during spring. Id. p. 224-228. However, after November 15, 2002, and after she had officially complained to both the Kitsap County Sheriff's Office and Ace, she was never called back to work, although she was on the "A-list" for call-backs. Id. p. 228-236.

On December 5, 2002, Mr. Campbell came to Ms. Vennes' home in an Ace Paving truck. Id. p. 94-98. Ms. Vennes saw Mr. Campbell pulling into her driveway and went to her front door to see why Mr. Campbell was at her house and what Mr. Campbell wanted. Id. p. 102-105. Ms. Vennes thought that Mr. Campbell was going to tell her that she was needed at

work. Id. Ms. Vennes was nervous at Mr. Campbell's presence and opened her front door with her arms folded and, in a hostile manner, asked Mr. Campbell what he needed. Id.; Id. p. 111-114. Mr. Campbell claimed that he was there to ensure Ms. Vennes that he had not forgotten about her and her work schedule. Id. Ms. Vennes was suspicious of this and told Mr. Campbell that it was the job of dispatch to inform her of her work schedule. Id.

Mr. Campbell initially looked uneasy with Ms. Vennes obviously hostile manner. Id. p. 112-113. Mr. Campbell then inquired as to Ms. Vennes' health, and Ms. Vennes told Mr. Campbell that she had an ovarian cyst and was not feeling well. Id. p. 114-115. While talking to Ms. Vennes on her front porch, Mr. Campbell went behind Ms. Vennes and entered her house uninvited. Id. p. 115-121. Ms. Vennes, in obvious pain, entered her house and again asked Mr. Campbell what it was he wanted. Id. Mr. Campbell began making small talk with Ms. Vennes regarding Christmas preparations. Id.

In the midst of making this small talk, Mr. Campbell went behind Ms. Vennes, spun her around and forced her into her living room and into a sitting position on her futon. Id. p. 120-134. Ms. Vennes attempted to resist by saying "no, I don't want to do that!" Id. However, Mr. Campbell was too strong for her and he managed to get her onto her futon. Id.

Mr. Campbell then exposed his erect penis, grabbed Ms. Vennes by the back of her head and again forced her to perform oral sex upon him until he ejaculated in her mouth. Id. During this entire incident, Ms. Vennes was in fear for her life. Id. Immediately after ejaculating in Ms. Vennes' mouth, Mr. Campbell left Ms. Vennes' house. Id. Ms. Vennes was, understandably emotionally distraught after this incident. Id.

Ms. Vennes was so humiliated and emotionally upset by the two rapes, that she could not tell anyone about them until a friend, John Havens, during a phone conversation, broke Ms. Vennes down emotionally and she told him about the rapes. Id. p. 134-143. Mr. Havens convinced Ms. Vennes to report what Mr. Campbell had done to her to the Kitsap County Sheriff's Office. Id. Ms. Vennes also eventually told her mother, father, brother, boyfriend, and other friends about the rape incidents. Id.

On January 7, 2003, Ms. Vennes filed a complaint with the Kitsap County Sheriff's Office. Id.; Ex. 3 to CP 42, Exhibit A. Deputy Roger Howerton was assigned to the investigation of Ms. Vennes' complaints against Mr. Campbell and Ace in early January of 2003. CP 42, Exhibit C p. 5-6. Deputy Howerton interviewed members of Mr. Campbell's crew, who stated that they had no knowledge of a sexual relationship

between Mr. Campbell and Ms. Vennes. Id. p. 6-8. When Deputy Howerton interviewed Mr. Campbell, and asked him about the incidents, Mr. Campbell admitted the incidents, but claimed that they were consensual, and was mostly concerned about losing his job. Id. p. 8-11. Deputy Howerton also interviewed Mr. Havens, who corroborated what Ms. Vennes had told him about the rapes. Id. p. 16-19. During Deputy Howerton's investigation, Ms. Vennes was extremely emotionally distraught and Ms. Vennes was of the opinion that Deputy Howerton did not believe her. Id. p. 19-24; CP 42, Exhibit A p. 144. Deputy Howerton agrees that Ms. Vennes was absolutely consistent with her story about both incidents during his investigation, which, in his opinion, is an indication that a witness or victim is being truthful. CP 42, Exhibit C p. 24.

Eventually, on January 27th, 2003, Ms. Vennes wrote a letter to Dick Christopherson, President of Ace, informing him of the two rape incidents which occurred when Mr. Campbell was on the clock for Ace. CP 42, Exhibit A p. 150-151; Ex. 3 to CP 42, Ex. A; CP 35. Mr. Christopherson claims that his first information regarding the complaints of Ms. Vennes was when Deputy Howerton had initiated his investigation on January 13, 2003. CP 42, Exhibit C p. 6; CP 35 p. 2. However, Mr. Christopherson did not contact Ms. Vennes regarding her complaints, but waited for Ms. Vennes to send a

letter on January 27, 2003. Id.

Mr. Christopherson sent Ms. Vennes a letter, in which he asked her to call him on his cell phone in order to discuss her complaint. CP 42, Exhibit A p. 163-174. When Ms. Vennes called Mr. Christopherson's cell phone number, he would not answer it and would not return her calls. Id. On February 13, 2003, Ms. Vennes was called by Angela Rossi of Ace and was told that a meeting between Ms. Vennes, Mr. Christopherson, and Ron Yingling (also of Ace Paving) was scheduled for that day, giving her no time to emotionally prepare for such an encounter. Id.

Mr. Christopherson and Mr. Yingling were both extremely uncomfortable about the situation during this meeting, obviously wary of any civil liability for Ace, and basically discounted Ms. Vennes version of the rape incidents, telling her an "in-house" investigation would occur, and they would keep her informed. Id. Mr. Christopherson and Mr. Yingling also told Ms. Vennes that they would wait to see the results of the criminal investigation before taking any action. Id.

Ms. Vennes was never kept informed of any in-house investigation, and was never called back to work to Ace, even though it was customary for Ace to call her back to work in the spring months after the winter months, and she had always

been called back to work in previous years. Id.; CP 43 p. 1-2. After Ms. Vennes made her complaint to Mr. Christopherson and Mr. Yingling, she never worked for Ace again, although she was on the A-list to be re-called when work was available. CP 43 p. 1-3. Ms. Vennes personally saw other individuals, who should have been lower on the re-call list, working on Ace crews at a time when she was available and capable of working after she had made her complaint about Mr. Campbell's outrageous behavior. Id.

B. PROCEDURAL FACTS.

Ms. Vennes filed a complaint for, *inter alia*, wrongful termination in violation of public policy, violations of her rights under Title VII and the WLAD, post-traumatic stress, and intentional infliction of emotional distress on October 14, 2004. CP 2. Defendant Ace Paving moved for dismissal on June 13, 2005. CP 12. On July 29, 2005, Hon. Judge Theodore Spearman dismissed Ace Paving, finding that it was not vicariously liable for Mr. Campbell's sexual assault of Ms. Vennes and dismissed Ms. Vennes claim for intentional infliction of emotional distress against Ace Paving. CP 22. On April 6, 2006, defendant Ace Paving moved for summary judgment on Ms. Vennes' wrongful termination, Title VII and WLAD claims. CP. 39. After several continuances, the Court denied Ace Paving's motion for summary judgment on Ms. Vennes'

wrongful termination claim. See CP 53 RP of May 19, 2006. On May 30, 2006, Ace Paving moved for reconsideration of its motion for summary judgment. CP. 54. On June 20, 2006, Judge Spearman granted Ace Paving's motion for reconsideration and granted its motion for summary judgment. CP 63.

**3. ARGUMENT.**

A. SUMMARY JUDGMENT REVIEW STANDARD.

The Court of Appeals reviews a grant of summary judgment de novo. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.2d 1068 (2002). The Court engages in the same inquiry as the trial court, viewing all facts and inferences in a light most favorable to the nonmoving party. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is only appropriate where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' CR 56(c). The Court will affirm a grant of summary judgment where reasonable minds can reach only one conclusion based on the admissible facts in evidence. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

B. THE SUPERIOR COURT ERRED IN FINDING THAT ACE PAVING WAS NOT VICARIOUSLY LIABLE FOR MR. CAMPBELL'S SEXUAL ASSAULT UPON MS. VENNES.

On July 29, 2005, the Superior Court held that Ace Paving could not be held vicariously liable for Mr. Campbell's sexual assault of Ms. Vennes.

Under Washington law, the question of whether an employer is liable for its employee's torts depends upon whether the tort was committed in the scope or course of the employee's employment. Dickinson v. Edwards, 105 Wash. 2d 457, 466 (1986) (underline added).

The question of whether an individual was acting within the course of their employment at the time that the tort was committed is if they were "engaged in the performance of the duties required of him by his contract of employment." Thompson v. Everett Clinic, 71 Wash. App. 548, 552 (1993).

As stated above, the first sexual assault of Ms. Vennes occurred while Mr. Campbell was driving Ms. Vennes to a work-site in an Ace Paving Company truck. Mr. Campbell was engaged in the performance of his duties, as Ms. Vennes' supervisor, when this first assault occurred. Ace Paving can not deny this fact.

The second occurrence of sexual assault happened at Ms. Vennes' home. Mr. Campbell, while purporting to be working for Ace Paving, forced his way into Ms. Vennes' home

and again sexually assaulted her. Mr. Campbell claimed that he was representing Ace Paving, as its agent, deciding to schedule her work hours. However, during the course of this purported "discussion" over Ms. Vennes' scheduled "work hours", Mr. Campbell again sexually assaulted Ms. Vennes.

Since Mr. Campbell was acting on the behalf of Ace Paving at the time of this second assault, and the fact that he was driving an Ace Paving vehicle at the time of the assault, he was engaged in the performance of his duties as Ms. Vennes' supervisor. Therefore, Ace Paving should be held liable for Mr. Campbell's actions, as he was acting in the course of his employment.

This Court should find that the Superior Court erred in finding that Ace Paving is not vicariously liable for Mr. Campbell's sexual assault of Ms. Vennes, as both incidents occurred while Mr. Campbell was engaged in the performance of his duties as an Ace Paving employee.

C. THE SUPERIOR COURT ERRED IN FINDING THAT MS. VENNES WAS NOT WRONGFULLY DISCHARGED IN CONTRAVENTION OF PUBLIC POLICY.

On May 19, 2006, the Superior Court denied Ace Paving's motion for summary judgment on Ms. Vennes' wrongful discharge claim. CP 53. After Ace Paving filed a motion for reconsideration, the Superior Court decided to grant Ace Paving's motion for summary judgment on Ms. Vennes' wrongful

discharge claim.

In order to have a valid claim for wrongful discharge in contravention of public policy, a plaintiff must show: 1) a clear public policy; 2) that discouraging the conduct engaged in by the employee jeopardizes that policy; 3) that the plaintiff's conduct caused the discharge; and 4) that the justification offered by the employer for the discharge is pretextual. Hubbard v. Spokane County, 146 Wn. 2d 699, 707 (2002).

Ms. Vennes report of her supervisor raping her to the owner of the business where she worked should obviously be considered a matter of public policy. By terminating its employer/employee relationship with Ms. Vennes, Ace discouraged other potential female employees from complaining about any sexual harassment which may occur at Ace. The question of whether Ace refused to re-call Ms. Vennes in the Spring of 2003 due to the fact that she had the nerve to complain about being raped should be preserved for a jury.

The defendants attempt to portray the fact that Ms. Vennes was never called back to work at Ace as a non-rehiring of Ms. Vennes, as opposed to actually firing Ms. Vennes. However, Ms. Vennes was called back to work in the Spring months following a slow time in the Winter every other year that she worked for Ace. Therefore, a reasonable jury could

easily find a connection between the fact that Ms. Vennes complained about being raped by an Ace employee and her never being called back to Ace.

The Court should reverse the Superior Court's order granting summary judgment on Ms. Vennes' wrongful discharge claim and remand this case for a jury trial.

D. THE SUPERIOR COURT ERRED IN FINDING THAT MS. VENNES DID NOT HAVE A VALID CLAIM UNDER BOTH TITLE VII AND THE WASHINGTON STATE LAW AGAINST DISCRIMINATION.

The Superior Court also granted summary judgment on Ms. Vennes' claim under Title VII and the WLAD.

A retaliation claim made under Title VII or WLAD is valid if an employee charges her employer with wrongful employment practices, even if the employment practices were not unlawful, as long as the employee has a reasonable, good faith, belief that the employment practices were unlawful. Moyo v. Gomez, 32 F. 3d 1382, 1384-1385 (9th Cir. 1994). Once an employee has made a good faith charge of an unlawful practice, that employee has engaged in protected activity under Title VII and WLAD.

To demonstrate a prima facie case of retaliation, an employee must show: 1) they engaged in protected activity; 2) there was an adverse employment action taken against the employee; and 3) there was a causal link between the protected activity and the adverse employment action. Stegall v.

Citadel Broadcasting Company, 350 F. 3d 1061, 1065-1066 (9th Cir., 2003).

Ms. Vennes complained to Ace about being raped by Mr. Campbell, which should certainly be considered to be protected activity on the part of Ms. Vennes. By not re-calling Ms. Vennes, as it had done in previous years, Ace took adverse action against Ms. Vennes. Since the adverse action occurred shortly after Ms. Vennes made her complaint against Mr. Campbell, a reasonable jury could decide that there was a causal connection between Ms. Vennes' complaint and Ace's decision to not call her for work.

The Court should reverse the Superior Court's order granting Ace Paving summary judgment for Ms. Vennes' Title VII and WLAD claims and remand these claims to a jury.

E. THE SUPERIOR COURT ERRED IN FINDING THAT MS. VENNES DID NOT HAVE A VALID CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The elements for the tort of outrage are: 1) extreme and outrageous conduct; 2) intentional or reckless infliction of emotional distress; and 3) actual result to the plaintiff of severe emotional distress. Birklid v. Boeing Co., 127 Wn. 2d 853, 867, 904 P. 2d 278 (1995). In order to meet the first element, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly

intolerable in a civilized community." Id. The initial determination by the court is whether reasonable minds could differ on whether the conduct in question meets this criteria. Id. One of the factors a Court must look at when determining whether a valid outrage claim exists is whether the defendant's conduct may have been privileged under the circumstances. Id.

In the instant case, Mr. Christopherson, as owner of Ace, took no action regarding Ms. Vennes' complaint about being raped. Mr. Christopherson actually accused Ms. Vennes of lying about the fact that Mr. Campbell had sexually assaulted her. Mr. Christopherson and other Ace Paving executives, such as Ron Yingling, accused Ms. Vennes of having consensual sex with Mr. Campbell during work hours.

Mr. Christopherson was very unhappy with Ms. Vennes' complaints to the Kitsap County Sheriff's Office regarding Mr. Campbell's assaults upon her. In fact, Mr. Christopherson ensured that Ms. Vennes never worked for Ace again after she made her complaint.

Mr. Christopherson was also aware of Ms. Vennes' physical and emotional condition at the time he discussed the situation with her and dismissed her complaint without even discussing the situation with Mr. Campbell or attempting to investigate her valid complaints regarding Mr. Campbell.

A reasonable jury could find that this constitutes outrageous conduct on the part of Ace.

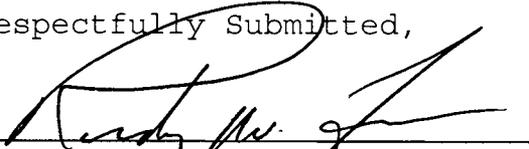
The Court should reverse the Superior Court's order dismissing Ms. Vennes' outrage claim and allow it to proceed to a jury.

**4. CONCLUSION.**

For all of the reasons stated above, the Court should reverse the Superior Court's Orders finding no vicarious liability for Ace Paving and Granting Summary Judgment in this case, and remand this case for a jury trial.

DATED this 19<sup>th</sup> day of February, 2008.

Respectfully Submitted,

  
\_\_\_\_\_  
RANDY LOUN, WSBA # 14669  
Attorney for Appellants

Joseph O'Meara, declares under penalty of perjury of the laws of the State of Washington that he is a citizen of the United States of America, over the age of 21 years, and competent to be a witness herein.

That on the 19th day of February, 2008, he deposited in the United States Mail, First Class, postage prepaid, copies of the following document:

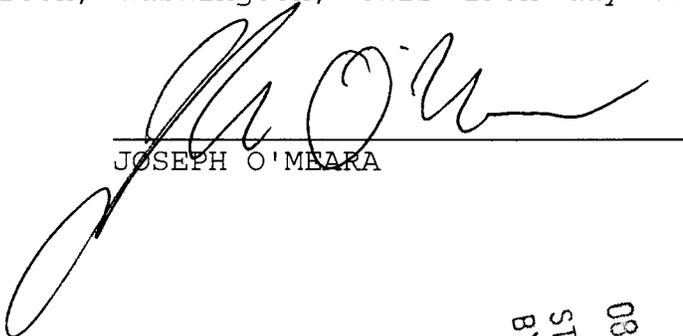
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DATED at Bremerton, Washington, this 19th day of February, 2008.



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