

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 08-35928, 08-35931

MYRNA I. JOHNSON,

Appellee/Cross-Appellant

v.

FRED MEYER STORES, INC.,

Cross-Appellant/Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. 1:04-cv-00008-RRB
Honorable Ralph R. Beistline,
District Court Judge

**REPLY BRIEF OF APPELLEE/CROSS-APPELLANT
MYRNA I. JOHNSON**

Douglas K. Mertz
Mertz Law Office
319 Seward St., Ste 5
Juneau, AK 99801
907-586-4004

Mark C. Choate
Choate Law Firm, LLC
424 N. Franklin St.
Juneau, AK 99801
907-586-4490

Attorneys for Appellee/Cross-Appellant Myrna I. Johnson

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
ARGUMENT	1
1. There is no case law in Alaska supporting Fred Meyer’s claim that a public policy tort can exist only when the plaintiff has no other remedy	1
2. Dismissal of certain statutory claims does not bar a public policy tort claim	2
3. When the Alaska Supreme Court declines to answer a certified question from the U.S. District Court, the refusal is not a ruling on the merits	3
CONCLUSION	4

TABLE OF AUTHORITIES

Cases

<i>Kinzel v. Discovery Drilling, Inc.</i> , 93 P.3d 427 (Alaska 2004)	2
<i>Missouri v. Jenkins</i> , 515 U.S. 70 (1995)	4
<i>Reust v. Alaska Petroleum Contractors, Inc.</i> , 127 P.3d 807 (Alaska 2005)	2

Alaska Statutes

AS 23.30.247	2
AS 39.90.100-39.90.120	1

Other Authorities

Kohn, <i>Concepts and Procedures in Whistleblower Law</i> (2001)	1
Kohn, <i>Whistleblower Law: A Guide to Legal Protections for Corporate Employees</i> (2004)	1

ARGUMENT

This is a reply to the part of Fred Meyer's Third Brief in which it opposes Ms. Johnson's cross-appeal point regarding the existence of a public policy tort in the circumstances of this case.

1. There is no case law in Alaska supporting Fred Meyer's claim that a public policy tort can exist only when the plaintiff has no other remedy.

Fred Meyer cites case law from other jurisdictions to support its argument that a public policy tort is recognizable only when the plaintiff has no adequate alternative cause of action under statute. It does not cite a single Alaska case or Ninth Circuit case for that proposition. The Alaska Supreme Court has never made such a ruling.

In fact, Alaska caselaw is to the contrary. Most Alaska public policy tort cases arise in the context of whistleblowers, who are protected by a state statute that protects whistleblowers in public employment¹ and by no less than thirty-six federal laws that protect individuals in both public jobs and private industry.² At least two of the Alaska Supreme Court cases find the existence of a public policy tort for retaliation

¹ AS 39.90.100-39.90.120.

² See Kohn, *Whistleblower Law: A Guide to Legal Protections for Corporate Employees* (2004); and Kohn, *Concepts and Procedures in Whistleblower Law* (2001).

against workers compensation claimants,³ although there is a clear statutory remedy for that offense through a private cause of action.⁴ Thus Alaska law supports the existence of a public policy tort, with its remedies of expanded compensatory damages and punitive damages, even when there is a statutory remedy of some sort available.

2. Dismissal of certain statutory claims does not bar a public policy tort claim.

The District Court dismissed claims under the Age Discrimination in Employment Act and the Alaska Human Rights Act, because, while it found Ms. Johnson had made out a *prima facie* case, it found only weak evidence that Fred Meyer's proffered reasons for dismissing Ms. Johnson were a pretext.⁵ Fred Meyer now claims this ruling precludes public policy torts based on age and sex discrimination.

This claim is erroneous for two reasons: First, because, as stated above, the existence of a partial statutory remedy does not preclude a public policy tort with different and more extensive remedies; and second, because the dismissal of those causes of action was based on a narrow ground – failure to provide more than

³ *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807, 812 (Alaska 2005); *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 432 (Alaska 2004).

⁴ AS 23.30.247.

⁵ 1ER 92 to 108.

circumstantial evidence to negative a proffered legitimate reason for her firing – that is not available in a public policy tort and arguably not even relevant. The District Court may or may not have been correct in its ruling on those statutory counts, but its ruling has no effect on the separate public policy tort.⁶

3. When the Alaska Supreme Court declines to answer a certified question from the U.S. District Court, the refusal is not a ruling on the merits.

Fred Meyer makes a new argument, not made below, that when a question is certified to the Alaska Supreme Court, and it refuses to answer the question without supplying a reason, as was done here, somehow that refusal constitutes a ruling on the merits of the question. Moreover, it claims it was a ruling in favor of Fred Meyers' position.

This claim merits no discussion other than to point out that there is no support for it in case law or in court rules. It is analogous to the denial of a writ of certiorari by the U.S. Supreme Court, in which the discretionary decision not to accept a matter for review is not a comment on the merits.⁷

⁶ Fred Meyer did not make the claim below that dismissal of the statutory counts was also a reason to dismiss the public policy tort claim. It has therefore waived this argument.

⁷ *Missouri v. Jenkins*, 515 U.S. 70 (1995).

CONCLUSION

Fred Meyer's arguments against the public policy argument boil down to a grudging acceptance of the fact that Alaska recognizes a public policy tort, that it can be based on well-established principles in statute, constitution, and common law – including policies against sex discrimination and harassment and discrimination based on age – but it attempts to avoid application of the tort by relying on laws in other states, but not in Alaska, that put more limitations on public policy torts. There is no justification for importing those limits when the Alaska Supreme Court has not done so.

July 2, 2009

/s/

Douglas K. Mertz
Alaska Bar No. 7505027
319 Seward Street, Suite 5
Juneau, Alaska 99801
907 586-4004, mertzlaw@gmail.com
Attorney for Myrna I. Johnson

CERTIFICATION AS TO BRIEF FORMAT
(Circuit Rule 32(a)(7))

I hereby certify that the attached Reply Brief of Appellee/Cross-Appellant Myrna I. Johnson is proportionately spaced, has a typeface of 14 point, and contains fewer than 7000 words.

July 2, 2009

/s/
Douglas K. Mertz
Attorney for Myrna I. Johnson,
Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that this brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 2, 2009. I certify that all counsel in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

July 2, 2009

/s/
Douglas K. Mertz
Attorney for Myrna I. Johnson,
Appellee/Cross-Appellant