IN THE SUPREME COURT OF THE STATE OF OREGON

RYAN GAYLOR, Plaintiff-Relator, v. K. F. JACOBSEN & CO., INC.; and ROSS ISLAND SAND & GRAVEL, CO., Defendants-Adverse Parties.	Multnomah Count Circuit Court No. 120709372 SC No. S061320 **MANDAMUS PROCEEDING**

RELATOR'S OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the Order of the Multnomah County
Circuit Court dated April 11, 2013
The Honorable John Wittmayer

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RELATOR'S OPENING BRIEF AND (SUPPLEMENTAL) EXCERPT OF RECORD

I. STATEMENT OF THE CASE

A. Nature of the action and relief sought

This is an action against K. F. Jacobsen & Co., Inc. (KFJ) and its parent corporation, Ross Island Sand & Gravel, Co. for lost wages, noneconomic and possibly punitive damages for allegedly engaging in several forms of employment discrimination and in common law wrongful discharge against Plaintiff-Relator Ryan Gaylor. The trial court granted in part the Adverse Parties' "Motion for Relief Due to Improper Conduct of Plaintiff," resulting in an order disqualifying Relator's attorney of choice from proceeding further and ordering that all non-confidential documents that Relator had removed from KFJ's premises while Relator worked for that entity be returned to Adverse Parties. Relator filed a writ of mandamus seeking that these portions of the trial court's order be vacated. This Court granted an order allowing Relator's petition for an alternative writ of mandamus, but the trial court did not act on that order. Relator now asks this Court to enforce the order and reverse the trial court's order disqualifying Relator's attorney of choice from further participation in this case and the order requiring that Relator and his attorneys return all copies of all documents removed from KFJ's premises.

B. Nature of the judgment

The nature of the order giving rise to this matter is the disqualification of Relator's attorney of choice from further participation in this case and Relator being required to return all documents that he removed from KFJ's premises to the Adverse Parties.

C. Basis of appellate jurisdiction

Appellate jurisdiction is based on ORS 19.205(2) and ORS 34.250(1).

D. Effective date for appellate purposes

The order at issue was signed April 9, 2013 and entered on April 11, 2013. Relator timely filed his petition for writ of mandamus on May 10, 2013.

E. Questions presented on appeal

a. Did the trial court err in disqualifying Relator's attorney of choice because the attorney had access to non-confidential documents that Relator had removed from his employer's premises, when no prejudice to the Adverse Parties was demonstrated?

b. Did the trial court err in ordering that Relator and his attorneys return to the Adverse Parties every copy of every document that Relator had removed from his employer's premises, when the documents removed were primarily computer copies of public records and the Adverse Parties had taken no measures to safeguard any of the documents?

F. Summary of argument

Disqualifying a party's attorney of choice requires, at a minimum, evidence that the party moving for disqualification was or will be prejudiced by the act(s) asserted as the basis for such disqualification. The trial court neither was presented with evidence of nor found any prejudice to the Adverse Parties by Relator having removed non-confidential documents from Adverse Party KFJ's premises when Relator worked for KFJ.

The documents that Relator removed from KFJ's premises consisted primarily of computer copies of documents that were sent to public entities after

the original copies were signed by KFJ personnel, and thus became public records. The Adverse Parties did nothing to protect the documents from disclosure to anyone. The documents were not trade secrets nor even confidential. The trial court did not consider the nature of the documents that the Relator removed, whether they were shared with anyone other than the Relator's attorney and other factors relating to the merits of whether the Relator in fact was not prohibited from removing the documents from his employer's premises.

G. Statement of facts

(The pertinent summary of facts is set forth as Section B of Relator's Petition for Peremptory Writ of Mandamus. Relator repeats them here. Additionally, Relator supplied this Court with the Excerpt of Record when he filed his brief supporting the petition for writ of mandamus. Relator incorporates that Excerpt of Record for purposes of this brief, and the citations to the Excerpt of Record below and throughout this brief refer to that earlier filed excerpt, except for the citation to the Supplemental Excerpt of Record, which is only a true copy of the signed order at issue in this proceeding.)

Relator Ryan Gaylor filed this lawsuit in Multnomah County Circuit Court on July 26, 2012, asserting claims for whistleblower discrimination (ORS 659A. 199 *et seq*.), for violation of Relator's rights under the Oregon Family Leave Act (ORS 659A.150 *et seq*.) and common law wrongful discharge. ER 6-10. The parties exchanged discovery requests and Relator produced a compact disk (CD) containing about 1560 documents that he had copied from Adverse Party K.F. Jacobsen & Co., Inc.'s (KFJ) internal computer system. ER 19. All of the documents on the CD were either related to public works projects or personal documents of the Relator. ER 19. KFJ had no confidentiality agreements in place

relating to the documents when the Relator downloaded them, nor did it have any other safeguards in place to protect the alleged confidential or proprietary status of the documents. *Id.*, and 30-32.

Relator also produced additional documents, some of which he had removed from KFJ's premises. ER 17. None of these additional documents were protected by KFJ, nor removed in violation of any confidentiality agreement. ER 18-22 and 30-32. Relator had access to all of the documents in the ordinary course of his employment, including those on the CD. *Id.*

KFJ filed a lawsuit in federal court shortly after it received the CD and additional documents in discovery in this proceeding. ER 17. KFJ asserted five causes of action against Relator in federal court, all based on allegations that the documents contained on the CD and some of the additional documents were trade secrets and that Relator had taken them without authority from KFJ's computer system. *Id*. The Adverse Parties' attorney then wrote the Relator's attorney demanding return of all copies of all documents that Relator had removed from KFJ's premises. ER 17-18. Counsel responded stating that he knew of no basis for having to return the documents, as they obviously were not confidential or proprietary, much less trade secrets. ER 14-15. The Adverse Parties' attorneys provided the Relator's counsel with nothing to support the claim that the documents were confidential and/or trade secrets. ER 18. Relator's counsel thus did not return any of the documents or the original CD. *Id*.

Relator moved to dismiss KFJ's claims filed in federal court in December 2012. ER 18. KFJ provided no additional evidence in response to that motion supporting the idea that any of the documents that Relator had removed from its premises were confidential and/or trade secrets. *Id.* Relator's counsel thus had no

legitimate notice that the subject documents were confidential or trade secrets. *Id*.

KFJ then filed a "Motion for Relief Due to Improper Conduct of Plaintiff" in this state court proceeding. ER 11. KFJ sought three items of relief in its motion: 1) that Relator be precluded from "using purloined confidential information of KFJ;" 2) that Relator's attorney and his firm be disqualified from further participation in the case; and 3) that Relator and his counsel return all of KFJ's "property." ER 11-12. KFJ's basic premise for the motion was that Relator had "misappropriated" many documents while employed by KFJ that he had shared with his attorney, and that his attorney had used the documents to draft the complaint and discovery requests in the case, but refused to return the documents when requested. ER 12.

The parties met for a hearing before Judge John A. Wittmayer on March 25, 2013 to address the Adverse Parties' motion for relief, as well as three discovery-related motions. ER 2. During oral argument, Judge Wittmayer expressed "shock" that Relator Gaylor's attorney took the position that an employee was not prohibited from removing non-confidential documents from his employer's premises. ER 41 (p. 25 of Transcript). Judge Wittmayer then granted the Adverse Parties' requests that Relator and his attorney return all copies of all documents removed from KFJ's premises, and disqualified Relator's attorney, based on the premise that Relator had no "right" to remove the documents. ER 42 (p. 29 of Transcript) and 44 (p. 37 of Transcript). The court denied the Adverse Parties' request that Relator not be allowed to use any of the removed documents in the course of the litigation. ER 44 (p. 36 of Transcript).

Relator's attorney pressed the court for the reasoning behind the trial court's granting the request for disqualification. ER 45 (ps. 38 and 39 of Transcript). The

court and counsel engaged in the following discussion at that point:

> "MR. FJELSTAD: Your Honor, I'd like - I apologize, but I'd like Your Honor to again express the basis for my disqualification.
>
> THE COURT: I think it's clear to me that you have - in representation of your client, you have benefitted from your client's improper conduct to the defendant - detrimental to the defendant, and there's no -
>
> MR. FJELSTAD: How so?
>
> THE COURT: By having the benefit of the knowledge of the contents of over 1,500 documents that you shouldn't have had the knowledge of in the work that you've been able to do on behalf of your client so far in this case. And that's really as far as I think I need to go and that's as far as I'm going to go. So, that's where we are.

Judge Wittmayer signed an Order prepared by the Adverse Parties' counsel on April 9, 2013 which was entered in the court docket on April 11, 2013. Fjelstad Decl., Exh. 1 and ER 4 (filed with Relator's brief in support of petition for writ of mandamus). Relator and his counsel already had complied with the court's order mandating that all copies of the subject documents (including the originals) be turned over to the Adverse Parties by April 1, 2013. ER 44 (ps. 34-35 of Transcript). Relator's counsel then wrote Judge Wittmayer a letter, asking that the portion of the Order disqualifying him be stayed or clarified to allow Relator's attorney to file a writ of mandamus pertaining to the order. Fjelstad Decl., Exh. 2. Judge Wittmayer granted that request during an April 29, 2013 teleconference. *Id*., ¶ 2.

The petition for a writ of mandamus followed.

II. ASSIGNMENT OF ERROR

A. Preservation of error

Relator assigns as error the trial court's granting portions of the Adverse Parties' Motion for Relief Due to Misconduct of Plaintiff. ER 11-13. Relator

preserved his claims of error by opposing the motion. ER 16-26. The trial court granted the motion in part, as reflected in the April 11, 2013 order. SER 46-48.

B. Standard of review

The Adverse Parties' Motion for Relief Due to Improper Conduct of Plaintiff sought relief "pursuant to ORCP 1B and ORCP 36A." It appears thus that the Adverse Parties pursued relief under a discovery abuse theory. The trial court did not identify any specific statute or rule as the basis for its decision to disqualify Relator's counsel and to order return of documents. When pressed, Judge Wittmayer stated generally that the basis for both decisions emanated from His Honor's belief that no employee has a right to remove documents from his or her employer's premises, absent specific authorization to do so. ER 42 and 44. The trial court did not appear to engage in any real factual or legal analysis beyond that conclusion as justification for either ruling. See ER 42 and 45. This creates a confusing situation regarding the applicable standard of review.

Generally, sanctions for asserted pretrial abuses are within the discretion of the trial court. *E.g.*, *State v. Guinn*, 56 Or.App. 412, 416, 642 P.2d 312 (1982). Unfortunately, the phrase "abuse of discretion" has no hard and fast meaning. *Far West Landscaping, Inc. v. Modern Merchandising, Inc*., 287 Or. 653, 664, 601 P.2d 1237 (1979). "Discretion" in the context of this standard of review "refers to the authority of a trial court to choose among several legally correct outcomes...and accordingly 'abuse of discretion' is a standard of review that applies only to certain legal rulings, never to factual findings." *In re Marriage of Shelton*, 196 Or.App. 221, 100 P.3d 1101, 1108 (2004). The abuse of discretion standard may not be "particularly helpful because it has no hard and fast meaning[, and] is relatively without content because it describes the conclusion reached and

not the analysis used to reach it."*Antunez v. Lampert*, 169 Or.App. 196, 7 P.3d 735, 737 (2000)(Wollheim, J., concurring). As in *Antunez*, the most critical difficulty regarding the abuse of discretion standard in this case (due to its posture) is that

> "[i]t does not address procedural concerns, such as whether the trial court's decision reflects a failure to exercise discretion or to consider all relevant circumstances in making the decision; those, too, can lead to a determination that discretion was abused."

Antunez, 7 P.3d at 737 (quoting *Liberty Northwest Ins. Corp. v. Jacobson*, 164 Or.App. 37, 46, 988 P.2d 442 (1999)).

Counsel could locate no cases that suggested whether another standard of review was applicable in cases such as this one. It appears that in these cases where the abuse of discretion standard does not seemingly address the heart of the matter, Oregon appellate courts cite the problems with the standard and apply it nonetheless, keeping in mind the problems identified. *See Liberty Northwest*, 988 P.2d at 447. The focus appears to be on determining whether the trial court's decision exceeded the permissible range of discretionary choices available to it, considering all pertinent facts in the process. *Id*.; *see also State ex rel. Kiesling v. Norblad*, 317 Or. 615, 623, 860 P.2d 241 (1993).

III. ARGUMENT

A. Attorney Disqualification is Unwarranted Absent Prejudice.

1. Standards applicable to attorney disqualification motions.

Oregon appellate courts have not addressed the issue of what standards a trial court should apply when deciding a motion to disqualify an attorney from further participation in a civil case. The few Oregon appellate cases that address attorney disqualification in civil cases suggest that the one factor that must be present to justify disqualifying an attorney is that of prejudice. For example, this

court found that attorney disqualification "may arise from a lawyer's prejudicially improper acts" in *State ex rel. Bryant v. Ellis*, 301 Or. 633, 638, 724 P.2d 811 (1986); *see also Collatt v. Collatt*, 99 Or.App. 463, 465 n. 1, 782 P.2d 456 (1989)(citing *Bryant* for the proposition that "[c]ourts have authority to disqualify an attorney in order to restrain him from a prejudicially improper act of legal representation."). Such prejudice may affect a party to the litigation or may adversely affect the functioning and integrity of the legal process. *Bryant*, 301 Or. at 638.

The *Bryant* court chose not to address specific standards applicable to attorney disqualification motions (301 Or. at 639, n.6), but did find that "common equitable principles" apply when such relief is requested. 301 Or. at 639. One strong consideration that the *Bryant* court noted in analyzing the equitable balance of prejudices in this context is the "prejudice...to the [potentially disqualified] lawyer's present client," which "becomes more acute as litigation progresses." *Id*.

Courts in other jurisdictions have echoed the *Bryant* court's emphasis on balancing the equities - including particularly a party's ability to proceed with the attorney of his or her choice - when deciding a motion to disqualify a party's attorney of choice. In *Burt Hill, Inc. v. Hassan*, 2010 WL 419433 (W.D. Pa.), a case that the Adverse Parties cited in their briefing relating to their motion for relief, the court denied a motion to disqualify an attorney, noting that

> When considering a motion to disqualify, a court must strike a balance between several competing considerations, including the unfettered practice of law, the judiciary's responsibility to ensure that the integrity of the profession is maintained, and striking a balance [between] the plaintiff's right to retain counsel of his or her choice against the opposing party's right to try a case without prejudice.

2010 WL 419433, at *6 (quoting *Nesselrotte v. Allegheny Energy, Inc*., 2008 WL 2890832, *4 (WD Pa.)). The *Burt Hill* court continued by noting that "[m]otions to

disqualify are generally disfavored, and a party's choice of counsel is entitled to substantial deference." *Id*.

2. The Adverse Parties demonstrated no prejudice.

The Order forming the subject of this mandamus proceeding does not identify any prejudice to the Adverse Parties. Declaration of Eric J. Fjelstad, Exh. 1 (attached to Petition for Peremptory Writ of Mandamus). It states only that "[Relator] and his attorney Eric J. Fjelstad ("Fjelstad') unfairly benefitted from Gaylor's improper conduct to the detriment of the defendants by retaining and using the information in over 1,500 documents in litigating this case." *Id*., p. 1, ls. 24-26. The Order says nothing about the nature of the "detriment" that the Adverse Parties allegedly endured or would endure if Relator's attorney and his firm were not disqualified.

The briefing relating to the Adverse Parties' Motion for Relief (ER 2) provides the only explanation of what "detriment" the Adverse Parties allegedly endured. The Adverse Parties stated that disqualification of Relator's attorney of choice and his law firm was "necessary to preserve the integrity of the adversarial process." ER 13. They stated that Relator's attorney used the documents removed from KFJ's premises to Relator's advantage, "as evidenced by the discovery requests which ask by title or category for the information taken by [Relator]." *Id*. Counsel for Adverse Parties repeated this one allegation of prejudice during oral argument on March 25, 2013. ER 37 (p. 6 of Transcript). The only prejudice thus articulated by the Adverse Parties was that Relator's attorney used the removed documents to formulate specific discovery requests (which was not true).

The trial court assumed that the documents removed by Relator were discoverable through standard discovery methods. ER 39 (p. 14 of Transcript) and

40 (p. 18 of Transcript). Relator thus would have had the right ultimately to receive all of the removed documents during the discovery process. Relator's alleged "self-help" in removing the documents that unquestionably would have to be produced did not actually prejudice the Adverse Parties.

3. Further balancing of the equities favors no disqualification.

The balancing question thus turns on whether the trial court was justified in disqualifying Relator's counsel of choice because the "self-help" discovery aspect of removing the documents may adversely affect the functioning and integrity of the legal process. *Bryant*, 301 Or. at 638. The nature of the documents is relevant in determining the weight properly given this issue, as is the trial court's view of the documents. The trial court was not presented with the actual documents to review. (Relator's counsel offered to provide them to the court, or at least discuss all of them if necessary. ER 19 (n. 1).) Relator stated that all of the removed documents were related to public works projects or were personal documents of the Relator. ER 19. The trial court stated that it did not evaluate or care if the documents were confidential, privileged or constituted trade secrets.[1] ER 41 (p. 23 of Transcript). The trial court's sole concern was that Relator had "no right to take [the documents] off the premises," regardless of their nature. *Id*.[2]

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[1]One definition of "arbitrary"is "[w]ithout fair, solid, and substantial cause; that is, without cause based upon the law." Black's Law Dictionary (5th ed., 1979).

[2]The trial court expressed "shock" that Relator's counsel tried to take the position that unless an employer acts to protect the confidentiality of its documents (or the law or another source renders them privileged or confidential), employees may not be prohibited from removing documents from an employer's premises. ER 41 (p. 25 of Transcript).

The trial court admittedly did not concern itself with the nature of the removed documents in deciding to grant the Adverse Parties' motion to disqualify Relator's attorney of choice and his law firm. This is one element of arbitrariness that evidences an abuse of discretion. Further evidence of such abuse is the lack of legal support for the trial court's position that an employee cannot remove documents from an employer's premises absent authorization by the employer.

Every case cited in the briefing relating to the Adverse Parties' motion for relief that resulted in disqualification of Relator's counsel involved situations where undeniably privileged and/or confidential documents were removed from the employer's premises. For example, in *Herrera v. The Clipper Group*, 1998 WL 229499 (S.D.N.Y.) - a case that the Adverse Parties cited frequently in their briefing - some of the subject documents that the plaintiff had removed from sources such as her managers' desk drawers "contained confidential and/or privileged information, such as internal financial records and legal advice from defendants' counsel." 1998 WL 229499, at *1. Nonetheless, the *Herrera* court refused to disqualify the plaintiff's counsel, finding that "while plaintiff's counsel have first-hand knowledge of relevant information, this knowledge is unlikely to lead to a situation at trial that would cause prejudice to either party." *Id*., at *4.

Another case upon which the Adverse Parties relied in their argument was *Lynn v. Gateway Unified Sch. District*, 2011 WL 6260362 (E.D. Cal.). The *Lynn* court stressed that some of the emails removed by the plaintiff in that case "were clearly protected by the attorney-client privilege." 2011 WL 6260362, at *2. The court granted the defendant's motion to disqualify the plaintiff's attorney after noting that the attorney had been fined for contempt of court. *Id*., *4.

A third case that the Adverse Parties cited in its motion for relief briefing

further demonstrated that the trial court here abused its discretion by not considering the nature of the documents that Relator removed from KFJ's premises. In *Richards v. Jain*, 168 F.Supp.2d 1195 (W.D. Wa. 2001), the court announced a six-part balancing test to use when evaluating a motion to disqualify counsel in a civil proceeding. The test on its face does not apply if the documents involved are not privileged, as four of the six factors expressly mention "privileged" documents. 168 F.Supp.2d at 1205. The fifth factor ("the extent to which movant may be at fault for the unauthorized disclosure") indirectly involves the nature of the documents, as it considers whether the party moving for disqualification made adequate effort to protect its "privileged and confidential documents" by taking such measures as requiring employees to sign a non-disclosure agreement. *Id*., at 1205 and 1208.[3] The *Richards* court also emphasized that the disqualified attorney knew or should have known that some of the documents were privileged. *Id*., at 1198 and n. 1.

A fair reading of the cases before the trial court supported the exact opposite conclusion that the court reached; namely, that unless documents contain trade secrets or are confidential, privileged or otherwise protected (by, for example, being subject to a contractual arrangement prohibiting their disclosure), an employee is not prohibited from removing them from an employer's premises. No authority presented to the trial court or located by counsel supports the proposition

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[3]As Relator pointed out in exhibits to his brief responding to the Adverse Parties' motion for relief, KFJ had no confidentiality policies in place, nor took any real protective measures whatsoever that were designed to maintain the secrecy of any of the documents that Relator removed from KFJ's premises. ER 18-19.

that an employee is prohibited from removing non-confidential documents from an employer's premises, absent specific authority to do so. Thus, the trial court's position that no employee has the right to remove documents from an employer's premises regardless of the document's nature was wholly without legal support. The court's position thus was arbitrary and the decision to disqualify counsel because Relator had removed non-confidential documents was an abuse of discretion.

4. The *Richards* factors are in line with *Bryant.*

The six-part test announced in *Richards* and referred to above is noteworthy regarding defining the equities balancing test anticipated by this court in *Bryant.* (Relator's counsel also tried to promote at least part of the *Richards* test in defense of the motion to disqualify (ER 41 (p. 24 of Transcript), as the Adverse Parties had cited *Richards* and it was the only case cited by either side that discussed standards for determining motions to disqualify.) The factors that a court should weigh in considering a motion to disqualify based on the *Richards* decision are:

> 1) whether the attorney knew or should have known that the material was privileged;
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> 2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
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> 3) the extent to which the attorney reviews and digests the privileged information;
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> 4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
>
> 5) the extent to which the movant may be at fault for the unauthorized disclosure;
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> 6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

Richards, 168 F.Supp.2d at 1205. Based on the parties' briefing and oral argument, these considerations favored denying the motion to disqualify. Relator's counsel had no valid basis for believing that the documents were confidential, and tried to argue this point to the trial court. The documents pertained mostly to public works projects, and the evidence of this was clear on the face of each document. Counsel had no basis for believing that the documents were subject to any effort by KFJ to protect their privacy, a fact later proven to be accurate. The first consideration thus favors Relator. The trial court here could not evaluate the second and third factors based on the record before it. Regarding the fourth consideration, the great majority of documents removed were public documents, and all of them were undeniably subject to the discovery process. Because the trial court denied that portion of the Motion for Relief in which the Adverse Parties requested that any document removed from KFJ's premises not be used further in this case, and those documents unquestionably were subject to the discovery process, the Adverse Parties legitimately could not claim any prejudice to their defense of Relator's claims.

The fifth consideration also favors Relator. The Adverse Parties took no measures whatsoever to protect their allegedly confidential documents. Simply inserting a confidentiality clause into an employee manual or having employees sign confidentiality agreements would have provided some protection to the Adverse Parties. Doing so certainly would have served the purpose of notifying employees (like Relator) that removing documents from the premises could violate contractual obligations owed to the employer. Moreover, counsel for such employees could then be alerted to the possibility that documents in the employee/client's possession may have to be revealed and returned immediately to

the employer. The Adverse Parties thus were in large part at fault for the allegedly unauthorized disclosure, and the fifth consideration favors Relator.

The sixth and final consideration also tilts the scale in favor of Relator. Should this Court decline to reverse the trial court and force Relator to litigate this case without the attorney whom he hired almost two years ago, Relator will be required to spend significant time and money bringing a new lawyer up to speed, besides simply being denied the attorney of his choice. Additionally, the issue of whether an employee always is prohibited from removing documents from an employer's premises is an important issue that apparently has not been addressed by this Court or the state Court of Appeals. These factors further warrant reversal of the trial court's order.

The *Richards* factors appear to be in harmony with this court's finding in *Bryant* that courts should balance equities when determining motions to disqualify a party's attorney of choice. The lone allegation of prejudice - that Relator's counsel used the documents to draft more specific production requests - strongly tilted the balance of equities against disqualifying Relator's attorney of choice.

Disqualifying a party's attorney of choice is a "drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel; therefore it should be imposed only when absolutely necessary." *Richards*, 168 F.Supp.2d at 1200. Considering that the non-confidential nature of the documents removed the lack of legal support for the proposition undergirding the trial court's decision, coupled with the fact that no threat to the integrity of the adversarial process exists under these circumstances, the equities strongly balance in favor of not imposing the "drastic remedy" of disqualification. The trial court's arbitrary decision to the contrary was an abuse of discretion and should be reversed.

B. The Trial Court Abused its Discretion in Ordering Relator to Return All Copies of the Removed Documents.

The trial court decided to disqualify Relator's counsel and granted the Adverse Parties' request that all copies of the removed documents be returned based on the court's conclusion that no employee has a "right" to remove documents from an employer's premises without specific authorization to do so. The trial court had no legal authority supporting this determination. Moreover, as Relator's counsel argued, the Adverse Parties' discovery responses indicated that the documents turned over based on the trial court's order may never be seen in the context of this litigation again. The trial court's order thus was an abuse of discretion.

The issue of whether, or under what circumstances, an employee may remove documents from his or her worksite apparently has not been addressed directly by any Oregon appellate court. Cases from other jurisdictions, however, have more directly discussed this topic. Those cases support Relator's basic premise in this case, which is that employees may not have a "right" to remove documents, as the trial court found in this case; they are not prohibited, however, from removing documents if the documents are not confidential, privileged or contain trade secrets, or otherwise protected by the employer. Employers thus always can protect their documents simply by including document confidentiality provisions in employee handbooks and/or having employees sign form confidentiality agreements.

No such protection of any kind existed in this case. Consequently, Relator was not prohibited from removing the documents that he took from KFJ's premises. The nature of the documents removed enhances this point, particularly in the context of the nature of the claims that Relator asserts in this lawsuit.

1. The nature of the documents removed by Relator.

As Relator's counsel offered to prove in his response to the Adverse Parties' motion for relief, all of the documents contained on the CD that Relator copied from the Adverse Parties' computer system were copies of documents filed with public entities relating to public works projects, or personal documents (such as family pictures) that Relator had in his work computer. ER 19.[4] While the vast majority of the documents in fact were copies of the exact documents that KFJ filed with public entities (albeit, in some instances, unsigned copies), a very few documents were not copies of the actual documents filed with the public entities. These few documents were copies of original test results that, when compared with other documents actually filed with the public entities, prove that test numbers were altered in the documents filed with public agencies. Relator based his good faith belief that KFJ was committing fraud on these documents, which led him in part to write a letter threatening to expose KFJ's actions. ER 7. Relator was terminated about 45 days after discussing the letter with KFJ management, following a series of unjustified disciplinary actions against him. *Id*.

Relator primarily was concerned about the documents that supported his belief that KFJ was committing fraud. Obviously, signed copies of those documents did not exist and thus no public entity would have them in its files. As

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[4]Adverse Parties argued in their reply brief that the many of the documents were not "public," as they were copies of the unsigned documents that, after being signed, actually were filed with the appropriate public entity. ER 34. In other words, many of the documents were the computer copies of documents copied from KFJ's computer system that were then signed and filed. Relator's position was that unsigned duplicates of the signed and filed documents does not alter the public nature of the documents. *Id*.

counsel pointed out to the trial court, KFJ had taken such a difficult stance regarding its discovery responses that Relator had no faith that if he had to disgorge all copies of such documents, he would ever receive them back from KFJ. ER 41 (ps. 22-24 of Transcript). This was true despite the trial court's denial of the Adverse Parties' request that the documents not be further used in this proceeding.

Relator's concern had merit. Not only had the Adverse Parties asserted numerous and unmerited objections to all but one of Relator's reasonable production requests, but the documents for the most part were only copies of public documents that were subject to a public records request. Relator believed that the only reason that the Adverse Parties wanted all copies of all documents returned was to allow it to not produce the few documents that evidenced his good faith belief that KFJ was defrauding public entities and were thus relevant to his whistleblower discrimination claim.[5]

2. The significance of the documents' nature.

The fact that the Adverse Parties had not taken any measures to protect the potential confidentiality of any of the removed documents is significant, especially when coupled with the public nature of the documents. As noted in Section A.3. above, all of the cases cited in the parties' briefing and that counsel has examined since the hearing involve documents that were expressly or otherwise clearly

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[5]As Relator argued in his response brief, none of the documents that he removed that were not on the CD were confidential or proprietary. ER 19 and 21-22. KFJ had submitted records to the Oregon Bureau of Labor and Industries on April 1, 2012 that were the same and/or same types of documents that Mr. Gaylor removed from KFJ's premises in November and December 2011. *Id*. KFJ thus waived any claim of confidentiality relating to such documents.

confidential and proprietary in their nature. A logical generalization gleaned from the cases is that an employee can remove non-confidential documents from his or her place of employment. If the employer so desires, a simple confidentiality agreement placed in an employee manual or separately signed by each employee would provide the protection needed for its documents.

Bedwell v. Fish & Richardson P.C., 2007 WL 4258323 (S.D. Cal.) supports this conclusion. *Bedwell* involved a lawsuit by a law firm's former paralegal, who removed a number of documents without authorization when she left the firm's employ. 2007 WL4258323 at *1. Similarly to Adverse Parties here, the defendant law firm asked the court to order the plaintiff to return all of the documents, asserting that the documents belonged to the firm and that the proper method for the plaintiff to obtain the documents was through discovery. *Id*.

The *Bedwell* court ordered return of all documents that contained names of the firm's clients or other confidential/privileged information, but allowed the plaintiff to keep an inventory of the documents returned. 2007 WL 4258323 at *1. The court declined, however, to order the return of documents that did not contain confidential or privileged information. *Id.*, at *2. Rather, the court "carefully reviewed" the defendant's "Confidentiality Policies and Procedures" - a copy of which the plaintiff had acknowledged receipt - and concluded that such policies did not bar the plaintiff from removing non-confidential documents. *Id*. The *Bedwell* court found that the policies and procedures did not prohibit the plaintiff's retention of the non-confidential documents "even if the e-mails were transmitted on and printed from the firm's computers" because "Defendant's policies do not conclusively establish that Defendant is the sole owner of these documents, and the Court finds that the e-mails cannot be swept into the broad

category of property which belongs to the firm." *Id*. The court thus excepted the non-confidential documents from those that the plaintiff had to return to the defendant, and even noted that it did not believe that a protective order was mandatory for the documents. *Id*., at *3.

The trial court here had no evidence before it from which it could reasonably conclude that the removed documents were confidential or proprietary. (As noted above, the court expressed that the nature of the documents was immaterial to the court's decision regarding whether Relator had to return the documents. ER 41 (p. 23 of Transcript).) KFJ was not the "sole owner" of the documents, as most of them were copies of public documents, and KFJ had done nothing of any moment to protect the confidentiality of the removed documents. The *Bedwell* decision thus is one case that demonstrates the arbitrariness of the trial court's decision in this matter.

Another case relevant to the issue of the circumstances under which an employee is not prohibited from removing an employer's documents from its premises is *Quinlan v. Curtiss Wright Corporation*, 204 N.J. 239, 8 A.3d 209 (2010). *Quinlan* involved a claim by a then-current employee that arose under New Jersey's Law Against Discrimination (LAD). 8 A.3d at 211-12. As in Relator's case, the defendant learned in discovery that the plaintiff had removed, and was removing, hundreds of documents in the ordinary course of her employment that the defendant considered to be confidential. *Id*., at 212. Upon learning that the plaintiff was continuing to take documents from the defendant's premises, defendant terminated the plaintiff's employment, leading her to add a claim of retaliation under the LAD to her lawsuit. *Id*. The court was faced with determining whether the plaintiff was justified in removing the documents to

support her belief that the defendant was engaging in discriminatory actions based on gender. *Id*.

Finding first that the LAD embodies "matters of great importance, with far-reaching implications for employers and employees," the *Quinlan* court announced a framework for courts to use that emphasized recognizing the policy behind the LAD in reaching a conclusion regarding documents removed from an employer's premises without the employer's expressed permission.[6] The court noted that the issue required it "to strike a balance between the employer's legitimate right to conduct its business, including its right to safeguard its confidential documents, and the employee's right to be free from discrimination or retaliation." 8 A.3d at 222.

The *Quinlan* court adopted a framework that it intended to be "a flexible, totality of the circumstances approach that rests on consideration of a wide variety of factors, all of which must be balanced in order to achieve the essential goals embodied in the LAD." 8 A.3d at 226. The framework consists of six elements:

1) The court should evaluate how the employee first came to possess or access the document. If the employee came into possession of the document innocently or in the ordinary course of his or her duties (as Relator did here), this factor favors the employee.

2) The court should evaluate what the employee did with the document. If the employee only reviewed the documents and shared them with an attorney to help in evaluating if he or she has a viable cause of action (as Relator did here),

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[6]The court's analysis pertained to whether removing documents under the circumstances was a "protected activity" for purposes of a retaliation claim under the LAD. 8 A.3d at 215.

this factor favors the employee.

3) The court should evaluate the nature and content of the documents to weigh the strength of the employer's interest in keeping the document confidential. If a document is protected by a privilege, if it reveals a trade secret or similar proprietary business information, or if it includes personal or confidential information "such as Social Security numbers or medical information about other people," this factor weighs in favor of the employer. (Here, no such considerations are present.)

4) The court should consider whether a clearly identified company policy exists relating to document privacy or confidentiality, and, if so, if the employee's disclosure violated that policy. (No such policy exists here.)

5) The court should evaluate the circumstances relating to whether disclosing the document will be "unduly disruptive to the employer's ordinary business." 8 A.3d at 227. If the document is "central to the discrimination claim and merely troubling or upsetting to the [employer], the factor will more likely weigh in favor of the employee." *Id*. Here, some of the documents are critical to proving the "good faith belief" component of Relator's whistleblower discrimination claim. The Adverse Parties' interest in the documents is to prevent a finding that they committed fraud against public entities. This interest cannot be an interest deserving of consideration, much less protection.

6) The court should evaluate the strength of the employee's expressed reason for copying the document rather than, for example, simply describing it or identifying its existence to counsel to allow it to be requested in discovery. "As part of this evaluation the court may also consider whether the document would be critical to the case, like the true 'smoking gun,' such that the employee's perceived

need to preserve it would be entitled to greater weight in light of the significance of the risk of its loss." *Id*. at 228. Some of the documents returned to the Adverse Parties here in fact constitute "smoking guns" relating to Relator's claim that the Adverse Parties were committing fraud against public entities in supplying low-quality asphalt for public works projects.

7) The court should conduct a two-part analysis to consider "the broad remedial purposes the Legislature has advanced through our laws against discrimination, including the LAD," and, secondly, consider the effect, if any, that the document's use may have upon the balance of legitimate rights of both employers and employees. 8 A.3d at 228.

Relator's claims in this case similarly involve discrimination and wrongful discharge claims that are founded on matters of great public importance. The Oregon legislature passed the whistleblower discrimination law as part of its laws prohibiting workplace discrimination. Relator's wrongful discharge claim is expressly allowed by the whistleblower discrimination claim (see ORS 659A.199(2)), and requires that an important societal right or interest be at stake. See ER 5. Oregon's interests that are served by its anti-employment discrimination laws certainly are as important as those of New Jersey. No reason exists not to apply the same emphasis on considering the importance of the underlying cause of action in determining if Relator was prohibited from removing the documents from KFJ's premises as the LAD was emphasized in *Quinlan*. This is particularly true when considering that Relator here alleges in his complaint that the Adverse Parties were engaging in defrauding the public regarding asphalt used in public roadways and regarding environmental protection laws.

The *Quinlan* case provides another example demonstrating the arbitrariness

of the trial court's decision that no employee ever has a "right" to remove any documents from his or her employer's premises. Employees may well not be prohibited from removing non-confidential documents, especially in situations such as those extant here where the employer took no actions to protect its documents. Adverse Parties very easily could have incorporated a simple policy and/or asked Relator and other employees to sign a confidentiality agreement. Relator has complied with the trial court's order that he turn over all copies of the removed documents, a few of which are critical to show that he had a good faith belief that Adverse Parties were defrauding the public. Relator legitimately fears that the critical documents may not be made available through discovery, thus furthering the Adverse Parties' desire to keep the public in the dark about the fraud in which Relator believes that he can prove the Adverse Parties have engaged. This Court should reverse the trial court's order compelling Relator and his attorney to return all copies of all removed documents, as that order was an abuse of discretion.

IV. CONCLUSION

The trial court erred when it disqualified Relator's attorney of choice absent proof of prejudice to the Adverse Parties. The trial court further erred by ordering that Relator and his counsel had to return every copy of every document that Relator had removed from his employer's premises. The April 11, 2013 order mandating these actions should be reversed.

Dated September 27, 2013.

SMITH & FJELSTAD

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Of Attorneys for Plaintiff-Relator

CERTIFICATION OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a) is 7384 words.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Smith & Fjelstad

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Attorney for Plaintiff-Relator

PROOF OF SERVICE

I certify that I directed that the original copy of Relator's Opening Brief and (Supplemental) Excerpt of Record be filed electronically with the Appellate Court Administrator for the State of Oregon on September 27, 2013.

I further certify that I directed that two copies of the Relator's Opening Brief to be served on the Adverse Parties' attorney on September 27, 2013 by United States mail, with postage prepaid, in an envelope addressed to:

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