No. 1025661

SUPREME COURT OF THE STATE OF WASHINGTON

JEREMY DAVID and MARK SPRINGER, individually and on behalf of all others similarly situated,

Petitioners,

v.

FREEDOM VANS LLC, a Washington limited liability company; and DOES 1-10,

Respondents.

AMICUS CURIAE OF WASHINGTON EMPLOYMENT LAWYERS ASSOC. IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION AND AMICUS INTEREST

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of approximately 230 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life.[1]

II. SUMMARY OF ARGUMENT

This case involves the interpretation of RCW 49.62 and the application of the common law duty of loyalty to lower wage workers. The court should review the court of appeals decision because the court of appeals failed to give effect to RCW 49.62.070's protection for lower wage workers. The court of appeals' application of the duty of loyalty to an electrician and a

[1] Plaintiff's attorney, Michael Subit, is a member of WELA's Amicus Committee. He has been recused from all of the WELA Amicus Committee's deliberations and decisions involving this case.

shop assistant vastly expands and distorts the common law duty of loyalty. Review of the court of appeals decision presents issues of substantial public interest because lower wage workers need a second job to make ends meet, and lower tier courts need direction from this court to give proper effect to RCW 49.62.

III. STATEMENT OF FACTS

This case involves two lower wage workers: an electrician earning $18-22 per hour and a shop assistant/foundations manager earning $16-25 per hour. CP 42, 74. Yet when applying RCW 49.62.070 and the common law duty of loyalty, the court of appeals opinion analogized the two lower-wage workers to "Pepsi marketing executives." Opinion, p. 11.

IV. ARGUMENT

Numerous state legislatures have recently reformed the noncompetition covenant common law to protect workers, particularly lower wage workers.[2] In RCW 49.62.070,

[2] 2019: Maryland (Md. Code Ann., Lab. & Emply. § 3-716); New Hampshire (N.H. Rev. Stat. Ann. § 275:70); North Dakota (N.D. Cent. Code § 9-08-06); Rhode Island (R.I. Gen. Laws § 28-59-1 – 28-59-3). 2020: Virginia (Va. Code Ann. § 40.1-28.7:8). 2021: Illinois (820 Ill.

Washington's legislature promulgated an indispensable protection for lower wage workers: "Subject to subsection (2) of this section, an employer may not restrict, restrain, or prohibit an employee earning less than twice the applicable state minimum hourly wage from having an additional job, supplementing their income by working for another employer, working as an independent contractor, or being self-employed."

As the cost of living increases, it disproportionately impacts lower wage workers. In Washington State, a single adult with one child must earn $38.68 per hour to attain a "Living Wage"; in King County, a living wage requires an adult with one child to earn $43.01 per hour, $55.43 with two children, and $74.56 for three. https://livingwage.mit.edu/states/53; https://livingwage.mit.edu/counties/53033. RCW 49.62.070(1) protects workers making less than $31.58 per hour. In other

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Comp. Stat. 90/1-97); Massachusetts (Mass. Gen. Laws ch.149, § 24L); Nevada (Nev. Rev. Stat. § 613.195); Oregon (Or. Rev. Stat. § 653.295). 2022: Colorado (Colo. Rev. Stat. § 8-2-113); Maine (Me. Rev. Stat. Ann. tit. 26, § 599-C).

words, it protects lower wage workers for whom a second job is indispensable.

Washington's legislature wanted courts to vigorously enforce RCW 49.62's protections: "This chapter is an exercise of the state's police power and shall be construed liberally for the accomplishment of its purposes." RCW 49.62.110. But by affirming summary judgment dismissing the claims of two lower wage workers under RCW 49.62.070, the court of appeals appeared to conclude that an electrician poses competitive risks identical to a "Pepsi marketing executive".

The Petition for Review raises issues of substantial public interest. RAP 13.4(b)(4). First, although RCW 49.62 has been construed in numerous judicial opinions, courts have regularly disregarded the legislature's direction to construe the statute in a manner that promotes "workforce mobility." RCW 49.62.005. The appellate court's interpretation of RCW 49.62.070 in this case is fundamentally at odds with the statute's plain language and purpose. Second, the court of appeals' analysis is divorced

from fundamental legal principles underlying the common law duty of loyalty. The court of appeals opinion allows McDonalds to prohibit a cashier from working a second job at Burger King.

A. RCW 49.62 has been construed by numerous courts without giving effect to the legislature's liberal construction mandate.

By enacting RCW 49.62, Washington's legislature reformed one hundred years of restrictive covenant common law. The legislature strove to promote "worker mobility," and recognized that noncompetition agreements "may be contracts of adhesion." RCW 49.62.005. The legislature intended its reforms to be bounteous: "This chapter is an exercise of the state's police power and shall be construed liberally for the accomplishment of its purposes." RCW 49.62.110. "Liberal construction" is a command that the coverage of an act's provisions in fact be liberally construed and that its exceptions be narrowly confined. *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364, 1370 (1991).

The court of appeals opinion quoted RCW 49.62.110.

Opinion, p. 5. But the court did *not* liberally construe RCW 49.62.070(1), and it failed to narrowly confine the exception contained in RCW 49.62.070(2)(b). Numerous judicial opinions interpret and apply RCW 49.62's provisions restrictively without ever citing or mentioning RCW 49.62.110's liberal construction requirement. *See, e.g., Griffin MacLean, Inc. v. Hites*, No. 81584-9-I, 2023 Wash. App. LEXIS 703, *2 (Ct. App. Apr. 10, 2023); *Wellspring Family Servs. v. Owen*, No. 82128-8-I, 2021 Wash. App. LEXIS 2417, at *4 (Ct. App. Oct. 11, 2021); *A Place for Mom v. Perkins*, 475 F. Supp. 3d 1217, 1228 (W.D. Wash. 2020); and *Groupon, Inc. v. Shin*, 2022 U.S. Dist. LEXIS 2685 (N.D. Ill. 2022). This court should take review because the court of appeals failed to adhere to RCW 49.62's liberal construction requirement and other courts are ignoring it entirely.

B. The court of appeals interpretation of RCW 49.62.070 is at odds with the plain language.

RCW 49.62.070(1) protects lower wage workers by ensuring that their employers cannot prohibit them from taking a second job. A "court is to view with caution any interpretation of

the statute that would frustrate its purpose." *Kilduff v. San Juan Cty*., 194 Wn.2d 859, 874, 453 P.3d 719, 727 (2019). And "any construction that would narrow the coverage of the law" would frustrate its purpose. *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43, 49 (1996). The court of appeals decision, which prohibits an electrician and a shop assistant from working a second job, cannot be reconciled with the protection established by RCW 49.62.070(1).

To evade the protection of RCW 49.62.070(1), the court of appeals relied upon the exception enunciated in RCW 49.62.070(2)(b): "This section does not alter the obligations of an employee to an employer under existing law, including the common law duty of loyalty and laws preventing conflicts of interest and any corresponding policies addressing such obligations."

Because RCW 49.62.070(2)(b) is an exception to the protection established in RCW 49.62.070(1), subsection 2(b) must be narrowly confined. But the court of appeals endorsed a

"Non-Compete Agreement" that prohibits the lower wage workers from doing any job for any third party if the third party is engaged in the same business: Employee "will not directly or indirectly engage in … becoming an employee of any third party that is engaged in such business." CP 26. Looked at another way, the covenant endorsed by the court of appeals would prohibit the electrician from taking a job as a janitor of a competing business. Courts have refused enforcement of covenants that lack a defined scope of prohibited activity that is competitively inappropriate. *North American Paper Co. v. Unterberger*, 172 Ill. App. 3d 410, 413, 526 N.E.2d 621 (1998) (prohibition from associating with any competitor in any capacity whatsoever is unenforceable); *Telxon Corporation v. Hoffman*, 720 F. Supp. 657, 664-665 (N.D. Ill. 1989) (absence of activity restriction unreasonable); *Mutual Service Casualty Insurance Co. v. Brass*, 242 Wis. 2d 733, 743-744, 625 N.W.2d 648 (2001) (same). When protecting lower wage workers in RCW 49.62.070, the legislature did not intend for the exception to swallow the rule. In short, Pepsi

marketing executives are not permitted to take a second job with Coca Cola for two reasons: such executives have competitively sensitive information and jobs, and such executives are not lower wage workers.

C. The common law duty of loyalty enormously impacts workers.

The court of appeals concluded that an electrician for a van conversion company would violate the common law duty of loyalty by accepting any job with another business offering competing services. The court of appeals determined that every second job, even with unrelated job duties, would violate the electrician's duty of loyalty. Opinion, pp. 9-10.

As applied to employees, the common law duty of loyalty is part of the law of unfair competition. If there is nothing unfair about the second job, it should not be prohibited by the duty of loyalty. This case involves an electrician, whose training and skills are generalized and governed by promulgated electrical codes. It is difficult to identify how an electrician pulling and connecting wiring could have a second job that would be

competitively unfair to an employer. In other words, courts need to distinguish between second jobs that threaten competitive injury. The Restatement (Second) of Agency § 393, comment *a* allows an agent to act freely "in matters not within the field of his agency" and so long as she does not use "confidential information." The court of appeals' conclusion expands the duty, identifying it as "a duty not to compete in the principal's direct commercial area and whether that duty is violated does not turn on the employee's job description." Opinion, pp. 9-10. The court of appeals conclusion appears to contradict the Restatement (Second) of Agency, upon which it relies.

The Restatement (Second) of Agency was the cornerstone of *Kieburtz & Associates, Inc. v. Rehn*, 68 Wn. App. 260, 842 P.2d 985 (1992), a thirty-year-old decision and one of the few Washington judicial opinions construing the common law duty of loyalty. But the facts in *Kieburtz* involved competitive misconduct. After their employer completed Phases One and Two of a project and the customer requested Phase Three, two

employees set up a different legal entity and misappropriated the Phase Three project. One of the defendants had done the Phase One and Phase Two projects, thus being in a unique position to purloin and perform Phase Three.

A remedy for breach of the duty of loyalty is disgorgement of compensation. *Williams v. Queen Fisheries*, 2 Wn. App. 691, 697, 469 P.2d 583 (1970). Thus, by dramatically expanding the scope of an employee's duty of loyalty, the court of appeals decision exposes lower wage employees in other proceedings to an unfair outcome.

D. Adopting or rejecting the Restatement (Third) of Agency § 8.04 will profoundly affect lower wage workers.

In its unpublished decision, the court of appeals decided a new question of law. It adopted The Restatement (Third) of Agency § 8.04 (2006). The adoption occurred in a footnote, with the court justifying its action by stating "this court has relied on

Section 8.04 in unpublished decisions." Opinion, p. 9 n. 4.

The Restatement (Third) of Agency § 8.04 substantially differs from existing Washington common law as applied in *Kieburtz*, 68 Wn. App. at 265. *Kieburtz* adopted the Restatement (Second) of Agency § 393, which prohibits competitive conduct within the subject matter of the agency:

> Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency.

The Restatement (Second) requires competitive misconduct; for example, use of confidential information: "an agent can properly act freely on his own account in matters not within the field of his agency and in matters in which his interests are not antagonistic to those of the principal, exception that he can not properly thus use confidential information." The Restatement (Second) of Agency § 393, comm. *a*. (1958). The misconduct in *Kieburtz* was misappropriation of a corporate opportunity by soliciting an existing customer for a phase of work that otherwise would have been reaped by the employer. 68

Wn. App. at 265.

The Restatement (Third) of Agency § 8.04 enlarges the duty to cover any act that would assist any competitor:

> Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal *and from taking action on behalf of or otherwise assisting the principal's competitors."*

(Emphasis supplied).

The Restatement (Third) postulates that every employee is a "fiduciary" of the employer so even when "the agent does not use the principal's property or confidential information," the agency "contravenes the general fiduciary principle" by assisting a competitor in some fashion. Restatement (Third) of Agency § 8.04, comm. *b*. (2006).

Many employees, including Pepsi marketing executives, would undoubtedly breach their duty of loyalty by assisting a competitor. But lower wage, at-will employees, performing relatively routinized tasks, present a different case. The Restatement (Third) of Agency's "one size fits" all approach is unsatisfactory because it is divorced from the different risks

posed by different types of workers—the reality of their jobs. Many state legislatures reforming noncompetition covenant law distinguish between highly compensated employees and lower wage employees. That approach has merit when determining the proper scope and application of the common law duty of loyalty.

Adopting or rejecting the Restatement (Third) of Agency § 8.04 deserves careful, thorough analysis. After all, the proposed new standard will have particularly pernicious effects on lower wage workers. It is more difficult for lower wage workers to acquire education or new skills, and they are unlikely to secure a second job completely unrelated to their existing employment.

V. CONCLUSION

This case presents a rare opportunity for this Court to interpret RCW 49.62. Lower income Washingtonians typically cannot afford to hire a lawyer. "Four out of every five civil legal needs of the nation's poor go unmet,[22] possibly even nine out of ten.[23] *The Administrative Power: How State Courts Can Expand*

Access to Justice, 53 GONZ. L. REV. 207, 213. Even "[f]or the middle class, it is two to three-fifths.[24] *Id*.

Workers making $16-$25 per hour cannot afford to pay a lawyer and it's financially impractical for a lawyer to bring an individual case challenging an employer's policy prohibiting second jobs. To be financially viable, they must be brought as a class action, as in this case. *See, e.g., Oakley v. Domino's Pizza, LLC*, 23 Wn. App. 2d 218, 234-35, 516 P.3d 1237, 1246 (2022) (holding class action waiver in employment agreement unconscionable because it "frustrates our state's public policy of protecting workers' rights to undertake collective actions and ensure the proper payment of wages," relying on evidence that the plaintiff "would not have been able to pay a lawyer to bring the suit on an individual basis and his "attorney noted that he generally does not take cases like this one, 'with only smaller wage and hour claims against large entities like Domino's unless they can be filed on a class action basis,' based on his experience that 'handling smaller wage-only claims on an individual basis is

not viable from a financial standpoint.'")

Without review of this case, there is no realistic prospect that a worker will be able to entice a lawyer to bring another class action under RCW 49.62.070. "If a person cannot vindicate their legal rights, laws may go effectively unenforced." 53 GONZ. L. REV. 207, 217. This will disproportionately impact "Black, Indigenous, and People of Color (BIPOC), who are overrepresented in low income brackets." *Quinn v. Dep't of Revenue*, 526 P.3d 1, 7 (Wash. 2023). Because this case presents issues of substantial public interest, the court should grant review.

This document contains 2489 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 12th day of January, 2024.

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DECLARATION OF SERVICE

I hereby declare that on January 12, 2024, I electronically filed the foregoing Amicus Curiae of Washington Employment Lawyers Assoc. In Support of Petition For Discretionary Review with the Supreme Court of the State of Washington, and arranged for service of a copy of the same on the parties to this action as follows:

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