No. 70128-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

LARRY CURRIER, LARRY CURRIER DBA AMERICAN CONTAINER EXPRESS, and AMERICAN CONTAINER EXPRESS, INC.,

Respondents,

v.

NORTHLAND SERVICES, INC.,

Appellant.

BRIEF OF AMICUS CURIAE ASSOCIATION OF WASHINGTON BUSINESS

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I. INTRODUCTION

This brief is filed by the Association of Washington Business ("AWB"), the state's chamber of commerce and principal institutional representative of the state's employer community. Respondent Currier's claim, and the decision of the trial court below, rests upon an unprecedented expansion of the Washington Law Against Discrimination, RCW ch. 49.60 ("WLAD"). The effect of the trial court's decision is to provide substantive rights beyond the bounds established by the Legislature to independent business entities with whom services are contracted for outside the employment relationship, and to make businesses liable for discriminatory acts of other independent businesses acting alone outside the employment relationship. This claim has no basis in the plain language of the WLAD. It far exceeds the intent of the Legislature in declaring certain unfair practices in employment, and runs contrary to the underlying public policy of the WLAD. If sustained, this new reading of the WLAD could apply to virtually any business-to-business economic transaction, and create substantial new risk, uncertainty, and liability for Washington companies. The trial court should have disposed of the matter on summary judgment in favor of appellant Northland, should never have let the matter get to trial, and fundamentally

erred entering judgment for Currier. AWB urges the court to reverse and enter judgment in favor of appellant Northland Services.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

AWB is the state's largest general business membership organization, representing over 8,250 employers from every major industry sector and geographical region of the state. AWB members range from large, highly visible, multi-national corporations to very small businesses and sole proprietors. Collectively, they employ over 750,000 people in Washington, approximately one third of the state's workforce. AWB is also an umbrella organization which represents over 100 local and regional chambers of commerce and professional associations. AWB frequently appears in the appellate courts as amicus curiae on issues of substantial interest to its statewide membership. Most AWB members are directly covered under WLAD, and AWB promotes among its membership full compliance with the letter and spirit of the WLAD, providing educational programming and other technical assistance. Stability, predictability, and consistency in judicial interpretation and application of the laws related to civil rights in business and employment, including liability for employment practices and asserted retaliation against employees, is of great interest to these members.

III. ISSUE OF CONCERN TO AMICUS CURIAE

Does the anti-retaliation provision of the WLAD apply to independent contractors outside of an employment relationship, such that an independent contractor may maintain a retaliation action against another independent business, for conduct arising between two further independent businesses acting alone, in what the contractor unreasonably believes is opposition to a prohibited employment practice? *Cf.* Br. of App. at 5-7 (Issues 1-6).

IV. STATEMENT OF THE CASE

For brevity's sake, AWB adopts the statement of the case set forth in Northland's opening brief at 8-16.

V. ARGUMENT

This case is straightforward. Currier has sued Northland under the anti-retaliation provision of the WLAD for terminating his company's contract for opposing what he believes is racially discriminatory conduct by another truck driver to a third truck driver. The primary problem with this theory, as amply documented in Northland's briefing, is that both Currier and the other truck drivers are all independent contractors, not employees of Northland. The alleged discriminatory act was a statement that Currier overheard another independent contractor make to yet a third independent contractor. Northland was not involved in that statement, and

no employees of Northland were involved. The WLAD's anti-retaliation provision does not apply to non-employee independent contractors in these circumstances. Even if it did, a statement between two non-employee independent contractors is not a discriminatory practice prohibited by the WLAD. Currier could not have reasonably believed otherwise. These facts cannot possibly form the basis of a WLAD retaliation claim; to hold otherwise would stretch the WLAD well beyond the bounds established by the Legislature and applied by the courts for over half of a century.

A. THE WLAD COVERS EMPLOYERS AND EMPLOYEES; ANY COVERAGE OF INDEPENDENT CONTRACTORS IS EXTREMELY NARROW AND DOES NOT APPLY HERE.

The WLAD was originally adopted as an employment anti-discrimination law, and only in later years broadened to cover other activities. Laws of 1949, ch. 183; *Marquis v. City of Spokane,* 130 Wn.2d 97, 105, 922 P.2d 43 (1996). Its public policy and legislative purpose, with respect to employment, is to provide equal opportunity and freedom from discrimination on the basis of enumerated classifications. *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359–60, 20 P.3d 921 (2001). As such, the WLAD governs the relationship between employers and employees and specifically defines "employer" and "employee." RCW 49.60.040(3); .040(4). The Legislature has specifically excluded certain

employments from the coverage of the statute. RCW 49.60.040(3) (excluding employers of fewer than eight employees and non-profit employers); .040(4) (excluding family employment and domestic service employment). Our Supreme Court has stated it reads the definitions of "employer" and "employee" with the common law distinction between an employee and an independent contractor in mind. *Marquis*, 130 Wn.2d at 110. It is undisputed in this case that Currier and his business, American Container Express, and the two other truck drivers involved, are all independent contractors.

In *Marquis*, an independent contractor golf professional was found to be protected by the general declaration of rights provision of the WLAD in maintaining a sex discrimination action against the principal. RCW 49.60.030(1); 130 Wn.2d at 115. Relying heavily on a regulation promulgated by the Human Rights Commission, codified in its current form at WAC 162-16-230(2), the *Marquis* court believed that section .030 was sufficiently broad to allow a cause of action for discrimination for an independent contractor in the making and performance of her service contract with the principal. There has been no further appellate extension of the WLAD to cover independent contractors in any other aspect of their activities.

It is critical for the court to understand, as the trial court evidently misapprehended, this is not a section .030(1) case. Currier is explicitly not suing for prohibited discrimination by Northland in the making or performance of his contract. Unlike *Marquis*, which was explicitly not an anti-retaliation case, Currier's suit turns on section .210(1) of the WLAD, which in turn requires opposing a prohibited employment practice. The prohibited employment practices are enumerated in section .180 of the WLAD, and strictly apply only to the employment relationship, not an independent business-to-business contracting relationship. Indeed, in the same Human Rights Commission regulation that *Marquis* was based on, the Commission interprets section .180 to exclude independent contractors, and the Commission, charged with administratively enforcing the WLAD, claims no jurisdiction over them. WAC 162-16-230(1) ("RCW 49.60.180 defines unfair practices in employment. A person who works or seeks work as an independent contractor, rather than as an employee, is not entitled to the protection of RCW 49.60.180.").[1]

In an employment matter, if there is no violation of section .180, there is no violation of .210(1). And section .180 manifestly does not

[1] Furthermore, as Northland points out, *Br. of App.* at 32-34, the reasonableness of Currier's "reasonable belief" argument is tied to the substantive law. The trial court did not evidently apprehend that it is objectively unreasonable to believe one is opposing prohibited employment conduct under the WLAD when the conduct does not involve employment under the statute.

apply to independent contractors. Therefore, to whatever extent *Marquis* extended section .030 of the WLAD to cover independent contractors from discrimination by their principal in the making and performance of a service contract, that is the full extent to which the WLAD has been held to cover independent contractors. Any further expansion of the WLAD's provisions to independent contractors should only be done, if at all, by the Legislature, not -- as with the trial court below -- by a judicial amendment of the statute. *See, e.g., Kilian v. Atkinson*, 147 Wn.2d 16, 29, 50 P.3d 638 (2002) (noting, while refusing to read "age" into the list of protected classes in section .030, "[t]his court will not add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it.").

B. A BUSINESS IS NOT LIABLE UNDER THE WLAD FOR DISCRIMINATORY ACTS OF OTHER INDEPENDENT BUSINESSES ACTING ALONE.

It is undisputed that the purported discriminatory act in this case was witnessed (or overheard) between two independent contractors. One independent contractor (Currier) allegedly heard another independent contractor (Howell) make a racially insensitive statement to yet a third independent contractor (Martinez). *Br. of App.* at 13-14 (citing Clerk's Papers). As discussed above, this unfortunate situation does not involve a prohibited employment practice because there are no employers or

employees involved, only independent contractors. But a pernicious consequence of Currier's theory, and the trial court's decision, is to make companies liable for the potentially offensive or discriminatory utterances of completely independent business entities acting alone. Such a result is simply not contemplated by the WLAD or any case construing it.

In the typical employment discrimination case, the WLAD does not even create vicarious liability for an employer on the basis of its own non-supervisory employees' statements and conduct of which the employer is unaware. *See, e.g., Jenkins v. Palmer*, 116 Wn. App. 671, 674-75, 66 P.3d 1119 (2003). This is based on the compelling public policy that, while eradicating discriminatory conduct in employment is a key purpose of the law, interactions between private individuals not acting as agents of an employer, like non-supervisory co-workers, will not be so minutely policed. Otherwise, the law becomes a "general civility code," beyond the original intent of the Legislature. *See Alonso v. Qwest Communications Co., LLC.*, ___ Wn. App. ___, 315 P.3d 610, 614 (Dec. 31, 2013) ("The WLAD is not intended as a general civility code.") (citing *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297, 57 P.3d 280 (2002)).

If even a statement by co-workers of an employee does not by itself give rise to a prohibited employment practice, then *a fortiori*, a

statement between two independent contractors cannot possibly give rise to a prohibited employment practice. If an employer is not liable under the WLAD for the discriminatory acts and statements of co-workers acting alone, a company such as Northland cannot possibly bear liability for the acts or statements of independent contractors between and amongst themselves, in which it has no participation or awareness, that are then reported by another such as Currier. Holding otherwise, like the trial court, places an extreme and unreasonable legal burden on Washington businesses.

C. IF UPHELD, THE TRIAL COURT'S INTERPRETATION OF THE WLAD WOULD LEAD TO ABSURD RESULTS.

It is settled law that Title VII of the federal Civil Rights Act, forbidding discrimination in employment, does not cover independent contractors at all.[2] And, beyond the limited coverage the *Marquis* court extended to independent contractors under section .030(1), the employment and anti-retaliation provisions of the WLAD have never been interpreted to apply to a purely independent contracting relationship. The consequence of departing from this settled understanding of the law would be to expose Washington businesses to unreasonable new administrative

[2] Because the employment provisions of the WLAD are based in part and closely track Title VII, the courts routinely refer to federal interpretations for guidance in construing the WLAD. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406 n. 2, 693 P.2d 708 (1985).

and civil liability for conduct by independent actors that companies have no control over. Once applied beyond the employment relationship to principals and contractors, and interactions between third party independent contractors, there is no limiting principle that would keep the WLAD from creating liability to a business for the interactions of any number of subcontractors, vendors, and other external, independent actors that may come into a workplace on any given day. This absurd result would be visited not only upon public ports, shipping companies, and drayage truckers as are involved here, but also to construction sites, retail storefronts, office buildings, manufacturing facilities, farmlands, and any conceivable workplace across the state where vendors or independent contractors may interact. If this scenario is desirable under the WLAD – AWB submits it is not – then it is for the Legislature, upon careful weighing of the public policy implications and competing concerns of stakeholders, to make it so. It is not the province of the judiciary to expand the WLAD beyond its plain, unambiguous provisions.

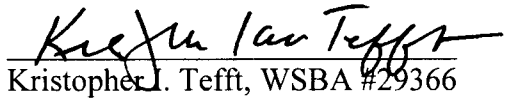
VI. CONCLUSION

The anti-retaliation provision of the WLAD does not apply to independent contractors outside an employment relationship in these circumstances, and the trial court's unprecedented extension of the law is

clear error. The Court of Appeals should reverse the judgment of the trial court and enter judgment in favor of Northland.

Respectfully submitted this 27th day of January, 2014.

ASSOCIATION OF WASHINGTON BUSINESS



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CERTIFICATE OF SERVICE

I reside in the State of Washington, am over the age of eighteen, and not a party to this action. My business address is 1414 Cherry Street SE, Olympia, WA 98507. On January 27th, 2014, I served the following:

MOTION FOR LEAVE TO SUBMIT BRIEF OF AMICUS CURIAE ASSOCIATION OF WASHINGTON BUSINESS; and

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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Executed on this 27th day of January, 2014, at Olympia, Washington.

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