

**FILED**  
**Court of Appeals**  
**Division III**  
**State of Washington**  
**2/26/2018 2:41 PM**  
NO. 35339-7

---

COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

---

BROOK HOWELL,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,  
STATE OF WASHINGTON,

Respondent.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR YAKIMA COUNTY

---

**AMICUS BRIEF IN SUPPORT OF APPELLANT BY THE  
MUCKLESHOOT AND KALISPEL TRIBES**

---

Judith A. Endejan, WSBA #11016  
GARVEY SCHUBERT BARER

Eighteenth Floor  
1191 Second Avenue  
Seattle, Washington 98101-2939  
(206) 464-3939

## Table of Contents

	<u>Page</u>
I. INTRODUCTION AND IDENTITY OF AMICUS .....	1
II. STATEMENT OF THE CASE .....	2
III. ARGUMENT .....	2
A. Native Americans Face Discriminatory Barriers to Employment. 2	
B. The Trial Court Erred Procedurally. ....	5
C. DSHS Is Covered By RCW 49.60 Because Its Actions Indirectly Control the Act of Employment. ....	7
IV. CONCLUSION .....	8

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<i>Barnum v. State</i> , 72 Wn.2d 928, 435 P.2d 678 (1967) .....	6
<i>Clark v. The Office of the Attorney General</i> , 133 Wn.App. 767, 138 P.3d 144 (2006).....	6
<i>Gaspar v. Peshastin Hi-Up Growers</i> , 131 Wn.App. 630, 128 P.3d 627 92006), <i>review denied</i> , 158 Wn.2d 1029 152 P.3d 1033 (2007).....	5
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97, 922 P.2d 43 (1996) .....	7
<i>Pearson v. Vandermay</i> , 67 Wn.2d 222, 407 P.2d 143 (1965) .....	6
<i>Shannon v. Pay n' Save Corp.</i> , 104 Wn.2d 722, 709 P.2d 799 (1985).....	6
<u>STATUTES</u>	
Cr 12(c).....	5, 6
RCW 49.60 .....	6, 7
RCW 49.60.030(1).....	7
RCW 49.60.040 .....	7
RCW 49.60.180 .....	6
<u>OTHER AUTHORITY</u>	
Department of Justice Sides With Natives, Files Lawsuit Against SD for Discrimination,” <a href="https://indiancountrymedianetwork.com/news/politics/departement...">https://indiancountrymedianetwork.com/news/politics/departement...</a> 2/8/2018 .....	4
Economic Policy Institute (“EPI”) Briefing Paper, “Native Americans and Jobs) (December 17, 2013) (“EPI Paper”), p.5...3 <a href="https://www.minneapolisfed.org/indiancountry/resources/reservation-profiles/muckleshoot-reservation">https://www.minneapolisfed.org/indiancountry/resources/reservation-profiles/muckleshoot-reservation</a> .....	1
<a href="https://fortress.wa.gov/esd/employmentdata/reports-publications/regional-reports/county-profiles/pend-oreille-county-profile">https://fortress.wa.gov/esd/employmentdata/reports-publications/regional-reports/county-profiles/pend-oreille-county-profile</a> .....	1
<a href="https://www.dshs.wa.gov/sites/default/files/CA/pub/documents/APSR-2016.pdf">https://www.dshs.wa.gov/sites/default/files/CA/pub/documents/APSR-2016.pdf</a> .....	5
White House Office of the Press Secretary 2013.....	3

## **I. INTRODUCTION AND IDENTITY OF AMICUS**

The Muckleshoot Indian Tribe is a federally recognized Indian tribe, located within the State of Washington. The Tribe has approximately 2,800 enrolled members. The Muckleshoot Indian Reservation is located southeast of Auburn in King and Pierce Counties. The Muckleshoot Reservation has an unemployment rate of 14.3%, almost double the national rate.<sup>1</sup>

The Kalispel Indian Community of the Kalispel Reservation is a federally recognized tribe of Lower Kalispel people, located in Washington. They are an Indigenous people of the Northwest Plateau, with 470 members. The Executive Order Kalispel Reservation, located in Pend Oreille County, Washington, was established in 1915. The Kalispel Reservation, located in Pend Oreille County, Washington, was founded in 1914 and is 4,557 acres (18.44 km<sup>2</sup>) large. The Tribe's headquarters is in Cusick, Washington. Pend Oreille County reports one of the highest unemployment rates in Washington. As of 2016 that rate was 9.7%.<sup>2</sup>

Collectively, the Muckleshoot and Kalispel Indian Tribes will be referred to as either "Tribes" or "*Amici*."

---

<sup>1</sup> <https://www.minneapolisfed.org/indiancountry/resources/reservation-profiles/muckleshoot-reservation>

<sup>2</sup> <https://fortress.wa.gov/esd/employmentdata/reports-publications/regional-reports/county-profiles/pend-oreille-county-profile>

The Tribes provide a larger perspective on the continually challenging problem of substantially lower employment rates for Tribes, than for the white population in general. They support the removal of unnecessary barriers to employment opportunities for all Native Americans. This case exemplifies such a barrier. Here, an individual tribal member challenges an agency practice. But this case has ramifications that extend to the larger Native American population because that practice has a demonstrably negative, disparate impact on Tribal members. Unfortunately, because the trial court misunderstood the basis for Brook Howell's claim, it foreclosed her ability to proceed to establish that disparate impact. The Tribes view the removal of that impact as a means to reducing obstacles to employment for Native Americans and therefore support Ms. Howell's appeal. The trial court's decision should be reversed, and this case should be litigated.

## II. STATEMENT OF THE CASE

*Amici* rely upon, and adopt, Ms. Howell's Statement of the Case.

## III. ARGUMENT

### A. Native Americans Face Discriminatory Barriers to Employment.

As noted, the Tribes experience a disproportionately higher unemployment rate, which is not unique to Washington tribal

communities. Indeed, President Barack Obama remarked in 2013, “The painful legacy of discrimination means that ... Native Americans are far more likely to suffer from a lack of opportunity — higher unemployment, [and] higher poverty rates.”<sup>3</sup> While the unemployment rate is one key correlator to poverty, the employment rate may be a more informative measure. That is because a significant number of Tribal members simply stop looking for work “because their odds of finding work are very low,” and thus they do not get counted as “unemployed.”<sup>4</sup> The EPI Paper reported that the employment rates of whites and American Indians in their prime working ages (25-54 years) had a sizable disparity, with the employment rates for whites at 78.1% and for American Indians at 64.7%,<sup>5</sup> or almost double. This gap can be caused by a range of factors, including educational attainment, reservation residency, and racial discrimination.

The EPI Paper suggests investigating the role of racial discrimination as a policy aimed at increasing the Native American employment rate.<sup>6</sup> This can take many different forms. One may be suing a state agency for refusing to hire qualified Native American job

---

<sup>3</sup> White House Office of the Press Secretary 2013.

<sup>4</sup> Economic Policy Institute (“EPI”) Briefing Paper, “Native Americans and Jobs” (December 17, 2013) (“EPI Paper”) p. 5.

<sup>5</sup> *Id.* at pp. 5-6.

<sup>6</sup> *Id.* at p. 25.

applicants.<sup>7</sup> Another could take the form of this lawsuit, which raises the issue of systemic discrimination due to the disparate impact of a state practice on Native Americans and their communities. The challenged practice in this case is not the retention of findings of abuse and neglect of children by the Respondent Department of Social and Health Services (“DSHS”). Rather, it is DSHS’s refusal to put in place a process that allows a party subject to those findings to expunge them for good cause, such as full rehabilitation or other extenuating reasons that results in a disparate impact on Native American communities. Without such a process the 35-year retention period effectively, and permanently, precludes employment opportunities for multiple categories of jobs. This concern has been recognized by the Affiliated Tribes of Northwest Indians (“ATNI”) that adopted Resolution #17-58 (Attachment A) to support action to change the DSHS policies to allow a party to demonstrate why “founded findings” should be expunged.<sup>8</sup>

This case is significant to *Amici*, who advocate for better, fairer treatment of Native Americans, because it tackles a common problem they face in their communities – the inability to find work. As Ms. Howell

---

<sup>7</sup> “Department of Justice Sides With Natives, Files Lawsuit Against SD for Discrimination,” <https://indiancountrymedianetwork.com/news/politics/department-...> 2/8/2018.

<sup>8</sup> *Amici* are members of ATNI.

notes, Native Americans are four times more likely to have a “founded finding” on their record than white persons. Complaint ¶ 29. Leaving aside any issues associated with DSHS making the underlying findings, this statistic requires further exploration because of the negative, unquestionable impact these findings have on job possibilities for Native Americans. Such findings permanently eliminate employment opportunities in the fields of health care, child care, education, and social work.<sup>9</sup> Ms. Howell should be allowed to prove the negative, disproportionate impact of DSHS’s policy on Native Americans.<sup>10</sup>

**B. The Trial Court Erred Procedurally.**

This case was dismissed pursuant to CR 12(c). A motion for judgment on the pleadings should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits. Usually, dismissal is granted only in the unusual case in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn.App. 630, 128 P.3d

---

<sup>9</sup> Where tribes have laws that provide tribal preferences in employment, tribes may still screen job applicants for certain jobs with vulnerable populations by using the DSHS registry. Thus, a founded finding in that registry may still deny tribal members access to jobs and the benefit of any tribal preference.

<sup>10</sup> DSHS has recognized that certain child welfare services disproportionately impact Native Americans and that remediation is required. For instance, DSHS has noted out-of-home placement of Native American children is disproportionately high. See *Washington State 2016 Annual Progress and Services Report*, available at <https://www.dshs.wa.gov/sites/default/files/CA/pub/documents/APSR-2016.pdf>

P.3d 627 (2006), *review denied*, 158 Wash. 2d 1029, 152 P.3d 1033 (2007). In considering the motion, the pleading is to be so construed as to do substantial justice. *Pearson v. Vandermay*, 67 Wash. 2d 222, 407 P.2d 143, 148 (1965). It is improper to resolve factual issues on a motion for judgment on the pleadings. *Barnum v. State*, 72 Wash. 2d 928, 435 P.2d 678, 680 (1967).

The trial court misread Ms. Howell's complaint to claim that *discrimination occurred when the founded findings were made* rather than *after they were made* due to the *disparate impact* of DSHS' refusal to provide a means of expunging those findings. In doing so, the trial court erred by denying Ms. Howell's claim. TR 39:21. Moreover, the trial court did not apply CR 12(c), consistent with the above authority. The trial court did not identify "some insuperable bar to relief" in the complaint. None exists. "A claim of discrimination based on disparate impact under RCW 49.60.180 requires proof that a facially neutral employment practice falls more harshly on a protected class." *Clark v. The Office of the Attorney General*, 133 Wn. App. 767, 785, 138 P. 3d 144 (2006). On its face, this complaint sufficiently states the elements for a *disparate impact* claim under RCW Ch. 49.60, according to *Shannon v. Pay n' Save Corp.*, 104 Wn.2d 722, 727, 709 P.2d 799 (1985). The trial court also failed to

construe the complaint “to do substantial justice.” The Tribes agree with Ms. Howell that justice requires close scrutiny of state practices that effectively eliminate many job opportunities for Native Americans. Dismissal of the complaint thwarts the delivery of justice.

Therefore the trial court’s dismissal of the complaint should be reversed and the case should proceed.

C. **DSHS Is Covered By RCW 49.60 Because Its Actions Indirectly Control the Act of Employment.**

An agency that has the power to set an absolute bar against employment plays an integral part in the employment process. If the very first words in RCW 49.60.030(1) declare state policy to recognize “the right to be free from discrimination”, then a state agency like DSHS is ill-positioned to refute its role in perpetuating employment discrimination. The lack of a direct employment relationship between Ms. Howell and DSHS does not diminish the *indirect* role DSHS plays in an employer’s employment decision according to RCW 49.60.040, which acknowledges such indirect ties. DSHS acts as a gatekeeper to job opportunities in certain fields and it has the discretion, through its rulemaking authority, to control the impact of a “founded finding” on job applicants. Given the

broad and liberal interpretation<sup>11</sup> to be accorded to RCW Ch. 49.60 this court should reject a narrow, crabbed view of “employer”.

#### IV. CONCLUSION

The Tribes respectfully request that this Court reverse the trial court’s erroneous decision. Justice requires that Ms. Howell be given the opportunity to prove that DSHS’ harsh, unbending handling of “founded findings” has a disproportionately negative impact on her, and all Washington Native Americans, which can and must be remediated.

DATED this 23<sup>rd</sup> day of February, 2018.

GARVEY SCHUBERT BARER

By   
Judith A. Endejan, WSBA #11016

---

<sup>11</sup> *Marquis v. City of Spokane*, 130 Wn. 2d 97, 110-111, 922 P. 2d 43 (1996).

# Attachment A



**2017 Annual Convention  
Spokane, WA**

**RESOLUTION #17 - 58**

**“SUPPORTING CHANGE IN THE WASHINGTON STATE DEPARTMENT OF SOCIAL  
AND HEALTH SERVICES RECORD-KEEPING POLICIES PERTAINING TO FOUNDED  
FINDINGS OF CHILD ABUSE AND NEGLECT”**

**PREAMBLE**

We, the members of the Affiliated Tribes of Northwest Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian Treaties, Executive Orders, and benefits to which we are entitled under the laws and constitution of the United States and several states, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise to promote the welfare of the Indian people, do hereby establish and submit the following resolution:

**WHEREAS**, the Affiliated Tribes of Northwest Indians (ATNI) are representatives of and advocates for national, regional, and specific tribal concerns; and

**WHEREAS**, ATNI is a regional organization comprised of American Indians/Alaska Natives and tribes in the states of Washington, Idaho, Oregon, Montana, Nevada, Northern California, and Alaska; and

**WHEREAS**, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of the ATNI; and

**WHEREAS**, having an administrative founded finding of child abuse or neglect on one's record automatically disqualifies one from working or volunteering with vulnerable adults or minors; and

**WHEREAS**, Washington State Department of Social and Health Services (DSHS) findings related to allegations of child abuse and neglect can be automatically made for numerous reasons unrelated to substantiated child abuse or neglect; and

**WHEREAS**, current DSHS record-keeping policies maintain records of child abuse and neglect findings indefinitely without a mechanism for expungement or an opportunity to demonstrate rehabilitation; and

**WHEREAS**, these DSHS policies have a discriminatory impact on American Indians and Alaska Natives in Washington State, where Native people are four times more likely than white individuals and three times more likely than individuals in the general population to have these findings on their records; and

**WHEREAS**, the current DSHS record-keeping system causes American Indian and Alaska Native individuals to experience a lifetime ban from certain employment and volunteer opportunities at a rate that is significantly disproportionate to other groups; and

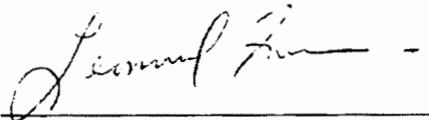
**WHEREAS**, the current DSHS record-keeping system creates unnecessary and formidable barriers to tribes realizing their tribal preference in employment, employing tribal members in meaningful jobs, assisting tribal members in remedying past mistakes, and engaging their families as volunteers in their communities; now

**THEREFORE BE IT RESOLVED**, that ATNI acknowledges the harm these record-keeping policies have on tribes and American Indian and Alaska Native individuals; and

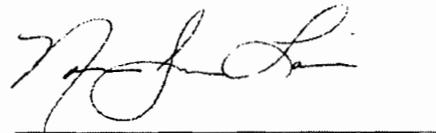
**BE IT FURTHER RESOLVED**, that ATNI supports efforts to change DSHS record-keeping policies to allow for demonstration of rehabilitation or a mechanism for expungement so as to mitigate the disparate discriminatory impact that the policies currently have on American Indians and Alaska Natives, including legal action, legislative advocacy, or government-to-government dialogue.

#### **CERTIFICATION**

The foregoing resolution was adopted at the 2017 Annual Convention of the Affiliated Tribes of Northwest Indians, held at the Davenport Grand Hotel, Spokane, Washington on September 18-21, 2017 with a quorum present.



Leonard Forsman, President



Norma Jean Louie, Secretary

# GARVEY SCHUBERT BARER

February 26, 2018 - 2:41 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35339-7  
**Appellate Court Case Title:** Brooke Howell v Department of Social & Health and Services  
**Superior Court Case Number:** 17-2-00979-1

### The following documents have been uploaded:

- 353397\_Briefs\_20180226143841D3494619\_9110.pdf  
This File Contains:  
Briefs - Amicus Curiae - Modifier: Amended  
*The Original File Name was Amicus Brief in Support of Appellant by Muckleshoot and Kalispel Tribes.pdf*

### A copy of the uploaded files will be sent to:

- AlmaZ@nwjustice.org
- brakes@gsblaw.com
- cina.littlebird@nwjustice.org
- jendejan@gsblaw.com
- jennisl@atg.wa.gov
- ldruss@gsblaw.com
- scottc@nwjustice.org
- shsappealnotification@atg.wa.gov

### Comments:

Amicus Brief filed on 2-26-2018 was missing the Attachment A. This amended Brief contains the referenced Attachment and replaces the filing made both on 2-26-2018 AND on 2-23-2018.

---

Sender Name: Lori Druss - Email: ldruss@gsblaw.com

**Filing on Behalf of:** Judith A. Endejan - Email: jendejan@gsblaw.com (Alternate Email: )

### Address:

1191 Second Avenue, Suite 1800  
Seattle, WA, 98101  
Phone: (206) 464-3939

**Note: The Filing Id is 20180226143841D3494619**