

NO. 35339-7

**IN THE COURT OF APPEALS
OF 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

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The Department claims this case is about which statute—RCW 49.60.030 or RCW 74.39A.056—should control the Court’s decision. In reality, it is not a choice among these two statutes that control the Court’s decision. The Court must instead balance the Department’s policies of indefinitely maintaining and reporting founded findings to disqualify people from employment and the Law Against Discrimination’s statutory mandate to eradicate discrimination.¹

The Department exercises considerable control over the pool of applicants who seek work in regulated nursing assistant jobs in Washington State, and the Department directly controlled the ability of Ms. Howell to work as a nursing assistant. The Department is responsible for establishing background check criteria that exclude some from working as nursing assistants; the professional-development opportunities that employers must offer nursing assistants; the guidelines for the physical environments nursing assistants work in; and the training programs that nursing assistants must take. *See* RCW 43.43.832; WAC 388-97-1680; WAC 388-97-1660.

¹ A chart illustrating the process of the Department’s policies is included in the Appendix as an illustrative exhibit.

Unlike the Department's hypotheticals about liability for entities that just disclose information—a newspaper ad, or an archived website that is viewed by employers—the Department excluded Ms. Howell from work opportunities because of the Department's authority to determine how founded findings should impact employment. Resp't's Br. 11, n.3. The Department's control over the nursing assistant field, in combination with its legal authority and refusal to consider expunging these findings, shows that it directly or indirectly works in the interest of an employer.

The WLAD declares it to be an unfair practice for an employer—defined broadly rather than exclusively—to “bar any person” from employment on the basis of their race. RCW 49.60.180. The Department violates this provision, and the broad civil right of anyone to obtain employment free from discrimination, by disparately impacting the ability of a Native American person to pursue a profession as a nursing assistant. Because Native Americans are four times more likely to be denied employment than whites due to the Department's actions, the Department must create a less discriminatory alternative.

The Department chose to maintain and indefinitely report founded findings to its background check system as a means to disqualify people from employment in various fields, including healthcare and education. It has the power to not do this, to choose a shorter period of retention, or to

permit expungement of records from its system. Yet, it refuses to do so, and thus refuses to eradicate discrimination against Native Americans who pursue employment in the healthcare, day care, or other regulated fields. The WLAD mandates a different result, one that would permit a less discriminatory alternative to the present system.

II. ARGUMENT

A. **The Department's Control over the Nursing Assistant Profession Subjects It to Law Against Discrimination Liability for the Discriminatory Effect of Its Policies**

The Department's relationship to Ms. Howell and her employment qualifies it as an entity acting directly or indirectly in the interest of an employer under the WLAD. As the Department concedes in its Response, "RCW 49.60.040(11) expressly contemplates that a person [or entity] who indirectly acts in the interests of an employer may be liable under WLAD." Resp't's Br. 14. The Department does not "merely retain and disclose" information as it argues in its brief. *Id.* at 7. Ms. Howell alleged the Department did much more, and this Court's analysis must look to the allegations of the complaint as true. The Department exercises proprietary control over the employment and working conditions of nursing assistants throughout Washington State, and uses records that it creates to disqualify people from employment. CP at 8-10, ¶¶ 28, 32, 39.

While the WLAD contains the broad mandate against this discriminatory policy, federal case law helps provide the guidelines for liability. Ms. Howell does not apply a Title VII analysis in place of the WLAD as the Department contends, but rather looks to Title VII as support for her claim that the WLAD subjects entities like the Department to liability for discrimination when they are powerful enough to control entry into the employment field.

1. The WLAD Contains a Broad Mandate Protecting Ms. Howell's Right To Obtain Employment Without Fear of Discrimination

Washington courts must sometimes look to cases interpreting equivalent federal laws when the “WLAD lacks specific criteria for proving a discrimination claim.” *Xieng v. Peoples Nat’l Bank of Wash.*, 120 Wn.2d 512, 518, 844 P.2d 389 (1993). Where our state courts have departed from federal civil rights cases, they have done so to interpret state law more broadly than federal law. *See, e.g., Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 491, 325 P.3d 193 (2014). The Department attempts to misdirect the Court by focusing on Washington courts’ decisions to not follow federal law in interpreting the WLAD. It omits the fact that all of those decisions were made in order to interpret state law *more broadly* than federal anti-discrimination law would allow.

Because the WLAD is subject to judicial interpretation, the Court should use an interpretation that best fulfills the WLAD's mandate to eradicate discrimination. *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996). State case law, federal law interpreting Title VII, and the text of the WLAD all support Ms. Howell's theory that the Department unlawfully interfered with her right to obtain employment free of discrimination.

When Washington courts have rejected the interpretations of federal courts, it is only because Title VII lacks the breadth of the WLAD. For example, the *Marquis* court rejected a Title VII interpretation because it was too narrow when interpreting WLAD claims, not because an employment discrimination claim might be cognizable under Title VII but not under the WLAD. *Marquis*, 130 Wn.2d at 110-11. The court reasoned:

Unlike our state law against discrimination, Title VII does not contain a broad statement of the right to be free of discrimination in other areas. Our state law does. RCW 49.60.010. While Title VII[] is similar to RCW 49.60.180[], *there is no provision in the federal law which sets forth the equivalent of the broad language of RCW 49.60.030(1) and there is no statutory provision requiring liberal construction in order to accomplish the purposes of the act.*

Id. (emphasis added).

Moreover, the Supreme Court stated in *Marquis* that "RCW 49.60.030(1) does not limit the actions which may be brought to those listed in the statute." *Id.* at 110. Further: "We agree that RCW 49.60.030(1) is

unambiguous to the extent that it sets forth a *nonexclusive* list of rights.” *Id.* at 107. Thus, Ms. Howell’s claim that the Department, acting “directly or indirectly” in the interest of an employer, unlawfully deprived her of her right to be free from discrimination in employment is actionable.

The Department misapplied the broad construction of the WLAD in its Response by citing *Brown v. Scott Paper Worldwide Co.*: “the Washington Supreme Court has held that cases interpreting Title VII’s definition of ‘employer’ are ‘not directly applicable here because the language of the WLAD definition ‘is significantly differently [*sic*] from corresponding federal law.’” Resp’t’s Br. 14 (citing *Brown*, 143 Wn.2d 349, 358, 20 P.3d 921 (2001)). As in *Marquis*, the *Brown* court found that the WLAD’s definition of “employer” is clearly broader than Title VII. 143 Wn.2d at 358-59. Therefore Washington courts should not restrain liability by using limitations learned from Title VII. *Id.* The *Brown* court observed:

Not only do [the Title VII and WLAD definitions of “employer”] differ in grammatical structure, but they also differ in statutory construction. RCW 49.60.040(3) contains the word “includes,” which is a term of enlargement. In contrast, title VII uses the word “means,” which is a term of limitation. *Queets Band of Indians v. State*, 102 Wash.2d 1, 4, 682 P.2d 909 (1984) (citing 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.07, at 82 (4th ed. 1973)). Given these differences, federal case law is not helpful to our analysis here.

Id.

The Department's citation to *Brown* also incorporates a citation to *Martini v. Boeing*. In *Martini*, the Washington Supreme Court looked at an employment disability discrimination claim and considered the scope of remedies available under the WLAD. *Martini v. Boeing*, 137 Wn.2d 357, 971 P.2d 45 (1999). The Court noted that it was inappropriate to follow Title VII guidelines, which would have limited the remedies available to the employee under the WLAD. *Id.* at 372-73. The *Martini* court asserted, "the scope of Title VII is not as broad as RCW 49.60. . . . Nor does Title VII contain a direction for liberal interpretation, such as is the mandate in Washington's law against discrimination[, RCW 49.60.020]." *Id.*

Title VII provides guidance about WLAD liability for this case, given that our courts have not yet ruled on this unique issue. Under existing Title VII interpretations, which the above cases show are narrower than the WLAD, Ms. Howell's claim remains valid under the WLAD.

2. Indirect Employers Like the Department Can Be Liable Under the WLAD by Applying Title VII Case Law

Title VII case law applying liability to indirect employers suggests two critical questions. First is the question of whether the defendant has a sufficient reach into the employment field in question to be considered connected to the plaintiff's employment. Second is whether the defendant interfered in the employment relationship of the plaintiff. Because the

WLAD's broad right to be free from discrimination is best served by borrowing from the Title VII analysis, the Court should adopt it.

a. The Department Exercises Sufficient Reach into the Nursing Assistant Industry To Be Considered Connected to Ms. Howell's Employment

The Ninth Circuit Court of Appeals found that although “there must be some connection with an employment relationship for Title VII protections to apply,” and that “connection need not necessarily be direct.” *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th Cir. 1980). The court provided further guidance on what qualifies as a sufficient “connection” in *Association of Mexican-American Educators v. State of California (AMAE)*. 231 F.3d 572 (9th Cir. 2000). As the Department points out, the court's decision to extend liability to the State of California in *AMAE* hinged on “the peculiar degree of control that the State[] exercises over local school districts.” *Id.* at 581. The factors evidencing that degree of control include extensive oversight by the legislature, statutes regulating the day-to-day operations of schools, and the provision of resources (books, teachers, facilities) for public schools. *Id.* at 581-82. Given such a degree of entanglement with the public school system, the court found that use of the California Basic Educational Skills Test (CBEST) as a requirement for certification to teach and for other employment in California public schools violated Title VII. *Id.* at 582 (noting that “[a]gainst that background of

‘plenary’ state control, we have no difficulty concluding that the State of California is in a theoretical *and* practical position to ‘interfere’ with the employment decisions of local school districts[, and] by requiring, formulating and administering the CBEST, the state *has* ‘interfered’ to a degree sufficient to bring it within the reach of Title VII.”).

In the instant case, the Department’s level of involvement with the nursing assistant industry is analogous to that of California’s involvement in its public school system. The basic background criteria of who is even eligible to train as a nursing assistant starts with the Department in RCW 43.43.832. The Department then creates extensive rules governing the operation of any facility receiving state funding, which is in practice most of them. For example, in nursing homes, the Department regulates nearly every detail of the operation of the facility. *See, e.g.*, Ch. 388-97 WAC. These rules detail the requirements that a nursing home must follow in creating staff development opportunities and training programs. *See* WAC 388-97-1680. Another rule requires any nursing assistant providing direct patient care to have completed a “DSHS-approved nursing assistant training program” as Ms. Howell attempted to do. WAC 388-97-1660(2). The Department is not merely a passive provider of information, as it suggests. It controls some details of nearly every level of operation of the work available to a person with a nursing assistant’s certification.

In addition to controlling and regulating the duties of nursing assistants, the Department dictates whom may and may not be hired to work with vulnerable populations by virtue of its authority under RCW 43.43.832. That degree of control over nursing hiring decisions would subject the Department to Title VII liability. *See AMAE*, 231 F.3d at 582 (stating, “in addition to controlling local districts’ budgets and textbooks and regulating the duties of public school employees, the state dictates whom the districts may and may not hire. That degree of control over districts’ hiring decisions subject Defendants to the coverage of Title VII”). RCW 43.43.832 allows the Department to regulate the employment of a person in care paid for by the Department based on factors in a person’s background check including founded findings of abuse or neglect, criminal records, and other “additional information”. RCW 43.43.832(2).

To avoid liability, the Department mischaracterizes Ms. Howell’s claim as more like the “licensing examination” line of Title VII cases. Resp’t’s Br. 16. However, the cases it cites “stand for [the] proposition[] that Title VII does not apply when *the only* connection among the licensing agency, the plaintiff, and the universe of prospective employers is the agency’s implementation of a general licensing examination.” *AMAE*, 231 F.3d at 583 (emphasis in original). The connections between the Department, Ms. Howell, and the universe of prospective employers are far more numerous

and involved than a mere licensing exam. This case is therefore distinct from the licensing examination cases.

Looking at the federal cases the Department cited demonstrates why Ms. Howell's claim is not a licensing examination case. In *Haddock v. Board of Dental Examiners*, the plaintiff conceded that the only point of connection between himself and the Board was the administration of the licensing examination. 777 F.2d 462, 464 (9th Cir. 1985). The Ninth Circuit agreed with the trial court that the licensing examination in itself was insufficient to bring the Board under Title VII liability. *Id.* Here, Ms. Howell does not claim that a licensing examination is the only connection between herself and the Department. Rather, Ms. Howell alleged that the Department's involvement in the nursing field is so extensive that it prevented her from even completing her education, let alone taking the certification test or applying for a nursing position. CP at 6, ¶ 15.

Moreover, as Ms. Howell alleged, the Department is involved in the hiring of those seeking to work as nursing assistants, because it exercises judgment to allow some individuals with some criminal convictions to demonstrate their character, competence, and suitability for these jobs. *See, e.g.,* WAC 388-97-1790 and WAC 388-97-1820(a) (citing to list of disqualifying crimes in background check rules and those employer must evaluate character for). Thus, the decision-making authority involved in this

case establishes more connections than just the administration of a licensing examination and is distinct from *Haddock*.

The Fifth Circuit made an almost identical decision to that of the *Haddock* court in *Fields v. Hallsville Independent School District*, 906 F.2d 1017 (5th Cir. 1990). The Fifth Circuit rejected an employment discrimination claim brought by teachers who failed to pass a compulsory certification examination in Texas because the only evidence the plaintiffs provided supporting their argument that they were employees of the state was the Texas State Board of Education's administration of the certification exam. *Id.* at 1020 (noting that “[b]ecause the evidence before the district court suggested no more than a licensing relationship between the State and Teachers, we conclude that the district court properly granted summary judgment to the State”). For the same reasons as with *Haddock*, the case at hand is distinct.

In *George v. New Jersey Board of Veterinary Medical Examiners*, the Third Circuit considered a Title VII claim brought by an unsuccessful applicant for admission to practice veterinary medicine. 794 F.2d 113 (3rd Cir. 1986). The court required some indicia of an employer-employee relationship between the Board and the plaintiff, and found that it had none. *Id.* at 114. The Third Circuit's decision also appeared to rely on the understanding that state licensing examinations are acts of state police

power, which would not be subject to Title VII liability. *Id.* The *AMAE* court considered this part of the Third Circuit’s analysis in its own decision and held that a state licensing examination can be both an exercise of a state’s police power *and* its proprietary power, the latter of which would trigger Title VII liability. *Ass’n of Mexican American Educators*, 231 F.3d at 584. The relationship in *AMAE* differed because, in addition to the certification test, the state already controlled the hiring practices and working conditions for specific employers. *Id.*

The above discussion shows the “sufficiently close” relationship between the Department and Ms. Howell’s employment opportunities. The degree of involvement of the Department in the nursing field makes this case more similar to *AMAE* rather than the line of licensing examination cases.

b. The Department Actually Interfered in the Employment Relationship Between Ms. Howell and Her Universe of Prospective Employers

Ms. Howell demonstrates not only was the Department’s relationship sufficiently close to her employment, but the Department actually interfered in her employment opportunities. As she alleged, she could not even complete the nursing assistant training program because of the Department’s background check policies. CP at 6, ¶ 13. Given the Department’s required approval of these trainings, the link between Ms.

Howell's employment and the Department's actions is direct. *See, e.g.*, WAC 388-97-1660(2)(a).

Federal cases demonstrate why the Department's grip on the nursing assistant employment opportunities creates WLAD liability. In *Gomez v. Alexian Brothers Hospital*, the Ninth Circuit held that the defendant hospital could be liable under Title VII for its discriminatory treatment of plaintiff, even though the plaintiff was employed by a third party, if the defendant had interfered with the plaintiff's employment by the third party. 698 F.2d 1019, 1021 (9th Cir. 1983). The court expounded on this theory in *AMAE* noting that "Congress intended, through Title VII, to prohibit entities that possessed such power from 'foreclos[ing], on invidious grounds, access by any individual to employment opportunities otherwise available to him.'" 231 F.3d 572, 580 (9th Cir. 2000) (quoting *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973)). The court continued, "Congress intended to close any loopholes in Title VII's coverage and to extend the statute's coverage to entities with actual control over access to the job market, whether or not they are direct employers." *Id.* at 581 (citation omitted).

In *Sibley Memorial Hospital v. Wilson* where the District of Columbia Circuit Court analyzed the relationship between a male private-duty nurse and a hospital. 488 F.2d 1338 (D.C.Cir. 1973). When a patient in the

hospital requested a private nurse, the hospital arranged to have a private nurse provided, although the nurse would be paid directly by the patient. *Id.* at 1339. Through this service, the hospital allowed for private male nurses to attend only male patients while allowing for private female nurses to attend both male and female patients. *Id.* at 1339-40. As such, the plaintiff in *Sibley* alleged employment discrimination based on sex. The *Sibley* court reasoned that it would undermine Title VII to permit an employer to discriminatorily interfere with an individual's employment with another employer when that employer could not do the same its own employees. *Id.* at 1341. It held that the hospital's control over the list of potential nurses available to be hired by patients made for "a highly visible nexus with the creation and continuance of direct employment relationships between third parties," thereby violating Title VII. *Id.* at 1342.

Although the Department is not Ms. Howell's direct employer, the Department exercises power over Ms. Howell's ability to form employment relationships with third parties. This is similar to the hospital's power in *Sibley*. Indefinitely maintaining CPS findings while knowing that they serve to disqualify Ms. Howell from working as a nursing assistant foreclosed Ms. Howell from accessing an entire sector of the job market. Just as the defendant hospital in *Sibley* controlled the list of prospective nurses

available to patients, the Department controls the list of prospective nursing assistants available for hire through its rules for maintaining CPS findings.

B. State Law Gives the Department Discretion to Expunge Findings, and It Does Not Mandate the Prohibition Against Employment for Ms. Howell

The Department is not a passive conduit through which policy choices of the Legislature are handed down, as it argues in its brief. State law gives the Department discretion to expunge or remove findings, and it does not mandate the prohibition against employment for Ms. Howell. *See* RCW 43.43.832; RCW 26.44.031; WAC 388-15-077. Yet, the Department claims that its hands are tied by RCW 74.39A.056, which prohibits long-term care workers from working if they have founded findings. Because of this, the Department claims it cannot be liable under the WLAD for creating a disparate impact on the ability of Native Americans to work.

This argument is wrong for at least three reasons. First, RCW 74.39A.056 only applies to a small subset of the work opportunities available to Ms. Howell as a nursing assistant, none of which she was denied or fired from. Second, RCW 43.43.832 gives the Department discretion to determine for how long and from what jobs a person with a founded finding should be barred. Third, findings only impact employment decisions when they are entered into a registry, and the Department has discretion to decide how long findings are kept on that registry. RCW 26.44.031; WAC 388-

15-077. It is the Department, not the Legislature, that determines the disqualifying factors for the majority of the employment prospects for persons with founded findings. As Ms. Howell's case shows, the Department's policies and background check process can even result in workers being unable to complete their professional educations.

1. Ms. Howell Was Not Denied Work as a Long-term Care Worker

To pit a statute against the WLAD, rather than permit inquiry into its own decisions and policies, the Department repeatedly makes an unsupported and erroneous claim that Ms. Howell sought to work in long-term care. *See, e.g.*, Resp't's Br. 1, 15, 19. The Department cites to RCW 74.39A.056 as the barrier to Ms. Howell's claim. *See* Resp't's Br. 17 (stating, "the prohibition is set by statute"). This results either from the Department misunderstanding its own legal authority or as a red herring to distract the Court from the lack of any Legislative mandate for what happened to Ms. Howell. Inconsistently the Department acknowledged in its motion in the trial court that "[n]o law prohibits Ms. Howell from pursuing other employment" outside of long-term care. CP at 23. Yet, the Department's background process and pervasive reach into the health care field prevented her from doing just that.

Ms. Howell's complaint alleges that the Department barred her from even completing her degree, not that some other employer denied her

application for long-term care work. CP at 6, ¶ 13. Because RCW 74.39A.056 only applies to some but not all of employment that would have been available to Ms. Howell had she been able to obtain her certification, the Department's justification for its discriminatory policy is not set in stone by the Legislature. In fact, the definition of a long-term care worker expressly excludes work in nursing homes, hospitals, and other settings in which a nursing assistant might find employment. RCW 74.39A.009(17)(b) (excluding from scope of statute settings such as nursing homes, hospitals, or private pay agencies) *and* WAC 388-106-0010 (defining "provider" as a provider of long-term care). RCW 74.39A.056 does not necessarily even apply to Ms. Howell's nursing assistant training program, leaving the Department's regulations and rulemaking as the only controlling factors at play. The Department must take ownership of its own policies and the discriminatory effect they create.

Thus, the Department's argument that the Legislature tied its hands is an overstatement. By deciding that RCW 74.39A.056 mandates that the Department must forever disqualify persons with founded findings from work in healthcare, the Department made a legal error when it decided how founded findings should be used in its background check process. The Department perpetuates this legal error by asserting it has no authority to ameliorate the impact of its permanent employment disqualification.

2. The Department’s Control over the Background Check Process in Washington Created the Barrier to Employment, not RCW 74.39A.056

RCW 43.43.832 allows the Department to determine, through policies and rulemaking, how findings should impact employment, not any mandate from RCW 74.39A.056. Moreover, the Department’s argument hides the fact that the statutes that grant the Department authority to operate a background check system and retain findings are entirely silent on whether findings should be permanent or expunged at any time. These statutes show that the Department has discretion to determine how findings should impact employment.

RCW 43.43.832 gives the Department authority to promulgate rules regarding background checks for certain positions. This statute gives the Department authority over the qualifications permitted for the pool of workers that work in institutions that accept money from the state. That statute requires the Department to “establish rules and set standards to require specific action when considering information received,” including founded child abuse or neglect findings. RCW 43.43.832(1). The Department acknowledges the role RCW 43.43.832 plays, noting that, other than RCW 74.39A.056, “state law ... further delegated to DSHS the responsibility to make rules to consider the impact of those findings on care for which the State pays or is responsible.” Resp’t’s Br. 18.

RCW 74.39A.056, RCW 26.44.031, and RCW 43.43.832 should be read together to determine that, while the legislature has forbidden people to work in long-term care if their findings are entered into a registry, it has also given the Department the power to determine how long those findings must remain in a registry. RCW 26.44.031. The Legislature further granted to the Department discretion to decide what the employment implications should be for people with a finding who do not work in long-term care. RCW 43.43.832.

Because of the disparate impact on Native Americans, the Department now has a duty to exercise its discretion in a less discriminatory way. *Shannon v. Pay 'N Save Corp*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985). To harmonize these statutes with the WLAD requires that the Department provide a less discriminatory alternative when its policies create a discriminatory effect on employment.

3. RCW 74.39A.056 Would Not Even Apply If a Finding Was Expunged, as the Department Has Rulemaking Authority To Do

The text of RCW 74.39A.056 shows that findings are not required to be a permanent barrier. RCW 74.39A.056(2) states that a finding must be “entered” into a state registry for the statute to apply. If the finding is not entered, the statute does not apply. This construction is more consistent with common sense than one that interprets RCW 74.39A.056 to require

permanent disqualification from all employment as a nursing assistant. Several examples exist to show how a finding, once made, may cease to be entered into a registry and cease to be disqualifying.

In the context of Adult Protective Services findings, federal law requires the Department to create an expungement process for nursing assistants who have a single instance of neglect in a nursing home setting. Once the finding is expunged, RCW 74.39A.056 does not apply because that finding is no longer entered into the registry. Similarly, a person who has a finding reversed by a Superior Court judge upon appeal, will no longer have a finding entered into the registry and will be employable as a long-term care worker.

Thus, the Department clearly can control the impact a founded finding has by allowing for expungement from its registry. RCW 26.44.031. If it removes those findings, RCW 74.39A.056 is not a prohibition on employment. Because the WLAD requires the Department to make a less discriminatory alternative available when its policies create a disparate impact, it must create a process that removes the discriminatory barrier to employment for persons who are otherwise qualified.

C. The Department is Not Entitled to Immunity for Discriminatory Policies

The Court should not utilize the “extremely limited exception” to liability and grant the Department discretionary immunity for policy decisions that create or perpetuate discrimination. *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979). Because the WLAD specifically exists to eradicate discrimination, and the immunity is a general exception to tort liability, the Court should not extend the doctrine of discretionary immunity to illegal discrimination. To do so would exculpate the Department from all liability for the discriminatory impact of its policies and procedures.

Further, assuming that this Court should even apply the *Evangelical* test in this case, the Department’s defense fails because it cannot unequivocally answer each part. The distinction between tortious and immunized conduct hinges on separating basic policy decisions from operational steps taken to implement policy. Only the high-level policy decisions, made by high-level executives, that balance the risks and advantages of a policy choice are exempt from suit. *Taggart v. State*, 118 Wn.2d 195, 215, 822 P.2d 243 (1992). The Department has presented no evidence that the retention, maintenance, and disclosure of findings to disqualify a person from employment fits into this category or should be exempt from state anti-discrimination laws.

In *Stewart v. State*, the Washington Supreme Court outlined that only policy choices that are explicit balancing acts between risks and advantages are, in theory, immune. *Stewart* dealt with the distinction between the decision to build a freeway and the decisions that went into the design of that freeway. This distinction between a basic policy decision and the implementation of that policy is similar to the difference between a goal of the “protection of vulnerable populations” and the implementation of a program to maintain and report findings for employment disqualification. The court used evidence of the weighing of risks and advantages of particular design decisions to help categorize the decisions as immunized or not, the idea being that the more carefully considered decisions will be the ones about enacting basic policy goals.

The Department did not engage in such consideration about its decisions to retain findings here. First, since the Department denies that discrimination exists as alleged by Ms. Howell, it could not have balanced the risks of maintaining a policy with discriminatory effects. Second, an error of law cannot constitute a conscious balancing of the risk and advantages of discriminatory policies. The Department’s belief that RCW 74.39A.056 mandates permanent disqualification from all employment in health care for a person with a founded finding is an error of law, as discussed above, and thus not a considered policy choice. Third, whether

the Department balanced *any* risks and benefits is a factual question not resolved by the pleadings. As such, the decision should not be afforded discretionary immunity on motion for judgment on the pleadings.

Moreover, claims that a government policy is discriminatory rise to another level of tortious conduct. While courts have said that “discrimination is a tort,” it is a tort of a different nature that must be understood within the context of the WLAD. *See, e.g., Blair v. Wash. State Univ.*, 108 Wn.2d 558, 576, 740 P.2d 1379 (1987). The *Martini* court asserted that the WLAD “embodies a public policy of the ‘highest priority.’” 137 Wn.2d at 364 (citing *Xieng*, 120 Wn.2d at 521). The WLAD explicitly applies to conduct by state agencies. *See* RCW 49.60.040 (19). Thus, while the discretionary immunity exception may have some limited application to shield government processes from liability for common-law negligence claims, those court-made distinctions are less viable in the face of inherently tortious decisions by a state agency.

Demonstrating indirectly why a discriminatory policy cannot be essential to the achievement of a valid policy goal, the *Steward* court held:

The decisions to build the freeway, to place it in this particular location so as to necessitate crossing the river, the number of lanes—these elements involve a basic governmental policy, program or objective. ... [A]ppellant argues that once those governmental decisions were made they had to be carried out without negligent design of the bridge or of the lighting system. *Negligent design was*

not essential to the accomplishment of the policy, program or objective.

Steward, 92 Wn.2d at 294 (emphasis added).

The instant case does not pit broad legislative goals against each other, as the Department claims. The Department's rules and policies for achieving its goals must be compared against the legislative goal of ending discrimination. Because of the WLAD, discrimination cannot be essential in the operation of a valid policy goal.

III. CONCLUSION

Ms. Howell respectfully requests that the Court vacate the Yakima County Superior Court's order of dismissal and remand this matter for trial.

DATED: February 6, 2018.

NORTHWEST JUSTICE PROJECT



Scott Crain, WSBA #37224

Sarracina Littlebird, WSBA #51417

Alma Zuniga, WSBA #38883

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on February 6, 2018, I caused the foregoing to be served on the persons below via the Court of Appeals' e-filing electronic service delivery portal:

Jennifer Meyer
Office of the Attorney General
7141 Cleanwater Dr. SW
Olympia, WA 98504

DATED: February 6, 2018 at Seattle, Washington.



Scott Crain

APPENDIX

- App. 1-6 Applicable Statutes: RCW 43.43.832
- App. 7 Illustrative Exhibit: Flowchart for Founded Findings

RCW 43.43.832**Background checks—Disclosure of information—Sharing of criminal background information by health care facilities. (Effective until July 1, 2018.)**

(1) The Washington state patrol identification and criminal history section shall disclose conviction records as follows:

(a) An applicant's conviction record, upon the request of a business or organization as defined in RCW **43.43.830**, a developmentally disabled person, or a vulnerable adult as defined in RCW **43.43.830** or his or her guardian;

(b) The conviction record of an applicant for certification, upon the request of the Washington professional educator standards board;

(c) Any conviction record to aid in the investigation and prosecution of child, developmentally disabled person, and vulnerable adult abuse cases and to protect children and adults from further incidents of abuse, upon the request of a law enforcement agency, the office of the attorney general, prosecuting authority, or the department of social and health services; and

(d) A prospective client's or resident's conviction record, upon the request of a business or organization that qualifies for exemption under section 501(c)(3) of the internal revenue code of 1986 (26 U.S.C. Sec. 501(c)(3)) and that provides emergency shelter or transitional housing for children, persons with developmental disabilities, or vulnerable adults.

(2) The secretary of the department of social and health services must establish rules and set standards to require specific action when considering the information received pursuant to subsection (1) of this section, and when considering additional information including but not limited to civil adjudication proceedings as defined in RCW **43.43.830** and any out-of-state equivalent, in the following circumstances:

(a) When considering persons for state employment in positions directly responsible for the supervision, care, or treatment of children, vulnerable adults, or individuals with mental illness or developmental disabilities provided that: For persons residing in a home that will be utilized to provide foster care for dependent youth, a criminal background check will be required for all persons aged sixteen and older and the department of social and health services may require a criminal background check for persons who are younger than sixteen in situations where it may be warranted to ensure the safety of youth in foster care;

(b) When considering persons for state positions involving unsupervised access to vulnerable adults to conduct comprehensive assessments, financial eligibility determinations, licensing and certification activities, investigations, surveys, or case management; or for state positions otherwise required by federal law to meet employment standards;

(c) When licensing agencies or facilities with individuals in positions directly responsible for the care, supervision, or treatment of children, developmentally disabled persons, or vulnerable adults, including but not limited to agencies or facilities licensed under chapter **74.15** or **18.51** RCW;

(d) When contracting with individuals or businesses or organizations for the care, supervision, case management, or treatment, including peer counseling, of children, developmentally disabled persons, or vulnerable adults, including but not limited to services contracted for under chapter **18.20**, **70.127**, **70.128**, **72.36**, or **74.39A** RCW or Title **71A** RCW;

(e) When individual providers are paid by the state or providers are paid by home care agencies to provide in-home services involving unsupervised access to persons with physical, mental, or developmental disabilities or mental illness, or to vulnerable adults as defined in chapter **74.34** RCW, including but not limited to services provided under chapter **74.39** or **74.39A** RCW.

(3) The director of the department of early learning shall investigate the conviction records, pending charges, and other information including civil adjudication proceeding records of current employees and of any person actively being considered for any position with the department who will or may have unsupervised access to children, or for state positions otherwise required by federal law

to meet employment standards. "Considered for any position" includes decisions about (a) initial hiring, layoffs, reallocations, transfers, promotions, or demotions, or (b) other decisions that result in an individual being in a position that will or may have unsupervised access to children as an employee, an intern, or a volunteer.

(4) The director of the department of early learning shall adopt rules and investigate conviction records, pending charges, and other information including civil adjudication proceeding records, in the following circumstances:

(a) When licensing or certifying agencies with individuals in positions that will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood education services, including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older;

(b) When authorizing individuals who will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood learning education services in licensed or certified agencies, including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older;

(c) When contracting with any business or organization for activities that will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood learning education services;

(d) When establishing the eligibility criteria for individual providers to receive state paid subsidies to provide child day care or early learning services that will or may involve unsupervised access to children.

(5) Whenever a state conviction record check is required by state law, persons may be employed or engaged as volunteers or independent contractors on a conditional basis pending completion of the state background investigation. Whenever a national criminal record check through the federal bureau of investigation is required by state law, a person may be employed or engaged as a volunteer or independent contractor on a conditional basis pending completion of the national check. The Washington personnel resources board shall adopt rules to accomplish the purposes of this subsection as it applies to state employees.

(6)(a) For purposes of facilitating timely access to criminal background information and to reasonably minimize the number of requests made under this section, recognizing that certain health care providers change employment frequently, health care facilities may, upon request from another health care facility, share copies of completed criminal background inquiry information.

(b) Completed criminal background inquiry information may be shared by a willing health care facility only if the following conditions are satisfied: The licensed health care facility sharing the criminal background inquiry information is reasonably known to be the person's most recent employer, no more than twelve months has elapsed from the date the person was last employed at a licensed health care facility to the date of their current employment application, and the criminal background information is no more than two years old.

(c) If criminal background inquiry information is shared, the health care facility employing the subject of the inquiry must require the applicant to sign a disclosure statement indicating that there has been no conviction or finding as described in RCW **43.43.842** since the completion date of the most recent criminal background inquiry.

(d) Any health care facility that knows or has reason to believe that an applicant has or may have a disqualifying conviction or finding as described in RCW **43.43.842**, subsequent to the completion date of their most recent criminal background inquiry, shall be prohibited from relying on the applicant's previous employer's criminal background inquiry information. A new criminal background inquiry shall be requested pursuant to RCW **43.43.830** through **43.43.842**.

(e) Health care facilities that share criminal background inquiry information shall be immune from any claim of defamation, invasion of privacy, negligence, or any other claim in connection with any

dissemination of this information in accordance with this subsection.

(f) Health care facilities shall transmit and receive the criminal background inquiry information in a manner that reasonably protects the subject's rights to privacy and confidentiality.

[**2017 3rd sp.s. c 20 § 5**. Prior: **2012 c 44 § 2**; **2012 c 10 § 41**; **2011 c 253 § 6**; **2007 c 387 § 10**; **2006 c 263 § 826**; **2005 c 421 § 2**; **2000 c 87 § 1**; **1997 c 392 § 524**; **1995 c 250 § 2**; **1993 c 281 § 51**; **1990 c 3 § 1102**; prior: **1989 c 334 § 2**; **1989 c 90 § 2**; **1987 c 486 § 2**.]

NOTES:

Construction—Competitive procurement process and contract provisions—Conflict with federal requirements and Indian Child Welfare Act of 1978—2017 3rd sp.s. c 20: See notes following RCW **74.13.270**.

Application—2012 c 10: See note following RCW **18.20.010**.

Findings—Purpose—Part headings not law—2006 c 263: See notes following RCW **28A.150.230**.

Short title—Findings—Construction—Conflict with federal requirements—Part headings and captions not law—1997 c 392: See notes following RCW **74.39A.009**.

Effective date—1993 c 281: See note following RCW **41.06.022**.

Index, part headings not law—Severability—Effective dates—Application—1990 c 3: See RCW **18.155.900** through **18.155.902**.

RCW 43.43.832

Background checks—Disclosure of information—Sharing of criminal background information by health care facilities. (Effective July 1, 2018.)

(1) The Washington state patrol identification and criminal history section shall disclose conviction records as follows:

(a) An applicant's conviction record, upon the request of a business or organization as defined in RCW **43.43.830**, a developmentally disabled person, or a vulnerable adult as defined in RCW **43.43.830** or his or her guardian;

(b) The conviction record of an applicant for certification, upon the request of the Washington professional educator standards board;

(c) Any conviction record to aid in the investigation and prosecution of child, developmentally disabled person, and vulnerable adult abuse cases and to protect children and adults from further incidents of abuse, upon the request of a law enforcement agency, the office of the attorney general, prosecuting authority, or the department of social and health services; and

(d) A prospective client's or resident's conviction record, upon the request of a business or organization that qualifies for exemption under section 501(c)(3) of the internal revenue code of 1986 (26 U.S.C. Sec. 501(c)(3)) and that provides emergency shelter or transitional housing for children, persons with developmental disabilities, or vulnerable adults.

(2) The secretary of the department of social and health services and the secretary of children, youth, and families must establish rules and set standards to require specific action when considering the information received pursuant to subsection (1) of this section, and when considering additional information including but not limited to civil adjudication proceedings as defined in RCW **43.43.830** and any out-of-state equivalent, in the following circumstances:

(a) When considering persons for state employment in positions directly responsible for the supervision, care, or treatment of children, vulnerable adults, or individuals with mental illness or developmental disabilities provided that: For persons residing in a home that will be utilized to provide foster care for dependent youth, a criminal background check will be required for all persons aged sixteen and older and the department of social and health services may require a criminal background check for persons who are younger than sixteen in situations where it may be warranted to ensure the safety of youth in foster care;

(b) When considering persons for state positions involving unsupervised access to vulnerable adults to conduct comprehensive assessments, financial eligibility determinations, licensing and certification activities, investigations, surveys, or case management; or for state positions otherwise required by federal law to meet employment standards;

(c) When licensing agencies or facilities with individuals in positions directly responsible for the care, supervision, or treatment of children, developmentally disabled persons, or vulnerable adults, including but not limited to agencies or facilities licensed under chapter **74.15** or **18.51** RCW;

(d) When contracting with individuals or businesses or organizations for the care, supervision, case management, or treatment, including peer counseling, of children, developmentally disabled persons, or vulnerable adults, including but not limited to services contracted for under chapter **18.20**, **70.127**, **70.128**, **72.36**, or **74.39A** RCW or Title **71A** RCW;

(e) When individual providers are paid by the state or providers are paid by home care agencies to provide in-home services involving unsupervised access to persons with physical, mental, or developmental disabilities or mental illness, or to vulnerable adults as defined in chapter **74.34** RCW, including but not limited to services provided under chapter **74.39** or **74.39A** RCW.

(3) The secretary of the department of children, youth, and families shall investigate the conviction records, pending charges, and other information including civil adjudication proceeding records of current employees and of any person actively being considered for any position with the department who will or may have unsupervised access to children, or for state positions otherwise required by federal law to meet employment standards. "Considered for any position" includes decisions about (a) initial hiring, layoffs, reallocations, transfers, promotions, or demotions, or (b) other decisions that result in an individual being in a position that will or may have unsupervised access to children as an employee, an intern, or a volunteer.

(4) The secretary of the department of children, youth, and families shall adopt rules and investigate conviction records, pending charges, and other information including civil adjudication proceeding records, in the following circumstances:

(a) When licensing or certifying agencies with individuals in positions that will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood education services, including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older;

(b) When authorizing individuals who will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood learning education services in licensed or certified agencies, including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older;

(c) When contracting with any business or organization for activities that will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood learning education services;

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(6)(a) For purposes of facilitating timely access to criminal background information and to reasonably minimize the number of requests made under this section, recognizing that certain health care providers change employment frequently, health care facilities may, upon request from another health care facility, share copies of completed criminal background inquiry information.

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(d) Any health care facility that knows or has reason to believe that an applicant has or may have a disqualifying conviction or finding as described in RCW 43.43.842, subsequent to the completion date of their most recent criminal background inquiry, shall be prohibited from relying on the applicant's previous employer's criminal background inquiry information. A new criminal background inquiry shall be requested pursuant to RCW 43.43.830 through 43.43.842.

(e) Health care facilities that share criminal background inquiry information shall be immune from any claim of defamation, invasion of privacy, negligence, or any other claim in connection with any dissemination of this information in accordance with this subsection.

(f) Health care facilities shall transmit and receive the criminal background inquiry information in a manner that reasonably protects the subject's rights to privacy and confidentiality.

[2017 3rd sp.s. c 20 § 5; 2017 3rd sp.s. c 6 § 224. Prior: 2012 c 44 § 2; 2012 c 10 § 41; 2011 c 253 § 6; 2007 c 387 § 10; 2006 c 263 § 826; 2005 c 421 § 2; 2000 c 87 § 1; 1997 c 392 § 524; 1995 c 250 § 2; 1993 c 281 § 51; 1990 c 3 § 1102; prior: 1989 c 334 § 2; 1989 c 90 § 2; 1987 c 486 § 2.]

NOTES:

Reviser's note: This section was amended by 2017 3rd sp.s. c 6 § 224 and by 2017 3rd sp.s. c 20 § 5, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Construction—Competitive procurement process and contract provisions—Conflict with federal requirements and Indian Child Welfare Act of 1978—2017 3rd sp.s. c 20: See notes following RCW 74.13.270.

Effective date—2017 3rd sp.s. c 6 §§ 102, 104-115, 201-227, 301-337, 401-419, 501-513, 801-803, and 805-822: See note following RCW 43.216.025.

Conflict with federal requirements—2017 3rd sp.s. c 6: See RCW 43.216.908.

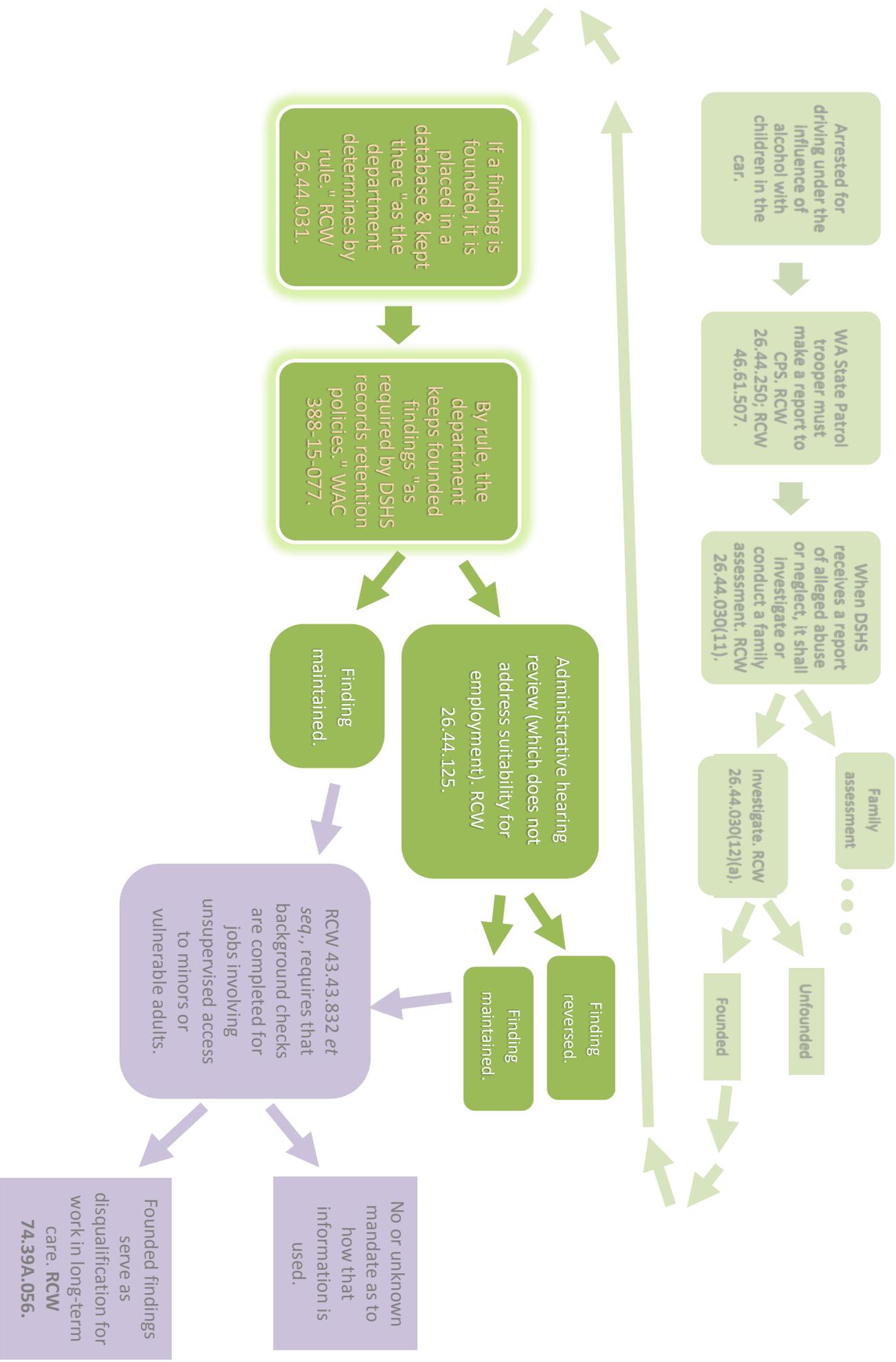
Application—2012 c 10: See note following RCW 18.20.010.

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Effective date—1993 c 281: See note following RCW [41.06.022](#).

Index, part headings not law—Severability—Effective dates—Application—1990 c 3: See RCW [18.155.900](#) through [18.155.902](#).



Arrested for driving under the influence of alcohol with children in the car.

WA State Patrol trooper must make a report to CPS. RCW 26.44.250; RCW 46.61.507.

When DSHS receives a report of alleged abuse or neglect, it shall investigate or conduct a family assessment. RCW 26.44.030(11).

Family assessment ...

Investigate. RCW 26.44.030(12)(a).

Unfounded

Founded

Administrative hearing review (which does not address suitability for employment). RCW 26.44.125.

Finding reversed.

Finding maintained.

RCW 43.43.832 et seq., requires that background checks are completed for jobs involving unsupervised access to minors or vulnerable adults.

No or unknown mandate as to how that information is used.

Founded findings serve as disqualification for work in long-term care. RCW 74.39A.056.

If a finding is founded, it is placed in a database & kept there "as the department determines by rule." RCW 26.44.031.

By rule, the department keeps founded findings "as required by DSHS records retention policies." WAC 388-15-077.

NORTHWEST JUSTICE PROJECT

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Transmittal Information

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