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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

BRIEF OF APPELLANT

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I. INTRODUCTION

Washington's facially neutral schemes for making, retaining, and expunging findings of abuse and neglect of children disparately impacts Native Americans. This impact arises primarily from the State's policy of retaining records of such findings for at least 35 years, and from its policy of refusing to consider expunging such findings made since 1998. The impact of the discriminatory policy prohibits Native Americans from obtaining employment in such fields as long-term care and child care at four times the rate as for white individuals.

Appellant, Brook Howell ("Ms. Howell"), a 27-year-old Native American mother of three children, is a victim of this unlawfully discriminatory system. The State charged Ms. Howell five years ago with driving under the influence (DUI) with her children in the car. The DUI was dismissed when Ms. Howell fulfilled the terms of a deferred prosecution agreement. Nonetheless, the Department of Social and Health Services ("the Department") entered a finding of neglect against Ms. Howell based on this incident. The finding stopped Ms. Howell from completing her education and finding a job in healthcare.

Ms. Howell fulfilled all treatment requirements and other terms of her deferred prosecution, including abstaining from alcohol. She has no criminal record from this incident or any other. Yet, she is still prevented

from providing a better life for her family through work of her choice because of the Department's policies regarding CPS findings. Ms. Howell's CPS finding that resulted from the incident has stopped Ms. Howell's pursuit of her Nursing Assistant certification, and it will always impair her ability to work in the healthcare field.

Moreover, Ms. Howell's story is not unique. The Department's policy disparately impacts Native Americans across Washington State. Native Americans are four times more likely to have a founded finding on their record than white persons and three times more likely than the population in Washington generally. Because the Department enters such findings disproportionately against Native Americans, the employment disqualification also disparately impacts Native Americans' ability to obtain work, education, training, and licensure in a field of their choosing. Consequently, the Department's policies bar Native Americans from preferred employment opportunities at four times the rate of white individuals. Just as a "No Felons" sign at an employers' workplace can create a disparate impact, so too does the Department's policy. *See Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC Enforcement Guidance, at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

Ms. Howell sued to enjoin this policy, and the trial court dismissed her lawsuit under CR 12(c). The trial court failed to comprehend the concept of disparate impact and its use to remedy the effects of systemic, unconscious bias. More specifically, the trial court failed to understand that the policy at issue in this case is not how the Department makes or finalizes a CPS finding but in the Department's policies of continuing to use those findings against individuals permanently, regardless of their actual suitability. The court concluded as much at a hearing on DSHS's motion:

THE COURT: [They're three times] more likely to have founded findings. But you're not challenging the process by which the findings are made.

MS. LITTLEBIRD: Correct.

THE COURT: [I]f there's discrimination, that's where it is.

RP at 24.

By insisting that the plaintiff show the court some discriminatory act when the Department made the finding, the court overlooked the purpose of a disparate impact claim. The purpose is to remedy the effect of "unconscious prejudices and disguised animus" that exist throughout the child welfare system. *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 192 L. Ed. 2d 514 (2015). This results not only in increased numbers of Native Americans with founded findings but a disparate impact of the collateral consequences of such findings.

This appeal asks the Court to consider whether the Washington Law Against Discrimination (“WLAD”) permits or prohibits Native Americans from being disqualified from employment at four times the rate of their white counterparts. Ms. Howell established her prima facie case on this claim before the Yakima County Superior Court. Yet, that court erred by dismissing her case for failure to state a claim. In this appeal, Ms. Howell respectfully asks this Court to remedy that error and allow her the opportunity to have her day in court.

II. ASSIGNMENT OF ERROR

The trial court erred when it dismissed, on the pleadings, Ms. Howell’s complaint for failure to state a claim upon which relief may be granted on June 14, 2017.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Whether Ms. Howell adequately pled a prima facie case of disparate impact under the Washington Law Against Discrimination against the Department.
- B. Whether the Department is liable for the discriminatory effect of its policies on the ability of Native Americans to seek and obtain employment that is regulated by the Department.
- C. Whether the Department is immune from suit for the discriminatory effects of its policies and practices.

IV. STATEMENT OF THE CASE

This case concerns the review of a motion for judgment on the pleadings. Thus, the facts as alleged in the plaintiff's complaint are assumed to be true. Further, any facts that the plaintiff could plausibly prove should be used to support her legal theory.

A. Ms. Howell Has a Child Protective Services Founded Finding from a Driving under the Influence Incident Five Years Ago, but There is no Criminal Conviction Because Ms. Howell Complied with her Deferred Prosecution

Ms. Howell is a 27-year old mother of three children. CP at 4. She is Native American and is an enrolled member of the Yakama Indian Nation. *Id.*

On November 4, 2012, the Washington State Patrol arrested Ms. Howell on suspicion of driving under the influence of alcohol. *Id.* Ms. Howell was charged with DUI and reckless endangerment because her three children were in the car with her. *Id.* Ms. Howell entered into a deferred prosecution agreement based upon the criminal action being related to alcoholism. *Id.* Under the terms of the deferral agreement, compliance with the terms would result in dismissal of all charges related to the incident. *Id.*

Following the deferred prosecution, Ms. Howell complied with all terms of treatment and terms of the deferred disposition. *Id.* The criminal

court dismissed the charge based on her successful compliance with those terms. *Id.*

Unknown to Ms. Howell at the time, CPS investigated these allegations and made an administrative finding of child neglect against her for the November 4, 2012 traffic incident. *Id.* at 5. The Department placed the neglect record in its FamLink database on January 3, 2013 and sent Ms. Howell notice by certified mail, which was returned unclaimed to the Department. *Id.*

In 2015, Ms. Howell entered a Nursing Assistant Certified (“NAC”) program. *Id.* She wanted to train to obtain an NAC license so she could work in the healthcare field. *Id.* In the middle of her school year, and prior to beginning clinical rotations, Ms. Howell learned for the first time of the founded finding of neglect after her school completed a routine background check. *Id.*

A Department background check is mandatory to complete the NAC program, obtain a nursing assistant license, and pursue employment in any job that might include unsupervised access to a child or vulnerable adult. *Id.* Solely because of the CPS finding, Ms. Howell was not allowed to complete the nursing class or obtain an NAC license to work in the healthcare field. *Id.*

On January 20, 2017, Ms. Howell made a request to the Department to allow her to expunge her founded finding from its CPS database because of the discriminatory effect of the finding on her ability to work. *Id.* at 6. The Department did not respond to this request or otherwise permit Ms. Howell to expunge her finding. *Id.*

B. CPS Administrative Findings are Effectively Permanent Barriers to Employment

RCW 26.44.100 authorizes the Department to investigate reports of child abuse or neglect. When the Department believes that a preponderance of evidence supports the report, and the allegations meet the statutory definition of “abuse” or “neglect”, the Department is authorized to make a “finding” against the alleged perpetrator. *Id.*; WAC 388-15-129. The Department is authorized to maintain this finding in its records. RCW 26.44.031. The alleged perpetrator has an opportunity for an administrative hearing to contest whether the facts, as alleged, constitute abuse or neglect. *Id.* They may not challenge the severity or appropriateness of any sanction that occurs as a result of the founded finding, nor may they introduce mitigating evidence that they should not be sanctioned for their conduct. CP at 6.

Ms. Howell never received notification of her finding or the possibility for its review. *Id.* at 5. The Department placed the neglect record in its FamLink database on January 3, 2013, and sent notice by certified mail to Ms. Howell, which was returned to the Department unclaimed. *Id.*

A background check is performed any time a person seeks employment that might include unsupervised access to a vulnerable adult or child, such as a school cook or custodian, or pursues relevant professional licensure, such as to become a nursing assistant. *See, e.g.,* WAC 388-06-0700; RCW 43.43.834 (authorizing background check for school volunteers). The existence of a finding is reported on this background check. If reported, it is an automatic and unreviewable barrier to employment in certain fields, such as home healthcare. RCW 74.39A.056 (2). Ms. Howell was not allowed to complete the second half of her Nursing Assistant Certified program when the school conducted a routine background check before the start of clinical rotations. CP at 5.

The permanent, automatic bar erected by CPS findings disparately impacts the ability of Native Americans to obtain and hold employment. Native Americans are four times more likely than white persons to have founded findings on their background reports, and three times more likely than the general population. *Id.* at 8. Being unable to expunge these records

disparately harms Native Americans and their ability to pursue employment in healthcare and education when they are otherwise fit to work. *Id.* at 9.

The Department is capable of judging the suitability of a person to safely work in a field that serves vulnerable adults and minors, yet chooses not to do this for most persons with founded findings. *Id.* The Department does, however, allow people whose findings are older than October 1, 1998 to show that they are safe to work with minors or vulnerable adults and to work in these fields regardless of their finding. *See, e.g.,* WAC 388-97-1820; WAC 388-71-0540 (5)(d)(ii); WAC 388-825-640 (2)(b) (permitting employment with vulnerable adults for persons with founded findings older than October 1, 1998). The Department has the ability to determine whether founded findings should exist indefinitely or be allowed to be expunged or reviewed after a period of time. CP at 9; RCW 26.44.031 (3).

C. The Proceedings Below

Once Ms. Howell discovered that the Department had issued a founded finding of child abuse or neglect against her, she appealed the decision on June 3, 2015. CP at 5. An administrative law judge reversed the finding, but the Department's Board of Appeals reversed the ALJ and reinstated the finding. *Id.* Ms. Howell did not appeal to the Superior Court, allowing the Department's finding to become final.

On January 20, 2017, Ms. Howell made a request to the Department to allow her to expunge the founded finding from its CPS database because of the discriminatory effect of the finding on her ability to work. *Id.* at 6. The Department did not respond to this request or otherwise permit Ms. Howell to expunge the finding. *Id.*

On January 23, 2017, Ms. Howell filed a statutory notice of claim with the State of Washington. *Id.* The State denied the claim. *Id.* With no resolution after more than 60 days, she filed her complaint in the Yakima County Superior Court, alleging the Department's policies violated her right to obtain employment without discrimination under the WLAD. *Id.* at 3. The Yakima County Superior Court dismissed the case on the pleadings on June 14, 2017. *Id.* at 69-70. Ms. Howell timely filed this appeal on July 10, 2017. *Id.* at 66.

V. ARGUMENT

A. Standard of Review

This Court has acknowledged that “[d]ismissal under CR 12 is appropriate only where it appears beyond doubt that the plaintiff cannot prove any set of facts that would justify recovery.” *Lowe v. Rowe*, 173 Wn. App. 253, 258, 294 P.3d 6 (2012). Dismissal of a claim pursuant to CR 12(c) is reviewed de novo. *Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 241, 242 P.3d 891 (2010).

In a motion for judgment on the pleadings, the factual allegations pled in a complaint are presumed to be true and the defendant's denials are presumed to be untrue. *Hodgson v. Bicknell*, 49 Wash.2d 130, 136, 298 P.2d 844 (1956). CR 12(c) motions should be granted “‘sparingly and with care,’ and ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’” *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (quoting *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

If the Department asserts an affirmative defense, it bears the burden of proving the facts of that defense. *E.g.*, *Olpinski v. Clement*, 73 Wn.2d 944, 950, 442 P.2d 260 (1968).

Further, this case involves allegations of discrimination in violation of Ms. Howell's civil rights. Dismissing the claim at the outset can be particularly problematic in civil rights and discrimination cases. The Ninth Circuit has noted that “it is axiomatic that ‘[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.’” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (quoting § 1357 Motions to Dismiss – Practice Under Rule 12(b)(6), 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.)). As the Fourth Circuit recently noted in reversing a dismissal, plaintiffs “in civil rights cases are more likely to suffer from information-asymmetry, pre-discovery” and be at a disadvantage when a

defendant moves for early dismissal. *Woods v. City of Greensboro*, 855 F.3d 639, 2017 WL 1754898, at *10 (4th Cir. May 5, 2017). The Ninth Circuit similarly noted this issue, emphasizing the “danger of dismissing a discrimination case on a minimal record.” *Gilligan*, 108 F.3d at 250.

B. Ms. Howell Pled a Prima Facie Case of Disparate Impact

Ms. Howell pled a prima facie case for disparate impact under the WLAD. The United States Supreme Court recognizes disparate impact claims under anti-discrimination laws because disparate impact “permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.” *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2512, 192 L. Ed. 2d 514 (2015). The disparate impact theory allows plaintiffs to “challenge[] practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale.” *Id.* at 2513 (internal quotation marks omitted). In deciding to open up anti-discrimination liability in this way, the Court noted that Congress wrote certain statutes to “proscribe not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971). As such, “Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation,” because the statute’s

goal is to achieve “equality of employment opportunities and [the] remov[al] of] barriers that have operated in the past” to favor certain races over others. *Id.* at 429-30, 432. The Washington Law Against Discrimination is Ms. Howell’s sole claim for relief, is construed both by consulting federal anti-discrimination case law for guidance, and departing from it where necessary to provide more liberal relief to plaintiffs.

To make a prima facie case of disparate impact, a plaintiff must prove “(1) a facially neutral employment practice [that] (2) falls more harshly on a protected class.” *See, e.g., Shannon v. Pay ‘N Save Corp.*, 104 Wn.2d 722, 727, 709 P.2d 799 (1985). Taking the facts alleged in her complaint as true, Ms. Howell established the existence of a facially neutral employment practice that falls more harshly on Native Americans, a protected class based on race.

Ms. Howell identified the Department’s policy of retaining and reporting founded findings of child abuse or neglect without providing a means for expungement or otherwise demonstrating rehabilitation or suitability for employment as the facially neutral employment practice at issue. CP at 6-7. The Department’s policy, she alleged, constitutes an employment practice because it forecloses access to employment opportunities otherwise available to certain individuals. *Id.* at 8. The existence of a finding is an absolute barrier to certain fields of employment,

including the field Ms. Howell sought to work in. *Id.* at 7. The Department's policy directly shapes the list of prospective candidates for jobs providing healthcare or education.

Ms. Howell alleges that this facially neutral policy falls more harshly on a protected class because Native Americans are four times more likely than white persons and three times more likely than the average Washingtonian to have such a finding on their record. *Id.* at 8. A disparate impact of three to four times is an "extremely large" one. *See R.I. Comm'n for Human Rights v. Graul*, 120 F. Supp. 3d 110, 126 (D.R.I. 2015) (approving conclusion of expert report on size of disparity). This means that Native Americans are potentially foreclosed from pursuing their chosen professions at three times the rate of the general population due to the Department's policy. As such, Ms. Howell sufficiently established her prima facie disparate impact case.

Employers have the opportunity to establish a business necessity defense to a disparate impact claim. *See, e.g., Griggs*, 401 U.S. at 431-32. An employer successfully argues this defense by demonstrating how the challenged requirement has a manifest relationship to the employment in question. *Id.*

Ms. Howell alleged that the Department has no legitimate reason for indefinitely maintaining and reporting these records when they have a

discriminatory effect. CP at 9. The Department's arguments in the trial court merely reiterate its belief that state law compels disqualification, without addressing the issue that the decision for how long to maintain those findings was entrusted to the Department. *Id.* at 26-28. This belief, however, does not establish a business necessity of indefinite maintenance of founded findings, nor one of using those findings as an automatic employment bar instead of applying the Department's existing suitability review process.

Yet, even if the Department had successfully established a business necessity defense, Ms. Howell could still prevail on her disparate impact claim by showing that other less discriminatory alternatives can equally serve the employer's needs. *Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 727, 709 P.2d 799 (1985). In her complaint, Ms. Howell provides the following examples of less discriminatory alternative policies available to the Department:

[The Department could] permit accused persons to expunge their findings after demonstrating their rehabilitation; reduce the period of retention of the record on a background check when there is no evidence of future harm to children; or periodically review all records to determine ongoing need to retain any given record on its background check database.

CP at 9. In this manner, Ms. Howell sufficiently set forth a set of facts upon which her disparate impact claim could prevail.

C. The Department is Liable for the Discriminatory Effects of its Policies under the Washington Law Against Discrimination

By foreclosing Ms. Howell's employment possibilities, the Department's challenged actions bring it under the Washington Law Against Discrimination (the "WLAD"). The WLAD provides the broad "right to obtain and hold employment without discrimination." RCW 49.60.030. The WLAD further directs that it "shall be construed liberally for the accomplishment of the purposes" of deterring and eradicating discrimination in Washington State. RCW 49.60.020. None of this text suggests that the legislature intended the law to apply only in direct employer-employee situations. Moreover, the WLAD's definition of "employer" includes any person—"person" being defined to include any state agency—"acting in the interest of an employer, directly **or indirectly**." RCW 49.60.040 (emphasis added). The right to obtain employment free from discrimination under the WLAD is broader than the rights provided by federal law. *Marquis v. City of Spokane*, 120 Wn.2d 97, 110-11 (1996).

In addition to acting in the interests of vulnerable adults and children, the Department is indirectly acting in the interests of Ms. Howell's prospective employers. It does this by preventing her from even receiving her Nursing Assistant certification, let alone getting to the stage of actually applying for jobs. This policy indisputably obstructed Ms. Howell's right to

obtain employment. The Department has closed off an entire field of potential employment opportunities for Ms. Howell. As such, the inquiry about whether the WLAD applies in this case should end here with a plain reading of the statute.

1. Guidance from Title VII supports state court interpretations of the Washington Law Against Discrimination that the Department is an indirect employer

Ms. Howell's claim would be cognizable under Title VII, and Washington courts are clear that the WLAD is broader than Title VII. In *Xieng v. Peoples National Bank of Washington*, the Washington Supreme Court noted that in recognition of the fact "that WLAD lacks specific criteria for proving a discrimination claim, Washington courts have looked to cases interpreting equivalent federal laws." 120 Wn.2d 512, 518, 844 P.2d 389, (1993). Noting that the WLAD "is patterned after Title VII of the Civil Rights Act of 1964," the Court acknowledged that "decisions interpreting the federal act are [consequently] persuasive authority for the construction of RCW 49.60." *Id.* (citing *Oliver v. Pac. Nw. Bell Tel. Co., Inc.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986)). Where our state courts have departed from federal civil rights cases, they have done so to interpret the state law more broadly than federal law. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 491, 325 P.3d 193 (2014).

A direct employment relationship is not a prerequisite to Title VII liability. The Ninth Circuit Court of Appeals found that although “there must be some connection with an employment relationship for Title VII protections to apply,” that “connection need not necessarily be direct.” *Lutcher v. Musicians Union Local*, 47, 633 F.2d 880, 883 (9th Cir. 1980). The Ninth Circuit expounded on this theory in *Association of Mexican-American Educators v. State of California* 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) (emphasis added).

Although the Department is not Ms. Howell’s direct employer, the complaint alleges that the Department exercised considerable control over her employment. CP at 5. Indefinitely maintaining CPS findings while knowing that they serve as automatic disqualifiers for certain employment opportunities means that the Department exerts direct control over the list of prospective candidates available to the employers in these fields. The

Department exercised enough control over Ms. Howell's employment that it prevented her from even finishing her coursework towards her certification, since she could not complete the clinical work necessary to graduate. This control included the use of a mandatory background check, on forms prescribed by the Department, with outcomes dictated by Department rules. As such, the Department exercises a sufficient degree of control over the employment relationship in question to bring it under the protections of the WLAD.

2. The Department inaccurately claimed that Ms. Howell challenged the acts of the Department that resulted in her founded finding, and the trial court was misled by this argument

The Department's position below mischaracterized the nature of Ms. Howell's complaint. The Department referenced the State Patrol's arrest of Ms. Howell and the Department's determination that she committed child neglect as the actions at issue. CP at 28. However, because this is a claim of disparate impact, the Court's focus should be solely on the facially neutral policy that harms Ms. Howell: the Department's indefinite maintenance of founded findings that results in a disparate rate of employment disqualification for Native Americans.

Ms. Howell challenges the Department's dissemination of findings without a method to avoid the racial disparity those findings impose on Ms. Howell and all Native Americans with founded findings. Ms. Howell's

complaint alleges that the Department has the legal authority to remove or expunge Ms. Howell's findings while still meeting its statutory duties, yet it refuses to even consider doing so. *Id.* at 9. If Ms. Howell is successful in removing her finding from a "registry", as she would be if successful in this lawsuit, this law would no longer bar her employment. Both allegations must be accepted as true for purposes of a motion for judgment on the pleadings.

Likewise, the Department claims that Ms. Howell's citation to *Marquis v. Spokane* should fail because Ms. Howell is not an independent contractor. The *Marquis* court reviewed the WLAD to determine whether its breadth covered independent contractors and not just employees, as the defendant in that case claimed. 130 Wn.2d 97, 105-113, 922 P.2d 43 (1996). To reach this conclusion, the court noted that the act did not define the scope of the right to obtain employment free from discrimination. *Id.* at 107. Thus, to best achieve the purposes of the WLAD—to eradicate discrimination—the court determined the WLAD should be read broadly to include independent contractors; the court declined to follow Title VII because it was too narrow relative to the WLAD. *Id.* at 110-11.

Ms. Howell never claimed to be an independent contractor. She claimed that the Department's indirect control over her employment prospects discriminated against her. The *Marquis* decision stands for the

proposition that the right to be free from discrimination in employment is broader than the typical employment relationship. Thus, to eradicate discrimination in Washington State against Native Americans, this Court should construe the WLAD to cover practices by a state agency that have the effect of disproportionately excluding minorities from the job market.

D. The Department is not Immune from Suit for the Discriminatory Effect of its Policies

The decisions at issue in this case are not the type of decisions to which discretionary immunity applies, and thus the Department is not immune from suit for its CPS findings retention and reporting practices. The discretionary immunity defense is a narrow one,¹ applying only to basic policy decisions made by high level government actors; it does not apply to the ministerial or operational decision made to implement those goals. *See, e.g., Taggart v. State*, 118 Wn.2d 195, 215, 822 P.2d 243 (1992); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 157-58, 744 P.2d 1032 (1987). The immunity's name can be misleading, because rather than

¹ The Department's Motion for Judgment on the Pleadings misconstrues the origin of this immunity. Rather than being a carve out left over by the Legislature's broad waiver of state sovereign immunity, it is the common law immunity afforded the executive branch that resurfaced once the state sovereign immunity was abolished in the 1950s and 1960s. Debra L. Stephens & Bryan P. Harnetiaux, *The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability*, 36 S.U. L. Rev. 35, 42 (2006).

hinging on the degree of discretion exercised in the decision, the immunity hinges on the type of decision being made.

Courts have drawn distinctions between the high-level decision to do something and the decisions about the manner in which it is done. The immunized decision is the decision to site a freeway, not the decisions about the design or lighting of the bridge. *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979). The immunized decision is the decision to grant parole, not the decisions about supervision of parolees. *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992). The immunized decision is the decision to build a power plant, not the decisions about design and funding of the plant. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 157-58, 744 P.2d 1032 (1987).

Here, the immunized decision is the basic policy goal of protecting “the state’s most vulnerable people.” CP at 28. The decisions about how to implement that goal—including procedures for maintaining, disseminating, and expunging records of child abuse or neglect—are not immune. Ms. Howell does not challenge how the Department investigates or determines that abuse or neglect occurs. She challenges how the Department retains and communicates that information to automatically disqualify Native Americans from employment at rates disproportionate to their prevalence in the population. These challenges to the operational implementation of the

Department's basic policy goal, vis-à-vis its sub-regulatory practice of retaining and reporting findings, are not challenges to basic policy functions. Rather, they are challenges to the technical means by which a decision is implemented. Indeed, the fact that the Department has no rule that expressly states these findings are permanent, and has instead delegated the decision to sub-regulatory operations, indicates this is not a high-level basic policy question.

Moreover, the Department's analysis fails the test for whether to apply discretionary immunity. The Department cites the *Evangelical* case for its authority that it is entitled to immunity. The *Evangelical* court created a four-question test:

- (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
- (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
- (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
- (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Evangelical United v. State, 67 Wn.2d 246, 253, 407 P.2d 440 (1965). Not only must the Court consider these questions, they must be “clearly and

unequivocally answered in the affirmative.” *Id.* at 255. Lacking unequivocal answers, the Court should deny the motion dismiss to allow factual development. *Stewart*, 92 Wn.2d at 293. The Department did not, at this stage of the litigation, clearly and unequivocally answer these questions in the affirmative.

In fact, the Court need only look at the first two questions to see that the Department is not entitled to discretionary immunity. The *Evangelical* court underscored that the discretionary immunity question is all about a court’s ability to apply typical tort analysis to governmental decisions. *See* *Stephens et al.*, *supra* at 51 (noting that “courts cannot assess basic policy decisions against tort standards of reasonableness”). Providing a clear example of this analysis, the *Stewart* 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. However, these are not the elements which are challenged by appellant. Rather, appellant 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.**

92 Wn.2d 294 (emphasis added).

The *Evangelical* court offered that the key inquiry unlocking the applicability of tort liability is whether the government conduct in question would be tortious conduct from a private entity, concluding that “the official

conduct giving rise to liability must be tortious, and it must be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation”. 67 Wn.2d at 253. In this case, the analog is a private corporation maintaining a policy of terminating employment for any employee with a founded finding, regardless of the relationship of that finding to suitability or fitness for employment. That corporation could be required to abandon that policy under the WLAD if a plaintiff proved a discriminatory effect and a less discriminatory alternative available to the employer.

Courts can easily assess whether a policy creates a disparate impact and whether the state has a less discriminatory alternative available to it. The *Evangelical* factors do not support immunity when a less discriminatory alternative is available, given that a discriminatory policy can hardly be described as “essential” when a nondiscriminatory alternative exists. To find that the Department’s policies that create discriminatory effects are immune from suit would allow the exception to swallow the rule and entirely immunize state agencies from disparate impact claims under the WLAD.

E. Ms. Howell is Entitled to Attorneys' fees under RCW 49.60.030

Attorneys' fees are available to the prevailing party where authorized by "contract, statute, or a recognized ground in equity." *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296-97, 149 P.3d 666 (2006). In the present case, Ms. Howell is entitled to recover her attorney fees under the WLAD, RCW 49.60.030.

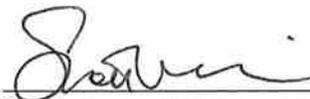
Ms. Howell is a person deeming herself injured by an act in violation of RCW 49.60.030. Once the Court establishes that her injury was a violation of the WLAD, it should authorize an award of actual damages, fees, and costs, including reasonable attorneys' fees pursuant to this statute and RAP 18.1.

VI. CONCLUSION

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

Respectfully submitted this 17th day of November, 2017.

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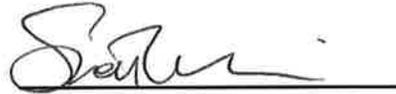
Scott Crain, WSBA #37224
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Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on November 17 2017, I cause 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: November 17, 2017 at Seattle, Washington.



Scott Crain

Appendix

App. 1-2	Applicable Statutes: RCW 49.60.030
App. 3	Applicable Statutes: RCW 26.44.031
App. 4-5	Applicable Statutes: RCW 74.39A.056

RCW 49.60.030**Freedom from discrimination—Declaration of civil rights.**

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

- (a) The right to obtain and hold employment without discrimination;
- (b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;
- (c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;
- (d) The right to engage in credit transactions without discrimination;
- (e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW **48.30.300**, **48.44.220**, or **48.46.370** does not constitute an unfair practice for the purposes of this subparagraph;
- (f) The right to engage in commerce free from any discriminatory boycotts or blacklists.

Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW **49.60.225** contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter **19.86** RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

[**2009 c 164 § 1**; **2007 c 187 § 3**; **2006 c 4 § 3**; **1997 c 271 § 2**; **1995 c 135 § 3**. Prior: **1993 c 510 § 3**; **1993 c 69 § 1**; **1984 c 32 § 2**; **1979 c 127 § 2**; **1977 ex.s. c 192 § 1**; **1974 ex.s. c 32 § 1**; **1973 1st ex.s. c 214 § 3**; **1973 c 141 § 3**; **1969 ex.s. c 167 § 2**; **1957 c 37 § 3**; **1949 c 183 § 2**; Rem. Supp. 1949 § 7614-21.]

NOTES:

Intent—1995 c 135: See note following RCW [29A.08.760](#).

Severability—1993 c 510: See note following RCW [49.60.010](#).

Severability—1993 c 69: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [[1993 c 69 § 17](#).]

Severability—1969 ex.s. c 167: See note following RCW [49.60.010](#).

Severability—1957 c 37: See note following RCW [49.60.010](#).

Severability—1949 c 183: See note following RCW [49.60.010](#).

RCW 26.44.031**Records—Maintenance and disclosure—Destruction of screened-out, unfounded, or inconclusive reports—Rules—Proceedings for enforcement.**

(1) To protect the privacy in reporting and the maintenance of reports of nonaccidental injury, neglect, death, sexual abuse, and cruelty to children by their parents, and to safeguard against arbitrary, malicious, or erroneous information or actions, the department shall not disclose or maintain information related to reports of child abuse or neglect except as provided in this section or as otherwise required by state and federal law.

(2) The department shall destroy all of its records concerning:

(a) A screened-out report, within three years from the receipt of the report; and

(b) An unfounded or inconclusive report, within six years of completion of the investigation, unless a prior or subsequent founded report has been received regarding the child who is the subject of the report, a sibling or half-sibling of the child, or a parent, guardian, or legal custodian of the child, before the records are destroyed.

(3) The department may keep records concerning founded reports of child abuse or neglect as the department determines by rule.

(4) No unfounded, screened-out, or inconclusive report or information about a family's participation or nonparticipation in the family assessment response may be disclosed to a child-placing agency, private adoption agency, or any other provider licensed under chapter 74.15 RCW without the consent of the individual who is the subject of the report or family assessment, unless:

(a) The individual seeks to become a licensed foster parent or adoptive parent; or

(b) The individual is the parent or legal custodian of a child being served by one of the agencies referenced in this subsection.

(5)(a) If the department fails to comply with this section, an individual who is the subject of a report may institute proceedings for injunctive or other appropriate relief for enforcement of the requirement to purge information. These proceedings may be instituted in the superior court for the county in which the person resides or, if the person is not then a resident of this state, in the superior court for Thurston county.

(b) If the department fails to comply with subsection (4) of this section and an individual who is the subject of the report or family assessment response information is harmed by the disclosure of information, in addition to the relief provided in (a) of this subsection, the court may award a penalty of up to one thousand dollars and reasonable attorneys' fees and court costs to the petitioner.

(c) A proceeding under this subsection does not preclude other methods of enforcement provided for by law.

(6) Nothing in this section shall prevent the department from retaining general, nonidentifying information which is required for state and federal reporting and management purposes.

[2012 c 259 § 4; 2007 c 220 § 3; 1997 c 282 § 1.]

NOTES:

Effective date—2012 c 259 §§ 1 and 3-10: See note following RCW 26.44.020.

Effective date—Implementation—2007 c 220 §§ 1-3: See notes following RCW 26.44.020.

RCW 74.39A.056**Criminal history checks on long-term care workers.**

(1)(a) All long-term care workers shall be screened through state and federal background checks in a uniform and timely manner to verify that they do not have a criminal history that would disqualify them from working with vulnerable persons. The department must perform criminal background checks for individual providers and prospective individual providers and make the information available as provided by law.

(b)(i) Except as provided in (b)(ii) of this subsection, for long-term care workers hired after January 7, 2012, the background checks required under this section shall include checking against the federal bureau of investigation fingerprint identification records system and against the national sex offenders registry or their successor programs. The department shall require these long-term care workers to submit fingerprints for the purpose of investigating conviction records through both the Washington state patrol and the federal bureau of investigation. The department shall not pass on the cost of these criminal background checks to the workers or their employers.

(ii) This subsection does not apply to long-term care workers employed by community residential service businesses until January 1, 2016.

(c) The department shall share state and federal background check results with the department of health in accordance with RCW **18.88B.080**.

(2) No provider, or its staff, or long-term care worker, or prospective provider or long-term care worker, with a stipulated finding of fact, conclusion of law, an agreed order, or finding of fact, conclusion of law, or final order issued by a disciplining authority or a court of law or entered into a state registry with a final substantiated finding of abuse, neglect, exploitation, or abandonment of a minor or a vulnerable adult as defined in chapter **74.34** RCW shall be employed in the care of and have unsupervised access to vulnerable adults.

(3) The department shall establish, by rule, a state registry which contains identifying information about long-term care workers identified under this chapter who have final substantiated findings of abuse, neglect, financial exploitation, or abandonment of a vulnerable adult as defined in RCW **74.34.020**. The rule must include disclosure, disposition of findings, notification, findings of fact, appeal rights, and fair hearing requirements. The department shall disclose, upon request, final substantiated findings of abuse, neglect, financial exploitation, or abandonment to any person so requesting this information. This information must also be shared with the department of health to advance the purposes of chapter **18.88B** RCW.

(4) The department shall adopt rules to implement this section.

[**2012 c 164 § 503**; 2012 c 1 § 101 (Initiative Measure No. 1163, approved November 8, 2011).]

NOTES:

Reviser's note: (1) The language of this section, as enacted by 2012 c 1 § 101, was identical to RCW **74.39A.055** as amended by 2009 c 580 § 2, which was repealed by **2012 c 1 § 115**. This section has since been amended by **2012 c 164 § 503**.

(2) The code reviser was directed to codify the sections listed in 2012 c 1 § 302 with the same codification numbers as repealed sections. Following standard practices and pursuant to RCW **1.08.015**, sections 101 through 109 and 111 through 113, chapter 1, Laws of 2012 were given unique numbers to effectuate the orderly and logical arrangement of the code.

Finding—Intent—Rules—Effective date—2012 c 164: See notes following RCW **18.88B.010**.

Intent—Findings—2012 c 1 (Initiative Measure No. 1163): "It is the intent of the people

through this initiative to protect vulnerable elderly and people with disabilities by reinstating the requirement that all long-term care workers obtain criminal background checks and adequate training. The people of the state of Washington find as follows:

(1) The state legislature proposes to eliminate the requirement that long-term care workers obtain criminal background checks and adequate training, which would jeopardize the safety and quality care of vulnerable elderly and persons with disabilities. Should the legislature take this action, this initiative will reinstate these critical protections for vulnerable elderly and persons with disabilities; and

(2) Taxpayers' investment will be protected by requiring regular program audits, including fraud investigations, and capping administrative expenses." [2012 c 1 § 1 (Initiative Measure No. 1163, approved November 8, 2011).]

Performance audits—2012 c 1 (Initiative Measure No. 1163): "The state auditor shall conduct performance audits of the long-term in-home care program. The first audit must be completed within twelve months after January 7, 2012, and must be completed on a biennial basis thereafter. As part of this auditing process, the state shall hire five additional fraud investigators to ensure that clients receiving services at taxpayers' expense are medically and financially qualified to receive the services and are actually receiving the services." [[2012 c 164 § 709](#); 2012 c 1 § 201 (Initiative Measure No. 1163, approved November 8, 2011).]

Spending limits—2012 c 1 (Initiative Measure No. 1163): "The people hereby establish limits on the percentage of tax revenues that can be used for administrative expenses in the long-term in-home care program. Within one hundred eighty days of January 7, 2012, the state shall prepare a plan to cap administrative expenses so that at least ninety percent of taxpayer spending must be devoted to direct care. This limitation must be achieved within two years from January 7, 2012." [2012 c 1 § 202 (Initiative Measure No. 1163, approved November 8, 2011).]

Contingent effective dates—2012 c 1 (Initiative Measure No. 1163): "(1) Sections 101 and 115(6) of this act only take effect if [RCW 74.39A.055](#) is amended or repealed by the legislature in 2011.

(2) Sections 102 and 115(10) of this act only take effect if [RCW 74.39A.260](#) is amended or repealed by the legislature in 2011.

(3) Sections 103 and 115(1) of this act only take effect if [RCW 18.88B.020](#) is amended or repealed by the legislature in 2011.

(4) Sections 104 and 115(2) of this act only take effect if [RCW 18.88B.030](#) is amended or repealed by the legislature in 2011.

(5) Sections 105 and 115(3) of this act only take effect if [RCW 18.88B.040](#) is amended or repealed by the legislature in 2011.

(6) Sections 106 and 115(5) of this act only take effect if [RCW 74.39A.050](#) is amended or repealed by the legislature in 2011.

(7) Sections 107 and 115(7) of this act only take effect if [RCW 74.39A.073](#) is amended or repealed by the legislature in 2011.

(8) Sections 108 and 115(8) of this act only take effect if [RCW 74.39A.075](#) is amended or repealed by the legislature in 2011.

(9) Sections 109 and 115(9) of this act only take effect if [RCW 74.39A.085](#) is amended or repealed by the legislature in 2011.

(10) Sections 110 and 115(11) of this act only take effect if [RCW 74.39A.310](#) is amended or repealed by the legislature in 2011.

(11) Sections 111 and 115(12) of this act only take effect if [RCW 74.39A.330](#) is amended or repealed by the legislature in 2011.

(12) Sections 112 and 115(13) of this act only take effect if [RCW 74.39A.340](#) is amended or

repealed by the legislature in 2011.

(13) Sections 113 and 115(14) of this act only take effect if RCW **74.39A.350** is amended or repealed by the legislature in 2011.

(14) Sections 114 and 115(4) of this act only take effect if RCW **74.39A.009** is amended or repealed by the legislature in 2011.

(15) Section 303 of this act takes effect only if one or more other sections of this act take effect pursuant to paragraphs (1) through (14) of this section." [2012 c 1 § 301 (Initiative Measure No. 1163, approved November 8, 2011).]

Application—2012 c 1 (Initiative Measure No. 1163): "Notwithstanding any action of the legislature during 2011, all long-term care workers as defined under RCW **74.39A.009**(16), as it existed on April 1, 2011, are covered by sections 101 through 113 of this act or by the corresponding original versions of the statutes, as referenced in section 302 (1) through (13) on the schedules set forth in those sections, as amended by chapter 164, Laws of 2012, except that long-term care workers employed by community residential service businesses are exempt to the extent provided in RCW **18.88B.041**, **74.39A.056**, **74.39A.074**, **74.39A.331**, **74.39A.341**, and **74.39A.351**." [**2012 c 164 § 710**; 2012 c 1 § 303 (Initiative Measure No. 1163, approved November 8, 2011).]

Construction—2012 c 1 (Initiative Measure No. 1163): "The provisions of this act are to be liberally construed to effectuate the intent, policies, and purposes of this act." [2012 c 1 § 305 (Initiative Measure No. 1163, approved November 8, 2011).]

Effective date—2012 c 1 (Initiative Measure No. 1163): "This act takes effect sixty days from its *enactment by the people [January 7, 2012]." [2012 c 1 § 307 (Initiative Measure No. 1163, approved November 8, 2011).]

***Reviser's note:** Initiative Measure No. 1163 was approved by a vote of the people November 8, 2011. The secretary of state has determined that the effective date of Initiative Measure No. 1163 is January 7, 2012.

Short title—2012 c 1 (Initiative Measure No. 1163): "This act may be known and cited as the restoring quality home care initiative." [2012 c 1 § 308 (Initiative Measure No. 1163, approved November 8, 2011).]

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