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Court of Appeals
Division III
State of Washington
4/19/2018 3:57 PM

NO. 35339-7-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

BROOK HOWELL,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

RESPONSE TO AMICUS BRIEF

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I. INTRODUCTION

The amici Tribes identify their interest as reducing and removing unnecessary obstacles to employment for Native Americans. This is a laudable objective. In this case, however, the specific policy change advanced by the amici Tribes conflicts with the Legislature's directive that individuals with founded findings of child abuse and neglect shall not have unsupervised access to vulnerable adults. The policy concerns expressed by the amici Tribes should be addressed to the Legislature, not this Court.

The amici Tribes' legal arguments are unavailing. They do not assert that DSHS meets the statutory definition of an employer, but instead ask this Court to disregard the plain language of WLAD and import a Title VII analysis in its place. This Court should adhere to the plain language of WLAD. And, in any event, DSHS would not be an employer under the Title VII analysis. The amici Tribes are mistaken in their contention that DSHS controls nursing assistant employment. Rather, pursuant to its state and federal obligations, DSHS is one of several entities involved in the regulation of nursing assistants and some settings in which they work. Additionally, the Legislature has not granted DSHS the statutory authority to give amici Tribes the remedy they seek—expungement opportunities for founded findings of child abuse and neglect.

DSHS whole-heartedly supports the eradication of discrimination in employment. However, insofar as the statutory prohibitions on employment by persons with founded findings produce discriminatory results, the remedy lies with the Legislature, not an unprecedented expansion of WLAD's definition of "employer." This Court should affirm dismissal of the complaint.

II. ARGUMENT

Contrary to the amici Tribes' contention, this case involved "an insuperable bar to relief" for Ms. Howell. In fact, it involved two. First, the Department was not an "employer," which is a necessary element in establishing an employment discrimination claim. Second, Ms. Howell cannot show any "employment practice," which is a required component in a WLAD claim based on a disparate impact theory. *Fahn v. Cowlitz Cty.*, 93 Wn.2d 368, 375-76, 610 P.2d 857 (1980).

A. DSHS Was Not Ms. Howell's Employer Under WLAD

The amici Tribes ignore the definition of "employer" in RCW 49.60.040. Contrary to the implication of the amici Tribes, the inquiry is not whether a person or entity has an "indirect role . . . in an employer's employment decision." Amicus Br. at 7 (emphasis omitted).¹ The plain

¹ The amici Tribes filed four versions of their amicus brief, all of which appear to be substantively the same. DSHS' citations are to the last filed version, which was filed on 02/26/2018 at 2:41 p.m.

language of RCW 49.60.040(11) is substantially narrower. Under RCW 49.60.040(11), an employer is “any person *acting in the interest of* an employer, directly or indirectly” (emphasis added).

DSHS is not Ms. Howell’s employer under WLAD. WLAD defines “employer” as “any person acting in the interest of an employer, directly or indirectly” RCW 49.60.040(11). The amici Tribes do not argue that DSHS “acts in the interest” of her employer indirectly, nor could they. DSHS’ business practice of retaining founded findings and disclosing them with the consent of the subject cannot be considered acting in the interest of a person who would hire and employ Ms. Howell; rather, it is in the service of the public who determined by initiative that the background check requirements in RCW 74.39A.056 are necessary to protect the safety of vulnerable adults and based on DSHS’ business needs in order to comply with applicable statutes. Laws of 2012, ch. 1, § 1 (Initiative Measure No. 1163); *see also* Respondent’s Br. at 11-13.

Insofar as the amici Tribes are attempting to import a Title VII “indirect employer” analysis in place of the plain language of RCW 49.60.040(11), this Court should reject that invitation. Because of the “significantly different definitions,” the Washington State Supreme Court has held that cases interpreting Title VII’s definition of “employer” are not directly applicable to WLAD. *Brown v. Scott Paper Worldwide Co.*,

143 Wn.2d 349, 358, 20 P.3d 921 (2001). While Washington courts have often found that WLAD “provides greater employee protections than its federal counterparts,” *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 491, 325 P.3d 193 (2014), it does not follow that courts may ignore the plain language of WLAD in order to create such greater protections in every conceivable scenario. This Court should decline to do so here.

B. Even Applying a Title VII Indirect Employer Analysis, DSHS Was Not Ms. Howell’s “Employer”

Even if this Court were to determine that Title VII’s “indirect employer” analysis applies in lieu of WLAD’s definition of employer, DSHS still would not be an indirect employer. Title VII cases do not define “employer” to include every person or entity that has an indirect impact on an employer’s employment decision. That would be a stunning expansion of liability. Instead, to be an indirect employer under Title VII, one must have “some peculiar control over the employee’s relationship with the direct employer” and engage in “discriminatory interference.” *Anderson v. Pacific Maritime Ass’n*, 336 F.3d 924, 932 (9th Cir. 2003) (internal quote omitted).

1. DSHS Is One of Several Entities Involved in the Regulation of Nursing Assistants and Some Settings in Which They Work

The amici Tribes appear to contend that DSHS “has the power to set an absolute bar against employment” and, as a result, that it “indirectly

control[s] the act of employment.” Amicus Br. at 7. Insofar as this is intended to support the new argument made by the Appellant—made for the first time in her Reply Brief—that DSHS “exercises proprietary control over the employment and working conditions of nursing assistants,” Appellant’s Reply at 3, 8-13, the argument fails for two reasons. First, that issue is not properly before the court because Ms. Howell did not raise that issue in her Opening Brief,² and courts do not consider issues raised only by amici. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”); *In re M.J.*, 187 Wn. App. 406 n.2, 348 P.3d 1265 (2015) (“Appellate courts will not address issues argued only by an amicus.”). Second, as a matter of law, DSHS does *not* have the power to set an absolute bar to employment and does *not* exercise “peculiar control” over the employment of nursing assistants.

Contrary to the amici Tribes’ claim, DSHS is not the “gatekeeper” to the job opportunity Ms. Howell sought. *See* Amicus Br. at 7. Several entities besides DSHS are involved in the regulation of nursing assistants

² In her opening brief, Ms. Howell did not argue that DSHS was an employer by virtue of its control over the working conditions of nursing assistants. Instead, her argument was limited to the contention that DSHS was Ms. Howell’s employer because it “indefinitely maintain[ed] CPS findings while knowing that they served as automatic disqualifiers for certain employment opportunities.” Appellant’s Opening Br. at 18.

and the settings in which they work.³ Ms. Howell was pursuing a career as a nursing assistant. Nursing assistants are certified by the Department of Health (DOH), not DSHS. RCW 18.88A.040(2), .085. Ms. Howell entered a Nursing Assistant-Certified (NAC) program to obtain an NAC license. CP 5, ¶ 9. DOH is the “disciplining authority that has the right to grant or deny licenses” to NACs. RCW 18.130.040(2)(a)(xii). The Washington State Nursing Care Quality Assurance Commission, under the umbrella of DOH, approves NAC training programs and reviews them for state compliance. RCW 18.88A.020(2), .060; RCW 18.79.070.

Under federal law, nursing assistants who seek employment in Medicare/Medicaid certified nursing facilities must be certified “nurse aides.” 42 U.S.C. § 1395i-3(a)(5)(F). DSHS is the federally designated “state agency” responsible for maintaining the “nurse aide registry” and for reviewing programs that offer certified nursing assistant training and testing⁴ required in Washington state. 42 C.F.R. §§ 483.152, .156

³ As of July 1, 2018, DSHS’ duties to investigate allegations of child abuse and neglect, make findings that the allegation is founded or unfounded, and retain such records will transfer from DSHS to the Department of Children, Youth, and Families (DCYF). Laws of 2017, 3rd Spec. Sess., ch. 6, §§ 321-22.

⁴ The programs are known as Nurse Aide Training and Competency Evaluation Programs (NATCEP).

In order to protect vulnerable adults and to comply with federal and state law, including RCW 74.39A.056, DSHS' rules prohibit providers and their staff (including nursing assistants) who have findings of abuse and neglect from having unsupervised access to vulnerable individuals. These rules apply in long-term care settings that are licensed or certified by DSHS. DOH nursing assistant certification is voluntary for nursing assistants who work in other health care facilities, such as physicians' offices, hospitals, or hospice care, and DSHS' rules do not apply. RCW 18.88A.030(2)(b).

Thus, DSHS' role in the nursing assistant field is primarily limited to long-term care facilities. It cannot be said, therefore, that DSHS exerts "peculiar control" over nursing assistant employment. *See Anderson*, 336 F.3d at 932. It is one of several entities involved in the regulation of nursing assistants, pursuant to its state and federal requirements. It does not grant or deny nursing assistant licenses, and its regulations do not apply to several settings in which a nursing assistant may work, such as physicians' offices, hospitals, or hospice care. As a result, even under a Title VII indirect employer analysis, DSHS was not Ms. Howell's employer.

2. Even if DSHS Were an "Employer," It Cannot Provide the Relief Sought by the Amici Tribes

The amici Tribes seek to compel DSHS to "put in place a process that allows" a person with a founded finding of child abuse or neglect to

“expunge” that finding “for good cause.” Amicus Br. at 4. But the assertion by the amici Tribes that DSHS “has the discretion, through its rulemaking authority, to control the impact of a ‘founded finding’ on job applicants” is incorrect. Amicus Br. at 7. The Legislature, not DSHS, determined the impact founded findings have on certain types of employment. Employment in settings like nursing homes, where the individual has unsupervised access to vulnerable adults, is governed by RCW 74.39A.056. That statute prohibits providers and their staff from being “employed in the care of and hav[ing] unsupervised access to vulnerable adults” if they have “a final substantiated finding of abuse, neglect, exploitation, or abandonment of a minor” that is “entered into a state registry.” RCW 74.39A.056(2).

DSHS does not have discretion or authority to create the expungement process that the amici Tribes advocate; doing so would exceed DSHS’ statutory authority. Administrative agencies have only those powers expressly delegated to them. *Campbell v. Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004) (“In order for an administrative rule to have the force of law, it must be promulgated pursuant to delegated authority.”). No statute expressly gives DSHS authority to

expunge founded findings of abuse or neglect of a child.^{5,6} Where the Legislature intends to give DSHS authority to disregard statutory disqualifications, it has done so expressly. *See* RCW 9.97.020(b) (giving DSHS authority to disregard the disqualifications in RCW 43.20A.710 in specific, narrowly-drawn circumstances). Similarly, where the Legislature has given DSHS authority to destroy records, it has done so in no uncertain terms. *E.g.*, RCW 26.44.031(2) (instructing that DSHS “shall destroy” screened-out reports and unfounded or inconclusive reports within certain timeframes).

Further evidence that the Legislature did not intend to create an expungement process for persons who care for vulnerable adults is reflected in its recent creation of “certificates of restoration of opportunity.” *See* RCW 9.97.020. Such a certificate precludes government agencies from disqualifying persons from employment based solely on the applicant’s criminal history. RCW 9.97.020(1). However, the Legislature expressly

⁵ This is distinguishable from those instances in which a federal statute requires the creation of a procedure by which the names of persons with founded findings of neglect of residents of nursing home facilities can be removed from the registry. 42 U.S.C. § 1396r(g)(1)(D); *see also* WAC 388-71-01275(3)(d).

⁶ DSHS investigates allegations of child abuse and neglect and upon completion, makes a finding whether the report is founded or unfounded. RCW 26.44.030(12)(a). DSHS retains these records for a minimum of 35 years, in accordance with the retention schedule set by the State Records Committee. RCW 40.14.050 (only the State Records Committee has authority to dictate the minimum length of time that agencies must retain records); RCW 26.44.030 (maintenance of founded findings); WAC 388-15-077(5); *see also* Respondent’s Br. at 5.

provided that “[a] certificate of restoration does not apply to the state abuse and neglect registry” and that the statute “does not apply to . . . vulnerable adult care providers.” RCW 9.97.020(1)(a)(ii), (4)(a). The exclusion of these categories reflects the Legislature’s intent not to have an expungement process for founded findings of child abuse and neglect.

The limitations in the certificate of restoration statute are incongruent with the amici Tribes’ assertion that DSHS has discretion under its rulemaking authority to control the impact of founded findings on employment opportunities. Had the Legislature intended to grant DSHS the authority to create an expungement process for founded findings, the certificate of restoration bill would have been an appropriate act in which to do so. Instead, the Legislature balanced the competing policy objectives between restoration of employment opportunities and its goal of keeping vulnerable adults safe, and it prioritized the protection of vulnerable adults. *See also* Respondent’s Br. at 18-19. “Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice.” *Rodriguez v. United States*, 480 U.S. 522, 526, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987).

In sum, even if the inquiry into whether DSHS was Ms. Howell’s employer turns on DSHS’ ability to expunge records of founded findings of

child abuse or neglect, the amici Tribes are incorrect in their contention that DSHS has the authority to create an expungement process.

C. DSHS' Retention of Founded Findings Is Not an "Employment Practice"

Contrary to the argument of the amici Tribes, there was a second "insuperable bar to relief" in this case: DSHS' retention and disclosure of founded findings is not an "employment practice." A claim of disparate impact requires that there be an "employment practice." *Fahn v. Cowlitz Cty.*, 93 Wn.2d at 375-76. Ms. Howell specifically identified the purported "employment practice" as "the Department's policy of retaining and reporting founded findings of child abuse or neglect without providing a means for expungement" Appellant's Br. at 13. But DSHS' retention and disclosure of founded findings of child abuse and neglect is not an employment practice. Rather, it is a business practice of the agency for purposes of having child welfare records, including founded findings of child abuse and neglect, available to social workers working with families to meet its obligation to reunify families, pursue placement with relatives, and obtain permanency for children in its care, custody, and control. *See generally* 42 U.S.C. § 671 (requiring notification of removal of children to relatives and reasonable efforts to place with relatives and siblings, prevent removal, and facilitate permanency, much of which requires retention of

historical information including founded findings); *see also* RCW 13.34.020 (“the family unit is a fundamental resource of American life which should be nurtured”); *see also* RCW 13.34.110(2) (the dependency court may consider the family’s history of past involvement with child protective services for “the purpose of establishing a pattern of conduct, behavior, or inaction with regard to the health, safety, or welfare of the child”); *see also* RCW 13.34.136 (preference for relative placement); *see also* Respondent’s Br. at 8-11. The trial court agreed. In its oral ruling, the trial court said:

I think that keeping the record is a basic governmental function that, in fact, the legislature requires—essentially requires the Department to keep these records. And certainly, there’s no direct authorization in any of the statutes that have been cited where the legislature in any way directs the Department to have any process that results in the deletion of any records. I’m not convinced the Department even has the authority to do that. I’m not convinced that the Department stands in any role remotely akin to an employer for the purposes of the [WLAD] simply because they keep these records that potential employers consult, because the legislature said we need to keep these records so employers can consult them and actually require some potential employers to consult them.

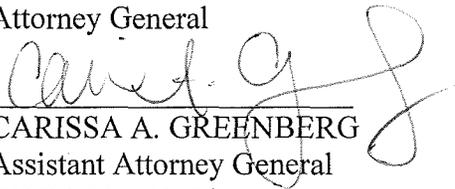
RP at 38-39 (emphasis added). The trial court did not err and properly dismissed the complaint. This Court should affirm that dismissal.

III. CONCLUSION

This Court should decline the invitation to uproot statutory construction and replace WLAD's definition of "employer" with a Title VII analysis. DSHS does not control the nursing assistant profession, and providing the remedy the amici Tribes say it must would be beyond DSHS' delegated authority. The trial court properly understood Ms. Howell's claim and dismissed it because DSHS is not an employer, and its retention of founded findings is not an employment practice. This Court should affirm.

RESPECTFULLY SUBMITTED this 19th day of April, 2018.

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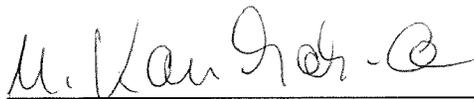
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April 19, 2018 - 3:57 PM

Transmittal Information

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

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