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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PATRICIA BLACKBURN, ET AL.,

Plaintiffs/Appellants,

vs.

STATE OF WASHINGTON DEPT OF SOCIAL & HEALTH SERVICES,
ET AL.,

Defendants/Respondents.

FILED E
APR - 6 2016
WASHINGTON STATE
SUPREME COURT
h/L

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the proper interpretation and application of the Washington Law Against Discrimination, Ch. 49.60 RCW (WLAD).

II. INTRODUCTION AND STATEMENT OF THE CASE

This case is before the Court on direct review and involves a number of issues regarding proper interpretation and application of the WLAD in an employment discrimination context. This brief addresses only whether, with respect to disparate treatment claims, an employer's subjective intent, borne out of either ill will or good will, plays any role in determining liability.¹

¹ This brief uses the term "subjective intent" as referring to a state of mind that is either hostile toward a protected characteristic or benevolent in nature. As developed, *infra*, to the extent the State urges the relevance of either state of mind in evaluating the WLAD discrimination claims in question, this brief challenges that position.

Patricia Blackburn and eight other employees of Western State Hospital (Blackburn) sued the State of Washington Department of Social & Health Services and Western State Hospital (State), alleging employment discrimination under the WLAD for disparate treatment and hostile work environment. The underlying facts are set forth in the briefing of the parties and the trial court's amended findings of fact and conclusions of law. See Blackburn Amended Br. at 1, 3-19; State Br. at 1-2, 3-9, 30-32; Blackburn Reply Br. at 1, 8-11; CP 2709-2712 (amended findings and conclusions). The principal focus of the briefing on appeal is the claim of disparate treatment.

Following a bench trial, the trial court entered amended findings of fact and conclusions of law dismissing Blackburn's disparate treatment and hostile work environment claims. This Court accepted direct review of Blackburn's appeal, challenging the decision below on multiple grounds.

The briefing of the parties involves a myriad of legal issues bearing on whether WLAD discrimination occurred, and these arguments are not recounted here. What is of particular concern, for purposes of this brief, is whether the requirement in WLAD disparate treatment cases that there be a "discriminatory motive" or "discriminatory animus" necessitates proof of an employer's subjective intent manifesting ill will or the like, or,

alternatively, whether an employer's benign subjective intent may operate as a defense to otherwise discriminatory conduct.

On review, Blackburn questions whether the trial court imposed on plaintiffs an ill will-type "animus" requirement in deciding this case. See Blackburn Amended Br. at 39 (quoting Conclusion of Law 4); Blackburn Reply Br. at 8-11. Blackburn argues that this Court's teaching in Franklin County v. Sellers, 97 Wn.2d 317, 646 P.2d 113 (1982), supported by analogous federal authority, makes clear that under the WLAD discriminatory motive or animus does not require proof of a subjective ill will, or the like. See Blackburn Amended Br. at 38-41.

The State's response to this argument is, at best, unclear, and does not seem to acknowledge that ill will is irrelevant in determining liability for disparate treatment. See State Br. at 1, 17-19. Instead, a fair reading of the State's argument suggests either that it considers an employer's subjective ill will necessary for liability under these circumstances, or that an employer's benign subjective intent may serve as a defense to liability. See State Br. at 1 (noting absence of "allegation of racial animus"); id. at 19 (distinguishing federal cases relied upon by Blackburn on the basis that

they involve "a job assignment based on the false belief, following from repugnant stereotypes").²

In light of the foregoing, this brief focuses on whether a defendant's ill will, or lack thereof, is relevant in resolving employment discrimination claims under the WLAD.

III. ISSUES PRESENTED

Whether a plaintiff in WLAD employment discrimination cases must prove the defendant had a subjective intent to discriminate manifesting ill will, or the like? Otherwise, does a defendant's benign subjective intent play any role in determining liability under the WLAD?

IV. SUMMARY OF ARGUMENT

To the extent the State argues in this case that either (1) a plaintiff's proof of WLAD discrimination requires evidence of a defendant's subjective intent manifesting ill will or the like, or (2) that a defendant may avoid liability when its subjective intent is benign, it is incorrect. Generally, for purposes of employment discrimination, a defendant exhibits "discriminatory animus" when it engages in purposeful conduct based upon a

² In responding to Blackburn's argument, the State does not address the relevance of Franklin County v. Sellers, *supra.*, and Lewis v. Doll, 53 Wn.App. 203, 765 P.2d 1341, *review denied*, 112 Wn.2d 1027 (1989), both of which are cited by Blackburn and touch upon the impact of a defendant's subjective beliefs in determining liability under the WLAD. See Blackburn Amended Br. at 38-39.

protected characteristic that is a substantial factor in the employer's decision. Subjective intent is irrelevant.

V. ARGUMENT

Proof of "discriminatory animus" or "discriminatory motive" in WLAD disparate treatment cases does not require evidence of a subjective intent manifested by ill will, or the like; similarly, an employer's benign subjective intent cannot serve to excuse otherwise discriminatory conduct.

RCW 49.60.180(1)-(4) set forth the grounds for claims of unfair employment practices under the WLAD. For purposes of this brief, the applicable provision is sub-section .180(3). RCW 49.60.180(3) provides that it shall be an unfair practice for an employer “[t]o discriminate against any person in compensation or in other terms or conditions of employment *because of* age, sex, marital status, sexual orientation, race, creed, color, national origin” (Emphasis added).³

Generally, the phrase “because of” under the WLAD has been construed by this Court to require that the employee’s protected status be a “substantial factor” in bringing about the employer's decision. Mackay v.

³ The full text of the current version of RCW 49.60.180 is reproduced in the Appendix to this brief. RCW 49.60.180(1) & (2) address claims for refusal to hire and for discharge, respectively, and are not at issue in this case. Subsection .180(4) addresses situations in which employers “print, circulate, or cause to be printed or circulated any statement,” or make “any inquiry in connection with prospective employment” that “expresses a limitation, specification, or discrimination” on the basis of a protected characteristic. Blackburn also invokes .180(4) in the course of argument. See Blackburn Amended Br. at 31-32; Blackburn Reply Br. at 17.

Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 306-12, 898 P.2d 284 (1995) (collecting cases). While this Court has indicated that WLAD disparate treatment claims require proof of "discriminatory motive," Shannon v. Pay 'n Save, 104 Wn.2d 722, 733, 709 P.2d 799 (1985), or "discriminatory animus," Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 359, 172 P.3d 688 (2007), the relevant inquiry is whether the WLAD defendant acted knowingly and purposefully on the basis of the plaintiff's protected characteristic and whether the protected characteristic was a substantial factor in bringing about the employer's decision. See E-Z Loader Boat Trailers, Inc. v. Traveler's Indem. Co., 106 Wn.2d 901, 910, 726 P.2d 439 (1986) (purposeful); Scrivener v. Clark College, 181 Wn.2d 439, 444-46, 334 P.3d 541 (2014) (substantial factor); see also 6A WASH. PRAC., WPI 330.01 & Comment at 345-46 (2012) (disparate treatment pattern instruction). No Washington case law interpreting the WLAD has read into RCW 49.60.180 disparate treatment claims a requirement that a defendant's subjective intent manifests an ill will or the like in order to establish liability. Proof of ill will is unnecessary.⁴

⁴ This analysis is wholly consistent with recognition that WLAD discriminatory acts are torts, and that liability for an intentional tort such as an assault does not rest upon proof of subjective ill will, or the like. See Blair v. Washington State University, 108 Wn.2d 558, 575, 740 P.2d 1379 (1987) (characterizing WLAD discrimination as a tort); cf. Restatement (Second) of Torts, § 34 (1965) (providing that intent necessary for liability for civil assault does not require proof of personal hostility).

An employer's benign subjective intent is also irrelevant in determining WLAD liability for discriminatory conduct, and cannot serve as a basis for avoiding liability. As Blackburn notes, in Franklin County v. Sellers, *supra.*, this Court upheld liability for sex discrimination in hiring notwithstanding the county's benign intent to achieve gender balance in its workforce, in the absence of a bona fide occupational qualification defense. *See* 97 Wn.2d at 328-29; Blackburn Amended Br. at 39-40. This same principle is reflected in Xieng v. People's Nat. Bank of Washington, 120 Wn.2d 512, 519-22, 844 P.2d 389 (1993) (holding that an employer's good faith belief that a natural origin accent materially interfered with job performance was not enough to avoid WLAD liability); Kastanis v. Educ. Employees Credit Union, 122 Wn.2d 483, 499, 859 P.2d 26, 865 P.2d 507 (1993) (holding that "a good faith belief is not a defense in a case alleging a discriminatory discharge," and an employer must instead establish a "factual basis" for the employee's discharge).⁵

WLAD decisional law involving public accommodation discrimination claims under RCW 49.60.030 and RCW 49.60.215 is to the same effect. *See* Fell v. Spokane Transit Auth., 128 Wn.2d 618, 911 P.2d 1319

⁵ Cf. International Union v. Johnson Controls, Inc., 499 U.S. 187, 199-200 (1991) (recognizing under Title VII, 42 U.S.C.A. § 2000e et seq., that an employer's benign motive did not alter the intentionally discriminatory nature of its policy).

(1996); Lewis v. Doll, supra. In Fell, this Court confirmed that WLAD public accommodation liability turns on the act of the defendant, and "has nothing to do with the subjective intent of the defendant." 128 Wn.2d at 642 n.30. In Lewis, the Court of Appeals held refusal of service to a member of the public could not be based solely on race, and the fact that the business proprietor did not intend discriminatory effect is irrelevant. See 53 Wn. App. at 210.

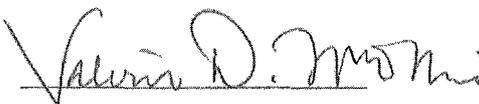
A defendant's subjective intent plays no role in determining liability for WLAD disparate treatment claims. Generally, the focus is on the conduct – or act – of the defendant, and whether the protected characteristic is a substantial factor in the employer's decision. See Scrivener, 181 Wn.2d at 444. To the extent the State contends otherwise, this argument must be rejected.⁶

⁶ The subjective intent analysis regarding disparate treatment claims should apply equally to hostile work environment claims. See generally Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 406-07 (1985) (describing elements of a hostile work environment claims).

VI. CONCLUSION

The Court should adopt the argument advanced in this brief in the course of resolving this appeal.

DATED this 21st day of March, 2016.

 
FOR BRYAN P. HARNETIAUX, VALERIE D. McOMIE
With Authority
On Behalf of WSAJ Foundation

Appendix

West's RCWA **49.60.180**

49.60.180. Unfair practices of employers

Effective: July 22, 2007

Currentness

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, 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, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation.

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, 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.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, 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: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, 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, or any intent to make any such limitation,

specification, or discrimination, unless based upon a bona fide occupational qualification:
PROVIDED, Nothing contained herein shall prohibit advertising in a foreign language.

Credits

[2007 c 187 § 9, eff. July 22, 2007; 2006 c 4 § 10, eff. June 8, 2006; 1997 c 271 § 10; 1993 c 510 § 12; 1985 c 185 § 16; 1973 1st ex.s. c 214 § 6; 1973 c 141 § 10; 1971 ex.s. c 81 § 3; 1961 c 100 § 1; 1957 c 37 § 9. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

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Dear Mr. Carpenter:

On behalf of the WSAJ Foundation, a letter request to file an Amicus Curiae Brief and accompanying Amicus Curiae Brief (with Appendix) are attached to this email. Counsel for the parties are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

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