

No. 94209-9

IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

Certified Question
Propounded by The Hon. Justin L. Quackenbush
United States District Judge
United States District Court (E.D. Wash.)

ZIN ZHU,

Plaintiff,

vs.

**NORTH CENTRAL EDUCATIONAL
SERVICE DISTRICT NO. 171,**

Defendant.

DEFENDANT'S REPLY BRIEF

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I. REPLY TO PLAINTIFF’S INTRODUCTION

Plaintiff asserted: “ESD 171 can find no support for its position in the plain text of the WLAD, this Court’s prior decisions, or in the decisions of any courts nationwide.” (Plaintiff’s response at 1.) Court opinions discussed cited by the District provide support for the District’s position based on the text of RCW 49.60.210(1). This Court has never held that there is a retaliation cause of action under the statute at issue under the facts involved in this case. Additionally, Plaintiff has not cited any decision from any state court in the nation with state anti-retaliation statutes similar to RCW 49.60.210(1) that permits a cause of action under facts such involved in this case. The District has cited state court cases from other jurisdictions supporting the District’s position on the certified issue. Plaintiff’s assertion at 1: “All state and federal courts that have squarely addressed the issue presented here, as well as the EEOC, have come down against ESD 171’s position.” Plaintiff’s assertion is factually inaccurate.

II. REPLY TO PLAINTIFF’S STATEMENT OF THE CASE

Plaintiff went into great detail about his version of the facts. (Plaintiff’s response at 3-8.) Although an extended discussion of the facts

is not required for this Court to decide the certified issue, some additional facts are set forth in view of the extensive facts cited by Plaintiff.

“On Sept. 28, 2010, Mr. Zhu filed a Title VII federal race discrimination and retaliation suit against Waterville School District” (Judge Quackenbush’s certification at 3.) “Mr. Zhu settled the case on March 13, 2012, and, as a condition of settlement, resigned his position with Waterville.” (*Id.*)

“ESD 171’s Assistant Fiscal Director Sally Ryan, who managed Waterville’s finances [attended] the March 13, 2012 settlement conference regarding Mr. Zhu’s case against Waterville.” (*Id.* at 4.) “ESD 171 helped process the *Zhu v. Waterville* settlement payment.” (*Id.*)

There was no evidence that Ms. Ryan had anything to do with Plaintiff’s application for employment with the District.

Plaintiff was one of five applicants for a math-science specialist job that was posted by the District on May 25, 2012. (*Id.* at 4-5.) “Other employees of ESD 171, including Superintendent Richard McBride and at least two of the members of a hiring panel that would later evaluate Mr. Zhu’s May 2012 employment application and sit in on Mr. Zhu’s June 12, 2012, interview, were aware of the Waterville litigation.” (*Id.* at 4.)

There was no evidence that Supt. McBride had anything to do with the recommendations made by the hiring committee. Supt. McBride simply accepted the hiring committee's recommendation.

On May 30, 2012, Plaintiff applied for a job with the District. (ECF 31-3 ¶ 9.) There were four members of the District's hiring committee: Mary Jane Ross, Mechelle LaLanne, Cindy Duncan and Suzanne Reister. (ECF 35 35 SSF 7, Reister tr. 91-93.) Ms. Ross and Ms. LaLanne testified that they were not aware that Plaintiff had a lawsuit against Waterville. (Ross tr. at 30-31 and LeLanne tr. at 19.) Ms. Duncan was not even asked if she was aware that Plaintiff filed a lawsuit against Waterville. (Duncan tr.)

Plaintiff's dispute with Waterville was covered in *The Wenatchee World*. Before trial Plaintiff filed four news article from the newspaper: *Teacher says he doesn't know why he's on paid leave* (undated), *Former teacher files suit* (Oct. 9, 2010); *Waterville follows court order, reinstates fired math teacher* (Sept. 21, 2011) and *Teacher will get \$430,000 to leave* (March 21, 2012). (ECF 31-3.) None of the news articles were admitted into evidence.

The only member of the hiring committee at the District who read about Plaintiff's dispute at Waterville was Suzanne Reister. She assumed that she read an article before Plaintiff applied for a job with the District;

she knew that Plaintiff filed a lawsuit against Waterville; she only recalled “that there were some issues with his employment” and her reading of the article had nothing to do with her decision regarding whether the District would hire Plaintiff. (Reister tr. at 22, 38, 39, 83, 84.) There was no evidence that Ms. Reister knew that Plaintiff’s dispute with Waterville was a racial discrimination/national origin lawsuit. Ms. Reister simply knew from the news article that “there was a lawsuit.” (ECF 31-1 ¶ 7.) Ms. Reister admitted that she had read *something* about Plaintiff’s lawsuit against Waterville but she did not remember any of the details. (Reister tr. 22, 38, 39, 83, 84.) “All I remember it [the news article] stating that there was a lawsuit,” Ms. Reister testified. (Reister tr. 83.)

At the end of the hiring committee’s deliberations it was unanimous that Mr. Hickman was the best candidate for the job. (ECF 35 SSF 9, Reister tr. 102-03, Ross tr. 27.) Mr. Hickman was way out ahead of the other candidates. (ECF 35 SSF 9, Reister tr. 99-100.) The committee ranked Mr. Kelley as the second strongest candidate and Plaintiff behind Mr. Kelley. (ECF 35 SSF 9, Reister tr. 102.)

All four members of the hiring committee testified unequivocally that their unanimous decision to hire Andrew Hickman instead of Plaintiff and the decision had absolutely nothing to do with any lawsuit that Plaintiff brought against Waterville or because of Plaintiff’s race and

nationality. (Reister tr. at 103-05, Duncan tr. at 10-11, Ross tr. at 24, 30-31 and LeLanne tr. at 19-20.)

The position for which Plaintiff applied required a Bachelor's Degree in Education, three years of teaching mathematics, and understanding of Washington's Math and Science Standards, effective communication skills and the ability to manage, prioritize and meet deadlines. (ECF 35 SSF 4.) The position's preferred (but not required) skills included a Master's Degree in Education or math/science, five years teaching in math or science, teacher leadership experience with multiple bands and vertical teams, extensive knowledge of research-based instructional strategies and assessment practices, experience in managing workshops and special events and successful leadership skills in school improvement planning and/or effective educational practices. The successful candidate had experience in the underlined areas and Plaintiff did not. (ECF 35 SSF 17, 18.)

All five applicants were first screened by District staff. (ECF 35 SSF 7, Reister tr. 32, 90.) After the initial screening, Plaintiff and two other candidates – Andrew Hickman and Jeremy Kelley – were invited to interview for the position. (*Id.*)

During the interview process each committee member made notes of the candidates' answers to questions. (ECF 35 SSF 8, Reister tr. 34-35,

38-39.) At the conclusion of the interviews each committee member independently determined that Mr. Hickman was the best qualified candidate for the job. (ECF 35 SSF 8, Reister tr. 100-02). After all interviews were completed the committee members discussed their notes and reached a consensus to recommended Mr. Hickman. (ECF 35 SSF 8, Reister tr. 103, Ross tr. 27.) During the discussions each member of the interview committee rated Mr. Hickman as the top candidate; he was everyone's first choice and the strongest candidate. (ECF 35 SSF 8, Reister tr. 100, 102-03, Ross tr. 27.)

Mr. Hickman was extremely confident in his answers to the scenario questions and Ms. Ross had never seen anyone else field the questions as professionally and profoundly as Mr. Hickman. (ECF 35 SSF 28, Ross tr. 22-23.) On the other hand, Plaintiff struggled in answering the scenario questions. (ECF 35 SSF 29, Ross tr. 24-25.) Plaintiff did not give strong answers and did not address the questions directly. (ECF 35 SSF 29, Ross tr. 24-25.)

III. REPLY TO PLAINTIFF'S ARGUMENT

A. THE PLAIN LANGUAGE OF THE STATUTE DOES NOT SUPPORT A RETALIATION CAUSE OF ACTION IN THIS CASE.

RCW 49.60.210(1) provides:

It is an unfair practice for any **employer, employment agency, labor union, or other person** to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

(Emphasis added.)

The statute was interpreted in *Owa v. Fred Meyer Stores*, 2017 WL 897808, *2 (W.D.Wash. 2017). The district court stated at *2 that the term “or other person” is restricted by the words “employer,” “employment agency” and “labor union.” The district court in *Owa* concluded at *3: “Upon finding no such employer-employee relationship exists between Fred Meyer and Plaintiff, the Court **DISMISSES** with prejudice Plaintiff’s claims for retaliation” (Emphasis in original.) Here, as in *Owa*, there was never an employer-employee relationship that existed between the District and Plaintiff.

Plaintiff asserted: “There is simply no ambiguity in this statute” (Plaintiff’s response at 10.) If the statute was not ambiguous, then Judge Quackenbush would not have needed to certify the issue to this Court. Judge Quackenbush specifically stated that “in light of the fact **the scope of RCW 49.60.210(1) is unclear**, the court will grant certification of the question of local law to the Washington Supreme Court.” *Zhu v. North Central Educ. Service Dist.*, 2016 WL 7428204, *11 (E.D.Wash.

2016). (Emphasis added.) The district court also stated: “If RCW 49.60.210(1) has been extended to prospective job applicants, this determination should be made by the State of Washington courts, not this court.” *Id.*

Plaintiff did not directly address the District’s argument that the Legislative history of the 1985 amendments does not suggest that the Legislature intended for the statute to apply in the manner advanced by Plaintiff. Plaintiff’s entire argument is footnote 2 of Plaintiff’s response. Plaintiff simply asserted: “There was no need [for the Legislative history] to mention the addition of job applicant protection when they were already covered by the statute.” If the Legislature intended to amend the retaliation statute to apply to the fact pattern in this case then it would be expected that such a significant change in the law would have been mentioned by the Legislature. In *Jones v Lodge at Torrey Pines Partnership*, 42 Cal.4th 1158, 177 P.3d 323, 72 Cal.Rptr. 624 (Cal. 2008), the California Supreme Court interpreted Cal. Gov’t Code § 12940(h), which is almost identical to our state’s anti-retaliation statute. The *Jones* court stated at 632:

If plaintiff is correct that the word “person” makes individuals liable for retaliation, then the legislation that added that word created individual liability where none had existed previously.

The *Jones* court stated at 634:

The legislation passed by a vote of 32 to 0 in the Senate and 64 to 9 in the Assembly. . . . It is hard to imagine that a bill that created individual liability for retaliation where none had existed could be considered noncontroversial.

Here, the amended statute was not thought to be controversial or substantive given the fact that the amendments passed 96 to 0 in the House and 44 to 5 in the Senate.

B. PLAINTIFF LACKS BINDING AND PERSUASIVE CASE LAW TO SUPPORT A CAUSE OF ACTION IN THIS CASE.

1. Judicial interpretations of the WLAD.

This Court and the Courts of Appeal have never interpreted the WLAD in the manner urged by Plaintiff. The WLAD is to be construed liberally. *State v. Arlene's Flower's, Inc.*, -- Wn.2d --, 389 P.3d 543, 553 (2017); RCW 49.60.020. But that does not mean that this Court should interpret RCW 49.60.201(1) in a manner that was not intended by the Legislature.

Plaintiff advanced an argument that an “implied cause of action” should be recognized. (Plaintiff’s response at 16-17.) The case cited by Plaintiff involving an implied cause of action is not applicable to this case. Plaintiff cited *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), which held that a cause of action for age discrimination is implied under a

statute making it an unfair employment practice to discriminate against an employee who is between the ages of 40 and 70. *Bennett* was distinguished in *Amaker v. King County*, 479 F.Supp.2d 1162 (W.D.Wash. 2007), where Judge Pechman stated at 1163:

Moreover, in terms of the second *Bennett* prong, the cases cited by Plaintiff do not support her contention that the legislative intent supports creating a remedy here. . . . *Bennett* and *Wingert* both involved statutes that specifically granted rights to an identifiable class without providing an express cause of action for that class. . . Unlike the laws at issue in those cases, this case involves a statute that does not clearly grant rights to an identifiable class. Plaintiff has not cited any legislative history suggesting that the legislature intended to create a remedy for relatives of the deceased.

The issue here is how the statute at issue should be construed and the intention of the Legislature when it amended the statute.

In the District's opening brief it cited *Lechner v. The Boeing Co.*, 2017 WL 347080 (W.D.Wash. 2017) and explained that defendant simply failed to make the argument that is advanced by the District in this case. Plaintiff argued that because the opinion did not raise the argument advanced by the District in this case it "speaks volumes about the argument's viability." (Plaintiff's response at 18.) This case should not be decided just because "a powerful and sophisticated corporation that retains fully capable counsel" (*Id.*) failed to recognize the lack of Legislative intent when it amended the statute at issue.

If the statute is to be interpreted in the manner advanced by Plaintiff then the Court of Appeal’s decision was incorrect in *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn.App. 927, 965 P.2d 1124 (1998), *rev. denied* 137 Wn.2d 1029, 980 P.2d 1284 (1999). The *Malo* court held that a co-employee, who would qualify as a “person,” could not be liable if he discriminated against a “person.” This Court should adopt the interpretation set forth in *Owa v. Fred Meyer Stores*, 2017 WL 897808, *2 (W.D.Wash. 2017): “the term ‘or other person’ is restricted by the words ‘employer,’ ‘employment agency,’ and ‘labor union.’” (*Citing Malo*, 92 Wn.App. at 965.)

2. Federal Civil Right Law.

Plaintiff cited the EEOC Compliance Manual (EEOCCM) to support a retaliation cause of action in this case. EEOCCM § 8-II(B)(3)(d) provides, when analyzing claims of retaliation *under certain federal statutes* enforced by the EEOC: “There is no requirement that the entity charged with retaliation be the same as the entity whose allegedly discriminatory practices were opposed by the charging party.”¹ The United

¹ The federal anti-retaliation statutes enforced by the EEOC are Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); Section 4(d) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(d); Section 503(a) and (b) of the Americans with Disabilities Act (ADA), 42 U.S.C. §12203(a), (b) and Section 15(a)(3) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3). The federal courts have held that under the ADA and the FLSA a defendant must be an “employer” of plaintiff to be liable. *See, e.g., Sheriff v. State Farm Ins. Co.*, 2013 WL 4084081, *4 (W.D.Pa. 2013) (under the ADA, “[t]o construe the term ‘employee’ to include job

States Supreme Court has held that “interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant *Chevron*-style deference.”² *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). *See also Reno v. Koray*, 515 U.S. 50, 61 (1995) (an internal agency guideline, which was not “subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment,” was only entitled only to “some deference”); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-58 (1991) (interpretative guidelines do not receive *Chevron* deference); *Peterson v. Kitsap Community Fed. Credit Union*, 171 Wn.App. 404, 423 n. 20, 287 P.3d 27 (2012) (following *Christensen* and finding that two federal credit union administration opinion letters were unpersuasive).

The EEOC’s interpretation is simply “entitled to respect” to the extent it has the “power to persuade” *Christensen*, 529 U.S. at 587, quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

applicants would require ignoring the plain language of the statute and would extend the section’s purview beyond that for which Congress provided”) and *Dellinger v. Science Applications Intern. Corp.*, 649 F.3d 226, 229, 230 (4th Cir. 2011) (under the FLSA, “an applicant who never began or performed any work could not, by the language of the FLSA, be an ‘employee.’” -- “An employee may only sue *employers* for retaliation” -- “We have been unable to find any case that extends FLSA protection to applicants or prospective employees.”) (emphasis in original). Moreover, the ADA defines the term “employee” as “an individual employed by an employer.” 42 U.S.C. § 12111(4).

² *Chevron*-style deference was based on the Court’s opinion in *Chevron USA, Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

Plaintiff cited *McMenemy v. City of Rochester*, 241 F.3d 279 (7th Cir. 2011), and *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), which do not support a retaliation claim in this lawsuit.

In *McMenemy*, plaintiff was a former firefighter for the City of Rochester and the former treasurer of the firefighters' union. Plaintiff alleged that he was passed over for promotion by defendant city in retaliation for his investigation of a sexual harassment complaint by the female secretary of the firefighters' union against the male president of the union. *Id.* at 281. Plaintiff sued his former employer and his former union. *Id.* The *McMenemy* court stated at 285 that "the members and officers of the Union, who may have had an interest in retaliating against McMenemy, were also employees of the City whose retaliation against McMenemy they may have been able to orchestrate." Therefore, the *McMenemy* court allowed plaintiff's retaliation action to go forward against plaintiff's former union. The *McMenemy* court stated in passing at 284:

We think that Title VII protects an employee from *any* employer, present or future, who retaliates against him because of his prior or ongoing opposition to an unlawful employment practice of participation in Title VII proceedings.

(Emphasis in original.) This passage was dicta because it was not necessary to decide the issue in *McMenemy*, which did not involve the

issue in this case. This passage was cited in *Despot v. Baltimore Life Ins. Co.*, 2016 WL 4148085, *9 (W.D.Pa. 2016) (the district court indicated that such a claim might be made but dismissed plaintiff's lawsuit because plaintiff threatened to sue a prospective employer if he was not hired);³ *Rolle v. Educational Bus Transp., Inc.*, 2014 WL 4662256, *7 (E.D.N.Y. 2014) (plaintiff sued his former employer for retaliation); *Ruggerio v. Dynamic Elec. System, Inc.*, 2012 WL 3043102, *9 (E.D.N.Y. 2012) (plaintiff sued his former employer for retaliation) and *Lott v. Tradesmen Intern., Inc.*, 2012 WL 2374238, *2 (E.D.Ky. 2012) (plaintiff sued his former employer for retaliation).

The *McMenemy* opinion was distinguished in *Kunzler v. Canon, U.S.A., Inc.*, 257 F.Supp.2d 574 (E.D.N.Y. 2003), which held that alleged harassment by a supervisor of a customer was not an unlawful practice protected by Title VII for which an employee could assert a retaliatory discharge claim.

In *Robinson v. Shell Oil Co.*, the Court held that a former employee could bring a Title VII retaliation claim *against his former*

³ Additionally, the statutes at issue in *Despot* included 42 U.S.C. § 2000e-3(a) of Title VII and the Pennsylvania Human Relations Act (PHRA), 43 P.S. §§ 955. The Title VII statute provides that it is unlawful “for an employer to discriminate against any of his employees or applicants for employment . . . because [the employee or applicant]” engaged in protected activities. The PHRA provides that it is unlawful “[f]or any person, employer, employment agency or labor organization to discriminate any manner against any individual because such individual” engaged in protected activities.

employer for retaliation occurring after the employment relationship had ended. 519 U.S. at 346. The *Robinson* Court did not address the issue involved in this case.

Plaintiff further cited *Flowers v. Columbia College Chicago*, 397 F.3d 532 (7th Cir. 2005), *Christopher v. Stouder Memorial Hosp.*, 936 F.3d 870 (6th Cir. 1991) and *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 325 P.3d 193 (2014). In *Flowers*, plaintiff was **an employee** of defendant college. The college assigned plaintiff to serve as a counselor at a public high school. Plaintiff filed a charge of discrimination against the public school system because it banned him from wearing religious head covering. The college fired plaintiff after the school system complained to the college. The *Flowers* case is not applicable here because plaintiff's retaliation claim was against his own employer.

Plaintiff further cited *Christopher v. Stouder Memorial Hosp.*, 936 F.2d 870 (6th Cir. 1991), *cert. denied* 502 U.S. 1013 (1991). Plaintiff nurse settled a sex discrimination lawsuit against her previous employer. Defendant hospital later hired plaintiff to a nursing position. Plaintiff was next granted temporary privileges by defendant hospital to work as a private duty scrub nurse. "Private duty scrub nurses are normally paid by the doctors with whom they work" and "are not employees of the hospital itself" *Id.* at 872. After staff reorganization at the hospital, plaintiff

was informed that her services would no longer be needed. Plaintiff then applied two more times for limited privileges. The executive committee did not hire plaintiff after receiving unfavorable references on plaintiff. In a trial to the court, which was won by plaintiff, plaintiff alleged that Grubb told her: “If you hadn’t had some legal action prior to this, this might not have occurred.” *Id.* at 873. Plaintiff also alleged that Dr. Hess told her “that she was having difficulties because of her prior legal action against Miami Hospital.” *Id.* at 873-74. The *Christopher* court stated at 874:

While it is true that Christopher was not a direct employee of Stouder, we find that Stouder’s control over Christopher’s ability to practice as a private scrub nurse sufficiently impacted her employment opportunities to bring her within the intended scope of § 2000e-3.

In addition to being inapplicable to this case, the *Christopher* opinion was overruled. In *E.E.O.C. v. Valero Refining-Texas, L.P.*, 2013 WL 1168620 (S.D.Tex. 2013), the district court stated at *4:

Christopher held in a retaliation suit that “Title VII does not require a formal employment relationship” and thus a hospital that denied privileges to a doctor who was not the hospital’s employee or independent contractor was nonetheless subject to suit because it “significantly affect[ed] access . . . to employment opportunities.” *Id.* at 876. But this reasoning relied on a Seventh Circuit decision that has since been expressly overruled. *See id.* (citing *Doe v. St. Joseph’s Hosp.*, 788 F.2d 411, 422-25 (7th Cir. 1986), overruled by *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 488 (7th Cir. 1996). And the Fifth Circuit reached a contrary result on the same issue before *Christoppher* was even decided. *See Diggs v. Harris*

Hosp.-Methodist, Inc., 847 F.2d 270, 272 (5th Cir. 1988) (emphasizing that “a Title VII claim must necessarily involve an employment relationship” in rejecting the view that a hospital’s termination of privileges for nonemployee doctor subjected it to suit under Title VII). *Diggs* and the numerous subsequent cases within the Fifth Circuit requiring a more formal “employment relationship” than existed in *Christopher, id.*, preclude this Court from following that Sixth Circuit decision.

Plaintiff further cited *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 325 P.3d 193 (2014). Plaintiffs brought a class action lawsuit against their own employer, which barred employees from bringing their own food for lunch due to security reasons. Plaintiffs alleged that they could not eat the meals provided by their employer due to religious reasons. (The employees alleged that the employer used animal by-products in vegetarian meals.) This Court held that the WLAD creates a cause of action for failure to reasonably accommodate an employee’s religious practices. This Court’s opinion did not discuss the issue in this case.

3. Decisions from Other States.

Plaintiff cited *Carter Coal Co. v. Human Rights Com’n*, 633 N.E.2d 202 (Ill.App. 1994), *rev. denied* 633 N.E.2d 202 (Ill. 1994), which held that an employer could not refuse to hire a job applicant due to the applicant’s filing of a discrimination charge against a former employer. The statute at issue Section 6-101 of the Illinois Human Rights Act, which provides:

It is a civil right violation for a person, or two or more persons to conspire, to:

(A) Retaliation. Retaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination . . . because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act

The statute in *Carter Coal Co.* is couched in very different terms than RCW 49.60.210(1), which has been interpreted to be “directed at entities functionally similar to employers” *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn.App. 927, 930, 965 P.2d 1124 (1998), *rev. denied* 1376 Wn.2d 1029, 980 P.2d 1284 (1999). As concluded by the district court in *Owa Fred Meyer Stores*, 2017 WL 897808, *2 (W.D.Wash. 2017), the term “or other person” in RCW 49.60.210(1) is restricted by the words “employer,” “employment agency,” and “labor union.”

Moreover, the *Carter Coal Co.* opinion relied on case law directly opposite to case law of the state of Washington. In Illinois, “a cause of action has been recognized against one’s current employer if the employer discharges an employee because the employee filed a workers’ compensation claim against a previous employer.” *Carter Coal Co.*, 633 N.E.2d at 748, *citing Darnell v. Impact Industries, Inc.*, 473 N.E.2d 935 (Ill. 1984). This Court has specifically rejected such a holding. *Warnek v. ABB Combustion Eng’g Servs., Inc.*, 137 Wn.2d 450, 455, 972 P.2d 453

(1999) (rejecting a claim that a former employee has a retaliation cause of action for a failure to hire because the employee filed a workers' compensation grievance during the course of previous employment with the employer). In *Warnek*, this Court stated: "There is a distinction between discharge or other discrimination in the course of employment and not being rehired for new employment." *Id.* at 456.

C. PUBLIC POLICY DOES SUPPORTS A DECISION THAT PLAINTIFF HAS A CAUSE OF ACTION IN THIS CASE.

Plaintiff contends that if the statute at issue is not interpreted in the way that Plaintiff wants it interpreted then "the WLAD is effectively worthless." (Plaintiff's response at 37.) This is a rather dramatic statement to make. The WLAD is strong legislation for situations that were actually intended by the Legislature.

Plaintiff's public policy argument is based primarily on *McMenemy v. City of Rochester*, 241 F.3d 2789 (7th Cir. 2001), which involved a defendant that was the functional equivalent of an employer. The *McMenemy* opinion is discussed in detail above.

Plaintiff further argued: "The only public policy ESD can articulate in favor of its position is an alleged overburdening of the courts and a defendant's supposed difficulty of proof in failure to hire cases."

(Plaintiff's response at 40.) The District's public policy argument is much stronger than Plaintiff suggests. *See* Defendant's Opening Brief at 19-22.

D. IN THE CONTEXT OF THIS CASE, A FAILURE TO HIRE IS NOT AN ADVERSE EMPLOYMENT ACTION.

Plaintiff quoted from a case from the Court of Appeals: "Adverse employment action' is simply another way to describe discipline, demotion, or failure to hire." *Burchfiel v. Boeing Corp.*, 149 Wn.App. 468, 493 (2009), *rev. denied* 166 Wn.2d 1038, 217 P.3d 783 (2009). *Burchfiel* was a disability discrimination and retaliation case brought by a Boeing employee who applied for a different job within Boeing and also applied for a transfer to another Boeing facility. *Id.* at 477. When plaintiff was not hired for another job or transferred he quit his job. *Id.* In *Burchfiel*, it was potentially an adverse employment action for plaintiff not to be hired for a different job *with his employer*. This is completely different than a job applicant not being hired by a prospective employer.

Another case cited by Plaintiff, *Scrivener v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014), stated at 444: "Under the WLAD, it is an unfair practice for an employer to refuse to hire any person on the basis of age if the person is within the protected class of individuals between the ages of 40 to 70." *Scrivener* does not support the argument that it is an adverse employment action for a prospective employer to not hire a

prospective employee. The facts were also different than in this case. Plaintiff in *Scrivener* was already an employee of defendant when she complained about not being hired for a tenure-track position. The case did not involve a retaliation claim.

To courts have set forth a rule for what constitutes an adverse employment action: “The **employee** must show that a **reasonable employee** would have found the challenged action materially adverse, meaning that it would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Boyd v. State Dep’t of Social and Health Servs.*, 187 Wn.App. 1, 13, 349 P.3d 864 (2015) (emphasis added), quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). “An adverse employment action involves a **change in employment** that is more than an inconvenience or alteration of **one’s job responsibilities.**” *Boyd, supra* at 13. (Emphasis added.) Because Plaintiff was never an employee of the District he did not suffer an adverse employment action.

E. PLAINTIFF IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES.

Assuming, *arguendo*, Plaintiff prevails in this proceeding, Plaintiff is not entitled to an award of attorney fees. Plaintiff cited RAP 18.1, which provides:

If applicable law grants to a party the right to recover reasonable attorney fees or expenses **on review** before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(Emphasis added.) This case is before this Court upon certification from the district court – it is not before this Court on review. RAP 1.1(a) provides: “These rules govern proceedings in the Supreme Court . . . for review of a trial court decision” This Court is not reviewing a trial court decision. RAP 2.1(a) provides:

The only methods for seeking review of decisions of the superior court . . . by the Supreme Court are the two methods provided by these rules. The two methods are:

- (1) Review as a matter of right, called “appeal”; and
- (2) Review by permission of the reviewing court, called “discretionary review.”

Both “appeal” and “discretionary review” are called “review.”

Here, the district court requested this Court to make a ruling on the scope of RCW 49.60.210(1). This Court is not involved in a review because this proceeding is not an appeal or discretionary review. The two cases cited by Plaintiff – *Blaney v. Int’l Ass’n of Machinists and Aerospace Workers*, 151 Wn.2d 203, 87 P.3d 757 (2004) and *Martini v. Boeing Co.*, 137 Wn.2d 357, 971 P.2d 45 (1999) – were actions where this

Court granted a party's petition for review. Recent opinions by this Court on issues certified by a district court did not award attorney fees to the prevailing party. *See, e.g., Allen v. Dameron*, 187 Wn.2d 692, 389 P.3d 487 (2017); *Travelers Casualty & Surety Co. v. Wash. Trust Bank*, 186 Wn.2d 921, 383 P.3d 512 (2016); *Jordan v. Nationstar Mortgage, LLC*, 185 Wn.2d 876, 374 P.3d 1195 (2016); *Certification from United States Dist. Court ex rel. Western Dist. of Wash. v. GEICO Ins. Co.*, 184 Wn.2d 925, 366 P.3d 1237 (2016); *Thornell v. Seattle Service Bureau, Inc.*, 184 Wn.2d 793, 363 P.3d 586 (2015). In *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015), this Court stated at 663-64: "The Workers' attorney fee request should be directed to the federal district court if that court enters a judgment in their favor, and therefore the request is denied without prejudice." *See also Feminist Women's Health Center v. Codispoti*, 118 Wn.2d 99, 110-11, 821 P.2d 1198 (1991):

Although the federal court certification statute provides that costs should be equally divided between plaintiff and defendant (subject to reallocation as between the parties by the federal court involved), it does not provide for an award of attorneys' fees. We therefore deny the debtor's request for attorney fees in this court except insofar as statutory attorneys' fees are permitted in accordance with RAP 16.16(f).

IV. CONCLUSION

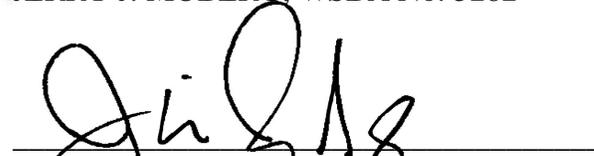
In interpreting RCW 49.60.210(1), this Court should hold as a matter of law that a prospective employee does not have a retaliation cause of action against a prospective employer based upon the prospective employee's remote protected activity involving a different employer.

RESPECTFULLY SUBMITTED this 2nd day of May, 2017.

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I certify that on this day I emailed a copy of this document and I mailed a copy of this document by first class United States mail to:

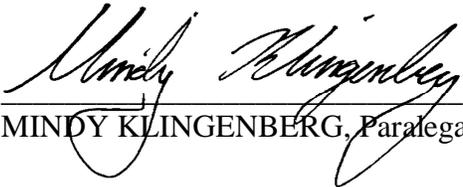
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