NO. 101525-9

SUPREME COURT OF THE STATE OF WASHINGTON

SALEH ELGIADI,

Petitioner,

v.

WASHINGTON STATE UNIVERSITY and STATE OF WASHINGTON,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Faithfully applying existing precedent, the Court of Appeals held that a plaintiff bringing claims under the Washington Law Against Discrimination can enter into settlement agreements to the full extent that all other plaintiffs may do so. That decision does not warrant review. The settlement agreement provision at issue does not prohibit Petitioner from working for the State of Washington, or even Washington State University. If any employer (including WSU) refuses to hire him in retaliation for his prior allegations of discrimination, Elgiadi will have a cause of action under the WLAD. The narrow, agreed-upon limitation on which campus he can work at does not change that.

Under the Court of Appeals decision, Elgiadi still receives the full benefit of the WLAD's antiretaliation provision. As a result, the Court of Appeals decision in no way undermines this Court's decision in *Zhu v. North Central Educational Service Dist. - ESD 171*, 189 Wn.2d 607, 404 P.3d 504 (2017).

Elgiadi's arguments to the contrary are based on an incomplete representation of the effect of the Court of Appeals decision. In a previous action, Elgiadi knowingly and voluntarily, with the advice of counsel, entered into a settlement agreement with the State of Washington under which he received $295,000 and, among other things, agreed to not seek or accept any future employment at *one* of WSU's six campuses, WSU-Spokane. The scope of the challenged provision is narrow. There are no restrictions on Elgiadi's employment with any state agency, any other state colleges or universities, or even any of WSU's other five campuses (including WSU-Global, which is internet-based). Thus, contrary to Elgiadi's characterizations, he has not been denied the opportunity to work for the State of Washington or even WSU.

Further, the uncontroverted facts show that the majority of settlement agreements in employment cases against the State do *not* include a no-rehire provision. This is a far cry from Elgiadi's

inflammatory, unsupported, and untrue allegation of a supposed "do not hire" list maintained by the State of Washington.

Existing precedent establishes both (1) that the WLAD prohibits employers from refusing to hire applicants in retaliation for prior opposition to discrimination, and (2) that a plaintiff—including a plaintiff bringing claims of discrimination—may resolve those disputes through voluntary settlements and settlements may include no-rehire provisions. The Court of Appeals decision is faithful to both lines of case law and respects the important public policy of combatting discrimination. Elgiadi's private interest in retaining the full $295,000 settlement while collaterally attacking the agreed-upon no-hire provision does not constitute a substantial issue of public interest.

This Court previously rejected Elgiadi's request for direct review. Thereafter, the Court of Appeals correctly applied existing precedent to affirm dismissal of Elgiadi's claims. His Petition does not meet the criteria set out for acceptance of review in RAP 13.4(b)(1) or (4) and should be denied.

II. COUNTER-STATEMENT OF THE ISSUE

Whether public policy prevents a former employee from voluntarily waiving future employment at one campus of a university as part of a settlement agreement that resolves an existing employment dispute when (1) the former employee was represented by counsel, (2) the former employee accepted settlement funds and does not want to rescind the agreement, and (3) there are no limitations on the former employee working at any of the university's five other campuses, at any other state college or university, or at any state agency.

III. COUNTER-STATEMENT OF THE CASE

A. *Elgiadi I* – Elgiadi Settles Remaining Claims Against WSU After his Age Discrimination Claim is Dismissed on Summary Judgment

In December 2017, Elgiadi initiated a lawsuit against Washington State University. His initial Complaint alleged three causes of action against his former employer: breach of contract, promissory estoppel, and wrongful discharge in violation of public policy. CP 102-10. Five months later, he amended his

Complaint to add causes of action for negligent misrepresentation, intentional misrepresentation, intentional interference with a business expectancy, retaliation, and age discrimination. His request for relief included lost wages, benefits, back wages, front pay, double damages, prejudgment interest, and attorney fees; he did not, however, ask to be reinstated. CP 121.

Elgiadi's claims for negligent misrepresentation, intentional misrepresentation, and age discrimination were dismissed on summary judgment. CP 125-26, 129. Thereafter, the parties negotiated resolution of his remaining claims. CP 132-40.

In exchange for the University paying him $295,000, and upon the advice of his counsel, Elgiadi agreed to not seek or accept employment at WSU's Spokane campus. CP 30. He could, however, still work for WSU at any of its other campuses, and work at any other state agency or university. *See id.* There were no restrictions on him working for a competitor, and the

agreement expressly provided that Elgiadi was free to work as (or for) a contractor, consultant, or vendor. CP 133. Approximately seven months after he accepted a lump-sum payment from WSU, Elgiadi initiated a second lawsuit.

B. *Elgiadi II* – Elgiadi Sues to Have the No Re-hire Provision of his Agreement Declared Void as Against Public Policy, but Without Disgorgement

Despite Elgiadi's knowing and voluntary resolution to his lawsuit, in September 2020, he brought a purported class action suit alleging his agreement to not seek future employment at WSU-Spokane violated Washington law. CP 3-10.

Prior to Elgiadi seeking class certification, the parties filed competing motions for summary judgment. It its motion, the University submitted uncontroverted evidence establishing that, contrary to Elgiadi's contention, the State does *not* require all employees who settle employment discrimination claims to agree to a no future employment term. CP 194-95. Out of the 137 employment disputes from October 1, 2017 through January 21, 2021, for which information was available, 50

contained some form of no-future employment provision; 87 did not. *Id.*

The trial court granted the University's motion for summary judgment, denied Elgiadi's motion, and in August 2021 dismissed his claims in their entirety with prejudice. CP 234-35. Elgiadi appealed.

After oral argument, the Court of Appeals asked for supplemental briefing regarding the proper remedy if it were to invalidate the limited no-rehire provision. Elgiadi never disputed that his promise to neither seek nor accept employment at WSU-Spokane was a material term in the settlement agreement. *Elgiadi v. Wash. State Univ. Spokane*, 519 P.3d 939, 942 (Wash. Ct. App. 2022); *see also id.* at 952 (dissenting opinion). Nonetheless, Elgiadi maintained that he should be allowed to keep the settlement funds, arguing that "a provision in a settlement agreement that violates public policy can be 'lined out' in accordance with the 'blue pencil test' and the remainder of the agreement enforced." *Id.* at 942.

In its opinion, the Court of Appeals first admonished that the "blue pencil test" of contract severability had long ago been rejected. *Id.* (citing *Wood v. May*, 73 Wn.2d 307, 313, 438 P.2d 587 (1968)). It concluded the no-rehire provision is not severable and that if the term is not valid, the entire agreement fails. *Id.* at 943. It then went on to conclude, however, that the provision at issue does not violate public policy and affirmed dismissal of Elgiadi's claims. *Id.* at 945.

IV. WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Decision Is Not in Conflict with a Decision of This Court

The Court of Appeals decision follows precedent and is entirely consistent with *Zhu v. North Central Educational Service Dist. - ESD 171*, 189 Wn.2d 607, 404 P.3d 504 (2017). Far from "ignoring" *Zhu*, as Eligadi asserts, Pet. at 5, the Court of Appeals carefully considered *Zhu* and correctly concluded that it is distinguishable. *Elgiadi,* 519 P.3d at 943-45. *Zhu* addressed a materially different factual situation.

In *Zhu*, the plaintiff had worked for Waterville School District. 189 Wn.2d at 609. After settling his claims against Waterville related to racially motivated disparate treatment, a hostile work environment, and retaliation, Zhu resigned and applied for a position with another school district: North Central Educational Service District – ESD 171. *Id.* at 610. ESD 171 declined to hire Zhu. *Id.* at 611. It was undisputed that members of ESD 171's hiring committee were aware of Zhu's lawsuit against Waterville. *Id.* at 610-11.

Zhu brought suit in federal court alleging that ESD 171 violated WLAD by refusing to hire him in retaliation for his prior opposition to discrimination by Waterville. *Id.* at 610. ESD 171 argued that WLAD was not applicable to alleged retaliatory discrimination against job applicants by prospective employers. *Id.* at 611. The district court disagreed, and Zhu prevailed on his claim following a jury trial. *Id.* After post-trial motions, the district court certified a question to the Washington Supreme Court as to the scope of RCW 49.60.210(1).

The *Zhu* Court noted, "By rendering a verdict in Zhu's favor, the jury has already decided as a question of fact that ESD 171 refused to hire Zhu because of his opposition to Waterville's discriminatory practices." *Id.* at 612. It went on to hold that the scope of WLAD extended to hiring decisions.

The Court of Appeals decision here is entirely consistent with *Zhu*. *Zhu* did not involve a no-rehire provision at all, much less one expressly agreed to by the plaintiff upon the advice of counsel. The validity of settlement agreements and such provisions is determined by a separate line of case law that has upheld the validity of such provisions. *E.g.*, *Lehrer v. Dep't of Social & Health Servs.*, 101 Wn. App. 509, 513-14, 5 P.3d 733 (2000), *review denied*, 142 Wn.2d 1014, 16 P.3d 1263 (2000) (approving no-rehire provision in settlement agreement); *see also Chadwick v. Northwest Airlines, Inc.*, 33 Wn. App. 297, 300-01, 654 P.2d 1215 (1983) (finding "no authority for adopting a rule that per se voids a settlement simply because it involves a possible discrimination claim"). Pursuant to *Zhu*, if Elgiadi were

denied employment by any employer in retaliation for prior allegations of discrimination, Elgiadi would have a cause of action under the WLAD. But that issue is not presented here. There is no conflict between this Court's decision in *Zhu* and the Court of Appeals decision in this case.

Here, the Court of Appeals acknowledged this Court's holding in *Zhu* and distinguished the facts before it. Unlike in *Zhu*, giving effect to a mutually agreed upon settlement agreement would not dissuade anyone from opposing unlawful discrimination. "The opposite is true here. Mr. Elgiadi is free to work for any employer except one branch campus of WSU. This very narrow prohibition would not cause a reasonable employee to be dissuaded from opposing unlawful discrimination." *Elgiadi,* 519 P.3d at 945. The Court of Appeals added, "This is especially true here, where Mr. Elgiadi in his initial lawsuit did not seek to be rehired." *Id.*

Here, Elgiadi, who was represented by counsel, voluntarily agreed to not seek employment at *one* of WSU's six

campuses. CP 30. The Court of Appeals held that public policy does not forbid the waiver of a contingent right, such as a right to be rehired. *Elgiadi,* 519 P.3d at 944 (citing *Helgeson v. City of Marysville*, 75 Wn. App. 174, 881 P.2d 1042 (1994) and *Vallet v. City of Seattle*, 77 Wn.2d 12, 459 P.2d 407 (1969)). *Zhu* does not require a different result.

Further, Elgiadi did not waive a future claim of discrimination. *Elgiadi,* 519 P.3d at 945, n.3. Rather, "[h]e waived his right to reapply or be rehired by one branch campus of a public university. This [contingent] 'right' was less important to Mr. Elgiadi than settling his claims for substantial compensation, as evidenced by his knowing, intelligent, and voluntary agreement to that condition in the settlement agreement." *Id.*

The Court of Appeals decision is not in conflict with *Zhu* or any other decision of this Court. The settlement agreement does not involve the waiver of claims for future discriminatory acts; nor does it "weaken[] the laudatory objectives of RCW

49.60." *See Chadwick*, 100 Wn.2d at 223. Review is not warranted.

B. The Petition Does Not Present an Issue of Broad Public Interest That Should Be Determined By This Court

There is strong public policy that supports both settling cases and eradicating discrimination. Those two important goals are not in conflict in this case. The settlement agreement was bargained for at arm's length, supported by valuable consideration, is not unreasonably restrictive, and does not adversely affect the public. Neither does settlement undermine the goals of eradicating employment discrimination.

Elgiadi's arguments that this case involves issues of substantial public interest are based on misrepresentations of the record. Elgiadi implies that the State and WSU are requiring a no-rehire provision as part of settlements for all employees who bring claims of violation of the WLAD. *See* Pet. at 12. The record demonstrates that characterization is false. The uncontroverted evidence demonstrates that the majority of settlement agreements do *not* include such a provision. CP 194-95. That

some parties voluntarily agree to no-rehire provisions as part of an agreement that provides meaningful consideration is not an issue of substantial public importance.

Elgiadi's wholly unsupported contention that the State maintains a "do not hire" list also does not establish an issue requiring this Court's review. He has never offered *any* evidence to support his claim.[1] Moreover, the uncontroverted facts show that the majority of settlement agreements in employment cases against the State do not include a no-hire provision. CP 195.

Further, Elgiadi continues to argue that no-rehire provisions are against public policy as an unlawful restraint on trade. However, *Lehrer v. Dep't of Social & Health Servs.*, 101 Wn. App. 509, 513-14, 5 P.3d 733 (2000), *review denied*, 142 Wn.2d 1014, 16 P.3d 1263 (2000) (approving no-rehire

[1] Elgiadi's lack of evidence to support his allegations has been repeatedly raised by the State, specifically noting at the Court of Appeals his violation of RAP 10.3(a)(5) and (6), which require citation to the record to support factual statements and related legal arguments.

provision in settlement agreement) resolved claims substantially similar to the legal theories brought by Elgiadi. In *Lehrer*, a psychiatrist at Eastern State Hospital "signed a document that purported to stipulate, settle, and release each other regarding an employment dispute." *Id.* at 511. In the agreement, Lehrer specifically agreed to "not apply to, or work for, ESH or Western State Hospital (WSH) 'in any capacity.'" *Id.* Thereafter, Lehrer sued, claiming in relevant part, the agreement was against public policy as an unconstitutional restraint on trade. *Id.* at 512. The Court of Appeals rejected Lehrer's theory and concluded that the no future employment provision was not void as against public policy. *Id.* at 513-14.[2]

The settlement agreement in this matter is not nearly as restrictive as the one approved in *Lehrer*. Here, Elgiadi may still work for the State; for all locations of WSU except one; at any

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[2] The dissent attempts to sidestep the holding in *Lehrer*, but does not acknowledge that Elgiadi's public policy argument includes an alleged unlawful restraint on trade. *See Elgiadi,* 519 P.3d at 950.

other state college or university; and for any competitor. The settlement agreement was the product of bargained-for consideration between two represented parties and does not constitute substantial issue of public interest warranting this Court's review.

V. CONCLUSION

Elgiadi has failed to demonstrate that this Court should accept review under RAP 13.4(1) or (4) and his Petition should be denied.

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RESPECTFULLY SUBMITTED this 30th day of January, 2023.

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CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the **RESPONDENTS' ANSWER TO PETITION FOR REVIEW** with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 30th day of January, 2023, at Spokane, Washington.

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