

65404-7

65404-7

WASHINGTON STATE COURT OF APPEALS
DIVISION I

65404-7-1

DEBORAH COLE,

Respondent,

v.

HARVEYLAND, LLC, d/b/a, The Harvey Apartments Group,
a Washington Corporation, MARWOOD, LLC, a Washington
Corporation, and, DONALD HARVEY, a single man,
and MICHELLE JEROME and JOHN DOE JEROME, and their
marital community,

Appellants.

RESPONDENT'S REPLY BRIEF
TO AMICUS CURIAE
NATIONAL FEDERAL OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER

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I. INTRODUCTION

The National Federation of Independent Business Small Business Legal Center (hereinafter Amicus) argues that there exists a public policy under the Washington Law Against Discrimination (WLAD) which exempts employers who employ less than eight employees. Although there exists an exemption under the statute for employers who employ less than eight, Washington case law holds that the WLAD established a broad public policy against discrimination by employers of any size.

Plaintiff does not argue that the exemption under the WLAD should be abolished or not enforced. Rather, the limited question is whether numerosity is a subject matter jurisdictional limitation. Numerosity under the WLAD is not subject matter jurisdictional. Because the issue of numerosity was not raised in the Court below, it has been waived.

Amicus makes not one reference to the Washington State Constitution, which is the source of the Superior Court's original jurisdiction. The language of the Washington Constitution is clear and unequivocal. It provides that: "The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court;" WASH. CONST., art. IV, § 6. The legislature's ability to restrict the Superior Court's subject matter jurisdiction is limited by this language.

Notwithstanding the legislature's limited ability to restrict the subject

matter jurisdiction of the Superior Court, there is no indication in the WLAD that the legislature intended the exemption for employers with less than eight employees to be a subject matter jurisdictional limitation. To the contrary, the WLAD provides: “Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights.” RCW 49.60.020.

If the issue had been raised in the Court below, the evidence would have established that the Defendant employed more than eight employees. In the alternative, Plaintiff would have amended the Complaint to allege a common law violation of public policy and/or a violation of the Seattle Municipal Code, which has no numerosity requirement at all. The jury’s verdict would have been exactly the same.

The trial court’s rulings and the jury’s verdict reflect the liberal mandate of the WLAD and the strong public policy against discrimination. Justice has been done, and the jury’s verdict should be affirmed.

II. ARGUMENT OF COUNSEL

A. Washington Public Policy Does Not Foreclose Discrimination Suits Against Small Employers.

Amicus argues that claims against small employers should be dismissed. In support of its position, Amicus cites *Jarman v. Deason*, 173 N.C. App. 297, 618 S.E. 776 (2005); *Thibodeau v. Design Group One*

Architects, LLC, 260 Conn. 691, 802 A.2d 731 (2002); and *Chavez v. Sievers*, 118 Nev. 288, 43 P.3d. 1022 (2002). Amicus cites all of these cases as examples where a discrimination suit was dismissed because the Plaintiff failed to satisfy the numerosity requirement. *See* Amicus Brief at 8-10. None of the cases cited by the Defendant were brought under the state’s anti-discrimination statute, or were dismissed because of the lack of subject matter jurisdiction. In none of the cases cited by Amicus was the issue of numerosity raised for the first time on appeal. All of the cases were brought under the common law theory of wrongful discharge in violation of a clear mandate of public policy.¹

Unlike the cases cited by Amicus, Washington State does recognize

¹ In *Jarman*, the Plaintiff freely acknowledged that numerosity requirement was not satisfied, but alleged “on information and belief, [it is] against the public policy of the State of North Carolina to allow discrimination on the basis of age. 618 S.E. at 777. The Court declined to adopt that public policy: “Thus, where, as here, the General Assembly has set forth the public policy of this State and limited the application of the policy to employers of fifteen or more people, it is not the province of this Court to superimpose our own determination of what North Carolina’s public policy should be over that deemed appropriate by our General Assembly.” *Id.* at 778. In *Thibodeau*, the Court was asked to decide “whether an employer with fewer than three employees, although not subject to liability under the act, nevertheless is barred, on public policy grounds, from discharging an at-will employee on the basis of pregnancy.” 802 A.2d at 694. The Court ruled “that a common-law claim for wrongful discharge on the basis of pregnancy will not lie against those employers.” *Id.* In *Chavez*, the Court was “asked to recognize a common law tortious discharge action based upon alleged racial discrimination.” 43 P.3d at 1024. The Court ruled “[s]ince we must respect the legislature’s limitation, we decline to recognize a common law cause of action for employment discrimination based on race, even when the employer has fifteen employees or less.” *Id.*

a claim under the common law public policy tort even where the employer employed less than eight. In *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000), the Defendant “argued Roberts had no cause of action under state law even if she were discharged because of her gender because Dudley was a small employer, employing fewer than eight persons.” *Id.* at 61. Relying *inter alia* upon the public policy contained in the WLAD, the Court ruled that the numerosity requirement does not negate the strong public policy against discrimination.

Thus, the statutory remedy is not in itself an expression of the public policy, and the definition of 'employer' for the purpose of applying the statutory remedy does not alter or otherwise undo to any degree this state's public policy against employment discrimination. Cf. Dissent at 3. If it is argued that the exclusion of small employers from the statutory remedy is itself a public policy, that policy is simply to limit the statutory remedy, but is not an affirmative policy to 'exempt{} small employers from {common law} discrimination suits.' Dissent at 3.

Id. at 70. The majority in *Roberts*, explicitly distinguished *Griffin v. Eller*, 130 Wn.2d 58, 922 P.2d 788 (1996).

Griffin held RCW 49.60.040(3)'s narrow definition of 'employer' survived an equal protection challenge under article I, section 12, of the Washington Constitution to which we applied the rational basis test as the appropriate standard of review. Griffin, 130 Wn.2d at 65. The statements in Griffin regarding possible reasons for the small employer exemption to RCW 49.60 were therefore made in the context of conducting a rational basis review. We did not purport to affirmatively state the public policy reasons behind the small employer exemption--rather we merely reasoned there could be a rational basis to satisfy the applicable standard of review. Therefore, although Griffin does uphold the statutory

'exemption' for small employers to suits brought under RCW 49.60, *Dudley's argument that Griffin affirmatively establishes a public policy in favor of exempting small employers from common law discrimination suits ultimately fails.*

Roberts, 140 Wn.2d at 75 (emphasis added). Contrary to Amicus' argument, the defeat of Senate Bill 5130 and ESB 5337 does not “evince[] a dedication to the shielding of small business.” Amicus Brief at 6.

The dissent also argues the defeat of two recent bills, SB 5130 and ESB 5337, 56th Leg., Reg. Sess. (1999), evidence the intent of the legislature not to subject small employers to any discrimination suits. However this argument is too broad. These bills, if enacted, would have subjected small employers to statutory remedies. *Their failure, however, does not signify any retraction of a more fundamental public policy against wrongful discrimination in the workplace.* Senate Bill 5130 would have changed the definition of 'employer' in RCW 49.60.030 to any person employing one or more employees, thus effectively removing the small employer 'exemption' from the statute. If this demonstrates any legislative intent at all, it simply indicates if the bill had been enacted the legislature would have removed the small employer 'exemption' to the provisions of RCW 49.60. For the same reason ESB 5337, which proposed a task force to examine the definition of 'employer' for the purposes of RCW 49.60, provides no relevant evidence of legislative intent.

Roberts, at 69 n9 (emphasis added).

B. The Refusal to Create a Jurisdictional Bar Does Not Create a Burden on Small Employers.

Amicus argues vociferously concerning the hypothetical cost of discrimination suits against employers of all sizes. Amicus Brief at 10-15. Amicus would have this court believe that if it were to only rule that numerosity is a jurisdictional bar then small employers could avoid the costs

of suit. But this is untrue. Whether an employer employs less than eight employees is often a question of fact. In cases like this one, where numerosity is contested, the issue must be litigated. If numerosity is not satisfied, a motion for summary judgment would suffice to have the WLAD claim dismissed. Otherwise, the question must be decided by the jury.

An employer is obviously in the best position to know the number of employees in their employ. If the employer believes that it employs less than eight employees, it can raise that issue well in advance of trial and avoid significant costs. But in this case the issue of numerosity was not raised in the Court below; either before, during or after trial. An employer who neglects to raise the issue of numerosity with the trial court has no one but itself to blame.

If the Defendants believed that Plaintiff failed to present sufficient evidence to satisfy all the legal elements of the WLAD claim, they had an obligation to object to the jury instructions, and to propose an instruction which they believed to be a correct statement of the law. The Defendants did not object to any jury instruction offered by Plaintiff in this case, and the jury instructions were silent on the subject of numerosity. Washington Pattern Instructions set out the legal elements of proof for claims filed under the WLAD. WPI 330. *et seq.* Those jury instructions are also silent on the subject of numerosity.

In this case the evidence satisfied the issue of numerosity. But as

stated above, the public policy of the WLAD makes discrimination actionable against even employers who employ less than eight employees. If the Defendant had timely and successfully raised the issue of numerosity in the Court below, Plaintiff could have amended the Complaint to state a common law public policy claim or a claim under the Seattle Municipal Code. *See Roberts v. Dudley, supra*; Seattle Municipal Code (SMC) 14.04.040 (defining an employer as “any person who has one (1) or more employees, or the employer's designee or any person acting in the interest of such employer”). In this case, neither the costs of suit nor the eventual outcome could have been avoided.

C. The Washington State Constitutional Confers Original Jurisdiction Upon the Superior Court.

The costs associated with defending discrimination claims are entirely unrelated to whether there exists subject matter jurisdiction with the Superior Court. The Washington State Superior Court derives its subject matter jurisdiction directly from the state constitution, unlike the federal constitution or the constitution of other states.² The relevant language of the State Constitution is neither ambiguous nor uncertain. It states: “The superior

² The United States Constitution confers original subject matter jurisdiction only in the Supreme Court. Jurisdiction of inferior courts are conferred by an act of Congress. Art. III, Section 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”). The Judiciary Act of 1789 created jurisdiction for federal appellate and district courts. Ch. 20, 1 Stat. 73-93.

court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court;” WASH. CONST., art. IV, § 6. The power of the legislature to restrict the subject matter jurisdiction of the Superior Court is constrained by this language. *See also State v. Golden*, 112 Wn. App. 68, 73, 47 P.3d 587 (2002)(“The superior courts have broad residual jurisdiction to hear all causes and proceedings over which jurisdiction is not vested exclusively in some other court”); *Ledgerwood v. Lansdowne*, 120 Wn. App. 414, 419-20, 85 P.3d 950 (2004) (“We narrowly construe legislative enactments purporting to limit this broad original jurisdiction of the superior court”), *citing Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 98-99, 864 P.2d 937 (1994); Plaintiff’s Response at 32-34. Not surprisingly, Amicus fails to cite this controlling authority.

Amicus does not contest that jurisdiction to adjudicate WLAD claims is not exclusively vested in another court, regardless of the number of employees. Nor does it contest that the Superior Court is vested with authority to hear WLAD cases generally. *See Dougherty v. Depot of Labor & Indus.*, 150 Wn.2d 310, 315-16, 76 P.3d 1183 (2003) (subject matter jurisdiction is jurisdiction over the type of case). Rather, it argues that the Superior Court is without subject matter jurisdiction because it could be expensive to defend discrimination claims. This argument is without merit.

Nothing in the text of the WLAD remotely suggests an intention to

restrict the Superior Court's subject matter jurisdiction. To the contrary, the statute provides: "Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights." RCW 49.60.020.

D. Plaintiff Satisfied the Numerosity Requirement.

Because the issue of numerosity is not required for subject matter jurisdiction, it has been waived. In the alternative, the evidence is sufficient to establish that the Defendant employed eight or more employees. Although payroll records are one method of establishing numerosity, it is not the only method. Contrary to the arguments of both Amicus and Defendants, payroll records are not required. *See* Washington Administrative Code (WAC) 162-16-220(2). Even part time employees are covered. WAC 162-16-220(3). Officers of Harveyland are employees and counted as employees "unless: (a) They receive no pay from the corporation or other entity; and (b) They do not participate in the management of the corporation or other entity beyond participation in formal meetings of the officers." WAC 162-16-220(15).

In this case, the evidence established that Harveyland employed five resident managers, a head of maintenance, and a maintenance crew. RP Feb. 11-71:2-7; Feb. 16- 167:7-14. It also employed the entire families of those resident managers, although not on a permanent basis. RP Feb. 17-60:25-61:16. Both Ms. Jerome and Mr. Harvey received compensation and

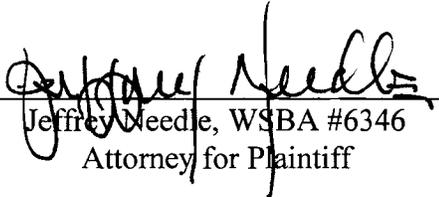
participated in the management of the corporation. Moreover, Mr. Harvey testified that he employed ten employees, although it varied. RP Feb. 17-100:16-23. That evidence and all its inferences must now be viewed in a light most favorable to Plaintiff.

The Defendants had every opportunity to offer evidence on the issue of numerosity and request a jury instruction on that issue. They offer no reason or excuse for their failure to do so. Considerations of judicial economy strongly militate against allowing an employer to remain silent until after the jury has rendered a verdict.

III. CONCLUSION

The trial court's rulings and the jury's verdict should be AFFIRMED.

Respectfully submitted this ^{22nd} 5 day of December, 2010.


Jeffrey Needle, WSBA #6346
Attorney for Plaintiff

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WASHINGTON STATE COURT OF APPEALS
DIVISION I

DEBORAH COLE,)	65404-7
)	NO. 465401-71
Plaintiff/Appellee)	
)	
v.)	DECLARATION
)	OF SERVICE
HARVEYLAND, LLC, d/b/a)	
The Harvey Apartments Group,)	
a Washington Corporation,)	
MARWOOD, LLC, a Washington)	
Corporation, and,)	
DONALD HARVEY, a single man,)	
and MICHELLE JEROME and)	
JOHN DOE JEROME, and their)	
marital community,)	
)	
Defendants/Appellants.)	
)	

THE UNDERSIGNED, under penalty of perjury, under the laws of the State of Washington, does hereby declare as follows:

1. That the undersigned is now and, at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not a party to nor interested in the

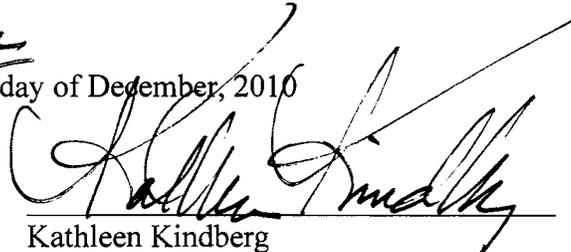
above-entitled action, and is competent to be a witness therein.

2. That on the 7th day of December, 2010, this declarant duly sent via Legal Messengers Service, a copy of the Respondent's Reply Brief to Amicus Curiae National Federation of Independent Business Small Business Legal Center in the above captioned case, delivering a true and correct copy thereof to the following:

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DATED THIS 7th day of December, 2010


Kathleen Kindberg
Law Offices of Jeffrey Needle