

84998-6

No.: 84998-6

Court of Appeals No.: 40247-5-II  
Pierce County Cause No.: 08-2-09228-9

SUPREME COURT  
OF THE STATE OF WASHINGTON

BY RONALD R. LAWRENTER  
10 SEP 20 11:03:15  
STATE OF WASHINGTON  
SUPREME COURT

ANGELA ERDMAN,

Plaintiff/Appellant,

v.

CHAPEL HILL PRESBYTERIAN CHURCH; MARK J. TOONE,  
individually; and the marital community of MARK J. TOONE and JANE  
DOE TOONE,

Defendants/Respondents.

*Answer to Petition for Review*

**CONDITIONAL PETITION FOR REVIEW**

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ORIGINAL

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**I. IDENTITY OF PETITIONER**

Angela Erdman, plaintiff in the underlying action in Pierce County Superior Court Cause No. 08-2-09228-9 and Appellant before the Court of Appeals, Division II, Cause No. 40247-5-II, respectfully submits this Conditional Petition for Review.

**II. INTRODUCTION**

Ms. Erdman files this Conditional Petition for Review, and respectfully requests that if the Court grants Chapel Hill Presbyterian Church (“Church”) and Rev. Mark J. Toone’s (“Toone”) petition that it also grant review of the Appellate Court’s determination concerning the constitutionality of RCW 49.60.040(11)’s religious organization exemption.

This matter concerns the application of the First Amendment protections to religious organizations. Ms. Erdman’s causes of action for violation of the Washington Law Against Discrimination (“WLAD”), Title VII, and common law were based on secular issues outside the application of the ecclesiastical abstention.

Without any analysis or consideration, the trial court ruled that if a lay employee submits a grievance to a hierarchically-organized church that has ecclesiastical judicial tribunals, whether liability was predicated upon secular conduct or involved the interpretation of church doctrine, and whether a religious tribunal investigated her claim, the aggrieved party

was barred from asserting a lawsuit in secular court. In addition, the trial court relied upon RCW 49.60.040(11) to dismiss Ms. Erdman's WLAD claims due to the Church's non-profit religious employer status.

Ms. Erdman appealed the trial court's decision to the Court of Appeals, and requested review of the trial court's application of the ecclesiastical abstention doctrine and challenged the constitutionality of RCW 49.60.040(11)'s non-profit religious employer exemption.

The Appellate Court agreed that civil courts may adjudicate church-related disputes if the dispute does not involve ecclesiastical or doctrinal issues<sup>1</sup>, and specifically that Ms. Erdman's claims against Toone and the Church involved prima facie elements of civil tort law, not ecclesiastical law.

In short, the Appellate Court resolved the dispositive question of whether resolution of Ms. Erdman's legal claim required the interpretation or weighing of church doctrine, and determined that the First Amendment was not implicated and neutral principles of law were properly before the Appellate Court to adjudicate the claim.<sup>2</sup>

The Appellate Court ultimately overturned the trial court's decision and remanded the case for further proceedings on Ms. Erdman's (1) negligent supervision and retention claims against the Church; (2)

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<sup>1</sup> See Elvig v. Ackles, 123 Wn. App. 491, 98 P.3d 524 (2004).

<sup>2</sup> See Serbian Eastern Orthodox Diocese for the U.S. and Canada v. Milivojevich, 426 U.S. 696, 710, 49 L. Ed. 2d 151, 163 (1976).

negligent infliction of emotional distress claim against Toone; and (3) Title VII claims based on sexual harassment and gender discrimination. However, the Appellate Court affirmed the trial court's dismissal Ms. Erdman's WDLA claims pursuant to RCW 49.60.040(11)'s non-profit religious employer exemption.

Ms. Erdman submits this Conditional Petition to review the Appellate Court's determination concerning the constitutionality of RCW 49.60.040(11)'s non-profit religious employer exemption.

### **III. ISSUES PRESENTED FOR REVIEW**

- Whether this Court should grant review of the Appellate Court's decision to affirm the constitutionality of RCW 49.60.040(11)'s non-profit religious employer exemption, when review of RCW 49.60.040(11) would (1) represent a significant question of law under the Constitution of the State of Washington and/or of the United States and (2) involves an issue of substantial public interest that should be determined by the Supreme Court.?

**ANSWER: YES**

### **IV. STATEMENT OF THE CASE**

#### **A. Relevant Facts**

Ms. Erdman disputes Toone and the Church's rendition of the facts in this case and objects to their inclusion of facts and argument related to the application of the ministerial exception, which was an issue not before the Appellate Court. However, the specific facts in this case are not relevant to Ms. Erdman's Conditional Petition for Review in light of the Appellate Court's determination that Ms. Erdman's claims against Toone

and the Church involved prima facie elements of civil tort law, not ecclesiastical law.

Only the Appellate Court's finding that RCW 49.60.040(11)'s non-profit religious employer exemption is pertinent to this petition.

## V. ARGUMENT

If the Court accepts review of Toone and the Church's petition, analyzing the constitutionality of RCW 49.60.040(11) would (1) represent a significant question of law under the Constitution of the State of Washington and/or of the United States and (2) involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

### A. **The Religious Employer Exemption of the WLAD is Unconstitutional**

RCW 49.60.040(11) is an unconstitutional violation of the Establishment Clause of the First Amendment, in that the exemption does not have a secular legislative purpose and its principal or primary effect is to advance religion.

In addition, the statutory mandate in RCW 49.60.040(11), that non-profit religious employers are exempt from adhering to the WLAD, deprived Mrs. Erdman, as an unprotected employee, of Equal Protection of the laws, in violation of both the Fourteenth Amendment to the United States Constitution and article I, § 12 of the Washington Constitution, in

that it creates a distinction between two classes of employees (those in a protected class that are covered by the protections of the WLAD and those who are in a protective class are not).

Ms. Erdman respectfully requests that if the Court grants review of Toone and the Church's petition, that it also review the constitutionality of RCW 49.60.040(11).

*1. RCW 49.60.040(11) Violates this State's Privileges and Immunities Clause*

RCW 49.60.040(11) violates the State's privileges and immunities clause, Constitution article I, § 12, because it confers an unequal privilege to a minority class -- religious organizations. Specifically, it allows religious organizations to discriminate in violation of RCW chapter 49.60.

“[T]he privileges and immunities clause of the Washington State Constitution, Article I, § 12, requires an independent constitutional analysis from the equal protection clause of the United States Constitution.” See Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 812, 83 P.3d 419 (2004); Madison v. State, 161 Wn.2d 85, 94-95 n. 6, 163 P.3d 757 (2007).

Article I, § 12 provides as follows: “No law shall be passed granting to any citizen, class of citizens, or corporation...privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” The plain language of this provision requires a

two-part analysis: “(1) Does a law grant a citizen, class, or corporation ‘privileges or immunities,’ and if so, (2) Are those ‘privileges or immunities’ equally available to all?” Andersen v. King County, 158 Wn.2d 1, 59, 138 P.3d 963 (2006). For a violation of article I, § 12 to occur, the law, or its application, must confer a privilege/immunity to a class of citizens. Grant County, 150 Wn.2d at 812, 83 P.3d 419.

Here, RCW 49.60.040(11) violates Article I, § 12 because it provides religious organizations, who employ thousands, the unabashed right to discriminate against their employees for any reason. Based on the language of RCW 49.60.040(11), religious organizations are exempt from adhering to the laws against discrimination. The plain language of the statute provides religious organizations an unequal privilege and immunity.

The Appellate Court determined that Washington residents do not have a fundamental right to pursue an occupation free from government interference. More specifically, the Appellate Court found that the religious employer exemption did not interfere with Ms. Erdman’s fundamental right to pursue an occupation. After rejecting Ms. Erdman’s argument that a fundamental right was being impinged upon, the Appellate Court applied rational basis review of the statute and confirmed its constitutionality.

Ms. Erdman requests review of the Appellate Court's determination in light of Supreme Court of N.H. v. Piper, 470 U.S. 274, 280 n. 9, 285, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985); Duranceau v. City of Tacoma, 27 Wn. App. 777, 620 P.2d 533 (1980); Grant County, 150 Wn.2d at 813, 83 P.3d 419. Washington residents enjoy the fundamental right to pursue an occupation without government-sanctioned discrimination, and Ms. Erdman requests that this Court apply a strict scrutiny review of the statute.

The privileges and immunities clause is concerned both with "avoiding favoritism" and "preventing discrimination," the latter being the primary purpose of the federal equal protection clause. Andersen, 158 Wn.2d at 14, 138 P.3d 963.

To survive strict scrutiny, the statute must be narrowly tailored to serve a compelling governmental interest. Here, as opposed to the equivalent federal statute, 42 U.S.C. § 2000e-1, which only exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion, RCW 49.60.040(11) provides religious organizations the ability to discriminate on any grounds. The statute is not narrowly construed to protect a religious organization's First Amendment protections. Rather, it is overly broad in its effect, and cannot survive strict scrutiny review.

The religious exemption in RCW 49.60.040(11) encourages favoritism and permeates discrimination. The constitutionality of RCW 49.60.040(11) raises a significant constitutional question and an issue of public policy.

2. **RCW 49.60.040(11) Violates the Equal Protection Clause of the United States Constitution**

Equal protection under the law is required by both the Fourteenth Amendment to the United States Constitution and article I, § 12 of the Washington Constitution. American Legion Post #149 v. Washington State Dept. of Health, 164 Wn.2d 570, 192 P.3d 306 (2008); O'Hartigan v. Dep't of Pers., 118 Wn.2d 111, 117, 821 P.2d 44 (1991). Equal protection requires that "all persons similarly situated should be treated alike." Id. The equal protection clause is aimed at "securing equality of treatment by prohibiting hostile discrimination." Andersen, 158 Wn.2d at 15, 138 P.3d 963. To show a violation, a party must establish that the challenged law treats unequally two similarly situated classes of people. Samson v. City of Bainbridge Island, 149 Wn. App. 33, 202 P.3d 334 (2009).

Under the equal protection clause, the appropriate level of scrutiny depends on the nature of the classification or rights involved. American Legion, 164 Wn.2d 608-09, 192 P.3d 306. Suspect classifications are subject to strict scrutiny. Id.; citing City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

Strict scrutiny also applies to laws burdening fundamental rights or liberties. Id.

In the instant matter, RCW 49.60.040(11) creates two distinct classes of employees in this State: (1) employees who are in a class protected by the WLAD, that **do not** work for a religious organization, yet **do** receive the protections of the WLAD and (2) employees who are in a class protected by the WLAD, **do** work for a religious organization, yet **do not** receive the protections of the WLAD.

Here, the Appellate Court relied on this Court's decision in Farnam v. CRISTA Ministries, 116 Wn.2d 657, 680-81, 807 P.2d 830 (1991), to reject Ms. Erdman's equal protection challenge of RCW 49.60.040(11). The Appellate Court applied the rational basis standard, and found the statute would survive both a Washington State and federal equal protection challenges. The Appellate Court based application of the rational basis standard on the determination that the exemption created employer classes based on religion and provided a uniform benefit to all religions.

However, strict scrutiny should apply because the parties affected by the unequal right are those that are protected by the WLAD. Namely, the individual classes described in RCW 49.69.010, which includes individuals who are discriminated against on the basis sex. The WLAD was an exercise of the State's police power for the protection of the public welfare, health,

and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. Id. The legislature found and declared that practices of discrimination against any of its inhabitants because protected classes are a matter of state. Id.

The analysis should not be placed on the conclusion that that exemption is provided to all religious employers, but rather on those suspect/protected classes that are impacted by the exemption. An exemption that allows a religious organization to discriminate against a protected group should be narrowly construed and survive strict scrutiny. The federal government has resolved this issue in the language used in 42 U.S.C. § 2000e-1; however, Washington has not. The federal counterpart to RCW 49.60.040(11) still provides a benefit equally to all religious organizations, but also provides protection to those classes that the statute is based upon.

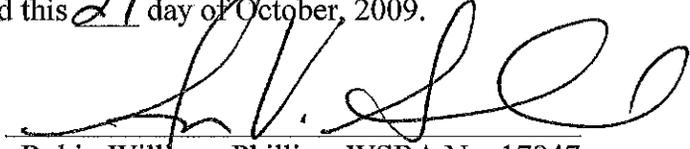
Ms. Erdman's Complaint against the Church alleges discrimination on the basis of sex. As a member of a suspect class, as such, strict scrutiny should apply to the review of RCW 49.60.040(11).

The religious exemption in RCW 49.60.040(11) provides an unequal benefit to religious organizations over other protected classes. The constitutionality of RCW 49.60.040(11) raises a significant constitutional question and an issue of public policy.

**VI. CONCLUSION**

For all of the foregoing reasons, Ms. Erdman requests that if this Court grants review of Toone and the Church's petition that is also review the constitutionality of RCW 49.60.040(11)'s non-profit religious employer exemption.

Respectfully submitted this 24 day of October, 2009.



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