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SUPREME COURT OF THE STATE OF WASHINGTON

PATRICIA BLACKBURN, et al.,

PLAINTIFFS/APPELLANTS,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH
SERVICES, et al.,

DEFENDANTS/RESPONDENTS.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON

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I. INTRODUCTION

Plaintiffs in this case are employees of Western State Hospital (“WSH”), one of the state psychiatric hospitals. They filed suit against the Department of Social and Health Services (“DSHS,” which runs Western State Hospital) and the hospital itself, challenging a race-based staffing assignment policy and practice based on patients’ expressed racial preferences, demands, or threats. Plaintiffs alleged race discrimination in violation of the Washington Law Against Discrimination (“WLAD”), Chapter 49.60 RCW and claimed two causes of action: race-based disparate treatment and race-based hostile work environment. After a bench trial, the Pierce County Superior Court ruled there was no violation of the WLAD. Although the court found that WSH had made race-based staffing assignments, it held that these assignments did not amount to disparate treatment because: (1) they were motivated by safety concerns rather than racial hostility; and (2) there was insufficient evidence of an adverse employment action. Additionally, the court found the use of race-based staffing assignments was not sufficiently severe or persuasive to support Plaintiffs’ hostile work environment claim. The trial court did not make a finding as to whether WSH had an official policy or practice of allowing race-based staffing assignments. Plaintiffs appealed, filing a Petition for Direct Review, which this Court granted.

For the reasons stated below, this Court should hold that Defendant's staffing decisions violate the WLAD because they constitute facial race-based discrimination. First, employer decisions that explicitly prohibit certain employees from performing certain tasks solely on the basis of employee race are discriminatory on their face. Facial discrimination is prohibited by both the WLAD and long-held constitutional principles that protect individuals from discrimination. Second, there is no applicable exception to the WLAD of the sort the State seeks—and, indeed, such an exception would swallow the rule as a whole. A judicially created exception permitting facially discriminatory race-based classifications would be both inconsistent with a core purpose of the WLAD (to prohibit consideration of certain biological and other characteristics in the employment context) and its statutory mandate (to apply its protections liberally and construe any exemptions narrowly). Creating such an exception for use by the State itself is also particularly pernicious. Our rule of law has long recognized the special nature of state action and the need for states to respect all of their citizens equally. The exception the State seeks here would be both unprecedented and unwise, permitting any state employer to make race-based classifications whenever they can articulate a reason for doing so.

II. STATEMENT OF INTEREST

Amicus' Statement of Interest is found in the Motion for Leave, filed concurrently with this Brief.

III. ISSUE TO BE ADDRESSED BY *AMICUS*

Whether a state hospital's race-based staffing assignments amount to discrimination in violation of the WLAD.

IV. STATEMENT OF THE CASE¹

WSH is a psychiatric hospital in Washington that provides evaluation and inpatient treatment for adults with serious or long-term mental illness. It is a division of DSHS and is run by the State of Washington. The nine Plaintiffs in this case were employed by the Hospital on the same ward (F-5) of the Center for Forensic Services ("CFS"). Plaintiffs' claims arise from a series of events that took place in April 2011.

M.P. is a mentally ill patient housed on Ward F-8 of the hospital, and has resided at WSH in the CFS since 2004. On the first Friday of April 2011, M.P.'s treatment team coordinator informed the supervising nurse that M.P. had made threats toward a psychiatric security attendant ("PSA"), Marley Mann, an African American. Subsequently, executive nursing staff decided that no Black employees would be staffed to M.P.'s

¹ Attorneys for *Amicus Curiae* have used the facts set forth in Appellants' and Respondents' briefing.

ward. This decision was explicitly communicated to staff—for example, “NO BLACK STAFF TO F8” was written on the nurse staffing white board of the unit.

The next day, Plaintiff Patricia “Polly” Blackburn, the Ward F-5 charge nurse at the time, was directed by her supervisor nurse to send three of her ward’s PSAs to work on three other wards. Whenever staff is diverted in this manner, hospital policy requires that they be selected from a “pull list” to ensure staff is pulled from their normal wards equally. Blackburn informed her supervisor nurse that the next three PSAs on the list were people of color, but was told she needed to send a white person to Ward F-8. When she objected that it would be illegal discrimination to assign employees based on race, she was directed to send the person “with the lightest skin.” Blackburn again refused, but overhearing the directive, the three PSAs at the top of the list compared skin tones, and the supervising nurse assigned the staff member whom she determined had the lightest-skin to work on F-8. Plaintiffs allege that this series of events was just one of many incidents where WSH has used race-based staffing assignments to accommodate patient wishes.

The record shows WSH explicitly used race in staffing decisions and directives during the first weekend of April 2011. WSH does not deny that Black staff were prohibited from working on Ward F-8, or that white

staff were requested. Indeed, WSH claims that this type of conduct does not amount to illegal discrimination and has argued that it has the right to make race-based staffing assignments when necessary. This case thus squarely presents the question of whether employers should be allowed to make facially race-based classifications in employment decisions in response to patients' expressed racial preferences, demands, or threats.

V. ARGUMENT

A. Race-Based Staffing Assignments Violate the Washington Law Against Discrimination

Pursuant to the authority cited in Appellants' briefs and below, race-based employment classifications violate the WLAD, which prohibits race discrimination in any terms or conditions of employment. RCW 49.60.180(3). Neither does the WLAD contain or otherwise imply an exception to permit race-based staffing decisions based upon a patient's— or anyone else's—expressed desires, demands, or threats.

1. Race-based classifications in staffing decisions are facial discrimination in violation of the WLAD.

The WLAD, codified at Chapter 49.60 RCW, is a set of laws designed to protect individuals from discrimination. It prohibits many forms of discrimination—including on the basis of race, sex, marital status, sexual orientation, disability, veteran status, or religion. RCW 49.60.180(1); *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 489, 325

P.3d 193 (2014). With regard to freedom from employment discrimination, Washington has a particularly “long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). In fact, the WLAD has prohibited discrimination in the workplace on the basis of race since its enactment in 1949 and devotes an entire section to protecting employees from unlawful discrimination. Laws of 1949, ch. 183, § 7; RCW 49.60.180. The WLAD not only prohibits discrimination in hiring, discharge, and advertising but also provides that it is unlawful for any employer to “discriminate against any person in compensation *or in other terms or conditions of employment because of . . . race*[.]” RCW 49.60.180(3) (emphasis added).

An employer engages in discrimination when it treats “a person in a manner which but for that person’s [protected characteristic] would be different.” *City of L.A. Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 711, 98 S. Ct. 1370 (1978). If an employment practice fails this “simple test” it is discrimination *per se*. *Id.* (holding that an employment practice that required female employees to make larger contributions to their pension fund than male employees constituted unlawful discrimination because it did not pass the “the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that

person's sex would be different.”).

There is no type of discrimination more painfully obvious than that of facial discrimination, which encompasses policies or practices that on their face differentiate between groups based on a protected characteristic. Cases involving such facially race-based classifications are rare in the post-WLAD and federal Civil Rights Act era for good reason: few employers engage in such blatant violations of the law any longer and those who do typically settle quickly rather than going to court. When WLAD precedent is lacking, the Court can look to federal case law interpreting federal statutes. *See, e.g., Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 518, 844 P.2d 389 (1993); *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996). Thus, this Court can look to analogous cases in the federal Title VII context to aid in interpreting the term “facial discrimination.” Although federal cases are not binding, this Court is “free to adopt those theories and rationale which best further the purposes and mandates of our state statute” to deter and eradicate discrimination. *Kumar*, 180 Wn.2d at 491 (quoting *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 361–62, 753 P.2d 517 (1988)). Further, “[w]here this court has departed from federal antidiscrimination statute precedent . . . it has almost always ruled that the WLAD provides *greater* employee protections than its federal counterparts[.]” *Id.*

(emphasis added).

Title VII makes it unlawful for an employer to “limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race[.]” 42 U.S.C. § 2000e-2(a)(2). Courts have repeatedly held that the essence of a facial discrimination claim is that a policy or practice on its face makes explicit distinctions between groups in what members can or cannot do; a facially discriminatory policy is one that applies unequally depending on a person’s race, sex, or other characteristic. *See, e.g., Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 (9th Cir. 2006) (holding that a homeless shelter policy that banned women and families was facially discriminatory); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198, 111 S. Ct 1196, 113 L. Ed. 2d 158 (1991) (holding that an employer policy banning fertile women from jobs entailing high levels of lead exposure but not men was facially discriminatory); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853 (9th Cir. 2000) (holding that lower weight requirements for women than men were facially discriminatory).

DSHS seeks judicial endorsement of a facially discriminatory policy that would permit its employees to classify staff explicitly on the basis of race. *See Manhart*, 435 U.S. at 711, 715-16 (distinguishing facial

discrimination classification from pretextual classification). WSH cannot and does not deny that over the course of at least one weekend, it directed only white staff to work on a particular ward, and it now seeks a judicially-created right to employ this directive in the future as it sees fit. When and under what conditions an employee may be staffed to a particular ward or patient is certainly a term or condition of employment. When these decisions are based on race—and only white staff can work in a particular ward, while Black staff are assigned elsewhere—they are facially discriminatory. Further, unlike a pretextual discrimination case, it is wholly unnecessary to determine whether WSH’s policy banning Black staff from working in Ward F-8 had a disparate impact on Black staff because the hospital’s directives reflect plainly race-based staffing decisions.

2. Race-based classifications do not have to result in demotions or loss of income to amount to unlawful discrimination.

Neither federal law nor state law—which was enacted to grant even greater protections against discrimination than that provided by federal law—requires a showing of lost wages, a demotion, or other “tangible” or calculable harm to succeed in a facial discrimination case. The U.S. Supreme Court “rejected the notion that separate can ever be equal-or ‘neutral’” more than 60 years ago in *Brown v. Board of*

Education and this Court should not resurrect it today. *Johnson v. California*, 543 U.S. 499, 506, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005); *Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

DSHS has argued that employers' race-based classifications in this case do not amount to unlawful discrimination because Black employees were not discharged, or demoted, and did not lose wages as a result. Its reasoning is wholly unpersuasive—not only is there no argument that Black employees were forbidden from engaging in tasks that white employees were permitted to engage in, but DSHS's logic would permit state-sanctioned segregation under the WLAD; employers could enact practices or policies that separate employees by race, as long as they did not discharge or demote employees, or cut their wages. Neither does the WLAD countenance this absurdity nor permit employers to categorize staff based on race merely on the basis of an employer's assertion that doing so is necessary.

An employer's motive is irrelevant to a facial discrimination claim. Thus, DSHS's motive for race-based staffing assignments is irrelevant to its liability under the WLAD. When a policy or practice is facially discriminatory, it is unnecessary for the court to conduct an analysis of the employer's motive underlying the race-based classification. *See Cmty. House, Inc.*, 490 F.3d at 1049 (9th Cir. 2007); *Johnson Controls*, 499 U.S.

at 199. When practices are facially discriminatory, there can be no “non-discriminatory reason” for the employment action. *See Cmty. House, Inc.*, 490 F.3d at 1049 (explicitly rejecting the *McDonnell Douglas v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) burden shifting test when the plaintiff had demonstrated facial discrimination); *Johnson Controls*, 499 U.S. at 199 (finding that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect”).

State court decisions have similarly found that an employer’s motive for discrimination is irrelevant in facial discrimination claims. *Lewis v. Doll*, 53 Wn.App. 203, 210, 765 P.2d 1341(1989) (finding an employer’s purpose in discriminating irrelevant to its WLAD liability). Rather, the discrimination element is “met if the employee demonstrates that the employer took action against the employee because of his or her condition[.]” *Sommer v. Dep’t of Soc. & Health Servs.*, 104 Wn.App. 160, 172, 15 P.3d 664 (2001). A court may take into account the particular circumstances or intentions in determining the lawfulness of a facially discriminatory policy if statutorily provided for, but no motive will erase the existence of its facially discriminatory definition.

A facially discriminatory practice or policy also cannot be justified by its short duration or limited frequency. Nowhere does the language of

the WLAD or this Court's precedent contemplate a time or frequency requirement on claims of facial discrimination, and it would be completely untenable to do so. Instead, the harm is inflicted by the segregation or discrimination, regardless of its duration. What is discriminatory over the long term across wide swaths of employees is just as discriminatory over 48 hours or only a handful of employees.

Here, regardless of the reasoning behind WSH's decision to only allow white staff to work on Ward F-8 the first weekend in April, the staffing decisions it made were, on their face, race based. *See, e.g., Johnson Controls*, 499 U.S. at 197-98; *Frank*, 216 F.3d at 853. WSH did not act based on a pretextual characteristic in staffing that affected only Black staff. Rather, WSH explicitly prohibited Black staff from working in a particular ward in the hospital, treating Black employees in a manner that, but for their race, would have been different. WSH may have had any number of reasons for this discrimination—but its explicit prohibition on Black staff to work with a particular patient cannot escape a facial discrimination definition. *See Cmty. House, Inc.*, 490 F.3d at 1049; *Lovell v. Chandler*, 303 F.3d 1039, 1057-58 (9th Cir. 2002); *Johnson Controls*, 499 U.S. at 199.

B. This Court Should not Create a New Exception to the WLAD
DSHS' race-based staffing assignments are clearly unlawful

discrimination unless an exception under the WLAD applies. However, no such exception exists—the plain language of the WLAD does not provide an exception for race-based classifications based on patients’ racial preferences, demands, or threats. A judicially created exception for this type of facial discrimination would undermine the entire WLAD as well as contradict the long-standing principle that individuals have the right to be free from discrimination.

1. The WLAD does not provide an exception for race-based classifications based on patients’ racial preferences, demands, or threats.

DSHS has maintained that it has the right to engage in race-based employment decisions to maintain hospital safety. However, neither the plain language of the WLAD nor this Court’s precedent provide exceptions to facial discrimination claims of this nature. First, the plain text of the WLAD, as well as the Washington Administrative Code promulgated by the Washington State Human Rights Commission, provide only for very limited and explicit exceptions to the WLAD for employers. RCW 49.60.180; WAC 162-16. *Not one* exception includes or even alludes to allowing employers to enact staffing assignments based on race due to patient requests or threats. RCW 49.60.180; WAC 162-16. As this Court stated, “[t]o determine legislative intent, this court looks first to the language of the statute. If the statute is unambiguous, its meaning is be

derived from the plain language of the statute alone.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002); *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997); *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). The unambiguous language of the WLAD alone indicates that the legislature did not intend to create additional exceptions not provided for within Chapter 49.60 RCW. *See, e.g., Landmark Dev., Inc. v. Roy*, 138 Wn.2d 561, 571 (1999); *Bour v. Johnson*, 122 Wn.2d 829, 835-36 (1993).

2. Creating an unprecedented exception would undermine the WLAD and its afforded protections.

Rather than merely lessen or decrease discrimination, the purpose of the WLAD is to “deter and eradicate discrimination” in Washington State. *E.g., Marquis*, 130 Wn.2d at 109. Furthermore, as this Court has continually held, the prevention and elimination of discrimination is a public policy of the highest priority. *Id.* at 109; *Xieng*, 120 Wn.2d at 521. As the text of the WLAD itself notes, “discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010.

The WLAD specifically mandates a liberal construction of its protections, demanding an interpretation necessary to achieve the

WLAD’s purpose of eliminating and preventing discrimination. RCW 49.60.020. Conversely, as this Court has consistently held, any exceptions to the WLAD are to be narrowly construed, and the court must “view with caution any construction that would narrow the coverage of the law.” *Marquis*, 130 Wn.2d at 108. *See also Fraternal Order of Eagles*, 148 Wn.2d at 247; *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989).

The race-based staffing assignments at issue before this Court are exactly the type of discrimination the WLAD was designed to eradicate. Creating such an exception by court mandate would undermine the WLAD itself—which was intended precisely to forbid consideration of personal characteristics the people of Washington have deemed irrelevant for certain purposes—and result in endless additional litigation to determine the contours of the newly permissible discrimination.

3. The right of individuals to be free from discrimination should not be sacrificed to accommodate patient demands or threats.

In addition to the specific language employed in the WLAD, and its underlying policy to protect individuals from discrimination, there is nothing in federal or state case law that allows employers to make facially discriminatory race-based staffing decisions to accommodate patient requests, even in response to threats of violence or disruptive behavior. In

fact, our country's history reflects precisely the opposite. *E.g.*, *Cooper v. Aaron*, 358 U.S. 1, 13, 16, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958) (“[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal constitution.”). *Id.* at 16 (mandating school integration in the face of “tension and unrest,” and “chaos, bedlam, and turmoil.”). *See also Brown*, 347 U.S. 483.

Violence incited by racism should not be accommodated by race-based classifications, even where safety concerns are high, as in the prison context. *Johnson*, 543 U.S. at 507 (“By perpetuating the notion that race matters most, racial segregation . . . may exacerbate the very patterns of [violence that it is] said to counteract.”) (alteration in original) (internal quotation marks omitted). Further, the right not to be discriminated against is not a right that needs to be compromised for proper administration of a state run facility. *See id.* at 510-511 (“On the contrary, compliance with the Fourteenth Amendment’s ban on racial discrimination is not only consistent with proper prison administration but also bolsters the legitimacy of the entire criminal justice system.”).

DSHS has argued that race-based staffing assignments are necessary to protect patient rights and maintain safety in the hospital. But racist violent threats of violence do not trump the rule of law. WSH did

not have to engage in race discrimination to neutralize any threat a patient posed. Rather, the State should look to alternatives to prevent the conduct of concern—for example, by providing adequate staffing and proper training in how to deal with violent outbursts, or allowing staff members to make decisions about their own personal safety. By its own admission, WSH has dealt with threatening behavior and disruptive conduct from its patients before this series of incidents and will continue to do so. Patients may express any number of preferences, make demands and threats toward staff for any number of characteristics, from the staff's race, sexuality, sexual orientation, religion—but the WLAD does not contemplate a patient-driven exception process.

Critically, the State also fails to articulate any meaningful limit to the exception it seeks. Under its reasoning, any agent of the State could justify race-based staffing decisions to accommodate client demands or threats of violence or disruption. School classroom teacher assignments, public defense attorney assignments, and even police beat assignments could all be adjusted to reflect the racial preferences of agency clientele. Nor is there any perceivable limit to race—such an exception to the WLAD would also permit accommodation of other prejudices, such as those based on gender, religion, or disability, no matter how irrational. In fact, the more irrational the prejudice and the more likely it is to lead to

violence, the more likely the accommodation would be to issue.

VI. CONCLUSION

The Washington Law Against Discrimination was enacted to prevent and eradicate discrimination. At its very core, unlawful race discrimination is that which treats one differently than another because of their race. Few cases exemplify the kind of discrimination the WLAD was enacted to prevent better than this—where the State allowed staff of one race to work in a particular ward of the hospital and not another. Upholding this type of discriminatory employer behavior is contrary to the WLAD and cases interpreting other statutes and the Constitution. This court should not create a new exception to the WLAD at the expense of individuals' right to be free from discrimination. We request that the Court declare race-based staffing assignments at the request, demands, or threats of patients as facial discrimination in violation of the WLAD.

Respectfully submitted this 21st day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2016, I caused to be served the foregoing *Motion of American Civil Liberties Union of Washington for Leave to File Amicus Curiae Brief* and *Amicus Curiae Brief of American Civil Liberties Union of Washington* to the parties below, in the manner noted:

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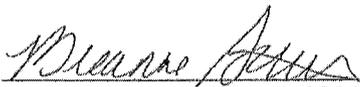
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From: Edward Wixler [mailto:ewixler@aclu-wa.org]
Sent: Monday, March 21, 2016 1:13 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Breanne Schuster <bschuster@aclu-wa.org>; La Rond Baker <lbaker@aclu-wa.org>; Nancy Talner <TALNER@aclu-wa.org>; 'JesseW@mhb.com' <JesseW@mhb.com>; josephs@mhb.com; 'tiffanyc@mhb.com' <tiffanyc@mhb.com>; 'josephD@atg.wa.gov' <josephD@atg.wa.gov>; 'GraceS@atg.wa.gov' <GraceS@atg.wa.gov>; 'allysonz@atg.wa.gov' <allysonz@atg.wa.gov>; 'LindaF1@atg.wa.gov' <LindaF1@atg.wa.gov>; 'TinaS1@atg.wa.gov' <TinaS1@atg.wa.gov>; 'TOROlyEF@atg.wa.gov' <TOROlyEF@atg.wa.gov>
Subject: No. 91494-0, Blackburn v. DSHS - Amicus Filings

Good afternoon,

Attached for filing in case no. 91494-0, Blackburn v. DSHS, are the following documents:

- Motion of American Civil Liberties Union of Washington for Leave to File Amicus Curiae Brief
- Amicus Curiae Brief of American Civil Liberties Union of Washington
- Certificate of Service

The documents are filed by Breanne Schuster, Bar No. 49993 (bschuster@aclu-wa.org, 206-624-2184). Parties' counsel have consented to service by email and are copied above.

Sincerely,
Edward Wixler
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