

No. 94209-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF WASHINGTON

IN RE:

JIN ZHU,

Plaintiff,

vs.

NORTH CENTRAL EDUCATIONAL SERVICE DISTRICT NO. 171,

Defendant.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation has an interest in the proper interpretation and application of the Washington Law Against Discrimination, Ch. 49.60 RCW (WLAD), including whether RCW 49.60.210(1) prohibits a prospective employer from refusing to hire a job applicant because he or she has opposed discriminatory practices by a previous employer.

II. INTRODUCTION AND STATEMENT OF THE CASE

Jin Zhu (Zhu) brought suit against North Central Educational Service District No. 171 (ESD) in federal court, for discrimination and retaliation he suffered as an applicant for employment. Following a jury verdict for Zhu on his WLAD retaliation claim, the district court certified to this Court the question of law presented herein. The underlying facts are drawn from the briefing of the parties and the federal district court's Order Re: Judgment as a Matter of Law or, in the Alternative, Motion for a New Trial. *See* ESD Op. Br. at 1-2; Zhu Response Br. at 3-9; ESD Reply Br. at 1-6; *Zhu v. North Central Educ. Svc. Dist. No. 171*, 2016 WL 7428204, at *1-2 (E.D. Wash. 2016).

For purposes of this brief, the following facts are relevant. Zhu, an immigrant from China, began working for Waterville School District in 2006. Zhu brought a federal action against Waterville in 2010, asserting race discrimination and retaliation in violation of Title VII, 42 U.S.C.A. § 2000e *et seq.* See *Zhu v. Waterville Sch. Dist. No. 209*, No. 132:10-CV-00333 (E.D. Wash. 2010). The Waterville action settled in 2012.

Zhu subsequently applied for multiple job openings with ESD, an educational service district serving 29 school districts, including Waterville. Zhu claims ESD was aware of the Waterville action, and that despite superior qualifications, he was denied the positions due to his race and/or his lawsuit against Waterville. Zhu brought suit, asserting race discrimination and retaliation. On September 16, 2016, the jury reached a verdict, finding for ESD as to race discrimination, but for Zhu as to retaliation under RCW 49.60.210. ESD filed a Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial, arguing § .210 does not create a cause of action against a prospective employer. On February 28, 2017, the court issued its Order Certifying Local Law Questions to this Court.

III. ISSUE PRESENTED

Does RCW 49.60.210(1) create a cause of action for job applicants who claim a prospective employer refused to hire them in retaliation for prior opposition to discrimination against a different employer?

IV. SUMMARY OF ARGUMENT

The WLAD was enacted for the purpose of eliminating and preventing discrimination, and the Legislature has mandated that its provisions be construed liberally to effectuate its purposes. This Court has declared the WLAD reflects a policy of the highest order, and it will view with caution any construction that narrows its protections.

Liberally construed, the plain meaning of RCW 49.60.210(1) creates a cause of action against a prospective employer who discriminates against a job applicant for opposing prior discrimination. However, even if the Court deems the statute ambiguous, neither the ejusdem generis doctrine nor legislative history warrants a narrow construction. Enforcement of the WLAD depends on victims' willingness to assert their rights in private actions, and allowing prospective employers to discriminate against job applicants in this context would discourage victims from asserting their statutory rights and undermine the goal of eradicating discrimination.

V. ARGUMENT

Introduction

The certified question requires the Court to construe § .210 in the context of the unique provisions and remedial purposes of the WLAD. While the Court has, at times, consulted federal opinions and those of oth-

er jurisdictions to inform its WLAD analysis, the Court has also emphasized it will “adopt those theories and rationale which best further the purposes and mandates of our state statute.” *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 491, 325 P.3d 193 (2014) (quoting *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988)). Mindful that the question here turns on the proper construction of § .210, read in context, and because the parties have examined analogous statutes from outside jurisdictions, this brief focuses its analysis on the text of the WLAD and this Court’s jurisprudence construing its provisions.

A. WLAD Provisions Must Be Construed Liberally To Effectuate The Purpose of Eliminating And Preventing Discrimination.

The WLAD was enacted in 1949 to prohibit employment discrimination on the basis of race, creed, color or national origin. *See* Laws of 1949, ch. 183 (codified in Ch. 49.60 RCW). Since its inception, the Legislature has amended the WLAD multiple times, consistently broadening its protections to encompass additional classes and to reach a variety of settings outside the employment context. *See Marquis v. City of Spokane*, 130 Wn.2d 97, 105-06, 922 P.2d 43 (1996). WLAD protections are grounded in the Washington State Constitution and the exercise of the police power “for the protection of the public welfare, health, and peace of the people of

this state.” RCW 49.60.010. The Legislature has mandated that the WLAD “be construed liberally for the accomplishment of the purposes” of eliminating and preventing discrimination. RCW 49.60.020.

This Court has recognized “the purpose of the WLAD — to deter and eradicate discrimination in Washington — is a policy of the highest order.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 246, 59 P.3d 655 (2002). The Court has declared it will “view with caution any construction that would narrow the coverage of the law.” *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 357, 20 P.3d 921 (2001) (quoting *Marquis*, 130 Wn.2d at 108). As such, in the absence of unambiguous exclusionary language in the text, the Court has liberally construed the WLAD to provide remedies for victims of discrimination. *See e.g. Brown*, 143 Wn.2d at 360 (broadly construing “employer” to include supervisors acting in the interest of an employer); *Marquis*, 130 Wn.2d at 110 (concluding RCW 49.60.030 provides a right of action for independent contractors “because, by its terms, RCW 49.60.030(1) does not limit the actions which may be brought to those listed in the statute”); *Holland v. Boeing Co.*, 90 Wn.2d 384, 389, 583 P.2d 621 (1978) (recognizing a duty to accommodate disability under RCW 49.60.180 because an “interpretation to the contrary would not work

to eliminate discrimination”); *cf. Griffin v. Eller*, 130 Wn.2d 58, 63-64, 922 P.2d 788 (1996) (victim of discrimination could not sue employer, a solo practitioner, because 49.60.040(11) expressly limited “employer” to one “who employs eight or more persons”).¹

B. RCW 49.60.210(1) Should Be Liberally Construed To Create A Cause Of Action Against A Prospective Employer Who Refuses To Hire A Job Applicant Because He Or She Has Opposed Discriminatory Practices By A Previous Employer.

The Legislature has balanced issues of public policy and instructed the WLAD must be construed liberally to effectuate the purpose of eradicating discrimination. *See supra* § V.A; RCW 49.60.020. While ESD urges the Court to consider public policy as support for the narrow construction it offers, this would appear to be beyond the Court’s interpretive function. Instead, in the absence of unambiguous language precluding a remedy, this Court should continue to “view with caution any construction that would narrow the coverage of the law,” *Brown*, 143 Wn.2d at 357, and liberally construe § .210 to effectuate the purpose of eradicating discrimination.

1. Liberally construed, the plain meaning of RCW § .210(1) creates a cause of action against a prospective employer who refuses to hire a job applicant for opposing discriminatory conduct by a previous employer.

¹ The current versions of RCW 49.60.010, .020, .030, .040, .180 and .210 are reproduced in the Appendix to this brief.

The fundamental inquiry in statutory construction is determining legislative intent, *see State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010), and the “surest indication of legislative intent is the language enacted by the legislature.” *Id.* Meaning is gleaned from “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Only if the language is reasonably susceptible to more than one meaning will the Court turn to aids of construction. *See Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

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[.]

(Brackets added).² For ESD to be liable under § .210(1), then, it must qualify as an “employer, employment agency, labor union or other person”

² While the parties refer to ESD’s actionable conduct as “retaliation,” as is discussed in more detail in this brief, *see infra* § V.B.1.b, the term “retaliate” does not appear in § .210(1). Accordingly, this brief hereinafter employs the language used in the statute, referring to discrimination “against any person because he or she has opposed any practices forbidden” by the WLAD.

that discharged, expelled or otherwise discriminated against “any person” because he or she opposed practices forbidden by the WLAD.³

- a. A prospective employer qualifies as an “employer, employment agency, labor union or other person” under the plain meaning of § .210(1).

Read in context, the plain meaning of “employer” includes a prospective employer making hiring-related decisions. The statutory definition is broad, and contains no language excluding prospective employers. *See* RCW 49.60.040(11).⁴ Additionally, “employer” is used elsewhere in the WLAD to refer to entities making decisions related to hiring. *See* RCW 49.60.180(1) (declaring an “employer” may not “refuse to hire any person” due to protected status). When the Legislature uses the same word in different but related statutory provisions, the Court assumes the word is

³ There appears to be no meaningful argument in the briefing that ESD did not “otherwise discriminate against” Zhu. It is worth noting, however, this Court has consistently construed “discriminate” broadly, recognizing discrimination in a variety of contexts, including: disparate treatment and disparate impact, *see Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985); harassment, *see Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-7, 693 P.2d 708 (1985); failure to accommodate in the context of disability, *see Holland v. Boeing Co.*, 90 Wn.2d 384, 388-89, 583 P.2d 521 (1978); and failure to accommodate in the context of religion, *see Kumar*, 180 Wn.2d at 500. To the extent the Court here liberally construes “discriminate” to include discriminatory failure to hire, it would appear to inform the proper construction of both “employer” and “other person” in § .210.

⁴ RCW 49.60.040(11) defines "employer" to include "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit."

intended to have the same meaning. *See Champion v. Shoreline Sch. Dist. No. 412*, 81 Wn.2d 672, 676, 504 P.2d 304 (1972).

Liberally construed, “other person” also encompasses a prospective employer. ESD easily qualifies as a “person” under the broad statutory definition. *See* RCW 49.60.040(19).⁵ “Person” refers to a variety of parties throughout the chapter, suggesting an expansive use of the term in the broader context of the WLAD. Moreover, language must not be deemed superfluous, and “other person” must have meaning independent of the enumerated parties it follows. *See Cent. Puget Sound Reg’l Transit Auth. v. Airport Inv. Co.*, 186 Wn.2d 336, 346, 376 P.3d 372 (2016) (recognizing the “primary goal is to give effect to the legislature's intent, which we derive by construing the language as a whole, giving effect to every provision”). Absent unambiguous exclusionary language, “other person” should be construed to include prospective employers in this context.

Of course, “other person” cannot be limitless. The Court instructs that statutory terms be read in *context*. The WLAD prohibits discrimination in a wide range of settings, including credit transactions (RCW 49.60.176), employment (RCW 49.60.180) and public accommodations

⁵ RCW 49.60.040(19) defines "person" to include "one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons."

(RCW 49.60.215). In the context of the whole chapter, use of the phrase “other person” in § .210 would appear to encompass any “other person” whose discriminatory conduct falls within the jurisdiction of the WLAD.

This view is reflected in the court of appeals opinion in *Galbraith v. Tapco Credit Union*, 88 Wn. App. 939, 951, 946 P.2d 1242 (1997), *review denied*, 135 Wn.2d 1006 (1998). There, a member sued his credit union under § .210 after he was expelled for assisting credit union employees in their employment discrimination lawsuit. The court permitted the claim, noting the WLAD includes “many situations other than employment, such as credit, travel, insurance, real estate transactions, etc.” *Galbraith*, 88 Wn. App. at 950. Relying on the “broad language of RCW 49.60.210, the Legislature’s mandate for liberal construction, and the strong public policy against discriminatory practices,” *id.* at 951, the court concluded that under § .210, “unfair practices can be committed, not only by employers, but also by any other person.” *Galbraith*, 88 Wn. App. at 950 (internal citations omitted); *see also Sambasivan v. Kadlec Medical Center*, 184 Wn. App. 567, 591-92, 338 P.3d 860 (2014) (permitting a claim under § .210 by an independent contractor); *Currier v. Northland Services, Inc.*, 182 Wn. App. 733, 744, 332 P.3d 1006 (2014), *review denied*, 182 Wn.2d 1006 (2015) (same).

Under this construction, any “other person” whose conduct constitutes an unfair practice elsewhere in the WLAD would also be prohibited from discriminating against “any person” for asserting their statutory rights. This would give meaning to all of the language in § .210 and would liberally construe the statute in the context of the WLAD as a whole.

- b. § .210(1) neither states nor implies an employment relationship must exist between the discriminator and the victim, and the Court should not read limiting language into the statute that would narrow coverage of the law.

Nothing in the text of § .210(1) indicates a person asserting a claim must have an employment relationship with the discriminator. §.210(1) protects “any person” from discrimination, implying no connection between liable parties and victims of discrimination. Had the Legislature intended to require a relationship, it could have indicated such a requirement in the text. For instance, it could have used parallel language, as is found in RCW 51.48.025(1), which prohibits retaliatory discharge in the worker’s compensation context: “No *employer* may discharge or in any manner discriminate against any *employee* because such *employee* has filed or communicated to the employer an intent to file a claim . . . ” (italics

added). By using the related terms “employer” and “employee,” the Legislature suggests a nexus between the parties not suggested in § .210(1).

Alternatively, the Legislature could have used the term “retaliate” in § .210(1), which might suggest a relationship between the discriminator and the victim. Unlike §§ .210(2) & (3), however, the term “retaliate” is conspicuously absent from the broad language in §.210(1).⁶ Instead, § .210(1) prohibits discharging, expelling or otherwise discriminating against any person for opposing practices forbidden by the WLAD. When the Legislature uses different language, the Court assumes it intends different meanings. *See State v. Flores*, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008).

- c. The lack of an express reference to job applicants in § .210(1) does not evidence legislative intent to exclude them from the protection of the statute.

In concluding the question presented here warranted certification, the federal court observed that “the Washington Legislature explicitly extended protection to job applicants and prospective employment on no less than six occasions within the WLAD,” and its absence in § .210 “could

⁶ The term retaliate *is* present in the statute’s heading. However, headings “are added by the code reviser subsequent to enactment...[and] are of little use as a guide to the intent of the legislature.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 149 Wn.2d 660, 684 n.10, 72 P.3d 151 (2003) (brackets added). Moreover, the reference to “retaliate” in the heading appears to track §§ .210(2) & (3), both of which expressly prohibit retaliation. The first portion of the heading — “Discrimination against person opposing unfair practice” — tracks the broader prohibition in § .210(1) and contains no reference to “retaliate.”

suggest that . . . the Legislature did not intend for job applicants to receive protection under RCW 49.60.210(1).” *Zhu*, 2016 WL 7428204, at *11.

The statutes listed by the district court, however, reference specific discriminatory practices, such as refusal to hire, *see* RCW 49.60.172(1), and discharge, *see* RCW 49.60.180(2). In contrast, § .210 uses the broad phrase “otherwise discriminate,” appearing to encompass the wide range of discriminatory practices prohibited by the WLAD. Additionally, by expressly including employment agencies and labor unions within its reach, § .210(1) clearly contemplates protection for job applicants, as the “persons” suffering discrimination by these entities would obviously include job applicants. It would seem absurd to assume the Legislature intended to protect job applicants from discrimination by an employment agency, but to provide no protection for the same applicant if the discrimination is inflicted by a prospective employer. *See also* RCW 49.60.030(1)(a) (declaring the “right to obtain and hold employment without discrimination”).

2. Even if the Court finds the statute ambiguous as to the construction of “other person,” neither the ejusdem generis doctrine nor legislative history warrants a narrow reading of RCW 49.60.210(1).⁷

⁷ The arguments discussed here address ESD’s claim that “other person” is ambiguous and must be construed to exclude a prospective employer. To the extent the Court reaches the conclusion a prospective employer qualifies as an “employer,” it would appear unnecessary to reach ESD’s arguments discussed here.

- a. Application of the ejusdem generis doctrine would not exclude prospective employers from § .210(1), but should nonetheless be rejected because it would contravene the mandate of liberal construction and fail to read the statute in the context of the WLAD as a whole.

ESD asserts the construction of “other person” in § .210(1) must be restricted by the terms it follows — “employer, employment agency, labor union” — and must accordingly be limited to employer-related entities. It seeks support in the court of appeals opinion *Malo v. Alaska Trawl Fisheries*, 92 Wn. App. 927, 965 P.2d 1164 (1998), *review denied*, 137 Wn.2d 1029 (1999), which applied ejusdem generis to construe “other person” as “entities functionally similar to employers.” *Malo*, 92 Wn. App. at 930. ESD contends this Court should narrowly construe “other person,” and that because only “entities functionally similar to employers” would be included, an employer-employee relationship is implicitly required.

Ejusdem generis is a rule of construction that applies “where legislative intent or language expressing that intent is unclear.” *City of Seattle v. Dep’t of Labor and Indus.*, 136 Wn.2d 693, 701, 965 P.2d 619 (1998) (citations omitted). It provides that “where specific words are followed by general words, the specific words govern the character or kind of the matter included in the general words.” *Champion*, 81 Wn.2d at 674. However,

the “ejusdem generis principle may not apply automatically in every problem of statutory interpretation where precise, specific words are followed by general words.” *State v. Thompson*, 38 Wn.2d 774, 777, 232 P.2d 87 (1951). Rather, “the ejusdem generis rule is to be employed to support the legislative intent in the context of the whole statute and its general purpose.” *Silverstreak, Inc. v. Dep’t of Labor and Indus.*, 159 Wn.2d 868, 883, 154 P.3d 891 (2007) (plurality opinion) (citations omitted).

Whether ejusdem generis is applied in any given case turns on whether its application will effectuate the statutory purpose. *See Dean v. McFarland*, 81 Wn.2d 215, 221-22, 500 P.2d 1244 (1972) (applying the doctrine in “light of the rule of strict construction that must be employed”); *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 810, 16 P.3d 583 (2001) (examining the statutory text and concluding “a more limited ejusdem generis construction was intended”); *City of Seattle*, 136 Wn.2d at 697-99 (rejecting ejusdem generis where its application would undermine legislative purpose and render statutory text superfluous); *Silverstreak*, 159 Wn.2d at 882-883 (doctrine inapplicable where statute must be “liberally construed in favor of the beneficiary of the act”).

At the outset, even if the Court applies ejusdem generis, its application should still result in an interpretation of “other person” that encom-

passes a prospective employer. In *Malo*, the court applied ejusdem generis to construe the term as an entity “functionally similar to employers.” 92 Wn. App. at 930. Under that rule, “other person” includes a prospective employer, because a prospective employer making hiring decisions is an entity “functionally similar” to an employer.⁸

More fundamentally, however, for several reasons the Court should *decline* to apply ejusdem generis here. First, application of the doctrine would fail to read the phrase “other person” in its full context, disregarding related WLAD statutes that shed light on the construction of “other person.” *See supra* at § V.B.1.a. Second, ejusdem generis may arguably render “other person” meaningless. Given the expansive definition of employer in § .040(11) — “any person acting in the interest of an employer, directly or indirectly” — it appears almost any entity functionally similar to an employer would qualify as an employer, employment agency or labor union. *See also City of Seattle*, 136 Wn.2d at 699 (noting “ejusdem generis applies only when the statute contains an enumeration by specific words” which suggest a class that “is not exhausted by the enumeration”; (citations omitted)). Third, the Legislature has mandated that WLAD pro-

⁸ A prospective employer would also be “functionally similar to an employment agency,” insofar as they both routinely interact with job applicants.

visions be construed liberally. Applying ejusdem generis as ESD urges to narrow the construction of “other person” would contravene this mandate.

- b. Silence in the legislative history as to prospective employers should not be interpreted as an intent to exclude job applicants from coverage of the law, particularly when it otherwise evidences an intent to significantly expand the protections of § .210(1).

ESD argues that when the Legislature added the phrase “other person,” the legislative history surrounding the amendment did not expressly state the phrase was added to reach prospective employers, and therefore it must be assumed the Legislature did not so intend. There are at least two reasons to reject this argument. First, there is no indication that prior to 1985, § .210(1) would have precluded a claim against a prospective employer. The definition of “employer” was the same, and the term was used to refer to entities making hiring decisions. *See* § .180(1). Second, if a statute is unclear, “it will be interpreted in the manner that best fulfills the legislative purpose and intent.” *Marquis*, 130 Wn.2d at 108. Silence in the legislative history as to the question here does not warrant overriding the mandate to liberally construe WLAD provisions.

Moreover, legislative history supports the expansive construction discussed above. *See supra* at § V.B.1.a. The Final Bill Report states:

[T]he coverage in the retaliation section is extended to apply to any person who has assisted the Commission or opposed a practice of discrimination, thus bringing under Commission protection those persons who have opposed unfair practices in places of public accommodation and real property, credit and insurance transactions.

Final B. Rep. SHB 52, at 2 (Wash. 1985) (brackets added).

While there is no express statement that § .210(1) was intended to apply to prospective employers, the legislative history does evidence an intent to significantly expand § .210(1) to a variety of contexts, many of which are not characterized by the existence of a relationship. Particularly in the absence of language limiting the application of § .210(1), it would seem counterintuitive that the Legislature intended to exclude job applicants from its protections because they lack a relationship with prospective employers, but that in other contexts, a relationship would be unnecessary.

3. Effective enforcement of the WLAD depends on victims' willingness to assert their rights in private actions, and permitting prospective employers to discriminate in this context would discourage such actions, undermining the WLAD's purpose of eradicating discrimination.

This Court has had only one opportunity to examine § .210. *See Allison v. Housing Authority*, 118 Wn.2d 79, 821 P.2d 34 (1991). In *Allison*, the Court was tasked with determining the proper causation standard

under § .210. Adopting the “substantial factor” test, the Court recognized the importance of private actions in securing WLAD protections:

Washington’s Law Against Discrimination contains a sweeping policy statement strongly condemning many forms of discrimination. RCW 49.60.010. It also requires that “this chapter shall be construed liberally for the accomplishment of the purposes thereof.” RCW 49.60.020. This language suggests that a rigorous “but for” causation requirement is too harsh a burden to place upon a plaintiff in a retaliation case. *This is particularly true, because enforcement of this State’s antidiscrimination laws depends in large measure on employees’ willingness to come forth and file charges or testify in discrimination cases. Plaintiffs bringing discrimination cases assume the role of a private attorney general vindicating a policy of the highest priority.*

Allison, 118 Wn.2d at 85-86 (italics added; citations omitted).

As discussed in this brief, *see supra* at § V.A, this Court will “adopt those theories and rationale which best further the purposes and mandates of our state statute.” *Grimwood*, 110 Wn.2d at 361-62.⁹ Permitting prospective employers to discriminate against applicants in this context would discourage victims of discrimination from bringing private actions. To safeguard the essential enforcement role provided by victims of discrimination who function as private attorneys general, *see Allison*, 118 Wn.2d at 86, this Court should hold § .210(1) creates a cause of action

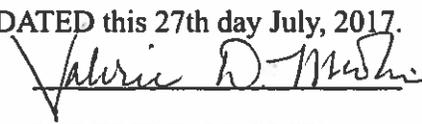
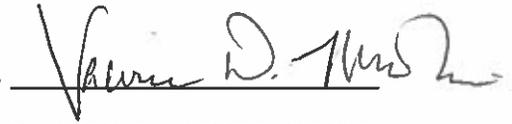
⁹ *Cf. Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (holding a retaliation cause of action lies under Title VII, 42 U.S.C.A. § 2000e-3, where the challenged conduct “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination”) (citations omitted).

against prospective employers who discriminate against job applicants for opposing discrimination by a previous employer.¹⁰

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving this appeal.

DATED this 27th day July, 2017.

VALERIE D. McOMIE

FOR DANIEL E. HUNTINGTON

with authority

On Behalf of WSAJ Foundation

¹⁰ In addition to the arguments discussed in this brief, ESD asserts Zhu failed to prove an “adverse employment action,” because he experienced no “*change in employment.*” ESD Op. Br. at 37 (emphasis in original; quoting *Boyd v. State Dep’t of Social and Health Serv.*, 187 Wn. App 1, 11, 349 P.3d 864 (2015)); see also 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.05, Comment (6th ed.) (referencing adverse employment action). Such a formulation of the doctrine would appear inconsistent with the text of several provisions of the WLAD, many of which prohibit conduct not necessarily amounting to a “change” in employment. See e.g. RCW 49.60.180(2) (“bar any person from employment”); § .180(3) (discriminate “in compensation or in other terms or conditions of employment”). To the extent an “adverse employment action” is required in Washington, refusal to hire would certainly seem to qualify. See RCW 49.60.180(1).

More fundamentally, it appears this Court has not expressly adopted this federal doctrine. It has, at times, used the phrase, but generally it is used as a shorthand for prohibited conduct while the Court analyzes a separate legal issue. See e.g. *Scrivener v. Clark College*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014) (noting a plaintiff “must ultimately prove that age was a substantial factor in an employer’s adverse employment action”; internal quotations omitted). In *Blackburn v. State*, 186 Wn.2d 250, 375 P.3d 1076 (2016), where employees argued race-based staffing assignments constituted an adverse employment action, this Court did not expressly require an “adverse employment action,” and instead focused on whether the work conditions constituted discrimination in “terms and conditions of employment” as required by the language of the relevant statute, RCW 49.60.180(3). See *Blackburn*, 186 Wn.2d at 258 (internal quotations omitted).

Appendix



RCW 49.60.010

Purpose of chapter.

This chapter shall be known as the "law against discrimination." It is an exercise of the police power of the state 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. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

[**2007 c 187 § 1**; **2006 c 4 § 1**; **1997 c 271 § 1**; **1995 c 259 § 1**; **1993 c 510 § 1**; **1985 c 185 § 1**; **1973 1st ex.s. c 214 § 1**; **1973 c 141 § 1**; **1969 ex.s. c 167 § 1**; **1957 c 37 § 1**; **1949 c 183 § 1**; Rem. Supp. 1949 § 7614-20.]

NOTES:

Effective date—1995 c 259: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995." [**1995 c 259 § 7.**]

Severability—1993 c 510: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1993 c 510 § 26.**]

Severability—1969 ex.s. c 167: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [**1969 ex.s. c 167 § 10.**]

Severability—1957 c 37: "If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of such act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby." [**1957 c 37 § 27.**]



RCW 49.60.020

Construction of chapter—Election of other remedies.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of race, color, creed, national origin, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, other than a law which purports to require or permit doing any act which is an unfair practice under this chapter. 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. This chapter shall not be construed to endorse any specific belief, practice, behavior, or orientation. Inclusion of sexual orientation in this chapter shall not be construed to modify or supersede state law relating to marriage.

[2007 c 187 § 2; 2006 c 4 § 2; 1993 c 510 § 2; 1973 1st ex.s. c 214 § 2; 1973 c 141 § 2; 1957 c 37 § 2; 1949 c 183 § 12; Rem. Supp. 1949 § 7614-30.]

NOTES:

Severability—1993 c 510: See note following RCW 49.60.010.



RCW 49.60.030

Freedom from discrimination—Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

- (a) The right to obtain and hold employment without discrimination;
- (b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;
- (c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;
- (d) The right to engage in credit transactions without discrimination;
- (e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW **48.30.300**, **48.44.220**, or **48.46.370** does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW **49.60.225** contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as

defined in the Consumer Protection Act, chapter **19.86** RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

[**2009 c 164 § 1**; **2007 c 187 § 3**; **2006 c 4 § 3**; **1997 c 271 § 2**; **1995 c 135 § 3**. Prior: **1993 c 510 § 3**; **1993 c 69 § 1**; **1984 c 32 § 2**; **1979 c 127 § 2**; **1977 ex.s. c 192 § 1**; **1974 ex.s. c 32 § 1**; **1973 1st ex.s. c 214 § 3**; **1973 c 141 § 3**; **1969 ex.s. c 167 § 2**; **1957 c 37 § 3**; **1949 c 183 § 2**; Rem. Supp. 1949 § 7614-21.]

NOTES:

Intent—1995 c 135: See note following RCW **29A.08.760**.

Severability—1993 c 510: See note following RCW **49.60.010**.

Severability—1993 c 69: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1993 c 69 § 17**.]

Severability—1969 ex.s. c 167: See note following RCW **49.60.010**.

Severability—1957 c 37: See note following RCW **49.60.010**.

Severability—1949 c 183: See note following RCW **49.60.010**.



RCW 49.60.040

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Aggrieved person" means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur.

(2) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

(3) "Commission" means the Washington state human rights commission.

(4) "Complainant" means the person who files a complaint in a real estate transaction.

(5) "Covered multifamily dwelling" means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units.

(6) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

(8) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.

(9) "Dwelling" means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(10) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

(11) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

(12) "Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer.

(13) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years.

(14) "Full enjoyment of" includes the right to purchase any service, commodity, or article of

personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, to be treated as not welcome, accepted, desired, or solicited.

(15) "Honorably discharged veteran or military status" means a person who is:

(a) A veteran, as defined in RCW **41.04.007**; or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(16) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment.

(17) "Marital status" means the legal status of being married, single, separated, divorced, or widowed.

(18) "National origin" includes "ancestry."

(19) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

(20) "Premises" means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

(21) "Real estate transaction" includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services.

(22) "Real property" includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(23) "Respondent" means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction.

(24) "Service animal" means an animal that is trained for the purpose of assisting or accommodating a sensory, mental, or physical disability of a person with a disability.

(25) "Sex" means gender.

(26) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

[**2009 c 187 § 3**. Prior: **2007 c 317 § 2**; **2007 c 187 § 4**; **2006 c 4 § 4**; **1997 c 271 § 3**; **1995 c 259 § 2**; prior: **1993 c 510 § 4**; **1993 c 69 § 3**; prior: **1985 c 203 § 2**; **1985 c 185 § 2**; **1979 c 127 § 3**; **1973 c 141 § 4**; **1969 ex.s. c 167 § 3**; **1961 c 103 § 1**; **1957 c 37 § 4**; **1949 c 183 § 3**; Rem. Supp. 1949 § 7614-22.]



RCW 49.60.180

Unfair practices of employers.

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation.

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: PROVIDED, Nothing contained herein shall prohibit advertising in a foreign language.

[2007 c 187 § 9; 2006 c 4 § 10; 1997 c 271 § 10; 1993 c 510 § 12; 1985 c 185 § 16; 1973 1st ex.s. c 214 § 6; 1973 c 141 § 10; 1971 ex.s. c 81 § 3; 1961 c 100 § 1; 1957 c 37 § 9. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

NOTES:

Severability—1993 c 510: See note following RCW 49.60.010.



RCW 49.60.210

Unfair practices—Discrimination against person opposing unfair practice—Retaliation against whistleblower.

(1) 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.

(2) It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter **42.40** RCW.

(3) It is an unfair practice for any employer, employment agency, labor union, government agency, government manager, or government supervisor to discharge, expel, discriminate, or otherwise retaliate against an individual assisting with an office of fraud and accountability investigation under RCW **74.04.012**, unless the individual has willfully disregarded the truth in providing information to the office.

[**2011 1st sp.s. c 42 § 25**; **1992 c 118 § 4**; **1985 c 185 § 18**; **1957 c 37 § 12**. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

NOTES:

Findings—Intent—Effective date—2011 1st sp.s. c 42: See notes following RCW **74.08A.260**.

Finding—2011 1st sp.s. c 42: See note following RCW **74.04.004**.

July 27, 2017 - 8:49 AM

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Comments:

Attached are a letter request to file an amicus curiae brief and accompanying proposed amicus curiae brief on behalf of Washington State Association for Justice Foundation.

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