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IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

Certified Question
Propounded by The Hon. Justin L. Quackenbush
United States District Judge (E.D. Wash.)

ZIN ZHU,

Plaintiff,

vs.

**NORTH CENTRAL EDUCATIONAL
SERVICE DISTRICT NO. 171,**

Defendant.

**DEFENDANT'S RESPONSE TO BRIEF OF
AMICUS CURIAE WASHINGTON
EMPLOYMENT LAWYERS ASSOCIATION**

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A. THE RULE OF LIBERAL CONSTRUCTION DOES NOT MANDATE A RETALIATION CAUSE OF ACTION IN THIS CASE.

This Court has stated on many occasions that the WLAD is to be broadly construed. However, broadly construing the statute does not mean that a cause of action should lie when the Legislature did not intend such a cause of action to lie. For example, in *Kilian v. Atkinson*, 147 Wn.2d 16, 50 P.3d 638 (2002), this Court acknowledged that the WLAD is to be liberally construed but refused to extend WLAD to age discrimination. This Court's opinion arose from a certified question from the United States District Court (E.D. Wash.). The certified question was "whether an age discrimination claim can be asserted by an independent contractor under RCW 49.60.030." 147 Wn.2d at 18. This Court stated at 21:

When a statute is ambiguous, this court must construe the statute in order to effectuate the intent of the Legislature. . . . Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.

This Court further stated at 23:

The Legislature's broad policy statement for chapter 49.60 RCW does not, standing alone, support Plaintiffs' argument that age is included among the protected classes listed in RCW 49.60.030(1). . . . A declaration of policy in a legislative act, however, serves only as an important guide in determining the intended effect of the operative sections. In reading the applicable statutes together to determine the legislative intent and to achieve a harmonious total

statutory scheme, it becomes clear that the Legislature referred to age discrimination only in RCW 49.44.090 and RCW 49.60.180 and did not intend to include it in the protected classes listed in RCW 49.60.030(1). Simply because “age” is included in the statement of purpose under RCW 49.60.010 does not support insertion by the court of “age” in the list of protected classes specified in RCW 49.60.030(1). If “age” is to be added to the statute, it must be added by the Legislature, which, despite numerous amendments since the statute was first enacted in 1949, has not done so.

(Paragraphing omitted.) This Court further stated at 26:

The legislative history of chapter 49.60 RCW does not support creation of a statutory cause of action for independent contractors for age discrimination under RCW 49.60.030. The statute was first enacted in 1949. The Legislature has since amended RCW 49.60.030 at least 10 times. At none of those times did the Legislature amend the statute to add “age” to the protected classes under RCW 49.60.030(a).

See also Morell E. Mullins, Sr., *Coming to Terms with Strict and*

Liberal Construction, 2000 Albany L.Rev. 9, 38 (2000):

Liberal construction, properly conceived, is not loose construction, in the sense of taking statutory language out of context and distorting it without regard to text or purpose. It is not a matter of interpretations limited only by the advocate’s imagination or the judge’s preference.

Here, the Legislature’s 1985 housekeeping amendment to RCW 49.60.210(1) was not intended to create a retaliation cause of action in favor of a job applicant against prospective employer.

In *Allison v. Housing Authority of the City of Seattle*, 118 Wn.2d 79, 821 P.2d 34 (1991) (employee’s suit against her employer), this Court held that the “substantial factor” standard of causation (as opposed to the “but for” standard) applied to a claim alleging retaliation for filing an age discrimination claim. *Allison* was based on adverse employment actions taken by an employer against an existing employee – not a prospective employer’s decision whether to hire a job applicant. Despite numerous cases addressing WLAD retaliation claims, no Washington case has yet recognized a retaliation cause of action against a prospective employer.

Amici argued: “The Court can take judicial notice that employees who prove wrongful termination are rarely reinstated as a remedy.” (Brief of Amici at 5.) This argument is not applicable to this case because Mr. Zhu was never terminated from his employment with North Central Educational Service District No. 171 (the District). Mr. Zhu was never an employee of the District. Moreover, it is pure speculation for Amici to argue that if this Court does not recognize a cause of action under these facts then “vast numbers of victims of employment discrimination would decline to complain or litigate potential claims.” (*Id.* at 6.)

The recognition of a cause of action under the facts of this case would affect all employers in the state of Washington. In the school district context, school districts recruit and select potential staff to assure

that students grow and meet their full potential in district programs. School districts require staff to be highly effective and have the necessary skills and experience to meet the learning needs of all students. School districts focus on hiring those applicants best prepared and able to improve student achievement.

Educational Service Districts are unique in that they exist in a network of support that creates opportunities for school districts to share information. RCW 28A.310.010, RCW 28A.310.200(7) and RCW 28A.310.430. If a Washington school district declines to hire an applicant, that applicant is likely to apply to another Washington school district or to multiple school districts. If an unsuccessful applicant for school district employment has a claim against a prospective employer under RCW 49.60.210(1) then the unsuccessful applicant could sue one or multiple Washington school districts simply because the former and prospective employing school districts participate in information sharing. This scenario has the potential to create real problems and additional litigation costs for all Washington school districts.

United States Supreme Court precedent does not support a cause of action in this case -- Amici cited Robinson v. Shell Oil Co., 519 U.S. 337 (1997) and Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

These cases do not suggest that Mr. Zhu has an actionable retaliation claim under the facts of this case.

In *Robinson*, a former *employee* brought a retaliation action against his former *employer*. The Court held that the term “employees” as used in the anti-retaliation provision of Title VII included former employees. 519 U.S. at 346. Plaintiff filed a charge with the EEOC after he was fired by Shell Oil Co. *Id.* at 339. Plaintiff claimed that Shell discriminated against him on the basis of his race. Plaintiff applied for a job with another employer. *Id.* Plaintiff claimed that Shell “gave him a negative reference in retaliation for his having filed the EEOC charge” against Shell. *Id.* The case involved 42 U.S.C. § 2000e-3(a), which specifically provides that it is an unlawful employment practice to discriminate against “applicants for employment” based upon protected activity. The Title VII cases brought by job applicants generally have this same fact pattern: a former employer gives a negative reference after a fired employee applies with a new prospective employer.

In *Jackson*, a former coach of a girls’ high school basketball team sued his former employer (a school district) for alleged retaliation against him in violation of Title IX. 544 U.S. at 171. Plaintiff complained that his team was not receiving equal funding and equal access to athletic equipment and facilities. *Id.* Plaintiff then received negative work

evaluations and he was ultimately removed as the girls' coach. *Id.* at 171-72. It was under these circumstances that plaintiff had a cause of action for retaliation. The Court stated at 171: "We hold that [a private right of action is implied by Title IX] where the funding recipient retaliates against an individual because he has complained about sex discrimination." *Id.* at 171. The case does not remotely involve the facts in this case where a prospective employee sued a prospective employer when the prospective employee was *never employed* by the prospective employer.

Amici stated: "Indeed, finding that RCW 49.60.210 prohibits refusals to hire would likely confirm the reasonable beliefs of most employers and employees, and their counsel." (Brief of Amici at 8.) As authority for this assertion, Amici cited to what was referred to as a treatise: Patricia A. Wise, *Understanding and Preventing Workplace Retaliation*, 5 (2015). There is a 2000 treatise with this title written by Patricia A. Wise and a law review article with this title written by Lisa Cooney.¹ The District could not find any treatise or law review article by Ms. Wise or Ms. Cooney suggesting that most employers, employees and their counsel would think that retaliation action such as brought by Mr. Zhu could be brought under RCW 49.60.210. If such was the law then it

¹ PATRICIA A. WISE, UNDERSTANDING AND PREVENTING WORKPLACE RETALIATION (Jerry Kline ed. 2000) and Lisa Cooley, *Understanding and Preventing Workplace Retaliation*, 88 Mass. L.Rev. 3 (2003).

would be expected that there would be numerous cases in Washington and in states with anti-retaliation statutes similar to Washington's – which there are not.

Additionally, the District was unable to find the quote set forth at footnote 3 of Amici's brief. Even if Ms. Wise's 2000 treatise included the quote set forth at footnote 3 it would be extremely weak secondary authority for finding a cause of action for Mr. Zhu under the facts of this case.

The statute as a whole supports the District's position in this case -- Amici cited *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359, 20 P.3d 921 (2001) (employee sued his own employer for disability and sex discrimination) for the propositions that in interpreting a statute the court looked not only to its text but also "at the statute in its entirety" and that the "overarching purpose" of the WLAD is "to deter and to eradicate discrimination in Washington." The fact that any particular statute is to be liberally interpreted does not detract from the fact that the most reasonable interpretation of the statute is how the statute was interpreted in *Owa v. Fred Meyer Stores*, 2017 WL 897808 (W.D.Wash. 2017). In *Owa*, the district court stated at *2 that the term "or other person" is restricted by the words "employer," "employment agency" and "labor union." Therefore, because there was not an employer-employee relationship between the

parties in *Owa*, plaintiff did not have an actionable claim for retaliation. *Id.* at *3. Amici did adequately explain why Judge Jones erred in the *Owa* case. Amici simply argued that Judge Jones “fail[ed] to account for the fact that under the plain language of RCW 49.60.210, the [District] is self-evidently an employer” and the holding that there must be an employer-employee relationship is “contrary to the liberal construction and protective purposes of the anti-retaliation provision.” (Brief of Amici at 16.)

The anti-retaliation statute creates liability only as to persons and entities who are employers or the functional equivalent of employers. *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn.App. 927, 930, 965 P.2d 1124 (1998) (liability under RCW 49.60.210 is limited to “entities functionally similar to employers”); *Woods v. Washington*, 2011 WL 31852, *4 (W.D.Wash. 2011) (citing *Malo* and refusing to extend the anti-retaliation statute’s reach to co-workers; “the ‘other person’ language of the statute may include managers, but not co-workers”).

Amici did not discuss Judge Quackenbush’s conclusion that the scope of RCW 49.60.220(1) is “unclear.”² “If the statute is ‘susceptible to two or more reasonable interpretations,’ it is ambiguous.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011),

quoting Burton v. Lehman, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). “If a statute is ambiguous, we ‘may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent.’” *Five Corners*, 173 Wn.2d at 305, *quoting Rest. Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 305-06, 80 P.3d 598 (2003). The District went into great detail in its briefs about the legislative history of the 1985 amendments to RCW 49.60.210(1). Amici did not challenge the District’s argument: If the Legislature intended to amend the anti-retaliation statute to apply in a case such as the case at bar then it would be expected that such a significant change in the law would have been mentioned in the legislative history. In the legislative history, the amendments were said to be merely “housekeeping.” The amendments passed 96-0 in the House, 44-5 in the Senate as amended and 96-0 in the House. As stated by the California Supreme Court, when considering legislation that passed by a vote of 32-0 in the Senate and 64-9 in the Assembly: “It is hard to imagine that a bill that created individual liability for retaliation where none had existed could be considered so

² This was the conclusion by Judge Quackenbush in *Zhu v. North Central Educ. Serv. Dist.*, 2016 WL 7428204, *11 (E.D.Wash. 2016).

noncontroversial.” *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal.4th 1158, 117 P.3d 232, 72 Cal. Rptr. 624, 634 (Cal. 2008).³

B. THE FAILURE TO HIRE IS NOT AN ADVERSE EMPLOYMENT ACTION.

Amici argued that the language of RCW 49.60.210 does not require a finding of an “adverse employment action.” Amici simply cited generally to *Blackburn v. State*, 186 Wn.2d 250, 375 P.3d 1076 (2016), which was a disparate impact and hostile work environment case. Amici did not distinguish *Currier v. Northland Servs., Inc.*, 182 Wn.App. 733, 332 P.3d 1006 (2004) (independent contractor was permitted to bring a retaliation action under the WLAD), *rev. denied* 182 Wn.2d 1006, 342 P.3d 326 (2015), in which the Court of Appeals stated at 742 that **in order to establish a prima facie case of retaliation under RCW 49.60.210(1) a plaintiff must show that “he or she suffered an adverse employment action”** (Emphasis added.)

Amici cited *Boyd v. State Dep’t of Social & Health Servs.*, 187 Wn.App. 1, 349 P.3d 846 (2015) (employee sued her own employer for retaliation), in which the Court of Appeals stated at 14-15: “An employment action is adverse if it is harmful to the point that it would

³ Amici made an attempt to distinguish *Lodge at Torrey Pines* when it stated the California Supreme Court did not address the precise issue that is before this Court. (Brief of Amici at 17, n. 6.)

dissuade a **reasonable employee** from making a complaint.” (Emphasis added.) In *Boyd*, plaintiff was an employee of defendant’s hospital, Western State Hospital. *Id.* at 6. Plaintiff claimed that he was retaliated against (a suspension for two weeks without pay and being removed from his ward) because he reported that he was sexually harassed by his supervisor. *Id.* at 6, 9, 14. The *Boyd* court stated at 13: “An adverse employment action involves a **change in employment** that is more than an inconvenience of alteration of **one’s job responsibilities.**” (Emphasis added.) The *Boyd* court stated: “**The employee** must show that a **reasonable employee** would have found the challenged action materially adverse” *Id.* (Emphasis added.) Here, Mr. Zhu was never an employee of ESD # 171.

Amici cited *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006) (employee sued his own employer for sex discrimination and retaliation), in which the Court stated at 57 that retaliation could be founded on any actions “materially adverse to a reasonable employee or job applicant” However, *Burlington Northern* involved Title VII, which specifically provides at 42 U.S.C. § 2000e-3(a) that it is “an unlawful employment practice for an employer to discriminate against . . . **applicants for employment**” due to protected activity. (Emphasis

added.) RCW 49.60.210(1) does not state that it applies to applicants for employment.

Amici criticized the District for citing from a dissenting opinion in *Robel v. Roundup Corp.*, 148 Wn.2d 35, 74 n. 14, 59 P.3d 611 (2002) (Bridge, J. dissenting), in which the dissent stated that adverse employment actions are such things as “demotion or adverse transfer, or a hostile work environment” Majority opinions also use the same language. *See. e.g., Alonso v. Qwest Communications Co., LLC*, 178 Wn.App. 734, 746, 315 P.3d 610 (2013):

An adverse employment action involves **a change in employment conditions** that is more than an inconvenience or alteration of **one’s job responsibilities**, such as **reducing an employee’s workload or pay**. [Citation omitted.] A demotion or adverse transfer, or a hostile work environment, may also amount to an adverse employment action. [Citation omitted.]

(Emphasis added.)

Amici also criticized the District’s argument that the Washington Pattern Jury Instructions⁴ do not list refusal to hire as one of the bracketed adverse actions. The “COMMENT” to the instructions states that an adverse employment action may be a failure to promote, reduction in pay and a demotion or transfer – all of which would be conduct by *a plaintiff’s employer*. Amici pointed out that the “NOTE ON USE” states: “It may be

appropriate to substitute other allegedly retaliatory acts” in the bracketed list of adverse employment actions. There is no suggestion that the authors of the note on use had a failure to hire in mind as an adverse employment action.

C. THE DECISIONS OF OTHER STATE APPELLATE COURTS DO NOT SUGGEST A RETALIATION CAUSE OF ACTION IN THIS CASE.

Amici primary relies upon *Carter Coal Co. v. Human Rights Com’n*, 633 N.E.2d 202 (Ill.App. 1994), *appeal denied* 642 N.E.2d 1275 (Ill. 1994). *Carter Coal* was a three judge opinion with one judge concurring specially. Two judges held that (1) an employer could not refuse to hire a job applicant due to the applicant’s filing of a discrimination charge against a former employer **and** (2) an employer could not fire **an employee** for filing a discrimination charge against a **former employer**. The concurring judge stated: “I would affirm the Commission only on the ‘alternate basis’ presented by the majority, that is, that plaintiff was discharged by Carter Coal Company because he had previously filed a charge of discrimination against a former employer.” 633 N.E.2d at 213. **Thus, only two judges held that there was an actionable retaliation claim under the facts presented here: a prospective employee suing a prospective employer.** The opinion of

⁴ 6A Wash. Prac., Wash. Pattern Jury Instr. Civil 330.05 (Employment

only two court of appeal judges does not support Amici's assertion that decisions of other state appellate courts provide persuasive authority for Mr. Zhu's position. This is especially true considering the fact that *Carter Coal Co.* was decided more than 20 years ago and there has not been a single case relying upon *Carter Coal Co.* holding that an employer cannot refuse to hire a job applicant due to the applicant's filing of a discrimination charge against a former employer.

Moreover, the opinion in *Carter Coal Co.* relied on case law directly opposite to the case law of the state of Washington. In Illinois, "a cause of action has been recognized against one's current employer if the employer discharges an employee because the employer filed a workers' compensation claim against a previous employer." 633 N.E. at 748. This Court has specifically rejected such a holding. *Warnek v. ABB Combustion Eng'g Servs., Inc.*, 137 Wn.2d 450, 455, 972 P.2d 453 (1999) (rejecting a claim that a former employee has a retaliation cause of action for the failure to hire because the employee filed a workers' compensation claim during the course of previous employment with the employer). In *Warnek*, this Court stated: "**There is a distinction between discharge or other discrimination in the course of employment and not being rehired for new employment.**" *Id.* at 456. (Emphasis added.)

Although *Carter Coal Co.* has been cited in about 20 published cases, in none of those cases was it cited for the proposition advanced here by Amici. For example, *Carter Coal Co.* was said to be “all but worthless” in *Griggs v. Marion Hosp. Corp.*, 366 F.Supp.2d 696, 697 (S.D.Ill. 2015) (noting that another Illinois case held that there is no cause of action predicated on an employer’s alleged demotion of or discrimination against an employee in retaliation for her assertion of her rights under a workers’ compensation act). See also *Stericycle, Inc. v. RQA, Inc.*, 2014 WL 4826653, *19 (Ill.App. 2014) (citing *Carter Coal Co.* on general statutory construction law); *People v. Childress*, 789 N.E.2d 330, 341 (Ill.App. 2003) (citing *Carter Coal Co.* for using federal law for guidance when state and federal statutes are similar); *Stone v. Dep’t of Human Rights*, 700 N.E.2d 1105, 1112 (Ill.App. 1998) (citing *Carter Coal Co.* on the elements of a prima facie case of retaliation); *Cook County State’s Attorney v. Illinois State Labor Relations Bd.*, 684 N.E.2d 970, 974 (Ill.App. 1997) (citing *Carter Coal Co.* on when a court will exercise de novo review); *Stahulak v. City of Chicago*, 684 N.E.2d 907, 921 (Ill.App. 1997) (citing *Carter Coal Co.* on inroads into the employee-at-will doctrine).

Amici asserted that the District misrepresented the holding of *Com’n of Human Rights & Opportunities v. Echo House Ambulance*, 113

A.3d 463 (Conn.App. 2015), *aff'd* 140 A.3d 190 (2016). (Brief of Amici at 18.) In *Echo House Ambulance*, Sarah Puryear alleged that Echo House Ambulance and the City of Shelton “discriminated and retaliated against her” in violation of state and federal law. 113 A.3d at 465. Ms. Puryear was accepted into a non-paid precept program and during the program she alleged that “was treated differently due to her race and color, and she was subject to discipline that other individuals . . . were not.” *Id.* at 466. A motion to dismiss was filed on the ground that Ms. Puryear “could not bring a claim of employment discrimination . . . because she was not an employee of Echo Hose or of the City.” *Id.* at 467. Conn. Gen. Stat. 46a-60(4) provided that it was unlawful “[f]or any **person**, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any **person**” due to protected activity. (Emphasis added.) The Connecticut Court of Appeals stated at 468: “**Puryear does not dispute that in order to invoke the protections [of the statute] she had to make factual allegations sufficient to establish that she was an employee of Echo House.**” (Emphasis added.) In *Echo House Ambulance*, because plaintiff was not an employee she did not have a retaliation cause of action under the Connecticut anti-retaliation statute. Here, the fact that the *Echo Hose Ambulance* court used the “remuneration test” to decide whether Ms. Puryear was an employee is

immaterial because under any scenario Mr. Zhu was never an employee of the District.

D. CONCLUSION.

The Court should find that in amending the statute at issue in 1985 the Legislature did not intend to create a retaliation cause of action in favor of a job applicant based upon the job applicant's protected activity while working for a previous employer.

RESPECTFULLY SUBMITTED this 18th day of August, 2017.

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Per GR 30(d)(2)

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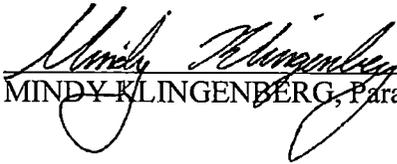
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Subject: RE: Zhu v North Central ESD #171 (USIP) *APPEAL (15-3950-001.001)

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Subject: Zhu v North Central ESD #171 (USIP) *APPEAL (15-3950-001.001)

Good afternoon,

Attached please find Defendant North Central ESD's brief submitted in response to the Amicus Curiae brief filed by the Washington Employment Lawyers Association in the above matter.

Have a wonderful weekend,

Mindy

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