

No. 94209-9

IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

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

ZIN ZHU,

Plaintiff,

vs.

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

Defendant.

DEFENDANT'S OPENING BRIEF

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A. CERTIFIED QUESTION

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?

B. INTRODUCTION

Defendant Educational Service District No. 171 (the District) is one of nine Educational Service Districts in the state of Washington.¹ The District is headquartered in Wenatchee.

Plaintiff Zin Zhu began employment as a teacher at Waterville School District (Waterville) in 2006. On Sept. 28, 2010, Mr. Zhu sued Waterville for alleged racial discrimination. On March 13, 2012, Mr. Zhu's lawsuit against Waterville was mediated by a federal magistrate judge and the case was settled. As part of the settlement Mr. Zhu agreed to resign from his employment at Waterville. Thereafter, on May 30, 2012, Mr. Zhu applied for the position of Math-Science Specialist with the District. Mr. Zhu and two other applicants were invited to interview for the position. On June 19, 2012, a committee consisting of four administrators of the District interviewed the three candidates. On July 20, 2015, after Mr. Zhu was not hired for the job, he sued the District for

racial discrimination, retaliation and on other claims. (Mr. Zhu also sued because the District did not hire him for a temporary “refurbishment assistant” job.) Mr. Zhu was unsuccessful on eight of his nine claims that alleged discrimination, retaliation or other wrongful conduct.² Mr. Zhu was successful on his state law retaliation claim based upon RCW 49.60.210(1).

Mr. Zhu’s retaliation claim -- Mr. Zhu alleged that some employees of the District were aware of his protected activity at Waterville and the District did not hire him in retaliation for Mr. Zhu’s protected activity at Waterville. The District filed a post-trial motion for judgment as a matter of law (JMOL) based in part on the District’s argument that a job applicant cannot maintain a state law retaliation claim based upon the job applicant’s protected activity with a former employer.

The district court stated:

Neither the Washington Court of Appeals or Washington Supreme Court has addressed the factual scenario presented here where a prospective employee alleges retaliation

¹ ESD 101 in Spokane, ESD 105 in Yakima, ESD 112 in Vancouver, ESD 113 in Tumwater, ESD 114 in Bremerton, ESD 212 in Renton, ESD 123 in Pasco, ESD 171 in Wenatchee and ESD 189 in Anacortes.

² The District prevailed on Mr. Zhu’s (1) federal claim for racial discrimination based on the math-science specialist job, (2) federal claim for racial discrimination based on the temporary assistant job, (3) federal claim for retaliation based on the math-science specialist job, (4) federal claim for retaliation based on the temporary assistant job, (5) WLAD racial discrimination claim based on the math-science specialist job, (6) WLAD racial discrimination claim based on the temporary assistant job, (7) WLAD claim for retaliation based on the temporary assistant job and (8) state common law “blacklisting” claim.

against a prospective employer for failing to hire the plaintiff based on the plaintiff's past discrimination lawsuit against a different employer.

Zhu v. North Central Educational Service District No. 171, 2016 WL 7428204, *6 (E.D.Wash. 2016). The district court stated: "If RCW 49.60.210(1) has been extended to prospective job applicants, this determination should be made by the State of Washington courts, not this court." *Id.* at *11.

A statute is ambiguous when it is subject to more than one reasonable interpretation. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). When a statute is ambiguous, the court first attempts to resolve any ambiguity and determine the legislature's intent by considering principles of statutory construction, legislative history and relevant case law. *Id.*

Here, the district court acknowledged that the statute was ambiguous when it stated: "However, in light of the fact **the scope of RCW 49.60.210(1) is unclear**, the court will grant certification of the question of local law to the Washington Supreme Court." *Zhu v. North Central Educational Service District, supra* at *11. (Emphasis added.)

There are some federal and state statutes that allow a discrimination cause of action in favor of a job applicant. These statutes

include the words “applicants for employment” or “applicant.”³ There are other federal and state statutes that do not create a retaliation cause of action in favor of a job applicant. These statutes do not use the word “applicant.”⁴

³ FEDERAL STATUTES -- *See, e.g.*, 42 U.S.C. § 2000e-3(a) of Title VII, which states: “It shall be an unlawful employment practice for an employer to discriminate against any of his employees **or applicants for employment**” due to protected activity. (Emphasis added.) *Kelly v. Goodyear Tire and Rubber Co.*, 220 F.3d 1174, 1179 (10th Cir. 2000) (discussing plaintiff’s claim under Title VII that a prospective employer retaliated against him for filing a complaint against a prior employer). *See also* 29 U.S.C. § 623(d) of the Age Discrimination in Employment Act (ADEA), which provides: “It shall be unlawful for an employer to discriminate against any of his employees **or applicants for employment**” due to protected activity. (Emphasis added.) STATE STATUTES – *See, e.g.*, Fla. St. § 440.105(2)(a)(2), which states: “It shall be unlawful for any employer to . . . [d]ischarge or refuse to hire an employee **or job applicant** because the employee or **applicant**” engaged in protected activities. (Emphasis added.) *See also* La. Rev. Stat. 23:1361, which states: “No person, firm or corporation shall refuse to employ any **applicant for employment** because of such **applicant** having asserted a claim for workers’ compensation benefits” (Emphasis added.)

⁴ FEDERAL STATUTES -- *See, e.g.*, 29 U.S.C. § 215(a)(3) of the Fair Labor Standards Act (FLSA), providing that “it shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee” due to protected activity. *See Johnson v. Serenity Transp., Inc.*, 141 F.Supp.3d 974, 988 (N.D.Cal. 2015) (“A defendant must be an ‘employer’ of the plaintiff to be liable under the FLSA.”); *Arias v. Raimondo*, 2015 WL 1469272, *3 (E.D.Cal. 2015) (the FLSA “explicitly provides that an employee may only sue employers for retaliation”), *appeal filed* (9th Cir. 2015); *Rodriguez v. SGLC, Inc.*, 2012 WL 5705992, *7 (E.D.Cal. 2012) (under the FLSA employees may only seek redress from “employers”); *Boddy v. Astec, Inc.*, 2012 WL 5507298, *6 (E.D.Tenn. 2012) (“the retaliation provisions of the FLSA do not apply to non-employers”); *Dellinger v. Science Applications Intern. Corp.*, 649 F.3d 226, 230 (4th Cir. 2011) (prospective employee brought action against prospective employer; “there is . . . no remedy for an employee to sue anyone but his employer for violations of the anti-retaliation provision [of the FLSA] [and] if the person retaliating against an employee is not an employer, the person is not subject to a private civil action”), *cert. denied* 565 U.S. 1197 (2012); *Darveau v. Detecon, Inc.*, 515 F.3d 334, 340 (4th Cir. 2008) (plaintiff must show that “he suffered adverse action by the employer”); *Glover v. City of North Charleston, S.C.*, 942 F.Supp. 243, 245 (D.S.C. 1996) (“the anti-retaliation provisions of the FLSA require an employer-employee relation to exist or to have existed between Plaintiffs and Defendants”); *Harper v San Luis Valley Regional Med. Center*, 848 F.Supp. 911, 913 (D.Colo. 1994) (anti-retaliation protection of the FLSA does not extend to non-employee job applicants). STATE STATUTES – *See, e.g.*, Cal. Gov’t Code § 12940(h), which provides that it is unlawful “[f]or any employer, labor organization, or person to discharge, expel, or otherwise discriminate against any person” due to protected

Federal statute using “applicants for employment” – In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the United States Supreme Court stated that 42 U.S.C. § 2000e-3(a) of Title VII was applicable to a retaliation claim brought by a former employee against his former employer because the term “employees” used in the anti-retaliation statute included former employees. Plaintiff was fired by Shell Oil Company and filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). *Id.* at 339. While the charge was pending, plaintiff applied for a job with another company. *Id.* Plaintiff claimed that when his prospective employer contacted Shell Oil Company that the former employer “gave him a negative reference in retaliation for his having filed the EEOC charge.” *Id.* Plaintiff’s lawsuit was against his former employer – not against the prospective employer.

Federal statute not using “applicants for employment” -- In *Dellinger v. Science Applications Intern. Corp.*, 649 F.3d 226 (4th Cir. 2011), *cert. denied* 556 U.S. 1197 (2012), the circuit court stated that the Fair Labor Standards Act (FLSA) is not intended to protect prospective

activity. *See also* Conn. Gen. St. § 46a-60(a)(4), which states that it is unlawful “[f]or any person, employer, labor organization, or employment agency to discharge, expel or otherwise discriminate against any person” due to protected activity.

employees from retaliation and that extending anti-retaliation protection to prospective employees would greatly expand the scope of the statute.⁵

There are numerous state anti-retaliation statutes that are almost identical to RCW 49.60.210(1).⁶ **The appellate courts of those states with retaliation statutes almost identical to RCW 49.60.210(1) have never held there is a retaliation cause of action for a job applicant**

⁵ The *Dellinger* court stated at 231 that “we hold that the FLSA anti-retaliation provision . . . does not authorize prospective employees to bring retaliation claims against prospective employers.”

⁶ **California** – unlawful “[f]or any employer, labor organization, employment agency, **or person** to discharge, expel, or otherwise discriminate against **any person**” due to protected activity – Cal. Gov’t Code § 12940(h) (Emphasis added); **Connecticut** – unlawful “[f]or **any person**, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against **any person**” due to protected activity – Conn. Gen. St. § 46a-60(a)(4) (Emphasis added); **Kentucky** – unlawful “for **a person** . . . “[t]o retaliate or discriminate in any manner against **a person**” due to protected activity – Ky. Rev. St. § 344.280(1) (Emphasis added); **Massachusetts** – unlawful “for **any person**, employer, labor organization or employment agency to discharge, expel, or otherwise to discrimination against **any person**” due to protected activity – Mass. St. 151B § 4(4) (Emphasis added); **Missouri** – unlawful “[t]o retaliate or discriminate in any manner against any **other person**” due to protected activity – Mo. Rev St. § 213.070(2) (Emphasis added.); **New Hampshire** – unlawful “for **any person** engaged in any activity to which this chapter applies to discharge, expel or otherwise retaliate or discriminate against **any person**” due to protected activity – N.H. Rev. St. 354-A:19 (Emphasis added); **New Jersey** – unlawful “[f]or **any person** to take reprisals against **any person**” due to protected activity – N.J. St. § 10:5-12(d) (Emphasis added); **North Dakota** – unlawful “for **a person** . . . to engage in any form of threats, retaliation, or discrimination against **a person**” due to protected activity – N.D. St. § 14-02.4-18 (Emphasis added); **Ohio** – unlawful “[f]or **any person** to discriminate in any manner against **any other person** because **that person**” engaged in protected activity – Ohio St. 4112.02(I) (Emphasis added); **Oregon** – unlawful “[f]or **any person** to discharge, expel or otherwise discriminate against **any other person**” due to protected activity – Or. Rev. St. § 659A.030(1)(f) (Emphasis added); **South Dakota** – unlawful “for **any person**, directly or indirectly . . . to engage in or threaten to engage in any reprisal, economic or otherwise, against **any person**” due to protected activity – S.D. St. § 20-13-26 (Emphasis added); **Tennessee** – unlawful “for **a person** . . . to . . . [r]etaliate or discriminate in any manner against **a person**” due to protected activity – Tenn. St. § 4-21-301(a)(1) (Emphasis added); **West Virginia** – unlawful “[f]or **any person**, employer, employment agency, labor organization, owner, real estate salesman or financial institution to . . . [e]ngage in

based upon an applicant’s protected activity while employed by a previous employer.

C. STATEMENT OF THE CASE

For the purpose of this certified question, the District accepts the district court’s recitation of the facts set forth at pp. 1-4 of the district court’s order certifying local law question to the Washington Supreme Court dated Feb. 28, 2017.

D. ARGUMENT

RCW 49.60.210(1) DOES NOT CREATE A RETALIATION CAUSE OF ACTION IN FAVOR OF A JOB APPLICANT DUE TO THE JOB APPLICANT’S OPPOSITIONAL ACTIVITY WHILE EMPLOYED BY A PREVIOUS EMPLOYER.

- 1. The 1985 amendments to RCW 49.60.210(1) were not intended to create a retaliation cause of action in favor of a job applicant.**

No Washington appellate court interpreting RCW 49.60.210(1) has held that the statute provides a cause of action in favor of a job applicant due to oppositional activity occurring during the applicant’s past employment. Moreover, no state appellate court interpreting a statute substantially similar to our retaliation statute has held there is a retaliation

any form of reprisal or otherwise discrimination against **any person**” due to protected activity – W.V. St. § 5-11-9(7)(C) (Emphasis added).

cause of action for a job applicant based upon an applicant's protected activity while employed by a previous employer.

The legislative history of RCW 49.60.210(1) does not suggest any intent on the part of the legislature to expand the retaliation claim to prospective employers in a later job.⁷ Before 1985, RCW 49.60.210(1) provided:

It is an unfair practice for any **employer**, employment agency or labor union to discharge, expel or otherwise discriminate against **any person** because he has opposed any practices forbidden by this chapter, or because he has filed a charge, testified, or assisted in any proceeding under this chapter.

(Emphasis added.)

The statute was amended in 1985 to provide:

It is an unfair practice for any employer, employment agent, ((or)) labor union, **or any 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.

(Added words in boldface.) As is apparent, the only substantive change was to add the words "or other person" to the statute.

The legislative history to the 1985 amendments did not include anything that stated or implied that the amendment was intended to make a

⁷ The legislative history of the Washington Law Against Discrimination (WLAD) is partially explained in *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996).

prospective employer potentially liable for protected activity of a job applicant when the person was employed by a previous employer. (Legislative history documents are attached to the Appendix of this brief.)

House Bill Report on HB 52 (Jan. 30, 1985) mentioned the addition of the words “to any person” where the report stated at 2:

The jurisdiction of the Law Against Discrimination is changed in four areas. . . . Third, the 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.

(Emphasis added.)

The text of Substitute House Bill No. 52 (Feb. 1, 1985) includes the words “or other persons” at Sec. 20.

House Bill Report – SHB 52 (Feb. 15, 1985) stated at 2-3:

The jurisdiction of the Law Against Discrimination is changed in four areas. . . . Third, the 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.

(Emphasis added.)

The report further stated at 3-4:

The opinion at p. 49 discusses the WLAD’s enactment in 1949 and certain amendments in 1957 and 1973.

This is a “housekeeping” bill and it is necessary to ensure that the law against discrimination is effectively enforced. The streamlined enforcement procedure is needed to assure the prompt enforcement of Human Rights Commission and administrative law judge orders.

(Emphasis added.)

Senate Bill Report – SHB 52 (March 26, 1985) stated at 2:

Several other types of discriminatory conduct are deemed to be unfair practices under the law against discrimination. . . . In addition, it is an unfair practice for a labor union or any employer to discriminate against **any person** because he or she opposed a discriminatory practice. It is also an unfair practice for an employment agency to discriminate on the basis of a person’s marital status.

(Emphasis added.)

Final Bill Report – SHB 52 – Synopsis as Enacted (undated) stated

at 2:

The jurisdiction of the Law Against Discrimination is changed in four areas. . . . Third, the 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, and insurance transactions.

(Emphasis added.)

The final bill report also stated at 3 that “gender-specific language is corrected.”

The Certification of Enrolled Enactment – Substitute House Bill No. 52 (April 12, 1985) recorded the votes on final passage: House 96-0, Senate 44-5 (Senate amended) and House 96-0.

If the Legislature intended to amend the 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. The pre-1985 retaliation statute applied to “any employer, employment agency or labor union” The 1985 retaliation statute should be interpreted to apply to “any person” who is an agent of an employer, employment agency or labor union. Under the pre-1985 retaliation statute and the 1985 retaliation statute the District was never an employer of Mr. Zhu. Moreover, the District was not an entity functionally similar to an employer of Mr. Zhu.

In *Owa v. Fred Meyer Stores*, 2017 WL 897808, *2 (W.D.Wash. 2017) (Jones, J.), the district court cited *Malo v Alaska Trawl Fisheries, Inc.*, 92 Wn.App. 927, 965, 965 P.2d 1124 (1988) (defendant co-captain was not plaintiff co-captain’s employer so defendant was not subject to liability for retaliatory discharge), *rev. denied* 137 Wn.2d 1029, 980 P.2d 1284 (1999). **The district court at *2 cited *Malo* for the proposition that the term “or other person” is restricted by the words “employer,” “employment agency” and “labor union.**

The district court in *Owa* added at *3: “Upon finding that no such employer-employee relationship exists between Fred Meyer and Plaintiff, the Court **DISMISSES** with prejudice Plaintiff’s claims for retaliation” (Emphasis in original.)

2. No appellate court in the state of Washington has held that a job applicant has a retaliation cause of action against a prospective employer based upon protected activity that took place during the job applicant’s past employment.

This Court has discussed or mentioned RCW 49.60.210(1) on only a handful of occasions and in all of those cases the facts involved an employee and his or her current or past employer.⁸

⁸ *Long v. Brusco Tug & Barge*, 185 Wn.2d 127, 139, 368 P.3d 478 (2016) (employer violated the WLAD “only if [**the employer**] had retaliated against [**the employee**] for opposing what he reasonably believed was unlawful discrimination”) (Gonzalez, J. dissenting); *Ellis v. City of Seattle*, 142 Wn.2d 450, 460, 13 P.3d 1065 (2000) (action by **an employee** against **an employer**; “in the retaliatory discharge context, Washington law has recognized a cause of action where **an employee** has an objectively reasonable belief **an employer** has violated the law.” – boldface added); *Marquis v. City of Spokane*, 130 Wn.2d 97, 121 n. 4, 922 P.2d 43 (1996) (action by **an employee** against **an employer**; RCW 49.60.210 concerns discrimination against one opposing discrimination under RCW 49.60); *Sherman v. State*, 128 Wn.2d 164, 202-03, 905 P.2d 355 (1995) (action by an **employee** against **an employer**; reversing the trial court’s order granting summary judgment on plaintiff’s retaliatory discharge claim); *Allison v. Housing Auth. of City of Seattle*, 118 Wn.2d 79, 86, 821 P.2d 79 (1991) (RCW 49.60.210 “prohibits **employers** from making an adverse employment decision “*because* [**the employee**] opposed any practices forbidden by [RCW 49.60]”). *Allison*, Wash.App. at 628” – boldface added); *Bennett v. Hardy*, 113 Wn.2d 912, 925, 784 P.2d 1258 (1990) (action by **an employee** against **an employer**; “RCW 49.60.210 makes it an unfair practice for **an employer** to discriminate against a person because she has opposed practices forbidden by that chapter” – boldface added); *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 906, 726 P.2d 439 (1986) (action by **an employee** against **an employer**; plaintiff employee “alleged that he was discharged . . . because he opposed [**his employer’s**] violation of the laws against discrimination” – boldface added); *Wash. Water Power Co. v. Wash. State Human Rights Comm’n*, 91 Wn.2d 62, 69, 586 P.2d 1149 (1978) (disparate treatment case holding that an anti-nepotism policy was

In *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn.App. 927, 965 P.2d 1124 (1998), *rev. denied* 137 Wn.2d 1029, 980 P.2d 1284 (1999), the court held that “RCW 49.60.210(1) does not create personal and individual liability for co-workers.” *Id.* at 931. The *Malo* court held that **the language of RCW 49.60.210(1) “is directed at entities functionally similar to employers who discriminate by engaging in conduct similar to employers who discriminate by engaging in conduct similar to discharging or expelling a person who has” engaged in protected activities.** *Id.* at 930. (Emphasis added.) The *Malo* court dismissed a retaliation claim against a co-worker because he “did not employ, manage or supervise” plaintiff and the co-worker “was not in a position to discharge Malo or to expel him from membership in any organization.” *Id.* at 930.

Here, it cannot be said that the District was functionally similar to Mr. Zhu’s employer because the District did not employ, manage or supervise Mr. Zhu. The *Malo* court suggested that while co-workers may not be liable for retaliation, supervisors may since they, like employers, have the power to “discharge” or “expel.” “Washington courts have explained that the “other person” language may include managers, but not co-workers.” *Woods v. Washington*, 2011 WL 31852, *4 (W.D.Wash.

prohibited under statute making it an unfair practice to ruse to hire a person due to the

2011) (holding that plaintiff's retaliation claim could not be asserted against Schliemann, who worked under plaintiff and had no supervisory control or authority over him), *citing Malo, supra* at 930-31.

This Court addressed a similar argument in an analogous case regarding retaliation against employees who filed a workers' compensation claim. In *Warnek v. ABB Combustion Eng'g Servs., Inc.*, 137 Wn.2d 450, 455, 972 P.2d 453 (1999), two former employees sued their former employer **for failure to rehire them because they had filed workers' compensation claims in an earlier job.** On certification from the district court this Court was asked:

Do either of the causes of action described by Wash. Rev. Code § 51.48.025⁹ and *Wilmont v. Kaiser Alum. & Chem. Corp.*, 118 Wash.2d 46, 821 P.2d 18 (1991) encompass a former employee who is not rehired because the former employee filed a workers' compensation grievance during the course of previous employment with the employer?

137 Wn.2d at 455. This Court answered "No." *Id.* This Court held that RCW 51.48.025 could not be the basis of a statutory claim or a common law claim under *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991) (common law claim for wrongful discharge in

person's marital status; the retaliation statute simply cited in passing).

⁹ RCW 51.48.025(1) provided: "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 for compensation or exercises any rights provided under this title."

retaliation for pursuing workers' compensation benefits **against a subsequent employer**). *Id.* at 455. This Court explained at 456:

Plaintiffs . . . would interpret the statute as providing for complaints by *ex-employees* and *former employees not rehired for employment because they filed for workers' compensation benefits during prior employment with the employer in another state*. . . . The statute by its plain language does not apply as Plaintiffs suggest, but expressly provides for complaints by employees who have been discharged or otherwise discriminated against during the course of their employment. This evidences a legislative intent not to provide protection under the statute to *former employees* who have not been rehired because they filed for workers' compensation benefits in the past. To reach a contrary conclusion would go beyond the statute's clear and unambiguous language resulting in this Court inappropriately "read[ing] into a statute matters which are not there."

(Emphasis in original.)

This Court went on to state that the common law retaliation claim required that "an actual employee be discharged from employment" and noted: "There is a distinction between *discharge or other discrimination during the course of employment and not being rehired for new employment*." *Id.* at 458. (Emphasis in original.) The same argument applies here. The retaliation statute requires that the oppositional activity and retaliation occur in the same employment. This Court should not extend RCW 49.60.210(1) beyond its terms. It is for the Legislature and not this Court to expand the scope of the statute if it so chooses.

Another analogous case decided by this Court is *Warnek v. ABB Combustion Eng'g Servs., Inc.*, 137 Wn.2d 450, 972 P.2d453, 455-57 (1999), in which this Court declined to recognize a common law claim for failure to rehire an employee on the basis of filing a workers' compensation claim. This Court stated: "There is a distinction between *discharge or other discrimination during the course of employment and not being rehired for new employment.*" *Id.* at 456. (Emphasis in original.) This Court in *Warnek* stated at 461-62:

Simply stated, Plaintiffs have not been "fired" or "discharged." They are merely former employees who were not rehired." Although Plaintiffs filed for workers' compensation benefits in the State of Colorado during the course of their prior employment with Defendant in that state, they are not current employees who have been fired . . . **Discharge during the course of employment and not being rehired for new employment are two distinctly different circumstances.** Because Plaintiffs are not current employees, but are former employees who have been refused rehiring, they also do not satisfy the wrongful discharge requirements articulated in *Gardner*.

(Emphasis added.)

Washington cases have consistently held: "The WLAD . . . protects **employees** engaged in statutorily protected activity from retaliation by **their employer.**" *Lodis v. Corbis Holdings, Inc.*, 192 Wn.App. 30, 49, 366 P.3d 1246 (2015), *rev. denied* 185 Wn.2d 1038, 377 P.3d 744 (2016). (Emphasis added.)

To establish a prima facie case of retaliation under the WLAD, the **employee** must show that (1) he engaged in statutorily protected activity; (2) the **employer** took some adverse employment action against the employee; and (3) there is a causal link between the protected activity and the adverse action.

Id., quoting *Lodis v. Corbis Holdings, Inc.*, 172 Wn.App. 835, 846, 292 P.3d 779 (2013). (Emphasis added.) “[A]n **employee** who opposes employment practices reasonably believed to be discriminatory is protected by the ‘opposition clause’ whether or not the practice is actually discriminatory.” *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 619, 60 P.3d 106 (2002), quoting *Graves v. Dep’t of Game*, 76 Wn.App. 705, 712, 887 P.2d 424 (1994). (Emphasis added.)

The state of Washington’s pattern jury instruction on retaliation also supports the conclusion that Mr. Zhu does not have a state law retaliation claim. The pattern instruction provides:

(2) That a substantial factor in the decision to **[discipline] [demote] [deny the promotion] [terminate]** was the plaintiff’s [opposition to what [he] [she] reasonably believed to be discrimination or retaliation] [or] [providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred.

6A Wash Practice, Pattern Jury Instructions: Civil 330.05 (Employment Discrimination – Retaliation). **The adverse actions are discipline, demotion, denial of promotion or termination. The adverse employment action is not a failure to hire.** This makes sense because,

under the WLAD, a plaintiff cannot establish a retaliation claim against a *prospective employer* due to her or his opposing discrimination by a *past employer*. It should be held that a plaintiff's evidence to establish a retaliation claim requires a showing that, after opposing *her or his own employer's* alleged discrimination, *the same employer* subjected her or him to an adverse employment action.

Here, there was no retribution in kind. The legal definition of "retaliation" is: "The act of doing someone harm in return for actual or perceived injuries or wrongs; an instance of reprisal, requital, or revenge." BLACK'S LAW DICT. 1510 (10th ed. 2014). The legal definition of "reprisal" is "any action taken by one person either in spite or as a retaliation for a[] [perceived] or real wrong by another." BLACK'S LAW DICT. 1303 (6th ed. 1990). The legal definition of "revenge" is: "Vindictive retaliation against a perceived or actual wrongdoer; the infliction of punishment for the purpose of getting even." BLACK'S LAW DICT. 1513 (10th ed. 2014). The legal definition of "*lex talionis*" is: "The law of retaliation, under which punishment should be in kind – an eye for an eye, a tooth for a tooth, and so on – but no more." BLACK'S LAW DICT. (10th ed. 2014). Retaliation suggests that Actor A did something against Actor B for something that Actor B did to Actor A. This is not the situation in the case at bar.

If applicants for employment are allowed to state a claim against a prospective employer under the anti-retaliation provisions of RCW 49.60.210(1) then the unsuccessful applicant could potentially sue numerous prospective employers by simply showing that the prospective employers had knowledge that the job applicant previously filed a discrimination lawsuit. A prospective employer's simple act of reading a newspaper about a discrimination lawsuit would subject the prospective employer to a long and costly lawsuit.

A wrongful refusal to hire claim based on protected activity that took place in the past would have a chilling effect on prospective employers. The additional burden to employers and the judicial system from creation of such a claim would far exceed any benefit to be derived from it. The refusal to hire claim would be difficult, if not impossible, to defend. As a result, the potential for abuse is substantial.

An employer who discharges an employee does so in the context of an existing relationship which, by its very nature, generates considerable evidence relevant to whether the employer's articulated reason for the termination is a pretext for an unlawful motive. Disciplinary records, performance evaluations and wage and salary histories are usually available. Supervisors, managers and co-employees are usually available to testify concerning the employee's job performance. The employer

defending the wrongful discharge claim usually has access to these documents and witnesses.

Thus, even in the highly unusual situation in which an employer *discharges* an employee for having reported wrongdoing by a *previous* employer, the existence of a current employment relationship gives a court or jury the benefit of testimony from co-workers and supervisors to determine the second employer's motive for discharge. In contrast, a prospective employer will often have little or no evidence to defend a claim that it refused to hire an applicant who opposed discrimination by a previous employer. Documentation of an employer's decision not to hire is usually sparse. The accused prospective employer will often be unaware of the previous oppositional activity until a lawsuit is filed and the rejected applicant alleges that she or he verbally informed the company during a job interview. Indeed, some job applicants would gratuitously offer evidence of previous oppositional activity in order to build a file in support of a future claim

These would be unique problems of proof for prospective employers. The same problems do not exist in the litigation of disparate treatment refusal to hire claims under the WLAD. For example, while it might be evidence of discriminatory intent for an employer to ask the age, sex or race of a job applicant, the employer nevertheless generally

becomes aware of such indicia of protected status during the pre-employment process. As a practical matter, there is usually no dispute over the defendant's knowledge of protected status. Litigation of claims for refusal to hire job applicants who were previously involved in oppositional activity would be undeniably different. Because there are no readily discernible physical characteristics of job applicants who previously were involved in oppositional activity, the question of a prospective employer's knowledge of the applicant's past oppositional activity would be a frequently litigated issue. Employers unfamiliar with the circumstances would be severely handicapped in any effort to demonstrate to a judge or jury whether the refusal to hire was based upon the applicant's previous oppositional activity. Forced to litigate the issue the defendant employer could find itself in the position of having to vindicate the previous employer without the benefit of ready access to relevant evidence. To be sure, third-party discovery from previous employers would be problematic, especially when (as in this case) the oppositional activity took place several years before the prospective employer's refusal to hire.

The creation of the new cause of action undoubtedly would increase the caseload of the Washington courts, which would be an added burden unbalanced by any benefit to be derived from allowing a job

applicant to sue a prospective employer. In short, interpreting the WLAD to create a retaliation claim by a job applicant against a prospective employer for wrongful refusal to hire is unnecessary and unwise.

Mr. Zhu at no time had an employment relationship with the District. This Court should not extend RCW 49.60.210(1) to create a retaliation claim in favor of a job applicant against a prospective employer.

3. Other state courts have ruled, as a matter of law, there is not an actionable retaliation claim against a prospective employer.

Other state courts have interpreted similar anti-retaliation state statutes and have held that **a job applicant does not have a claim for retaliation against a prospective employer.** The primary reason for not allowing a retaliation claim in hiring cases is that it would severely impact the ability of employers to hire the best qualified candidate. It would create a chilling effect on the employer's freedom to choose the best qualified candidate and would require preferential treatment of any job applicant claiming that he or she was involved in protective activity with a past employer. **“Engaging in protected activities should not put the plaintiff in a better position than she would be otherwise.”** *Ruggles v. Cal. Polytechnic St. Univ.*, 797 F.2d 782, 786 (9th Cir. 1986). (Emphasis added.) It is important for employers to be given broad discretion in

deciding which candidates will best serve their needs. An employer's right to hire is only restricted when a substantial basis for the decision involves the prospective employee's race, nationality or other protected status. In this case the jury unanimously agreed that the District's hiring decision did not involve Mr. Zhu's race or nationality.

In *Yardley v. Hosp. Housekeeping Systems, LLC*, 470 S.W.3d 800 (Tenn. 2015), the Tennessee Supreme Court responded to a certified question from the federal district court and held at 807 as a matter of first impression:

[A] job applicant does not have a cause of action under the Tennessee Workers' Compensation Act against a prospective employer for failure to hire if the prospective employer refused to hire the job applicant because that applicant had filed, or is likely to file, a workers' compensation claim against a previous employer.

The *Yardley* court also held that "there is no statutory or common law cause of action for retaliatory failure to hire." *Id.* at 803. The *Yardley* court stated at 806: "We have found no judicial decision recognizing a claim for retaliatory failure to hire under state common law or public policy."

The *Yardley* court noted that under the state's workers' compensation law "an employer's decision to fire an employee for filing a workers' compensation claim has been held to be an unlawful device" but

“this holding does not apply to Ms. Yardley because she was not an employee of the Company. The Act applies to employers and employees.” *Id.* at 805. It should be noted that Tennessee has a statute, Tenn. Code § 4-21-301(a)(1), which was not discussed in the opinion, which provides that it is unlawful “for **a person** . . . to [r]etaliat[e] or discriminate in any manner against **a person**” due to protected activity. (Emphasis added.)

The *Yardley* court noted at 806 that cases cited by plaintiff “are distinguishable, as they all involve parties who had been in an employer-employee relationship with each other at the time the tort allegedly occurred.” The *Yardley* court added at 806:

Ms. Yardley was not an employee of the Company, and thus, there was never a relationship. This is an important distinction. The employer-employee relationship involves mutual acquiescence, and certain levels of trust and dependence are created upon its formation. *See Mason*, 942 S.W.2d at 474. Both parties have rights and responsibilities that naturally flow from that relationship and which are not present before the relationship is formed. *See Stratton*, 695 S.W.2d at 950. For this reason, **failure to hire cannot be equated with termination of employment, as employees and job applicants are on different footing.**

Id. at 805-06. (Emphasis added.) The *Yardley* court stated at 806: “A few states have statutory provisions expressly allowing claims for retaliatory failure to hire” but “Tennessee does not.”¹⁰

¹⁰ The *Yardley* court cited Fla. Stat. § 440.105(2)(a) (unlawful “for **any employer** to . . . [d]ischarge, discipline, or take any other adverse personnel action against **any**

The *Yardley* court stated at 806: “We have found no judicial decision recognizing a claim for retaliatory failure to hire under state common law or public policy, and a number of courts have expressly refused to recognize such claims” and cited *Baker v. Campbell County Bd. of Educ.*, 180 S.W.3d 479, 484 (Ky.App. 2005) (holding that no cause of action exists under Kentucky public policy for retaliatory failure to hire); *Peck v. Elyria Foundry Co.*, 347 Fed.Appx. 139, 149 (6th Cir. 2009) (declining to recognize failure-to-hire claims as a public policy exception to the employment-at-will doctrine under Ohio law); *Sanchez v. Philip Morris, Inc.*, 992 F.2d 244, 249 (10th Cir. 1993) (declining to recognize common law failure-to-hire claims under Oklahoma law); *Wordekemper v. Western Iowa Homes & Equip., Inc.*, 262 F.Supp.2d 973, 988 (N.D.Iowa 2003) (noting that “Iowa has never recognized a cause of action for retaliatory failure to hire or rehire a prospective employee based on that employee’s past workers’ compensation claim”).

employee” for engaging in protected activity) (emphasis added); Ill. Comp. Stat. 5/6-101 (unlawful “for **a person** . . . to [r]etaliat[e] against **a person**” due to protected activity) (emphasis added); La. Rev. Stat. 23:1361 (“No **person**, firm or corporation shall refuse to employ any **applicant for employment** because of such applicant having asserted a claim for workers’ compensation benefits under the provisions of . . . the law of any state”) (emphasis added); Me. Rev. Stat. 5 § 4572 (“It is unlawful employment discrimination . . . [f]or **an employer**, employment agency or labor organization to discriminate in any manner against **individuals**” due to protected activity) (emphasis added) and Mass. Gen. Laws 152 § 75B (“No **employer** or duly authorized agent of an employer shall discharge, refuse to hire or in any other manner discriminate against **an employee** because the employee” engaged in protected activity) (emphasis added).

The *Yardley* court at 806 also cited a case decided by this Court: *Warnek v. ABB Combustion Eng'g Servs., Inc.*, 137 Wn.2d 450, 972 P.2d 453, 455-57 (1999) (declining to recognize a common law claim for failure to rehire an employee on the basis of filing a workers' compensation claim as "[t]here is a distinction between discharge . . . during the course of employment and not being rehired for new employment").

In *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal.4th 1158, 177 P.3d 232, 72 Cal.Rptr.3d 624 (Cal. 2008), the California Supreme Court reaffirmed its prior holding that in order for retaliation to be actionable under the state's Fair Employment and Housing Act (FEHA), the retaliation must "materially affect[] the terms, conditions, or privileges of *employment*" *Id* at 1168. (Emphasis added.) The California Supreme Court interpreted Cal. Gov't Code § 12940(h), which is almost identical to Washington's anti-retaliation statute.¹¹ An employee sued his employer and his supervisor under the statute. **The court held that despite the inclusion of the "or person" language the statute only applies to a plaintiff's employer (or a labor organization or employment agency).** The *Jones* court stated at 632:

¹¹ The California statute provides that it is unlawful "[f]or any employer, labor organization, employment agency, **or person** to discharge, expel, or otherwise discriminate against **any person**" due to protected activity. (Emphasis added.)

The legislative history, or more precisely, the *absence* of legislative history, behind the inclusion of the word “person” . . . also supports our conclusion that the subdivision does not impose personal liability on nonemployer individuals. . . . **If plaintiff is correct that the word “person” makes individuals liable for retaliation, then the legislation that added that word created individual liability where none had existed previously.** The legislative history behind . . . the bill that added “person” . . . does not support this conclusion.

(Italics in original; boldface added.) The *Jones* court stated at 634: “The legislation passed by a vote of 32 to 0 in the Senate and 64 to 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 noncontroversial.”

Likewise, if the addition of “other person” in Washington’s anti-retaliation statute was intended to extend liability to prospective employers the change would have been both controversial and substantive. (The amendment passed 96 to 0 in the House and 44 to 5 in the Senate.)

Cf. State v. McCullum, 98 Wn.2d 484, 493, 656 P.2d 1064 (1983) (“In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law.”).

In *Vernon v. State*, 116 Cal.App.4th 114, 10 Cal.Rptr. 121 (Cal.App. 2004), plaintiff’s complaint was dismissed because defendant

state of California was not plaintiff's "employer" under California's FEHA. A city firefighter filed a charge against defendant for discrimination, harassment and retaliation with California's Department of Fair Employment and Housing. Plaintiff thereafter sued. In dismissing plaintiff's lawsuit, the *Vernon* court stated at 123:

"The FEHA, however, prohibits only 'an employer' from engaging in improper discrimination. [Citation omitted] **The FEHA predicates potential "liability on the status of the defendant as an 'employer.'"** [Citation omitted.] The fundamental foundation for liability is the "existence of an *employment relationship* between the one who discriminates against another and the other who finds himself the victim of discrimination. [Citation omitted.] FEHA requires "some connection with an employment relationship," although the connection "need not necessarily be direct." [Citation omitted.] " If there is no proscribed 'employment practice,' the FEHA does not apply." [Citation omitted.]

(Emphasis added.)

See also Kelly v. Methodist Hosp. of So. Cal., 22 Cal.4th 1108, 95 Cal.Rptr.2d 514, 997 P.2d 1169, 1174 (Cal. 2000) (FEHA predicates liability on the existence of an employment relationship), *cert. denied* 531 U.S. 1012 (2000); *Rhodes v. Sutter Health*, 949 F.Supp.2d 997, 1002 (E.D.Cal. 2013) (2013) (FEHA "predicates potential . . . liability on the status of the defendant as an 'employer'").

In *Winn v. Pioneer Med. Group, Inc.*, 63 Cal.4th 148, 370 P.3d 1011, 202 Cal.Rptr. 447 (Cal. 2016), the phrase "having the care or

custody of an elder” was used in an elder neglect statute. Plaintiff argued that the statutory language imposed liability on physicians who treated their mother (an elderly patient) at an outpatient clinic. In rejecting plaintiff’s argument, the California Supreme Court stated at 1020:

Third, nothing in the legislative history suggests that the Legislature intended the Act to apply *whenever* a doctor treats any elderly patient. Reading the act in such a manner would radically transform medical malpractice liability relative to the existing scheme. . . . No portion of its legislative history contains any indication that the Legislature’s purpose was to effectuate such a transformation of medical malpractice liability.

When there is a slight word change to a statute, “[h]ad the Legislature intended to expand the reach of [the statute] we would expect to see an indication of this intent and an explanation of the significance of [the amendment].” *Larkin v. W.C.A.B.*, 62 Cal.4th 152, 358 P.3d 552, 194 Cal.Rptr.3d 80 (Cal. 2015) (elimination of the word “volunteer”). Here, there is no evidence that the addition of the words “or any person” was intended to expand the reach of the statute. *See also State v. Civil*, 388 P.3d 1185, 1197 n. 24 (Or. 2017) (if “[n]othing in the legislative history supports the inference or conclusion that the legislature was embarking on a major change . . . [t]his absence of evidence, this ‘dog that did not bark,’ is of significance” in construing an amended statute) (internal punctuation omitted); *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal.4th 1169, 72

Cal.Rptr.3d 624, 177 P.3d 232 (Cal.App. 2008) (attaching significance to “the *absence* of legislative history”); *Donovan v. Poway Unified School Dist.*, 167 Cal.App.4th 567, 597, 84 Cal.Rptr.3d 285 (Cal.App. 2008) (“the *absence* of legislative history [can] be of . . . significance in deciphering legislative intent”) (emphasis in original).

In *Adler v. 20/20 Companies*, 918 N.Y.S.2d 583 (N.Y.App. 2011), the court held that the intention of the New York anti-retaliation statute does not contemplate an action by a job applicant against a prospective employer for retaliation based on the applicant’s complaints regarding a former employer. The statute at issue was N.Y Labor Law § 215(1)(a), which provides:

No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, **or any other person**, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against **any employee** because such employee has made a complaint to his employer . . . that the employer has violated any provision of this chapter.

(Emphasis added.) The *Adler* court stated at 584:

Indeed, **neither the plain language of the statute nor its legislative history . . . contemplates an action by a job applicant against a prospective employer based on the applicant’s complaints regarding a former employer.** Rather, the clear intention was to provide a cause of action against current and former employers for discriminatory acts.

(Emphasis added.) *See also Wigdor v. SoulCycle, L.L.C.*, 33 N.Y.S.3d 30, 31 (N.Y. Sup. Ct., App. Div. 2016) (holding that the statute “was clearly intended to provide employees with a cause of action against their current or former employers”), *appeal denied* 45 N.Y.S.3d 374 (N.Y.App. 2016).

In *Day v. Summit Sec. Servs., Inc.*, 38 N.Y.S.3d 390 (N.Y. Sup. Ct. 2016), the court discussed *Adler, supra*, and dismissed plaintiff’s claim for retaliation against a prospective employer. The *Day* court stated at 394:

Without a clear manifestation that the legislature sought to expand potential defendants to include employers who did not employ plaintiff at the time of his or her reporting a labor law violation, the court cannot construe such a meaning. . . . Therefore, as Summit did not employ plaintiff at the time he made his prevailing wage complaint, plaintiff cannot articulate a claim against Summit pursuant to Labor Law § 215.

(Emphasis added.) The *Day* court stated at 395: “On its face, the statute is concerned with the actions or employers and those acting on behalf of the employer (i.e. agents and officers) for the improper conduct by the same employer.”

In *Comm’n on Human Rights and Opportunities v. Echo Hose Ambulance*, 113 A.3d 463 (Conn.App. 2015), *aff’d* 140 A.3d 190 (Conn. 2016), a lawsuit was brought on behalf of a purported employee alleging retaliation and other claims. Plaintiff interviewed with defendant and was accepted into a precepting program but was later terminated from the

program. The *Echo Hose Ambulance* court held that plaintiff was not an “employee” as required to state a retaliation claim under Conn. Gen. Statutes § 46a-60(a)(4), which is almost identical to Washington’s anti-retaliation statute.¹² The *Echo Hose Ambulance* court stated: “To establish a prima facie case of retaliation [under the statute] an *employee* must show . . . a causal connection between the protected activity and the adverse employment action.” *Id.* at 468-69. (Emphasis in original.)

Here, Mr. Zhu was never an employee of the District. Therefore, he did not have an actionable retaliation claim.

4. A federal district court opinion suggesting that a job applicant has a retaliation cause of action against a prospective employer due to protected activity that the job applicant took in the past is not controlling.

A recent federal district court opinion suggests that a job applicant may have a retaliation claim based upon protected activity with a previous employer under the WLAD. However, the issue was not specifically decided in the court’s opinion and should be considered non-binding dicta.

In *Lechner v. The Boeing Company*, 2017 WL 347080 (W.D.Wash. Jan. 24, 2017) (Lasnik, Jr.), the district court *assumed but did not actually decide* whether a job applicant has a retaliation cause of

¹² The Connecticut statute, Conn. Gen. St. § 46a-60(a)(4) states that it is 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.)

action against a prospective employer due to protected activity that the job applicant took in the past. Plaintiff worked for Nabtesco Aerospace, Inc. and was fired for cause in 2010. *Id.* at *1. She then filed an EEOC complaint against her former employer for disability discrimination. *Id.* Plaintiff then sued and settled with her former employer. *Id.* She then applied at Boeing and elsewhere before being offered a position at Boeing in 2012. *Id.* During reference checks Boeing learned that plaintiff was fired at Nabtesco for cause. *Id.* at *2. Boeing asked plaintiff about her discharge and plaintiff explained that she had requested an accommodation for her anxiety and she was fired 10 days later. *Id.* She also mentioned that she filed an EEOC complaint against Nabtesco and received a right to sue letter. *Id.* The hiring manager at Boeing concluded that “there’s too much risk in this” and decided not to proceed with plaintiff’s hiring. *Id.* The hiring manager was aware that plaintiff filed an EEOC complaint against her former employer. *Id.* Plaintiff sued Boeing for disability discrimination and retaliation under the WLAD, RCW Ch. 49.60. *Id.* As to plaintiff’s retaliation claim based on her EEOC complaint, the district court found “unpersuasive” Boeing argument that the EEOC complaint was filed almost two years before Boeing withdrew its offer of employment, negating any inference of causation. *Id.* at *5. “Boeing learned of plaintiff’s EEOC complaint days before it decided that

she was not good employee material. Far from being too remote, the timing suggests a link between the two events.” *Id.* The district court added:

Boeing argues that it withdrew plaintiff’s job offer when it discovered that she was discharged from her prior employment for performance issues, not because she filed an EEOC complaint against her employer. That may be true, but a jury will have to determine whether plaintiff’s EEOC complaint was a substantial motivating factor – separate from or in addition to her disability – in the decision to withdraw the job offer. Mr. Borries’ ambiguous concerns about “risks,” the fact that the Background Screening Committee discussed the EEOC complaint when determining how to characterize and evaluate plaintiff’s job history, and the temporal relationship between the relevant events give rise to a genuine issue of fact regarding retaliatory motive.

Id. The district court stated: “To establish a prima facie case of retaliation, plaintiff must show that she engaged in statutorily-protected activity, that she suffered an adverse employment action, and that there is a causal connection between the two.” *Id.* The district court did not address whether the anti-retaliation statute applied based upon a job applicant’s protected activity during the applicant’s former employment.

In Boeing’s motion for summary judgment and Boeing’s reply to plaintiff’s response **Boeing did not advance the argument advanced by the District in this case that a job applicant does not have a retaliation cause of action under the WLAD against a prospective employer.**

Boeing simply set forth the elements of a retaliation claim. (Boeing's motion for summary judgment at 14.) Relevant pages from Boeing's motion for summary judgment are attached as **Exhibit 10** in the appendix to this brief.

In *Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088 (9th Cir. 1990), the Court of Appeals for the Ninth Circuit predicted that the California Supreme Court would allow a public policy cause of action against a subsequent employer who *discharges* an employee for whistleblowing at his previous place of employment. *Id.* at 1092. The Ninth Circuit rejected defendant's assertion that the factual scenario in the case was "so idiosyncratic" that it was unlikely to be repeated, despite also noting "there are no appellate state court decisions or decisions from other jurisdictions deciding the issue." *Id.* at 1093. The very novelty of the issue should have indicated to the Ninth Circuit the highly irregular nature of the factual circumstances.

To establish a prima facie case of retaliation for protected activity under the WLAD an **employee** must show that (1) he engaged in statutorily protected activity, (2) the **employer** took an adverse employment action against the **employee**, and (3) there is a causal connection between the **employee's** activity and the **employer's** adverse employment action. *Boyd v. State Dep't of Social and Health Serv.*, 187

Wn.App. 1, 11, 349 P.3d 864 (2015) (plaintiff must prove that “**the employer** took an adverse employment action against **the employee**”) (emphasis added); *Burchfiel v. Boeing Corp.*, 149 Wn.App. 468, 482, 205 P.3d 145 (2009) (“The cause of action requires **an employee** to show . . . **the employer** took an adverse employment action, and . . . **the employee’s** activity prompted **the employer’s** action”) (emphasis added), *rev. denied* 173 Wn.2d 1033, 217 P.3d 783 (2009); *Tyner v. State*, 137 Wn.App. 545, 563, 154 P.3d 920 (2007) (plaintiff must prove “there is a causal link between **the employee’s** activity and **the employer’s** adverse action”), *rev. denied* 162 Wn.2d 1012, 175 P.3d 1094 (2008) (emphasis added).

In limited circumstances, a person claiming retaliation is not required to be in an actual employee-employer relationship. There is an exception for a person working as an independent contractor, which is the functional equivalent of being an employee. *Sambasivan v. Kadlec Med. Center*, 184 Wn.App. 567, 591, 338 P.3d 860 (2014). In *Sambasivan*, plaintiff physician had a contract with Kadlec Medical Center to work at the hospital as an independent contractor. *Id.* at 591-92. The *Sambasivan* court held that “Kadlec’s denial of privileges . . . is sufficiently equivalent, or derivative of a labor-related activity, to be actionable under the statute.” *Id.* at 592. Here, Mr. Zhu did not have independent contractor status.

Moreover, *Sambasivan* was a discharge case. The case involved removal of the physician's hospital privileges – not a retaliation case for engaging in protected activities.

5. A failure to hire is not an adverse employment action.

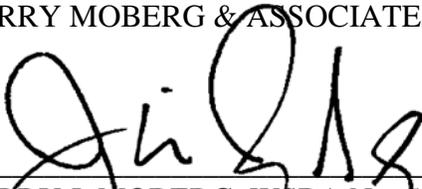
An actionable retaliation claim requires an adverse employment action. *Currier v. Northland Servs., Inc.*, 182 Wn.App. 733, 742, 332 P.3d 1006 (2014), *rev. denied* 182 Wn.2d 1006, 342 P.3d 326 (2015). Mr. Zhu was not subjected to an adverse employment action by the District. “An adverse employment action involves a *change in employment* that is more than an inconvenience or alteration of one's job responsibilities.” *Boyd v. State Dep't of Social and Health Serv.*, 187 Wn.App. 1, 11, 349 P.3d 864 (2015). (Emphasis added.) An adverse employment action includes an employee's “demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action.” *Robel v. Roundup Corp.*, 148 Wn.2d 35, 74, 59 P.3d 611 (2002). “[A]n adverse employment action is one that ‘materially affects the compensation, terms, conditions, or privileges of . . . employment’” *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008). (Emphasis added.) There was never a change in Mr. Zhu's employment with the District because Mr. Zhu was never employed by the District.

E. CONCLUSION

The Court should find that in amending the statute at issue in 1985 the Legislature did not intend to create a 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 30th day of March, 2017.

JERRY MOBERG & ASSOCIATES, P.S.



JERRY J. MOBERG, WSBA No. 5282
JAMES E. BAKER, WSBA No. 9459
Attorneys for Defendant North Central ESD No. 171

F. APPENDIX

1. Memo from legal intern to members of the House State Government Committee re HB 52 – revising provisions relating to the Human Rights Commission (Jan. 22, 1985).¹³
2. House Bill Report – HB 52 (Jan. 30, 1985).¹⁴
3. Substitute House Bill No. 52 (Feb. 1, 1985).¹⁵
4. House Bill Report – SHB 52 (Feb. 15, 1985).¹⁶

¹³ This memo does not discuss the addition of the words “or other person.”

¹⁴ This report does not discuss the addition of the words “or other person.”

¹⁵ This bill at Sec. 20 includes the word “or other person.”

¹⁶ This report does not discuss the addition of the words “or other person.” It states: “This is a ‘housekeeping’ bill and it is necessary to ensure that the law against discrimination is effectively enforced. The streamlined enforcement procedure is needed to assure the prompt enforcement of Human Rights Commission and administrative law judge orders.”

5. Senate Bill Report – SHB 52 (March 26, 1985).¹⁷
6. Washington Legislative Information System – All actions; Substitute House Bill (May 8, 1985).
7. Final Bill Report – SHB 52 – Synopsis as Enacted (undated).¹⁸
8. SHB 52 – Partial Veto (undated).¹⁹
9. Certification of Enrolled Enactment – Substitute House Bill No. 52 (April 12, 1985).²⁰
10. The Boeing Company’s motion for summary judgment (cover page and pp. 14-15) in *Lechner v. Boeing Company*, Cause No. 2:15-cv-01414-RSL (W.D.Wash.).

¹⁷ This report sets forth one sentence that states: “In addition, it is an unfair practice for a labor union or any employer to discriminate against any person because he or she opposed a discriminatory practice.”

¹⁸ This report stated: “The jurisdiction of the Law Against Discrimination is changed in four areas. . . . Third, the 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, and insurance transactions.”

¹⁹ The partial veto included the exact wording from the Final Bill Report – SHB 52 – Synopsis as Enacted as to extending the coverage in the retaliation section.

²⁰ The certification stated that SHB No. 52 passed the House by a vote of 96-0 and passed the Senate by a vote of 44-5.

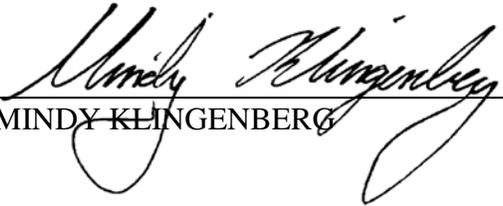
CERTIFICATE OF SERVICE

I certify that on this date I mailed a copy of this document to:

Matthew Z. Crotty, attorney for Plaintiff
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905 W. Riverside Avenue, Suite 409
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Michael Love Law, PLLC
905 W. Riverside Avenue, Suite 404
Spokane, WA 99201

DATED this 30th day of March, 2017 at Ephrata, WA.


MINDY KLINGENBERG

APPENDIX 1

Memo from legal intern to members of the House State
Government Committee re HB 52 – revising provisions relating
to the Human Rights Commission (Jan. 22, 1985)



OFFICE OF PROGRAM RESEARCH

House of Representatives

January 22, 1985

Memorandum

To: Members, House State Government Committee

From: Bonnie Austin, Legal Intern *Bonnie*

Re: HB 52 - REVISING PROVISIONS RELATING TO THE HUMAN RIGHTS COMMISSION

BACKGROUND: The Human Rights Commission, established in 1949 as the Washington State Board Against Discrimination, is responsible for the elimination and prevention of discrimination based on race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental or physical handicap. The Commission's jurisdiction extends to unfair practices in: 1) employment, 2) places of public accommodation, 3) real property transactions, 4) credit transactions, 5) insurance transactions, 6) certain labor union activities, 7) retaliation against a person who has assisted the Commission or opposed a practice of discrimination, and 8) aiding and inciting violation of the law against discrimination.

The Commission consists of five members appointed by the Governor, with advice and consent of the Senate. It is authorized to: 1) appoint staff, 2) adopt rules and regulations, 3) receive, investigate, and pass upon complaints, 4) hold hearings and subpoena witnesses, and 5) create advisory councils.

The majority of complaints filed with the Commission involve unfair practices in employment. Racial and sexual discrimination comprise the largest percentage of these complaints. When a complaint is filed and found to be within the Commission's jurisdiction, a fact-finding conference is scheduled. Settlement is encouraged, but if no agreement can be reached the Commission launches a full investigation. If the result of the investigation is a finding that there is reasonable cause to believe discrimination exists, the Commission attempts to eliminate the unfair practice by means of a conciliation agreement which is signed and processed as a Commission order. Only when this conciliation attempt is unsuccessful does the case require a hearing before an administrative law judge (ALJ). Either party may appeal the decision of the ALJ.

When a party, against whom a decision has been rendered by an ALJ, ignores the order and fails to appeal the decision, the Commission may file a petition for enforcement of the order in superior court. The same process is required for enforcement of ignored conciliation agreements and pre-finding settlements. The Commission must go through an appeal-type review of the entire agency proceeding to get the order enforced. The agency must file in court the entire record of the administrative proceeding, including the pleadings and testimony, and the court must review the facts. The court has the discretion to allow either party to introduce additional evidence. The court's enforcement decision may be appealed to the supreme court or court of appeals.

SUMMARY: ENFORCEMENT APPEALS. The enforcement of Human Rights Commission and Administrative Law Judge orders is streamlined by eliminating review of the administrative process and limiting reviewable issues. Issues that can be raised on appeal are generally precluded from the enforcement proceeding, unless the party gives a valid reason for failing to comply with the administrative order and gives a valid excuse for failing to use the appeals process. The only issues that can be raised in the enforcement proceeding are: 1) whether the order is regular on its face; 2) whether the order has been complied with; and 3) whether the party has a valid reason why the order should not be enforced, whether this reason could have been raised on appeal, and if so, whether the party has a valid excuse for failing to use the appeals process (section 25(4)).

JURISDICTION OF THE LAW AGAINST DISCRIMINATION. The Jurisdiction of the Law Against Discrimination is changed in four areas. First, discrimination by an employer against any person because of the race of another person, such as the person's spouse or child, is made an unfair practice (section 16). Second, when a labor union has a policy of referring unemployed nonmembers from its hiring halls, such a union's discriminatory refusal to refer an unemployed nonmember is explicitly made an unfair practice by extending protection to any person to whom a duty of representation is owed (section 17). Third, the 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 (section 19). Finally, the Commission's jurisdiction regarding age discrimination is brought into conformance with case law and administrative rules by limiting its application to persons between the ages of 40 and 70 and making compliance with the related labor statute (RCW 49.44.090) a defense to any charge of age discrimination (new section 29).

POWERS AND DUTIES OF THE COMMISSION. The Commission's powers are expanded in two areas. First, the Commission is expressly given the authority to cooperate and act jointly with federal, state, and local Washington agencies when such action involves unfair practices as defined by Washington law. The Commission may also be reimbursed for such services (section 10(7)). Second, the Commission is given the authority to foster good relations between minority and majority population groups through such means as seminars, conferences, and educational programs (section 10(8)), a power the Commission's advisory councils already possess.

TECHNICAL CHANGES. The clause relating to the record on appeal has been superseded by the Rules of Appellate Procedure and is deleted (section 25). The parts of the appeals process that have been superseded by the Administrative Procedure Act are eliminated (section 26). The chief administrative law judge is authorized to appoint administrative law judges to the Commission's cases (new section 30).

The partial listing of the jurisdictional bases upon which the Commission is empowered to investigate complaints is eliminated (section 10(4)). Age is added to ~~the section empowering advisory councils to study discrimination (section 11), and~~ the jurisdictional base of marital status is added to the second recital of jurisdictional bases in the employment agency section (section 18). The name of the Washington State Board Against Discrimination is changed to the Washington State Human Rights Commission, and gender-specific language is corrected.

BA:nb

APPENDIX 2

House Bill Report – HB 52 (Jan. 30, 1985)

Appropriation: _____

Revenue: _____

Fiscal Note: Requested 1/18/85

HOUSE BILL REPORT

HB 52

BY Representatives Niemi, Belcher, Hankins, Vekich, Baugher and Walk

Revising provisions relating to the human rights commission.

House Committee on State Government

House Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. (13)

SIGNED BY Representatives Belcher, Chair; Peery, Vice Chair; Baugher, Brooks, Fuhrman, Hankins, O'Brien, Sanders, Taylor, Todd, Van Dyke, Vekich and Walk.

House Minority Report:

SIGNED BY

House Staff: Ken Conte (786-7135)

As Reported by Committee on State Government January 30, 1985

BACKGROUND: The Human Rights Commission, established in 1949 as the Washington State Board Against Discrimination, is responsible for the elimination and prevention of discrimination based on race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental or physical handicap. The Commission's jurisdiction extends to unfair practices in: 1) employment, 2) places of public accommodation, 3) real property transactions, 4) credit transactions, 5) insurance transactions, 6) certain labor union activities, 7) retaliation against a person who has assisted the Commission or opposed a practice of discrimination, and 8) aiding and inciting violation of the law against discrimination.

The Commission consists of five members appointed by the Governor, with advice and consent of the Senate. It is authorized to: 1) appoint staff, 2) adopt rules and regulations, 3) receive, investigate, and pass upon complaints, 4) hold hearings and subpoena witnesses, and 5) create advisory councils.

The majority of complaints filed with the Commission involve unfair practices in employment. Racial and sexual discrimination comprise the largest percentage of these complaints. When a complaint is filed and found to be within the Commission's jurisdiction, a fact-finding conference is scheduled. Settlement is encouraged, but if no agreement can be reached the Commission launches a full investigation. If the result of the investigation is a finding that there is reasonable cause to believe discrimination exists, the Commission attempts to eliminate the unfair practice by means of a conciliation agreement which is signed and processed as a Commission order. Only when this conciliation attempt is unsuccessful does the case require a

hearing before an administrative law judge (ALJ). Either party may appeal the decision of the ALJ.

When a party, against whom a decision has been rendered by an ALJ, ignores the order and fails to appeal the decision, the Commission may file a petition for enforcement of the order in superior court. The same process is required for enforcement of ignored conciliation agreements and pre-finding settlements. The Commission must go through an appeal-type review of the entire agency proceeding to get the order enforced. The agency must file in court the entire record of the administrative proceeding, including the pleadings and testimony, and the court must review the facts. The court has the discretion to allow either party to introduce additional evidence. The court's enforcement decision may be appealed to the supreme court or court of appeals.

SUMMARY: SUBSTITUTE BILL: Enforcement-Appeals. The enforcement of Human Rights Commission and Administrative Law Judge orders is streamlined by eliminating review of the administrative process and limiting reviewable issues. Issues that can be raised on appeal are generally precluded from the enforcement proceeding, unless the party gives a valid reason for failing to comply with the administrative order and gives a valid excuse for failing to use the appeals process. The only issues that can be raised in the enforcement proceeding are: 1) whether the order is regular on its face; 2) whether the order has been complied with; and 3) whether the party has a valid reason why the order should not be enforced, whether this reason could have been raised on appeal, and if so, whether the party has a valid excuse for failing to use the appeals process.

Hearings. The chief administrative law judge is authorized to appoint administrative law judges to the Commission's cases. A respondent is required to file a written answer and appear at the hearing before the administrative law judge. Upon issuing a final order, the administrative law judge is required to give notice to the parties of their right to obtain judicial review of the order and of the thirty-day time limitation.

Jurisdiction of the Law Against Discrimination. The jurisdiction of the Law Against Discrimination is changed in four areas. First, discrimination by an employer against any person because of the race of another person, such as the person's spouse or child, is made an unfair practice. Second, when a labor union has a policy of referring unemployed nonmembers from its hiring halls, such a union's discriminatory refusal to refer an unemployed nonmember is explicitly made an unfair practice by extending protection to any person to whom a duty of representation is owed. Third, the 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. Finally, the Commission's jurisdiction regarding age discrimination is brought into conformance with case law and administrative rules by limiting its application to persons between the ages of 40 and 70 and making compliance with the related labor statute (RCW 49.44.090) a defense to any charge of age discrimination.

Human Rights Commission. Vacancies on the Commission shall be filled so as to guarantee that the membership of the Commission is representative of the state's geographical diversity. The Commission is expressly given the authority to cooperate and act jointly with federal, state, and local Washington agencies when such action involves unfair practices as defined by Washington law. The Commission may also be reimbursed for such services. The Commission is given the authority to foster good

relations between minority and majority population groups through such means as seminars, conferences, and educational programs; a power the Commission's advisory councils already possess. The Executive Secretary of the Human Rights Commission or the Director of the Department of Labor and Industries may establish reasonable minimum and/or maximum age limits with respect to employment that requires extraordinary physical effort or training.

Sunset. The Human Rights Commission is placed under the Washington State Sunset Act. The Commission is given a termination date of June 30, 1987, and the Commission's authorizing statutes are repealed as of June 30, 1988 if the Commission is not reauthorized by the legislature.

Technical Changes. The clause relating to the record on appeal has been superseded by the Rules of Appellate Procedure and is deleted. The parts of the appeals process that have been superseded by the Administrative Procedure Act are eliminated. The partial listing of the jurisdictional bases upon which the Commission is empowered to investigate complaints is eliminated. Age is added to the section empowering advisory councils to study discrimination, and the jurisdictional base of marital status is added to the second recital of jurisdictional bases in the employment agency section. The name of the Washington State Board Against Discrimination is changed to the Washington State Human Rights Commission, and gender-specific language is corrected.

SUBSTITUTE BILL COMPARED TO ORIGINAL: A respondent is required to file a written answer and appear at the hearing before the administrative law judge. Upon issuing a final order, the administrative law judge is required to give notice to the parties of their right to obtain judicial review of the order and of the thirty-day time limitation. A technical amendment clarifies that respondents or complainants, including the Commission, may obtain judicial review of a final order by an administrative law judge.

The Executive Secretary of the Human Rights Commission or the Director of the Department of Labor and Industries may establish reasonable minimum and/or maximum age limits with respect to employment that requires extraordinary physical effort or training.

Vacancies on the Commission shall be filled so as to guarantee that the membership of the Commission is representative of the state's geographical diversity.

The Human Rights Commission is placed under the Washington State Sunset Act. The Commission is given a termination date of June 30, 1987, and the Commission's authorizing statutes are repealed as of June 30, 1988 if the Commission is not reauthorized by the legislature.

Appropriation:

Revenue:

Fiscal Note: Requested January 18, 1985.

Effective Date:

HOUSE COMMITTEE - Testified For: Representative Janice Nlemi; Terry Quertarmous, Human Rights Commission; Mary Tennyson, Office of Attorney General.

HOUSE COMMITTEE - Testified Against: None Presented.

HOUSE COMMITTEE - Testimony For: This is a "housekeeping" bill and it is necessary to ensure that the law against discrimination is effectively enforced. The streamlined enforcement procedure is needed to assure the prompt enforcement of Human Rights Commission and administrative law judge orders. The Human Rights Commission supports the bill.

HOUSE COMMITTEE - Testimony Against: None Presented.

APPENDIX 3

Substitute House Bill No. 52 (Feb. 1, 1985)

SUBSTITUTE HOUSE BILL NO. 52

State of Washington 49th Legislature 1985 Regular Session
by Committee on State Government (originally sponsored by
Representatives Niemi, Belcher, Hankins, Vekich, Baugher and Walk)

Read first time 2/1/85 and passed to Committee on Rules.

1 AN ACT Relating to the human rights commission; amending RCW
2 49.60.010, 49.60.040, 49.60.050, 49.60.060, 49.60.070, 49.60.080,
3 49.60.090, 49.60.100, 49.60.110, 49.60.120, 49.60.130, 49.60.140,
4 49.60.150, 49.60.160, 49.60.170, 49.60.180, 49.60.190, 49.60.200,
5 49.60.210, 49.60.225, 49.60.226, 49.60.230, 49.60.240, 49.60.250,
6 49.60.260, 49.60.270, 49.60.310, 49.60.320; and 49.44.090; adding a
7 new section to chapter 49.60 RCW; adding a new section to chapter
8 34.12 RCW; adding new sections to chapter 43.131 RCW; and repealing
9 RCW 49.60.050, 49.60.051, 49.60.060, 49.60.070, 49.60.080, 49.60.090,
10 49.60.100, 49.60.110, 49.60.120, 49.60.130, 49.60.140, 49.60.150,
11 49.60.160, 49.60.170, 49.60.226, 49.60.230, 49.60.240, 49.60.250,
12 49.60.260, 49.60.270, 49.60.280, 49.60.310, and 49.60.320.

13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

14 Sec. 1. Section 1, chapter 183, Laws of 1949 as last amended by
15 section 1, chapter 214, Laws of 1973 1st ex. sess. and RCW 49.60.010
16 are each amended to read as follows:

17 This chapter shall be known as the "law against discrimination".
18 It is an exercise of the police power of the state for the protection
19 of the public welfare, health, and peace of the people of this state,
20 and in fulfillment of the provisions of the Constitution of this
21 state concerning civil rights. The legislature hereby finds and
22 declares that practices of discrimination against any of its
23 inhabitants because of race, creed, color, national origin, sex,
24 marital status, age, or the presence of any sensory, mental, or
25 physical handicap are a matter of state concern; that such
26 discrimination threatens not only the rights and proper privileges of
27 its inhabitants but menaces the institutions and foundation of a free
28 democratic state. A state agency is herein created with powers with
29 respect to elimination and prevention of discrimination in

1 employment, in credit and insurance transactions, in places of public
2 resort, accommodation, or amusement, and in real property
3 transactions because of race, creed, color, national origin, sex,
4 marital status, age, or the presence of any sensory, mental, or
5 physical handicap; and the ~~Commission~~ established hereunder
6 is hereby given general jurisdiction and power for such purposes.

7 Sec. 2. Section 3, chapter 183, Laws of 1949 as last amended by
8 section 3, chapter 127, Laws of 1979 and RCW 49.00.040 are each
9 amended to read as follows:

10 As used in this chapter:

11 "Person" includes one or more individuals, partnerships,
12 associations, organizations, corporations, cooperatives, legal
13 representatives, trustees and receivers, or any group of persons; it
14 includes any owner, lessee, proprietor, manager, agent, or employee,
15 whether one or more natural persons; and further includes any
16 political or civil subdivisions of the state and any agency or
17 instrumentality of the state or of any political or civil subdivision
18 thereof;

19 "Commission" means the Washington state human rights commission;

20 "Employer" includes any person acting in the interest of an
21 employer, directly or indirectly, who employs eight or more persons,
22 and does not include any religious or sectarian organization not
23 organized for private profit;

24 "Employee" does not include any individual employed by his or her
25 parents, spouse, or child, or in the domestic service of any person;

26 "Labor organization" includes any organization which exists for
27 the purpose, in whole or in part, of dealing with employers
28 concerning grievances or terms or conditions of employment, or for
29 other mutual aid or protection in connection with employment;

30 "Employment agency" includes any person undertaking with or
31 without compensation to recruit, procure, refer, or place employees
32 for an employer;

33 "National origin" includes "ancestry";

34 "Full enjoyment of" includes the right to purchase any service,
35 commodity, or article of personal property offered or sold on, or by,
36 any establishment to the public, and the admission of any person to

1 accommodations, advantages, facilities, or privileges of any place of
2 public resort, accommodation, assemblage, or amusement, without acts
3 directly or indirectly causing persons of any particular race, creed,
4 color, or with any sensory, mental, or physical handicap, or a blind
5 or deaf person using a trained dog guide, to be treated as not
6 welcome, accepted, desired, or solicited;

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

1 "Real property" includes buildings, structures, real estate,
2 lands, tenements, leaseholds, interests in real estate cooperatives,
3 condominiums, and hereditaments, corporeal and incorporeal, or any
4 interest therein;

5 "Real estate transaction" includes the sale, exchange, purchase,
6 rental, or lease of real property.

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

19 Sec. 3. Section 2, chapter 270, Laws of 1955 as last amended by
20 section 9, chapter 338, Laws of 1981 and RCW 49.60.060 are each
21 amended to read as follows:

22 There is created the "Washington state ((heard--against
23 discrimination)) human rights commission," which shall be composed of
24 five members to be appointed by the governor with the advice and
25 consent of the senate, one of whom shall be designated as
26 ((chairman)) chairperson by the governor.

27 Sec. 4. Section 3, chapter 270, Laws of 1955 and RCW 49.60.060
28 are each amended to read as follows:

29 One of the original members of the ((heard)) commission shall be
30 appointed for a term of one year, one for a term of two years, one
31 for a term of three years, one for a term of four years, one for a
32 term of five years; but their successors shall be appointed for terms
33 of five years each; except that any individual chosen to fill a
34 vacancy shall be appointed only for the unexpired term of the member
35 whom ((he)) the individual succeeds.

1 A member shall be eligible for reappointment.

2 A vacancy in the ((heard)) commission shall be filled within
3 thirty days, the remaining members to exercise all powers of the
4 ((heard)) commission.

5 On or after the effective date of this 1985 act, vacancies shall
6 be filled by the governor so as to guarantee that the membership of
7 the commission is representative of the various geographical areas of
8 the state.

9 Any member of the ((heard)) commission may be removed by the
10 governor for inefficiency, neglect of duty, misconduct or malfeasance
11 in office, after being given a written statement of the charges and
12 an opportunity to be heard thereon.

13 Sec. 5. Section 4, chapter 270, Laws of 1955 as last amended by
14 section 98, chapter 287, Laws of 1984 and RCW 49.60.070 are each
15 amended to read as follows:

16 Each member of the ((heard)) commission shall be compensated in
17 accordance with RCW 43.03.250 and, while in session or on official
18 business, shall receive reimbursement for travel expenses incurred
19 during such time in accordance with RCW 43.03.060 and 43.03.060.

20 Sec. 6. Section 5, chapter 270, Laws of 1955 and RCW 49.60.080
21 are each amended to read as follows:

22 The ((heard)) commission shall adopt an official seal which
23 shall be judicially noticed.

24 Sec. 7. Section 6, chapter 270, Laws of 1955 as amended by
25 section 8, chapter 37, Laws of 1957 and RCW 49.60.090 are each
26 amended to read as follows:

27 The principal office of the ((heard)) commission shall be in the
28 city of Olympia, but it may meet and exercise any or all of its
29 powers at any other place in the state, and may establish such
30 district offices as it deems necessary.

31 Sec. 8. Section 7, chapter 270, Laws of 1955 as amended by
32 section 74, chapter 76, Laws of 1972 and RCW 49.60.100 are each

33 amended to read as follows:
34 The ((heard)) commission, at the close of each fiscal year shall

1 report to the governor, describing the investigations, proceedings,
 2 and hearings it has conducted and their outcome, the decisions it has
 3 rendered, the recommendations it has issued, and the other work
 4 performed by it, and shall make such recommendations for further
 5 legislation as may appear desirable. The ((beard)) commission may
 6 present its reports to the legislature; the ((beard's)) commission's
 7 reports shall be made available upon request.

8 Sec. 9. Section 5, chapter 183, Laws of 1949 and RCW 49.60.110
 9 are each amended to read as follows:

10 The ((beard)) commission shall formulate policies to effectuate
 11 the purposes of this chapter and may make recommendations to agencies
 12 and officers of the state or local subdivisions of government in aid
 13 of such policies and purposes.

14 Sec. 10. Section 8, chapter 270, Laws of 1955 as last amended by
 15 section 4, chapter 214, Laws of 1973 1st ex. sess. and RCW 49.60.120
 16 are each amended to read as follows:

17 The ((beard)) commission shall have the functions, powers and
 18 duties:

19 (1) To appoint an executive secretary and chief examiner, and
 20 such investigators, examiners, clerks, and other employees and agents
 21 as it may deem necessary, fix their compensation within the
 22 limitations provided by law, and prescribe their duties.

23 (2) To obtain upon request and utilize the services of all
 24 governmental departments and agencies.

25 (3) To adopt, promulgate, amend, and rescind suitable rules and
 26 regulations to carry out the provisions of this chapter, and the
 27 policies and practices of the ((beard)) commission in connection
 28 therewith.

29 (4) To receive, investigate, and pass upon complaints alleging
 30 unfair practices as defined in this chapter ((because of sex, race,
 31 creed, color, national origin, or the presence of any sensory,
 32 mental, or physical handicap)).

33 (5) To issue such publications and such results of investigations
 34 and research as in its judgment will tend to promote good will and
 35 minimize or eliminate discrimination because of sex, race, creed,

1 color, national origin, marital status, age, or the presence of any
 2 sensory, mental, or physical handicap.

3 (6) To make such technical studies as are appropriate to
 4 effectuate the purposes and policies of this chapter and to publish
 5 and distribute the reports of such studies.

6 (7) To cooperate and act jointly or by division of labor with the
 7 United States or other states, and with political subdivisions of the
 8 state of Washington and their respective human rights agencies to
 9 carry out the purposes of this chapter. However, the powers which
 10 may be exercised by the commission under this subsection permit
 11 investigations and complaint dispositions only if the investigations
 12 are designed to reveal, or the complaint deals only with, allegations
 13 which, if proven, would constitute unfair practices under this
 14 chapter. The commission may perform such services for these agencies
 15 and be reimbursed therefor.

16 (8) To foster good relations between minority and majority
 17 population groups of the state through seminars, conferences,
 18 educational programs, and other intergroup relations activities.

19 Sec. 11. Section 9, chapter 270, Laws of 1955 as last amended by
 20 section 140, chapter 34, Laws of 1975-76 2nd ex. sess. and RCW
 21 49.60.130 are each amended to read as follows:

22 The ((beard)) commission has power to create such advisory
 23 agencies and conciliation councils, local, regional, or state-wide,
 24 as in its judgment will aid in effectuating the purposes of this
 25 chapter. The ((beard)) commission may empower them to study the
 26 problems of discrimination in all or specific fields of human
 27 relationships or in specific instances of discrimination because of
 28 sex, race, creed, color, national origin, marital status, age, or the
 29 presence of any sensory, mental, or physical handicap to foster
 30 through community effort or otherwise good will, cooperation, and
 31 conciliation, among the groups and elements of the population of the
 32 state, and to make recommendations to the ((beard)) commission for
 33 the development of policies and procedures in general and in specific
 34 instances, and for programs of formal and informal education which
 35 the ((beard)) commission may recommend to the appropriate state
 36 agency.

Sec. 11

1 Such advisory agencies and conciliation councils shall be
2 composed of representative citizens, serving without pay, but with
3 reimbursement for travel expenses in accordance with RCW 49.03.080
4 and 49.03.090 as now existing or hereafter amended, and the ((beard))
5 commission may make provision for technical and clerical assistance
6 to such agencies and councils and for the expenses of such
7 assistance. The ((beard)) commission may use organizations
8 specifically experienced in dealing with questions of discrimination.

9 Sec. 12. Section 10, chapter 270, Laws of 1955 and RCW 49.60.140
10 are each amended to read as follows:

11 The ((beard)) commission has power to hold hearings, subpoena
12 witnesses, compel their attendance, administer oaths, take the
13 testimony of any person under oath, and in connection therewith, to
14 require the production for examination of any books or papers
15 relating to any matter under investigation or in question before the
16 ((beard)) commission. The ((beard)) commission may make rules as to
17 the issuance of subpoenas by individual members, as to service of
18 complaints, decisions, orders, recommendations and other process or
19 papers of the ((beard)) commission, its member, agent, or agency,
20 either personally or by registered mail, return receipt requested, or
21 by leaving a copy thereof at the principal office or place of
22 business of the person required to be served. The return post office
23 receipt, when service is by registered mail, shall be proof of
24 service of the same.

25 Sec. 13. Section 11, chapter 270, Laws of 1955 and RCW 49.60.150
26 are each amended to read as follows:

27 No person shall be excused from attending and testifying or from
28 producing records, correspondence, documents or other evidence in
29 obedience to the subpoena of the ((beard)) commission or of any
30 individual member, on the ground that the testimony or evidence
31 required of ((him)) the person may tend to incriminate ((him)) or
32 subject ((him)) the person to a penalty or forfeiture, but no person
33 shall be prosecuted or subjected to any penalty or forfeiture for
34 or on account of any transaction, matter or thing concerning which
35 ((he)) the person is compelled, after having claimed ((his)) the

1 privilege against self-incrimination, to testify or produce evidence,
2 except that such person so testifying shall not be exempt from
3 prosecution and punishment for perjury committed in so testifying.
4 The immunity herein provided shall extend only to natural persons so
5 compelled to testify.

6 Sec. 14. Section 12, chapter 270, Laws of 1955 and RCW 49.60.180
7 are each amended to read as follows:

8 In case of contumacy or refusal to obey a subpoena issued to any
9 person, the superior court of any county within the jurisdiction of
10 which the investigation, proceeding, or hearing is carried on or
11 within the jurisdiction of which the person guilty of contumacy or
12 refusal to obey is found or resides or transacts business, upon
13 application by the ((beard)) commission shall have jurisdiction to
14 issue to such person an order requiring such person to appear before
15 the ((beard)) commission, its member, agent, or agency, there to
16 produce evidence if so ordered, or there to give testimony touching
17 the matter under investigation or in question. Any failure to obey
18 such order of the court may be punished by the court as a contempt
19 thereof.

20 Sec. 15. Section 13, chapter 270, Laws of 1955 and RCW 49.60.170
21 are each amended to read as follows:

22 Witnesses before the ((beard)) commission, its member, agent, or
23 agency, shall be paid the same fees and mileage that are paid
24 witnesses in the courts of this state. Witnesses whose depositions
25 are taken and the person taking the same shall be entitled to same
26 fees as are paid for like services in the courts of the state.

27 Sec. 16. Section 9, chapter 37, Laws of 1957 as last amended by
28 section 6, chapter 214, Laws of 1973 1st ex. sess. and RCW 49.60.180
29 are each amended to read as follows:

30 It is an unfair practice for any employer:
31 (1) To refuse to hire any person because of ((such person's))
32 age, sex, marital status, race, creed, color, national origin, or the
33 presence of any sensory, mental, or physical handicap, unless based
34 upon a bona fide occupational qualification; PROVIDED, That the
35 prohibition against discrimination because of such handicap shall not

1 apply if the particular disability prevents the proper performance of
2 the particular worker involved.

3 (2) To discharge or bar any person from employment because of
4 ((such person's)) age, sex, marital status, race, creed, color,
5 national origin, or the presence of any sensory, mental, or physical
6 handicap.

7 (3) To discriminate against any person in compensation or in
8 other terms or conditions of employment because of ((such person's))
9 age, sex, marital status, race, creed, color, national origin, or the
10 presence of any sensory, mental, or physical handicap: PROVIDED,
11 That it shall not be an unfair practice for an employer to segregate
12 washrooms or locker facilities on the basis of sex, or to base other
13 terms and conditions of employment on the sex of employees where the
14 ((board)) commission by regulation or ruling in a particular instance
15 has found the employment practice to be appropriate for the practical
16 realization of equality of opportunity between the sexes.

17 (4) To print, or circulate, or cause to be printed or circulated
18 any statement, advertisement, or publication, or to use any form of
19 application for employment, or to make any inquiry in connection with
20 prospective employment, which expresses any limitation,
21 specification, or discrimination as to age, sex, marital status,
22 race, creed, color, national origin, or the presence of any sensory,
23 mental, or physical handicap, or any intent to make any such
24 limitation, specification, or discrimination, unless based upon a
25 bona fide occupational qualification: PROVIDED, Nothing contained
26 herein shall prohibit advertising in a foreign language.

27 Sec. 17. Section 10, chapter 37, Laws of 1957 as last amended by
28 section 8, chapter 214, Laws of 1973 1st ex. sess. and RCW 49.00.190
29 are each amended to read as follows:

30 It is an unfair practice for any labor union or labor
31 organization:

32 (1) To deny membership and full membership rights and privileges
33 to any person because of age, sex, marital status, race, creed,
34 color, national origin, or the presence of any sensory, mental, or
35 physical handicap.

36 (2) To expel from membership any person because of age, sex,

1 marital status, race, creed, color, national origin, or the presence
2 of any sensory, mental, or physical handicap.

3 (3) To discriminate against any member, employer, ((or))
4 employee, or other person to whom a duty of representation is owed
5 because of age, sex, marital status, race, creed, color, national
6 origin, or the presence of any sensory, mental, or physical handicap.

7 Sec. 18. Section 11, chapter 37, Laws of 1957 as last amended by
8 section 9, chapter 214, Laws of 1973 1st ex. sess. and RCW 49.00.200
9 are each amended to read as follows:

10 It is an unfair practice for any employment agency to fail or
11 refuse to classify properly or refer for employment, or otherwise to
12 discriminate against, an individual because of age, sex, marital
13 status, race, creed, color, national origin, or the presence of any
14 sensory, mental, or physical handicap, or to print or circulate, or
15 cause to be printed or circulated any statement, advertisement, or
16 publication, or to use any form of application for employment, or to
17 make any inquiry in connection with prospective employment, which
18 expresses any limitation, specification or discrimination as to age,
19 sex, marital status, race, creed, color, or national origin, or the
20 presence of any sensory, mental, or physical handicap, or any intent
21 to make any such limitation, specification, or discrimination, unless
22 based upon a bona fide occupational qualification: PROVIDED, Nothing
23 contained herein shall prohibit advertising in a foreign language.

24 Sec. 19. Section 12, chapter 37, Laws of 1957 and RCW 49.00.210
25 are each amended to read as follows:

26 It is an unfair practice for any employer, employment agency,
27 ((or)) labor union, or other person to discharge, expel, or otherwise
28 discriminate against any person because he or she has opposed any
29 practices forbidden by this chapter, or because he or she has filed a
30 charge, testified, or assisted in any proceeding under this chapter.

31 Sec. 20. Section 7, chapter 167, Laws of 1968 ex. sess. as last
32 amended by section 11, chapter 127, Laws of 1979 and RCW 49.00.225
33 are each amended to read as follows:

34 When a determination has been made under RCW 49.00.250 that an
35 unfair practice involving real property has been committed, the

1 ((beard-or-its-successor)) commission may, in addition to other
2 relief authorized by RCW 49.60.280, award the complainant up to one
3 thousand dollars for loss of the right secured by RCW 49.60.010,
4 49.60.030, 49.60.040, and 49.60.222 through 49.60.228, as now or
5 hereafter amended, to be free from discrimination in real property
6 transactions because of sex, marital status, race, creed, color,
7 national origin, or the presence of any sensory, mental, or physical
8 handicap. Enforcement of the order and appeal therefrom by the
9 complainant or respondent shall be made as provided in RCW 49.60.280
10 and 49.60.270.

11 Sec. 21, Section 8, chapter 197, Laws of 1989 ex. sess. and RCW
12 49.60.228 are each amended to read as follows:

13 The ((beard-against-discrimination-or-its-successor)) commission
14 and units of local government administering ordinances with
15 provisions similar to the real estate provisions of the law against
16 discrimination are authorized and directed to enter into cooperative
17 agreements or arrangements for receiving and processing complaints so
18 that duplication of functions shall be minimized and multiple
19 hearings avoided. No complainant may secure relief from more than
20 one instrumentality of state or local government, nor shall any
21 relief be granted by any state or local instrumentality if relief has
22 been granted or proceedings are continuing in any federal agency,
23 court, or instrumentality, unless such proceedings have been deferred
24 pending state action.

25 Sec. 22, Section 16, chapter 270, Laws of 1956 as amended by
26 section 18, chapter 37, Laws of 1957 and RCW 49.60.230 are each
27 amended to read as follows:

28 Who may file a complaint

29 (1) Any person claiming to be aggrieved by an alleged unfair
30 practice may, ((by-himself)) personally or by his or her attorney,
31 make, sign, and file with the ((beard)) commission a complaint in
32 writing under oath. The complaint shall state the name and address
33 of the person alleged to have committed the unfair practice and the
34 particulars thereof, and contain such other information as may be
35 required by the ((beard)) commission.

1 (2) Whenever it has reason to believe that any person has been
2 engaged or is engaging in an unfair practice, the ((beard))
3 commission may issue a complaint.

4 (3) Any employer or principal whose employees, or agents, or any
5 of them, refuse or threaten to refuse to comply with the provisions
6 of this chapter may file with the ((beard)) commission a written
7 complaint under oath asking for assistance by conciliation or other
8 remedial action.

9 Any complaint filed pursuant to this section must be so filed
10 within six months after the alleged act of discrimination.

11 Sec. 23, Section 16, chapter 270, Laws of 1956 as last amended
12 by section 1, chapter 260, Laws of 1981 and RCW 49.60.240 are each
13 amended to read as follows:

14 After the filing of any complaint, the ((chairman)) chairperson
15 of the ((beard)) commission shall refer it to the appropriate section
16 of the ((beard's)) commission's staff for prompt investigation and
17 ascertainment of the facts alleged in the complaint. The
18 investigation shall be limited to the alleged facts contained in the
19 complaint. The results of the investigation shall be reduced to
20 written findings of fact, and a finding shall be made that there is
21 or that there is not reasonable cause for believing that an unfair
22 practice has been or is being committed. A copy of said findings
23 shall be furnished to the complainant and to the person named in such
24 complaint, hereinafter referred to as the respondent.

25 If the finding is made that there is reasonable cause for
26 believing that an unfair practice has been or is being committed, the
27 ((beard's)) commission's staff shall immediately endeavor to
28 eliminate the unfair practice by conference, conciliation and
29 persuasion.

30 If an agreement is reached for the elimination of such unfair
31 practice as a result of such conference, conciliation and persuasion,
32 the agreement shall be reduced to writing and signed by the
33 respondent, and an order shall be entered by the ((beard)) commission
34 setting forth the terms of said agreement. No order shall be entered
35 by the ((beard)) commission at this stage of the proceedings except
36 upon such written agreement.

1 If no such agreement can be reached, a finding to that effect
 2 shall be made and reduced to writing, with a copy thereof furnished
 3 to the complainant and the respondent.

4 Sec. 24. Section 17, chapter 270, Laws of 1955 as last amended
 5 by section 1, chapter 293, Laws of 1983 and RCW 49.60.250 are each
 6 amended to read as follows:

7 (1) In case of failure to reach an agreement for the elimination
 8 of such unfair practice, and upon the entry of findings to that
 9 effect, the entire file, including the complaint and any and all
 10 findings made, shall be certified to the ((chairman)) chairperson of
 11 the commission. The ((chairman)) chairperson of the commission shall
 12 thereupon request the appointment of an administrative law judge
 13 under Title 34 RCW to hear the complaint and shall cause to be issued
 14 and served in the name of the commission a written notice, together
 15 with a copy of the complaint, as the same may have been amended,
 16 requiring the respondent to answer the charges of the complaint at a
 17 hearing before the administrative law judge, at a time and place to
 18 be specified in such notice.

19 (2) The place of any such hearing may be the office of the
 20 commission or another place designated by it. The case in support of
 21 the complaint shall be presented at the hearing by counsel for the
 22 commission: PROVIDED, That the complainant may retain independent
 23 counsel and submit testimony and be fully heard. No member or
 24 employee of the commission who previously made the investigation or
 25 caused the notice to be issued shall participate in the hearing
 26 except as a witness, nor shall ((he)) the member or employee
 27 participate in the deliberations of the administrative law judge in
 28 such case. Any endeavors or negotiations for conciliation shall not
 29 be received in evidence.

30 (3) The respondent ((may)) shall file a written answer to the
 31 complaint and appear at the hearing in person or otherwise, with or
 32 without counsel, and submit testimony and be fully heard. The
 33 respondent has the right to cross-examine the complainant.

34 (4) The administrative law judge conducting any hearing may
 35 permit reasonable amendment to any complaint or answer. Testimony
 36 taken at the hearing shall be under oath and recorded.

1 (6) If, upon all the evidence, the administrative law judge finds
 2 that the respondent has engaged in any unfair practice, the
 3 administrative law judge shall state findings of fact and shall issue
 4 and file with the commission and cause to be served on such
 5 respondent an order requiring such respondent to cease and desist
 6 from such unfair practice and to take such affirmative action,
 7 including, (but not limited to) hiring, reinstatement or upgrading of
 8 employees, with or without back pay, an admission or restoration to
 9 full membership rights in any respondent organization, or to take
 10 such other action as, in the judgment of the administrative law
 11 judge, will effectuate the purposes of this chapter, including action
 12 that could be ordered by a court, except that damages for humiliation
 13 and mental suffering shall not exceed one thousand dollars, and
 14 including a requirement for report of the matter on compliance.

15 (8) The final order of the administrative law judge shall include
 16 a notice to the parties of the right to obtain judicial review of the
 17 order by appeal in accordance with the provisions of RCW 34.04.180 or
 18 34.04.130, and that such appeal must be served and filed within
 19 thirty days after the service of the order on the parties.

20 (7) If, upon all the evidence, the administrative law judge finds
 21 that the respondent has not engaged in any alleged unfair practice,
 22 the administrative law judge shall state findings of fact and shall
 23 similarly issue and file an order dismissing the complaint.

24 ((7)) (8) An order dismissing a complaint may include an award
 25 of reasonable attorneys' fees in favor of the respondent if the
 26 administrative law judge concludes that the complaint was frivolous,
 27 unreasonable, or groundless.

28 ((8)) (9) The commission shall establish rules of practice to
 29 govern, expedite and effectuate the foregoing procedure.

30 Sec. 25. Section 21, chapter 37, Laws of 1957 as last amended by
 31 section 3, chapter 289, Laws of 1981 and RCW 49.60.260 are each
 32 amended to read as follows:

33 (1) The ((board)) commission shall petition the court within the
 34 county wherein any unfair practice occurred or wherein any person
 35 charged with an unfair practice resides or transacts business((;))
 36 for the enforcement of any final order which is not complied with and

1 is issued by the commission or an administrative law judge under the
2 provisions of this chapter and for appropriate temporary relief or a
3 restraining order, and shall certify and file in court ((a transcript
4 of the entire record of the proceedings, including the pleadings and
5 testimony upon which such order was made and the findings and orders
6 of the administrative law judge)) the final order sought to be
7 enforced. Within five days after filing such petition in court, the
8 ((beard)) commission shall cause a notice of the petition to be sent
9 by registered mail to all parties or their representatives.

10 (2) From the time the petition is filed, the court shall have
11 jurisdiction of the proceedings and of the questions determined
12 thereon, and shall have the power to ((issue such orders and)) grant
13 such ((relief by injunction or otherwise, including)) temporary
14 relief ((,)) or restraining order as it deems just and suitable ((and
15 to make and enter, upon the pleadings, testimony and proceedings set
16 forth in such transcript, a decree enforcing, modifying and enforcing
17 as so modified, or setting aside in whole or in part any order of the
18 board or administrative law judge.

19 (2) The findings of the administrative law judge as to the facts,
20 if supported by substantial and competent evidence, shall be
21 conclusive. The court, upon its own motion or upon motion of either
22 of the parties to the proceeding, may permit each party to introduce
23 such additional evidence as the court may believe necessary to a
24 proper decision of the cause).

25 (3) If the petition shows that there is a final order issued by
26 the commission or administrative law judge under RCW 49.00.240 or
27 49.00.250 and that the order has not been complied with in whole or
28 in part, the court shall issue an order directing the person who is
29 alleged to have not complied with the administrative order to appear
30 in court at a time designated in the order, not less than ten days
31 from the date thereof, and show cause why the administrative order
32 should not be enforced according to the terms. The commission shall
33 immediately serve the person with a copy of the court order and the
34 petition.

35 (4) The administrative order shall be enforced by the court if
36 the person does not appear, or if the person appears and the court

1 finds that:
2 (a) The order is regular on its face;
3 (b) The order has not been complied with; and
4 (c) The person's answer discloses no valid reason why the order
5 should not be enforced, or that the reason given in the person's
6 answer could have been raised by review under RCW 34.04.130, and the
7 person has given no valid excuse for failing to use that remedy.
8 (5) The jurisdiction of the court shall be exclusive and its
9 judgment and decree shall be final, except that the same shall be
10 subject to a review by the supreme court or the court of appeals, on
11 appeal, by either party, irrespective of the nature of the decree or
12 judgment. Such appeal shall be taken and prosecuted in the same
13 manner and form and with the same effect as is provided in other
14 cases of appeal to the supreme court or the court of appeals, and the
15 record so certified shall contain all that was before the lower
16 court.

17 Sec. 26. Section 23, chapter 37, Laws of 1987 as amended by
18 section 4, chapter 259, Laws of 1981 and RCW 49.00.270 are each
19 amended to read as follows:

20 Any respondent or complainant, including the commission,
21 aggrieved by a final order of an administrative law judge may obtain
22 ((a)) judicial review of such order ((in the superior court or the
23 county where the unfair practice is alleged to have occurred or in
24 the county where the person resides or transacts business by
25 filing with the clerk of the court, within two weeks from the date of
26 receipt of such order, a written petition in duplicate, paying that
27 such order be modified or set aside. The clerk shall thereupon mail
28 the duplicate copy to the board. The board shall then cause to be
29 filed in the court a certified transcript of the entire record in the
30 proceedings, including the pleadings, testimony and order. Upon such
31 filing the court shall proceed in the same manner as in the case of a
32 petition by the board, and shall have the same exclusive jurisdiction
33 under the administrative procedure act, chapter 34.04 RCW. From the
34 time a petition for review is filed, the court has jurisdiction to
35 grant to any party such temporary relief or restraining order as it
36 deems just and suitable, and in like manner to make and enter a

1 decree enforcing or modifying and enforcing as so modified or setting
2 aside, in whole or in part, the order sought to be reviewed.

3 Unless otherwise directed by the court, commencement of review
4 proceedings under this section shall operate as a stay of any
5 order). If the court affirms the order, it shall enter a judgment
6 and decree enforcing the order as affirmed.

7 Sec. 27. Section 10, chapter 189, Laws of 1949 as last amended
8 by section 4, chapter 100, Laws of 1981 and RCW 49.60.310 are each
9 amended to read as follows:

10 Any person ((that)) who wilfully resists, prevents, impedes, or
11 interferes with the ((beard)) commission or any of its members or
12 representatives in the performance of duty under this chapter, or
13 ((that)) who wilfully violates an order of the ((beard)) commission,
14 is guilty of a misdemeanor; but procedure for the review of the order
15 shall not be deemed to be such wilful conduct.

16 Sec. 28. Section 11, chapter 183, Laws of 1949 and RCW 49.60.320
17 are each amended to read as follows:

18 In any case in which the ((beard)) commission shall issue an
19 order against any political or civil subdivision of the state, or any
20 agency, or instrumentality of the state or of the foregoing, or any
21 officer or employe thereof, the ((beard)) commission shall transmit
22 a copy of such order to the governor of the state ((who)). The
23 governor shall take such action ((as he deems appropriate)), to ensure
24 compliance with such order as the governor deems necessary.

25 NEW SECTION. Sec. 29. There is added to chapter 49.60 RCW a new
26 section to read as follows:

27 No person shall be considered to have committed an unfair
28 practice on the basis of age discrimination unless the practice
29 discriminates against a person between the age of forty and seventy
30 years and violates RCW 49.44.090. It is a defense to any complaint
31 of an unfair practice of age discrimination that the practice does
32 not violate RCW 49.44.090.

33 NEW SECTION. Sec. 30. There is added to chapter 34.12 RCW a new
34 section to read as follows:

1 When requested by the state human rights commission, the chief
2 administrative law judge shall assign an administrative law judge to
3 conduct proceedings under chapter 49.00 RCW.

4 Sec. 31. Section 5, chapter 100, Laws of 1981 as amended by
5 section 2, chapter 293, Laws of 1983 and RCW 49.44.090 are each
6 amended to read as follows:

7 It shall be an unfair practice:

8 (1) For an employer or licensing agency, because an individual is
9 between the ages of forty and seventy, to refuse to hire or employ or
10 license or to bar or to terminate from employment such individual, or
11 to discriminate against such individual in promotion, compensation or
12 in terms, conditions or privileges of employment: PROVIDED, That
13 employers or licensing agencies may establish reasonable minimum
14 and/or maximum age limits with respect to candidates for positions of
15 employment, which positions are of such a nature as to require
16 extraordinary physical effort, endurance, condition or training,
17 subject to the approval of the executive secretary of the Washington
18 state human rights commission or the director of labor and industries
19 through the division of industrial relations.

20 (2) For any employer, licensing agency or employment agency to
21 print or circulate or cause to be printed or circulated any
22 statement, advertisement, or publication, or to use any form of
23 application for employment or to make any inquiry in connection with
24 prospective employment, which expresses any limitation, specification
25 or discrimination respecting individuals between the ages of forty
26 and seventy: PROVIDED, That nothing herein shall forbid a
27 requirement of disclosure of birth date upon any form of application
28 for employment or by the production of a birth certificate or other
29 sufficient evidence of the applicant's true age.

30 Nothing contained in this section or in RCW 49.60.180 as to age
31 shall be construed to prevent the termination of the employment of
32 any person who is physically unable to perform his duties or to
33 affect the retirement policy or system of any employer where such
34 policy or system is not merely a subterfuge to evade the purposes of
35 this section; nor shall anything in this section or in RCW 49.60.180
36 be deemed to preclude the varying of insurance coverages according to

Sec. 31

1 an employee's age; nor shall this section be construed as applying to
2 any state, county, or city law enforcement agencies, or as
3 superseding any law fixing or authorizing the establishment of
4 reasonable minimum or maximum age limits with respect to candidates
5 for certain positions in public employment which are of such a nature
6 as to require extraordinary physical effort, or which for other
7 reasons warrant consideration of age factors.

8 NEW SECTION. Sec. 32. A new section is added to chapter 43.131
9 RCW to read as follows:

10 The human rights commission and its powers and duties shall be
11 terminated on June 30, 1987, as provided in section 53 of this act.

12 NEW SECTION. Sec. 33. A new section is added to chapter 43.131
13 RCW to read as follows:

14 The following acts or parts of acts as now existing or hereafter
15 amended are each repealed, effective June 30, 1988:

16 (1) Section 2, chapter 270, Laws of 1955, section 5, chapter 37,
17 Laws of 1957, section 9, chapter 338, Laws of 1981, section 3 of this
18 act and RCW 49.60.050;

19 (2) Section 2, chapter 52, Laws of 1971 ex. sess. and RCW
20 49.60.051;

21 (3) Section 3, chapter 270, Laws of 1955, section 4 of this act
22 and RCW 49.60.060;

23 (4) Section 4, chapter 270, Laws of 1955, section 145, chapter
24 54, Laws of 1975-'76 2nd ex. sess., section 98, chapter 287, Laws of
25 1984, section 6 of this act and RCW 49.60.070;

26 (5) Section 5, chapter 270, Laws of 1955, section 6 of this act
27 and RCW 49.60.080;

28 (6) Section 6, chapter 270, Laws of 1955, section 8, chapter 37,
29 Laws of 1957, section 7 of this act and RCW 49.60.090;

30 (7) Section 7, chapter 270, Laws of 1955, section 74, chapter 75,
31 Laws of 1977, section 8 of this act and RCW 49.60.100;

32 (8) Section 8, chapter 183, Laws of 1949, section 9 of this act
33 and RCW 49.60.110;

34 (9) Section 8, chapter 270, Laws of 1955, section 7, chapter 37,
35 Laws of 1957, section 1, chapter 81, Laws of 1971 ex. sess., section
36

Sec. 33

1 7, chapter 141, Laws of 1973, section 4, chapter 214, Laws of 1973
2 1st ex. sess., section 10 of this act and RCW 49.60.120;

3 (10) Section 9, chapter 270, Laws of 1955, section 2, chapter 81,
4 Laws of 1971 ex. sess., section 8, chapter 141, Laws of 1973, section
5 5, chapter 214, Laws of 1973 1st ex. sess., section 146, chapter 34,
6 Laws of 1975-'76 2nd ex. sess., section 11 of this act and RCW
7 49.60.130;

8 (11) Section 10, chapter 270, Laws of 1955, section 12 of this
9 act and RCW 49.60.140;

10 (12) Section 11, chapter 270, Laws of 1955, section 13 of this
11 act and RCW 49.60.150;

12 (13) Section 12, chapter 270, Laws of 1955, section 14 of this
13 act and RCW 49.60.160;

14 (14) Section 13, chapter 270, Laws of 1955, section 15 of this
15 act and RCW 49.60.170;

16 (15) Section 3, chapter 187, Laws of 1969 ex. sess., section 21
17 of this act and RCW 49.60.228;

18 (16) Section 15, chapter 270, Laws of 1955, section 16, chapter
19 37, Laws of 1957, section 22 of this act and RCW 49.60.230;

20 (17) Section 16, chapter 270, Laws of 1955, section 17, chapter
21 37, Laws of 1957, section 1, chapter 259, Laws of 1981, section 23 of
22 this act and RCW 49.60.240;

23 (18) Section 17, chapter 270, Laws of 1955, section 18, chapter
24 37, Laws of 1957, section 2, chapter 259, Laws of 1981, section 1,
25 chapter 293, Laws of 1983, section 24 of this act and RCW 49.60.250;

26 (19) Section 21, chapter 37, Laws of 1957, section 118, chapter
27 81, Laws of 1971, section 3, chapter 259, Laws of 1981, section 25 of
28 this act and RCW 49.60.260;

29 (20) Section 22, chapter 37, Laws of 1957, section 4, chapter
30 259, Laws of 1981, section 26 of this act and RCW 49.60.270;

31 (21) Section 23, chapter 37, Laws of 1957 and RCW 49.60.280;

32 (22) Section 10, chapter 133, Laws of 1949, section 26, chapter
33 37, Laws of 1957, section 4, chapter 100, Laws of 1961, section 27 of
34 this act and RCW 49.60.310; and

35 (23) Section 11, chapter 183, Laws of 1949, section 23 of this
36 act and RCW 49.60.320.

APPENDIX 4

House Bill Report – SHB 52 (Feb. 15, 1985)

HOUSE BILL REPORT

SHB 52

BY House Committee on State Government (originally sponsored by Representatives Niemi, Belcher, Hankins, Vekich, Baugher and Walk)

Revising provisions relating to the human rights commission.

House Committee on State Government

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. (13)

Signed by Representatives Belcher, Chair; Peery, Vice Chair; Baugher, Brooks, Fuhrman, Hankins, O'Brien, Sanders, Taylor, Todd, van Dyke, Vekich and Walk.

House Staff: Ken Conte (786-7135)

AS PASSED HOUSE FEBRUARY 15, 1985

BACKGROUND:

The Human Rights Commission, established in 1949 as the Washington State Board Against Discrimination, is responsible for the elimination and prevention of discrimination based on race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental or physical handicap. The Commission's jurisdiction extends to unfair practices in: 1) employment, 2) places of public accommodation, 3) real property transactions, 4) credit transactions, 5) insurance transactions, 6) certain labor union activities, 7) retaliation against a person who has assisted the Commission or opposed a practice of discrimination, and 8) aiding and inciting violation of the law against discrimination.

The Commission consists of five members appointed by the Governor, with advice and consent of the Senate. It is authorized to: 1) appoint staff, 2) adopt rules and regulations, 3) receive, investigate, and pass upon complaints, 4) hold hearings and subpoena witnesses, and 5) create advisory councils.

The majority of complaints filed with the Commission involve unfair practices in employment. Racial and sexual discrimination comprise the largest percentage of these complaints. When a complaint is filed and found to be within the Commission's jurisdiction, a fact-finding conference is scheduled. Settlement is encouraged, but if no agreement can be reached the Commission launches a full investigation. If the result of the investigation is a finding that there is reasonable cause to believe discrimination exists, the Commission attempts to eliminate the unfair practice by means of a conciliation agreement which is

signed and processed as a Commission order. Only when this conciliation attempt is unsuccessful does the case require a hearing before an administrative law judge (ALJ). Either party may appeal the decision of the ALJ.

When a party, against whom a decision has been rendered by an ALJ, ignores the order and fails to appeal the decision, the Commission may file a petition for enforcement of the order in superior court. The same process is required for enforcement of ignored conciliation agreements and pre-finding settlements. The Commission must go through an appeal-type review of the entire agency proceeding to get the order enforced. The agency must file in court the entire record of the administrative proceeding, including the pleadings and testimony, and the court must review the facts. The court has the discretion to allow either party to introduce additional evidence. The court's enforcement decision may be appealed to the supreme court or court of appeals.

SUMMARY:

Enforcement--Appeals. The enforcement of Human Rights Commission and Administrative Law Judge orders is streamlined by eliminating review of the administrative process and limiting reviewable issues. Issues that can be raised on appeal are generally precluded from the enforcement proceeding, unless the party gives a valid reason for failing to comply with the administrative order and gives a valid excuse for failing to use the appeals process. The only issues that can be raised in the enforcement proceeding are: 1) whether the order is regular on its face; 2) whether the order has been complied with; and 3) whether the party has a valid reason why the order should not be enforced, whether this reason could have been raised on appeal, and if so, whether the party has a valid excuse for failing to use the appeals process.

Hearings. The chief administrative law judge is authorized to appoint administrative law judges to the Commission's cases. A respondent is required to file a written answer and appear at the hearing before the administrative law judge. Upon issuing a final order, the administrative law judge is required to give notice to the parties of their right to obtain judicial review of the order and of the thirty-day time limitation.

Jurisdiction of the Law Against Discrimination. The jurisdiction of the Law Against Discrimination is changed in four areas. First, discrimination by an employer against any person because of the race of another person, such as the person's spouse or child, is made an unfair practice. Second, when a labor union has a policy of referring unemployed nonmembers from its hiring halls, such a union's discriminatory refusal to refer an unemployed nonmember is explicitly made an unfair practice by extending protection to any person to whom a duty of representation is owed. Third, the 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. Finally, the Commission's jurisdiction regarding age discrimination is brought into conformance with case law and administrative rules by limiting its application to persons between the ages of 40 and 70 and making compliance with the related labor statute (RCW 49.44.090) a defense to any charge of age discrimination.

Human Rights Commission. Vacancies on the Commission shall be filled so as to guarantee that the membership of the Commission is representative of the state's geographical diversity. The Commission is expressly given the authority to cooperate and act jointly with federal, state, and local Washington agencies when such action involves unfair practices as defined by Washington law. The Commission may also be reimbursed for such services. The Commission is given the authority to foster good relations between minority and majority population groups through such means as seminars, conferences, and educational programs, a power the Commission's advisory councils already possess. The Executive Secretary of the Human Rights Commission or the Director of the Department of Labor and Industries may establish reasonable minimum and/or maximum age limits with respect to employment that requires extraordinary physical effort or training.

Sunset. The Human Rights Commission is placed under the Washington State Sunset Act. The Commission is given a termination date of June 30, 1987, and the Commission's authorizing statutes are repealed as of June 30, 1988 if the Commission is not reauthorized by the legislature.

Technical Changes. The clause relating to the record on appeal has been superseded by the Rules of Appellate Procedure and is deleted. The parts of the appeals process that have been superseded by the Administrative Procedure Act are eliminated. The partial listing of the jurisdictional bases upon which the Commission is empowered to investigate complaints is eliminated. Age is added to the section empowering advisory councils to study discrimination, and the jurisdictional base of marital status is added to the second recital of jurisdictional bases in the employment agency section. The name of the Washington State Board Against Discrimination is changed to the Washington State Human Rights Commission, and gender-specific language is corrected.

Fiscal Note: Requested January 18, 1985.

House Committee - Testified For: Representative Janice Niemi; Terry Quartermous, Human Rights Commission; Mary Tennyson, Office of Attorney General.

House Committee - Testified Against: None Presented.

House Committee - Testimony For: This is a "housekeeping" bill and it is necessary to ensure that the law against discrimination is effectively enforced. The streamlined enforcement procedure is needed to assure the prompt enforcement of Human Rights Commission and

administrative law judge orders. The Human Rights Commission supports the bill.

House Committee - Testimony Against: None Presented.

APPENDIX 5

Senate Bill Report – SHB 52 (March 26, 1985)

SENATE BILL REPORT

SHB 52

BY House Committee on State Government (originally sponsored by Representatives Niemi, Belcher, Hankins, Vekich, Baugher and Walk)

Revising provisions relating to the human rights commission.

House Committee on State Government

Senate Committee on Judiciary

Senate Hearing Date(s): March 19, 1985; March 26, 1985

Majority Report: Do pass as amended.

Signed by Senators Talmadge, Chairman; Halsan, Vice Chairman; DeJarnatt, Fleming, Newhouse, Owen, Williams.

Senate Staff: Jon Carlson (786-7459)
March 26, 1985

AS REPORTED BY COMMITTEE ON JUDICIARY, MARCH 26, 1985

BACKGROUND:

The Human Rights Commission, established in 1949 as the Washington State Board Against Discrimination, is responsible for the elimination and prevention of discrimination based on race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental or physical handicap. The majority of complaints filed with the Commission involve unfair practices in employment. Racial and sexual discrimination comprise the largest percentage of these complaints.

Legislation is suggested to keep the act current and to ensure that the law against discrimination is effectively enforced.

SUMMARY:

Vacancies on the Human Rights Commission are filled by the Governor in such a manner as to guarantee that the membership of the Commission is representative of the state's geographical diversity.

The Commission is given the authority to cooperate and act jointly with federal, state, and local Washington agencies if the investigations are designed to reveal possible unfair practices. The Commission is also given the authority to foster good relations between minority and majority population groups through seminars, conferences, and educational programs.

Several other types of discriminatory conduct are deemed to be unfair practices under the law against discrimination. First, it is an unfair practice for a labor union to discriminate against any person to whom a duty of representation is owed. In addition, it is an unfair practice for a labor union or any employer to discriminate against any person because he or she opposed a discriminatory practice. It is also an unfair practice for an employment agency to discriminate on the basis of a person's marital status.

The final order of an administrative law judge must include a notice to the parties of the right to obtain judicial review of the order and of the 30-day time limitation for the filing of appeals.

A final order issued by the Human Rights Commission or an administrative law judge must be enforced by the court if the person who is alleged to have not complied with the order does not appear in court, or if the person appears and either (1) fails to provide a valid reason for his or her failure to comply; or (2) cannot offer a valid excuse for failing to use the appeals process to disclose his or her reason.

The commission may obtain judicial review of a final order by an administrative law judge as provided under the Administrative Procedure Act.

Technical changes are made throughout to improve language and modernize the statute.

The Commission is scheduled to terminate on June 30, 1987. The Commission's authorizing statutes are repealed as of June 30, 1988, if the Commission is not reauthorized by the Legislature.

Fiscal Note: available

SUMMARY OF SENATE AMENDMENTS:

The commission is scheduled to terminate on June 30, 1989. The commission's authorizing statutes are repealed as of June 30, 1990, if the commission is not reauthorized by the Legislature.

Senate Committee - Testified: Representative Janice Niemi; Terry Quertermous, Human Rights Commission; Mary Temyson, AAG

APPENDIX 6

Washington Legislative Information System – All actions;
Substitute House Bill (May 8, 1985)

WASHINGTON LEGISLATIVE INFORMATION SYSTEM

As of: May 8, 1985

10/44/38.51

Page 1

ALL ACTIONS; SUBSTITUTE HOUSE BILL

52 Human rights commission

-1985 REGULAR SESSION-

Feb 1 Majority; 1st substitute bill be substituted, do pass.
Passed to Rules committee for second reading.

Feb 8 Placed on second reading by Rules committee.

Feb 11 1st substitute bill substituted.
Passed to Rules committee for third reading.
Placed on third reading by Rules committee.

Feb 15 Third reading, passed; Yeas, 96; nays, 0; absent, 2.
--SENATE--

Feb 18 First reading, referred to Judiciary.

Mar 26 Majority; do pass with amendment(s).
Passed to Rules committee for second reading.

Mar 29 Placed on second reading by Rules committee.

Apr 8 AMENDED.
Held on second reading for Apr 9.

Apr 9 AMENDED.
Rules suspended.
Placed on third reading.
Third reading, passed; Yeas, 44; nays, 5; absent, 0.
--HOUSE--

Apr 12 House concurred in Senate amendments.
Passed final passage. Yeas, 96; nays, 0; absent, 2.

Apr 16 Speaker signed.
--SENATE--

Apr 17 President signed.
--OTHER THAN LEGISLATIVE ACTION--

Apr 19 Delivered to Governor.

Apr 25 Governor partially vetoed.
Chapter 185, 1985 Laws

ALL ACTIONS; HOUSE BILL

52 Human rights commission

-1985 REGULAR SESSION-

Jan 17 First reading, referred to State Government.

Feb 1 Majority; 1st substitute bill be substituted, do pass.
Passed to Rules committee for second reading.

Feb 8 Placed on second reading by Rules committee.

Feb 11 1st substitute bill substituted.

REPORT END

APPENDIX 7

Final Bill Report – SHB 52 – Syno[sis as Enacted (undated)

FINAL BILL REPORT

SHB 52

C 185 L 85 PV

BY House Committee on State Government (originally sponsored by
Representatives Niemi, Belcher, Hankins, Vekich, Baugher and Walk)

Revising provisions relating to the human rights commission.

House Committee on State Government

Senate Committee on Judiciary

SYNOPSIS AS ENACTED

BACKGROUND:

The Human Rights Commission, established in 1949 as the Washington State Board Against Discrimination, is responsible for the elimination and prevention of discrimination based on race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental or physical handicap. The Commission's jurisdiction extends to unfair practices in: 1) employment, 2) places of public accommodation, 3) real property transactions, 4) credit transactions, 5) insurance transactions, 6) certain labor union activities, 7) retaliation against a person who has assisted the Commission or opposed a practice of discrimination, and 8) aiding and inciting violation of the law against discrimination.

The Commission consists of five members appointed by the Governor, with advice and consent of the Senate. It is authorized to: 1) appoint staff, 2) adopt rules and regulations, 3) receive, investigate, and pass upon complaints, 4) hold hearings and subpoena witnesses, and 5) create advisory councils.

The majority of complaints filed with the Commission involve unfair practices in employment. Racial and sexual discrimination comprise the largest percentage of these complaints. When a complaint is filed and found to be within the Commission's jurisdiction, a fact-finding conference is scheduled. Settlement is encouraged, but if no agreement can be reached the Commission launches a full investigation. If the result of the investigation is a finding that there is reasonable cause to believe discrimination exists, the Commission attempts to eliminate the unfair practice by means of a conciliation agreement which is signed and processed as a Commission order. Only when this conciliation attempt is unsuccessful does the case require a

hearing before an administrative law judge (ALJ). Either party may appeal the decision of the ALJ.

When a party, against whom a decision has been rendered by an ALJ, ignores the order and fails to appeal the decision, the Commission may file a petition for enforcement of the order in superior court. The same process is required for enforcement of ignored conciliation agreements and pre-finding settlements. The Commission must go through an appeal-type review of the entire agency proceeding to get the order enforced. The agency must file ~~in court the entire record of the administrative proceeding,~~ including the pleadings and testimony, and the court must review the facts. The court has the discretion to allow either party to introduce additional evidence. The court's enforcement decision may be appealed to the supreme court or court of appeals.

SUMMARY:

The enforcement of Human Rights Commission and Administrative Law Judge orders is streamlined. Issues that can be raised on appeal generally may not be raised during the enforcement proceeding, unless the party gives a valid reason for failing to comply with the administrative order and gives a valid excuse for failing to use the appeals process. The only issues that can be raised in the enforcement proceeding are: 1) whether the order is regular on its face; 2) whether the order has been complied with; and 3) whether the party has a valid reason why the order should not be enforced, whether this reason could have been raised on appeal, and if so, whether the party has a valid excuse for failing to use the appeals process.

The chief administrative law judge is authorized to appoint administrative law judges to the Commission's cases. A respondent is required to file a written answer and appear at the hearing before the administrative law judge. Upon issuing a final order, the administrative law judge is required to give notice to the parties of their right to obtain judicial review of the order and of the thirty-day time limitation.

The jurisdiction of the Law Against Discrimination is changed in four areas. First, discrimination by an employer against any person because of the race of another person, such as the person's spouse or child, is made an unfair practice. Second, when a labor union has a policy of referring unemployed nonmembers from its hiring halls, such a union's discriminatory refusal to refer an unemployed nonmember is explicitly made an unfair practice by extending protection to any person to whom a duty of representation is owed. Third, the 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. Finally, the Commission's jurisdiction regarding age discrimination is brought into conformance with case law and administrative rules by limiting its

application to persons between the ages of 40 and 70 and making compliance with a related labor statute a defense to any charge of age discrimination.

To the extent possible, vacancies on the Human Rights Commission are to be filled so as to guarantee that the membership of the Commission is representative of the state's geographical diversity. The Commission is expressly given the authority to cooperate and act jointly with federal, state, and local Washington agencies when such action involves unfair practices as defined by Washington law. The Commission may also be reimbursed for such services. The Commission is given the authority to foster good relations between minority and majority population groups through such means as seminars, conferences, and educational programs, a power the Commission's advisory councils already possess. The Executive Secretary of the Human Rights Commission or the Director of the Department of Labor and Industries may establish reasonable minimum and/or maximum age limits with respect to employment that requires extraordinary physical effort or training.

The Human Rights Commission is placed under the Washington State Sunset Act. The Commission is given a termination date of June 30, 1987, and the Commission's authorizing statutes are repealed as of June 30, 1988 if the Commission is not reauthorized by the legislature.

Technical changes include the following: the clause relating to the record on appeal has been superseded by the Rules of Appellate Procedure and is deleted; the parts of the appeals process that have been superseded by the Administrative Procedure Act are eliminated; the partial listing of the jurisdictional bases upon which the Commission is empowered to investigate complaints is eliminated; age is added to the section empowering advisory councils to study discrimination; the name of the Washington State Board Against Discrimination is changed to the Washington State Human Rights Commission, and gender-specific language is corrected.

VOTES ON FINAL PASSAGE:

House	96	0	
Senate	44	5	(Senate amended)
House	96	0	(House concurred)

EFFECTIVE: 90 days after adjournment of 1985 Regular Session

PARTIAL VETO SUMMARY:

The partial veto deletes the requirement that the membership of the Human Rights Commission be representative of the geographical diversity of the state.

APPENDIX 8

SHB 52 – Partial Veto (undated)

SHB 50

cases. Those cases are ones in which the applicant and DSHS have entered into an agreement after August 23, 1983 for reimbursement of general assistance payments. As part of a class action lawsuit, DSHS has stipulated to an agreement which requires DSHS to seek legislation to clarify the application of the 1983 amendment.

SUMMARY:

The 1983 law that allows payment of attorneys' fees in successful appeals of denials of supplemental security income (SSI) is made applicable to any qualifying SSI case which meets the following two criteria: (1) federal reimbursement to the state for general assistance payments made during the appeal must have been received after August 23, 1983, the effective date of the 1983 law; (2) the attorney seeking a fee from the reimbursement must have undertaken the SSI case after August 23, 1983.

VOTES ON FINAL PASSAGE:

House 92 0
Senate 48 0

EFFECTIVE: April 22, 1985

SHB 52

PARTIAL VETO

C 185 L 85

By Committee on State Government (originally sponsored by Representatives Niemi, Belcher, Hankins, Velkich, Baugher and Walk)

Revising provisions relating to the human rights commission.

House Committee on State Government

Senate Committee on Judiciary

BACKGROUND:

The Human Rights Commission, established in 1949 as the Washington State Board Against Discrimination, is responsible for the elimination and prevention of discrimination based on race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental or physical handicap. The Commission's jurisdiction extends to unfair practices in: 1) employment, 2) places of

public accommodation, 3) real property transactions, 4) credit transactions, 5) insurance transactions, 6) certain labor union activities, 7) retaliation against a person who has assisted the Commission or opposed a practice of discrimination, and 8) aiding and inciting violation of the law against discrimination.

The Commission consists of five members appointed by the Governor, with advice and consent of the Senate. It is authorized to: 1) appoint staff, 2) adopt rules and regulations, 3) receive, investigate, and pass upon complaints, 4) hold hearings and subpoena witnesses, and 5) create advisory councils.

The majority of complaints filed with the Commission involve unfair practices in employment. Racial and sexual discrimination comprise the largest percentage of these complaints. When a complaint is filed and found to be within the Commission's jurisdiction, a fact-finding conference is scheduled. Settlement is encouraged, but if no agreement can be reached the Commission launches a full investigation. If the result of the investigation is a finding that there is reasonable cause to believe discrimination exists, the Commission attempts to eliminate the unfair practice by means of a conciliation agreement which is signed and processed as a Commission order. Only when this conciliation attempt is unsuccessful does the case require a hearing before an administrative law judge (ALJ). Either party may appeal the decision of the ALJ.

When a party, against whom a decision has been rendered by an ALJ, ignores the order and fails to appeal the decision, the Commission may file a petition for enforcement of the order in superior court. The same process is required for enforcement of ignored conciliation agreements and pre-finding settlements. The Commission must go through an appeal-type review of the entire agency proceeding to get the order enforced. The agency must file in court the entire record of the administrative proceeding, including the pleadings and testimony, and the court must review the facts. The court has the discretion to allow either party to introduce additional evidence. The court's enforcement decision may be appealed to the supreme court or court of appeals.

SUMMARY:

The enforcement of Human Rights Commission and Administrative Law Judge orders is streamlined.

Issues that can be raised on appeal generally may not be raised during the enforcement proceeding, unless the party gives a valid reason for failing to comply with the administrative order and gives a valid excuse for failing to use the appeals process. The only issues that can be raised in the enforcement proceeding are: 1) whether the order is regular on its face; 2) whether the order has been complied with; and 3) whether the party has a valid reason why the order should not be enforced, whether this reason could have been raised on appeal, and if so, whether the party has a valid excuse for failing to use the appeals process.

The chief administrative law judge is authorized to appoint administrative law judges to the Commission's cases. A respondent is required to file a written answer and appear at the hearing before the administrative law judge. Upon issuing a final order, the administrative law judge is required to give notice to the parties of their right to obtain judicial review of the order and of the thirty-day time limitation.

The jurisdiction of the Law Against Discrimination is changed in four areas. First, discrimination by an employer against any person because of the race of another person, such as the person's spouse or child, is made an unfair practice. Second, when a labor union has a policy of referring unemployed nonmembers from its hiring halls, such a union's discriminatory refusal to refer an unemployed nonmember is explicitly made an unfair practice by extending protection to any person to whom a duty of representation is owed. Third, the coverage in the retaliation section is extended to apply to any person who has assisted the Commission or posed 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. Finally, the Commission's jurisdiction regarding age discrimination is brought into conformance with case law and administrative rules by limiting its application to persons between the ages of 40 and 70 and making compliance with a related labor statute a defense to any charge of age discrimination.

To the extent possible, vacancies on the Human Rights Commission are to be filled so as to guarantee that the membership of the Commission is

representative of the state's geographical diversity. The Commission is expressly given the authority to cooperate and act jointly with federal, state, and local Washington agencies when such action involves unfair practices as defined by Washington law. The Commission may also be reimbursed for such services. The Commission is given the authority to foster good relations between minority and majority population groups through such means as seminars, conferences, and educational programs, a power the Commission's advisory councils already possess. The Executive Secretary of the Human Rights Commission or the Director of the Department of Labor and Industries may establish reasonable minimum and/or maximum age limits with respect to employment that requires extraordinary physical effort or training.

The Human Rights Commission is placed under the Washington State Sunset Act. The Commission is given a termination date of June 30, 1989, and the Commission's authorizing statutes are repealed as of June 30, 1990 if the Commission is not reauthorized by the legislature.

Technical changes include the following: the clause relating to the record on appeal has been superseded by the Rules of Appellate Procedure and is deleted; the parts of the appeals process that have been superseded by the Administrative Procedure Act are eliminated; the partial listing of the jurisdictional bases upon which the Commission is empowered to investigate complaints is eliminated; age is added to the section empowering advisory councils to study discrimination; the name of the Washington State Board Against Discrimination is changed to the Washington State Human Rights Commission, and gender-specific language is corrected.

VOTES ON FINAL PASSAGE:

House	96	0	
Senate	44	5	(Senate amended)
House	96	0	(House concurred)

EFFECTIVE: July 28, 1985

PARTIAL VETO SUMMARY:

The partial veto deletes the requirement that the membership of the Human Rights Commission be representative of the geographical diversity of the state. (See VETO MESSAGE)

APPENDIX 9

Certification of Enrolled Enactment – Substitute House Bill No.
52 (April 12, 1985)

IN THE LEGISLATURE
of the
STATE OF WASHINGTON



CERTIFICATION OF ENROLLED ENACTMENT

SUBSTITUTE HOUSE BILL NO.52.....

CHAPTER NO.

Passed the House.....February 15.....1985

Yeas96..... Nays0.....

Passed the SenateApril 9.....1985
as amended

Yeas44..... Nays.....5.....

April 12, 1985:

The House concurred
in the Senate
amendments and
passed the bill as
amended by the
Senate.

Yeas: 96 Nays: 0

CERTIFICATE

I, Dennis L. Heck, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is enrolled Substitute House Bill No. 52 as passed by the House of Representatives and the Senate on the dates hereon set forth.

Dennis L. Heck
DENNIS L. HECK, Chief Clerk

APPENDIX 10

The Boeing Company's motion for summary judgment (cover page and pp. 14-15 in *Lechner v. Boeing Company*, Cause No. 2:15-cv-01414-RSL (W.D.Wash.)).

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARGO H. LECHNER,

Plaintiff,

v.

THE BOEING COMPANY,

Defendant.

No. 2:15-cv-01414-RSL

DEFENDANT THE BOEING COMPANY'S
MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:

November 25, 2016

DEFENDANT THE BOEING COMPANY'S
MOTION FOR SUMMARY JUDGMENT
(No. 2:15-cv-01414-RSL)

03002-2601/92073968.2

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1 employment given her prior termination, and when plaintiff's status was not resolved, formally
2 withdrew its offer); *Waters v. Furnco Const. Corp.*, No. 72 C 2305, 1975 WL 127, at *6 (N.D.
3 Ill. Feb. 10, 1975), *aff'd in part, rev'd in part*, 551 F.2d 1085 (7th Cir. 1977), *rev'd*, 438 U.S.
4 567, 98 S. Ct. 2943 (1978) ("The failure to hire Plaintiff . . . was based upon his previous
5 discharge A refusal to hire upon such grounds is clearly legitimate in the absence of a
6 showing by the Plaintiffs that the refusal is a disguise for a racially discriminatory decision.");
7 *Cornish v. Dallas Indep. Sch. Dist.*, No. CIV.A. 3:08-CV-1968G, 2010 WL 375785, at *4 (N.D.
8 Tex. Feb. 2, 2010), *aff'd*, 412 F. App'x 732 (5th Cir. 2011) (employer policy not to hire
9 candidates who were terminated by a prior employer was a legitimate, non-discriminatory reason
10 for failing to hire plaintiff). Ms. Lechner's discrimination claim fails.

11 C. Ms. Lechner's Retaliation Claim Fails

12 Under the WLAD, to establish her retaliation claim, Ms. Lechner must present evidence
13 that she participated in a statutorily protected right, that there was an adverse employment action
14 taken against her by Boeing, and there was a causal connection between her protected activity
15 and the adverse employment action. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 481–82, 205
16 P.3d 145, 152 (2009) (citing *Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774,
17 797, 120 P.3d 579 (2005)). Ms. Lechner must also show that retaliation was a substantial factor
18 motivating the adverse employment decision. *Id.* If Ms. Lechner asserts a prima facie case of
19 retaliation, the burden shifts to Boeing to articulate a legitimate, non-retaliatory reason for the
20 adverse action. *Id.* If Boeing articulates such a reason, Ms. Lechner bears the ultimate burden of
21 demonstrating that the reason was merely a pretext for a retaliatory motive. *Id.*

22 Here, Ms. Lechner claims that Boeing rescinded her offer of employment because she
23 filed an EEOC charge against Nabtesco. Bushaw Decl. ¶ 2, Ex. B (Lechner Dep. at 54:10-24) at
24 40. Ms. Lechner's claim fails because she cannot show a causal connection between the filing of
25 her EEOC charge against Nabtesco and Boeing's decision to rescind her job offer. *See*

1 *Burchfiel*, 149 Wn. App. at 482 (causation may be established by the close proximity in time
2 between “the protected activity” and the “adverse employment action.”).

3 Ms. Lechner filed her EEOC charge against Nabtesco on November 19, 2010. Bushaw
4 Decl. ¶ 9, Ex. I, at 2. Ms. Lechner was notified that her offer of employment at Boeing was
5 rescinded on August 24, 2012. *Id.* (Lechner Dep. at 39:6-9, Ex. 5) at 27, 118-119. Thus, these
6 events are too remote in time to establish causation. *Hines v. California Pub. Utilities Comm’n*,
7 No. C-10-2813 EMC, 2011 WL 1302918, at *5 (N.D. Cal. Apr. 5, 2011) (“a two-year lapse in
8 time, without other evidence of causation, makes [plaintiff’s] retaliation claim facially
9 implausible.”); *Manatt v. Bank of Am., NA*, 339 F.3d 792, 802 (9th Cir. 2003) (a nine-month time
10 period between plaintiff’s protected activity and defendant’s adverse employment decision was
11 insufficient to establish causation).

12 Indeed, courts faced with similar allegations as alleged by Ms. Lechner, routinely dismiss
13 such claims. *See Muhammad v. Juicy Couture/Liz Claiborne, Inc.*, No. 09 CIV.8978 PAC THK,
14 2010 WL 4032735, at *5-6 (S.D.N.Y. July 30, 2010), *report and recommendation adopted*,
15 No. 09 CV 08978 KMW THK, 2010 WL 4006159 (S.D.N.Y. Oct. 12, 2010) (dismissing
16 retaliation claim where plaintiff claimed that she was denied a transfer because she filed an
17 EEOC charge against a prior employer two years before); *Riddle v. Citigroup*, 640 F. App’x 77,
18 79 (2d Cir. 2016) (a gap of sixteen months between the filing of plaintiff’s EEOC charge and the
19 date plaintiff submitted her online job application is too long to support a retaliation claim based
20 solely on temporal connection). Ms. Lechner cannot establish a prima facie case of retaliation.

21 Ms. Lechner’s retaliation claim also fails for the same reason as her discrimination
22 claim—Boeing has a legitimate non-retaliatory reason for rescinding her employment offer.
23 Ms. Lechner was discharged from a prior employer for poor performance and had no subsequent
24 positive work history and she cannot establish pretext. *See Supra* Section III(B). Summary
25 judgment is warranted on this claim.