

65404-7

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No. 65404-7-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

DEBORAH COLE,

Plaintiff-Respondent

v.

HARVEYLAND LLC, d/b/a The Harvey Apartments Group, a
Washington corporation; MARWOOD LLC, a Washington corporation;
DONALD HARVEY, a single man; and MICHELLE JEROME and
JOHN DOE JEROME, and their marital community,

Defendants-Appellants

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Hollis Hill)

**BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF
INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER**

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I. INTRODUCTION

The National Federation of Independent Business Small Business Legal Center submits this brief in support of the positions taken by Appellants Harveyland LLC and Michelle Jerome and to emphasize the importance of protecting very small businesses from discrimination lawsuits.

The Washington Law Against Discrimination explicitly exempts businesses of less than eight employees from statutory regulation. This exemption has remained unchanged for over half a century. The Supreme Court of Washington has recognized a substantial state interest in the well-being of small businesses. In ruling that the numerosity requirement of this statute is a jurisdictional bar, the Court furthers the persistent state interest of freeing Washington small business from undue burden. Small businesses will be able to dismiss pleadings strictly on their face, saving vulnerable business time and money. If, however, the Court declines to view this as a jurisdictional bar, it will encumber Washington small businesses with lengthier, more expensive litigation. To treat this exemption as anything other than a jurisdictional bar would negate the purpose of the exemption, would run contrary to the history of the statute, and would harm the ability of small businesses to operate confidently in this difficult economic climate.

II. INTEREST AND IDENTITY OF AMICUS CURIAE

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about \$500,000 a year. The NFIB membership is a reflection of American small business. Because many NFIB members employ less than eight people, the impact of this case will be felt throughout the NFIB Washington membership.

NFIB relies on the courts for the reasonable interpretation and application of statutory and common law affecting Washington businesses. For this reason, to fulfill its role as the voice for small

business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

This case will determine whether small businesses in Washington will be exposed to the risk of costly, burdensome, and often meritless employment litigation despite a clear exemption intended to protect them from that risk. The financial consequences for a small business from a decision inconsistent with this policy could be quite burdensome, with attendant impact on the local economy. NFIB believes that this brief will provide an additional perspective on these issues that may be of assistance to the court.

III. ISSUE PRESENTED

Whether the Washington Law Against Discrimination, which exempts businesses with less than eight employees from employment discrimination lawsuits, operates as a jurisdictional bar where: (a) RCW 49.60.040 (11) clearly exempts small employers, (b) Washington precedent justifies the exemption as a jurisdictional bar, and (c) construing the exemption merely as an element of a plaintiff's claim for relief confounds the Legislature's purpose for enacting the exemption.

IV. ARGUMENT

A. The Law Clearly Exempts Very Small Business From Discrimination Lawsuits.

The Washington Law Against Discrimination ("WLAD") governs employment discrimination lawsuits in the state of Washington.

RCW 49.60.010. The law is designed to prevent discrimination in employment and creates a private right of action for victims of discrimination to sue their employers. RCW 49.60.030(2). The WLAD prescribes which employers fall under the purview of the statute. RCW 49.60.040(11).

The WLAD specifically exempts very small businesses from employment discrimination lawsuits. *Id.* The statute defines “employer” as “any person acting in the interest of any employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.” RCW 49.60.040(11). The plain language of the statute makes clear that businesses employing less than eight people may not be sued under the WLAD.

Reacting to the definition of “employer” in the WLAD, the Washington Supreme Court held that “employers of fewer than eight employees are statutorily exempt” from the WLAD. *Griffin v. Eller*, 130 Wn.2d 58, 61, 922 P.2d 788 (1996). Since *Griffin*, Washington courts have continued to treat the definition of “employer” as a statutory exemption for small business. *See Roberts v. Dudley*, 140 Wn.2d 58, 74-75, 993 P.2d 901 (2000); *Anaya v. Graham*, 89 Wn. App. 588, 591, 950 P.2d 16 (1998); *Bennett v. Hardy*, 113 Wn.2d 912, 915, 784 P.2d 1258 (1990).

Despite this statutory exemption, Washington courts continue to allow employment discrimination actions brought against very small

businesses to proceed. In the present case, the trial court permitted Deborah Cole to sue Marwood, her employer, without requiring her to prove that Marwood had more than eight employees. Marwood did not have more than eight employees.

When determining the number of employees for WLAD purposes, this court utilizes the “payroll method.” *Anaya*, 89 Wn. App. at 590. Under this method, the court asks “whether an individual has an employment relationship with the employer on the date in question.” *Id.* at 589-90. Examining pay records is an “effective means of demonstrating whether a person has an employment relationship.” *Id.* at 593. Ms. Cole failed to provide payroll records and relied solely on testimony that the number of people employed “varied” but that it was around ten. Under the payroll method of determining the number of employees, Mr. Harvey’s testimony fails to render the WLAD exemption inapplicable to Marwood.

Because the plain language of the statute clearly exempts businesses employing less than eight people from the purview of the statute, and because Washington courts have continued to affirm the exemption, businesses have relied on this exemption. When courts upset commonly accepted legal rules such as the WLAD exemption, the legal environment becomes unstable. In an unstable environment, businesses

cannot operate confidently, which discourages expansion and hiring of additional employees.

B. Supreme Court of Washington Has Looked to Legislative Action and Other Courts in Interpreting Public Policy Reasons for Exempting Small Business From Burdensome Regulation.

While the Washington Legislature has provided little in the way of explicit legislative intent regarding the operation of the small business exemption, the Supreme Court has stated that “[t]he state has a substantial interest in the well-being of small-business with regard to the state economy, tax base, and opportunities for employment.” *Griffin*, 130 Wn.2d at 68. Further, one can infer, as the Court discussed in a footnote to *Roberts*, that the defeat of two bills (SB 5130 and ESB 5337, 56th Leg., Reg. Sess. (1999)) evidenced a continued legislative commitment to protecting small business from the statutory regulations of RCW 49.60. *Roberts*, 140 Wn.2d at 69 n.9. Senate Bill 5130 would have changed the definition of “employer” in RCW 49.60.030 to any person employing one or more employees. *Id.* ESB 5337 proposed a task force to examine the definition of “employer” under 49.60. *Id.* The defeat of both bills evinces a dedication to the shielding of small business.

In considering the possible legislative justification for the small business exemption, the Supreme Court of Washington referenced the Oklahoma Supreme Court, which stated:

“[T]he legislature doubtless sought to avoid imposing upon small shops the potentially disastrous expense of defending against a state-law claim for workplace discrimination.”

Griffin, 130 Wn.2d at 67 (citing *Brown v. Ford*, 905 P.2d 223, 227 (Okla. 1995)). Implicit in an exemption is a public policy to protect small business from damaging litigation.

The Court in *Griffin* also looked to the intent behind the small-employer exemption in the California Fair Employment Practices Act (FEPA). *Griffin*, 130 Wn.2d at 66-67. The Court, recognizing that the FEPA paralleled the WLAD, considered the rationale given by the California State Assembly for exempting employers with fewer than five employees. *Id.* Among these reasons was the belief that small employers tend to have close, personal relationships with their employees, and such relationships were outside the purview of employment law. *Id.* Further, the Assembly reasoned that discrimination on a small scale would be difficult to detect. *Id.* Finally, the Assembly believed that that primary concern behind the statute was the elimination of large scale discrimination, rather than redressing individual instances. *Id.* The Assembly struck a balance between the public policy concerns of eradicating discrimination and protecting small businesses from crushing litigation expense. *Id.*

C. Other Courts Have Recognized a Public Policy Interest in Protecting Small Business

The Court of Appeals of North Carolina has held that a trial court did not err in dismissing an age discrimination suit where the employer was not covered by the relevant statute. *Jarmon v. Deason*, 173 N.C. App. 297, 298, 618 S.E.2d 776 (2005). In her claim the plaintiff alleged that, while the employer employed less than the statutorily required fifteen employees, it would go against the public policy of the State of North Carolina to allow discrimination on the basis of age. *Id.* Nevertheless, the Court granted defendant's motion to dismiss for failure to state a claim upon which relief could be granted. In coming to this conclusion, the Court stated:

“Our legislature has specifically prohibited employment discrimination on certain enumerated bases by employers of fifteen or more people and deemed such discrimination to be contrary to the interests of the public. Our Supreme Court has noted that, where the legislature is clearly aware of a practice challenged on public policy grounds and knows how to forbid it but chooses not to, the proper course of action is to recognize and honor the legislative determination.”

Id. at 299.

The plaintiff further asserted that the Court is free to determine whether an act on the part of an employer, in an at-will employment situation, violates public policy. *Id.* The Court responded that the General Assembly had made a determination regarding the reach of the statute, and

that countermanding that determination would not be a proper function of the court. *Id.* at 300.

The Supreme Court of Connecticut reached a similar conclusion in *Thibodeau v. Design Group One Architects, LLC*. There, the plaintiff brought an action claiming she had been terminated due to her pregnancy, in violation of Fair Employment Practices Act General Statutes § 46a-51. *Thibodeau v. Design Group One Architects, LLC*, 260 Conn. 691, 694, 802 A.2d 731 (2002). However, the statute in question defined “employers” as those entities employing fewer than three people. *Id.* The trial court rendered summary judgment for the defendant, as the business employed less than three employees. *Id.* As in Washington, the legislative history was silent on the reason for the exemption. *Id.* at 707. Still, the court concluded that the reason for the exemption could not be doubted:

“[T]he legislature did not wish to subject this state's smallest employers to the significant burdens, financial and otherwise, associated with the defense of employment discrimination claims.”

Id. The Court conceded that, resulting from this outcome, some sex discrimination claims may go unremedied. *Id.* at 709. Nevertheless the Court concluded that it could not

“give voice to the act’s prohibitions and simultaneously ignore its exemption for small employers, for the latter operates as a limit on the former.”

Id. The Court concluded that the legislature would not have exempted small business unless it meant for them to be shielded. *Id.* at 718.

In *Chavez v. Sievers*, 118 Nev. 288, 293-94, 43 P.3d 1022 (2002), the Supreme Court of Nevada ruled that Nevada's employment discrimination statute, which is limited to employees of fifteen or more, exempts small business from both the statutory restriction as well as any common law claim. The Court ruled that the trial court did not err in granting summary judgment where the defendant did fall within the statutory definition. *Id.* at 294. The legislature, the Court held, had determined that small businesses should be exempt from racial discrimination suits. *Id.* Accordingly, the Court decline to extend any exception to the at will doctrine to small businesses. *Id.*

D. Allowing Discrimination Claims Against Very Small Businesses Would Significantly Harm Small Business in Washington.

1. Defending Discrimination Claims Is Expensive.

Small businesses are tremendously burdened by litigation. The U.S. Chamber Institute for Legal Reform has reported that small businesses (defined as those making less than \$10 million a year) paid \$105.4 billion in tort liability costs in 2008. *Tort Liability Costs for Small*

Business, U.S. Chamber Institute for Legal Reform, July, 2010.¹ It is forecasted the tort liability for small businesses (excluding medical malpractice) will \$121.2 billion in 2011. *Id.* Adding to the burden is the overall cost of federal regulation. The Small Business Office of Advocacy reports that small businesses (here defined as having 20 employees or less) bear the largest burden of federal regulation. Nicole V. Crain and W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, SBA Office of Advocacy, September 2010. As of 2008, small businesses face an annual regulatory cost of \$10,586 per employee. *Id.* This is 36% higher than the costs facing firms of 500 employees or more. *Id.*

Small business owners work hard to generate revenue for their business and often generate just enough revenue to support their business, employees, and themselves, without much leftover for additional expenses. According to the NFIB website, the typical NFIB member employs ten people and reports gross annual sales of about \$500,000.² Over 50% of NFIB members have less than five employees. *See also* NFIB National Small Business Poll, Vol. 7, Issue 7, Finance Questions, ISSN-1534-8326, at 1 (2007) (the “median amount an owner of a small employing business draws from his/her firm in a year is about \$72,500”).

¹http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/ilr_small_business_2010.pdf

² *See* <http://www.nfib.com/about-nfib/what-is-nfib-/who-nfib-represents>.

What is more, many small business owners earn their income through the profits of the business, bearing the total risk of the business. Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine In Employment Discrimination Law*, 80 St. John's L. Rev. 1197, 1249 (2006). Any cost that cannot be passed on to the customer will directly impact the livelihood of the owner. *Id.*

Because small businesses barely sustain themselves on the revenue they bring in, the cost of litigation frequently signals the death knell for small businesses who simply do not have extra cash on hand to defend a lawsuit. “[T]he costs of defending employment discrimination lawsuits can run well into six figures.” Timothy S. Bland, *EEOC Brings Mediation to the Table: Is it Right for Your Client?*, 47 JUL. Fed. Law. 44 (2000) (discussing federal employment discrimination claims). *See also* Stuart H. Bompey, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 Lab. Law. 21, 22 (1997) (addressing costs of employment discrimination defense, whether state or federal: “Defending against a wrongful discharge claim brought by a former employee can cost an employer hundreds of thousands of dollars in legal fees and considerable time of corporate personnel diverted from productive activity to providing information or testimony.”); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43

B.C. L. Rev. 351, 400 (2002) (“Litigation also is an expensive mechanism for resolving employment disputes. The cost of taking a case from complaint to trial typically reaches or exceeds \$300,000.”)

A 2007 *BusinessWeek* online cover story reported similar costs for litigation. The story indicated that the cumulative cost for a company to defend a single employment lawsuit is \$250,000 through trial and \$300,000 through appeal. The story also reported that a company “can easily spend \$100,000 to get a meritless lawsuit tossed out before trial,” and that even “meritless cases can ... tie up companies in burdensome and expensive proceedings for years.” Michael Orey, *Fear of Firing*, *BusinessWeek* (Apr. 23, 2007).³

Unfortunately, according to the U.S. Equal Opportunity Commission’s website, the majority of employment discrimination claims are meritless so businesses spend time and money defending lawsuits they never should have had to defend in the first place.⁴ EEOC 2009 charge statistics indicate that 52,363 of the 85,980 charges resolved, or 60.9 percent, were found to have no reasonable cause. According to the *BusinessWeek* story, out of 10,000 lawsuits, 7,000 settle, with most

³ See http://businessweek.com/magazine/content/07_17/b4031005.htm.

⁴ See <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>.

settlements being for nuisance value. *Id.* Additionally, out of the 600 cases that proceed to trial, only 186 are won by plaintiffs. *Id.*

The *BusinessWeek* story also discussed another indirect, harmful impact of subjecting small business to the threat of employment litigation. According to the report, “companies today are gripped by a fear of firing. Terrified of lawsuits, they let unproductive employees linger ... pay severance to screwups and even crooks in exchange for promises that they won’t sue Few things demotivate an organization faster than tolerating and retaining low performers.” Michael Orey, *Fear of Firing, supra*. Where the costs of defending even one discrimination lawsuit is in the same range as the average annual, after-tax revenues for very small employers, there can be no question that the exemption of such small firms from the purview of the WLAD serves a legitimate policy objective.

2. Small Businesses Are Disadvantaged in Litigation.

Small businesses are uniquely vulnerable to litigation. Smaller employers generally have greater difficulty absorbing the costs of litigation. E. Gary Spitko, *Exempting High-Level Employees ad Small Employers From Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. Davis L. Rev. 591, 648 (2009). Direct monetary costs in the form of attorney’s fees and the expenses of

discovery burden business disproportionately. *Id.* An immediate outlet in the form of a jurisdictional bar would greatly relieve this burden.

Not only is defending discrimination litigation expensive to small business, but small businesses have less resources available to fight a lawsuit. Unlike larger businesses, small employers do not retain in house legal counsel or human resource professionals who are in the best position to quickly, efficiently, and inexpensively handle employment discrimination claims. Larger corporations maintain a staff charged with ensuring that the business complies with anti-discrimination laws. Conversely, the owner of a small business will often act as a general manager, supervisor, and worker. Carlson, 80 St. John's L. Rev. at 1245-50. When tasked with mounting a legal defense, the toll is not only financial, but a burden on time, energy, and productivity. *Id.* at 1250.

E. The WLAD Exemption Should be a Jurisdictional Bar; Not an Element of the Plaintiff's Claim for Relief.

Treating the WLAD exemption as an element of the plaintiff's claim for relief does not help curb the initial litigation costs for small businesses. A jurisdictional bar would prevent businesses from having to make initial costly litigation expenditures. Accepting the premise that exempting small businesses from the WLAD is a legitimate policy objective because it spares businesses the cost of expensive and often meritless litigation, the only rational outcome is to treat the exemption as a

jurisdictional bar. If the WLAD exemption is merely an element of the plaintiff's claim for relief, then the exemption fails to serve this purpose.

In an analogous case, the Court of Appeals held that when a statute defined "family or household member" as persons 16 years or older who have had a dating relationship with other persons 16 years or older, that actions between an individual who was under 16 and an individual who was over 16 did not fall under the statute. *Neilson ex rel. Crump v. Blanchette*, 149 Wn. App. 111, 116-17, 201 P.3d 1089 (2009). In *Blanchette*, the Court concluded the definition of "family or household" operated as a jurisdictional bar. In this case, the definition of "employer" as employers employing eight or more persons should operate as a jurisdictional bar as well.

Business owners with less than eight employees certainly expect that the exemption has jurisdictional effect, based upon explanations by the Washington State Human Rights Commission, charged with administering and enforcing the WLAD. The Commission itself actually informs employers the exemption has jurisdictional effect, as noted on its website. The Commission's website provides a list of questions for employers to educate the employer on the law. The very first question on the webpage is: "What are the *jurisdictional* criteria?" (Emp. added).

The first criterion listed under that question is “Employer has at least 8 employees (does not include religious organizations).”⁵

Small business owners viewing the Commission’s webpage would rationally assume that if they employ less than eight employees, they could not be sued under the WLAD. Certainly, the WSHRC website is simply one resource for small businesses and not an authoritative source of the law. But the information on the website demonstrates how a well-meaning business owner, lacking sophisticated knowledge of the law, might understand that their small size exempts them from a lawsuit under the WLAD.

How this court treats the WLAD exemption will likely have far-reaching consequences for small business. Legal precedent and the commitment to sparing Washington businesses from the high expense of often meritless litigation both counsel in favor of treating the exemption as a jurisdictional bar.

V. CONCLUSION

For the foregoing reasons, Amicus Curiae requests that this court declare the judgment void for lack of subject-matter jurisdiction. Alternatively, Amicus Curiae requests that the court overturn the verdict and order dismissal or remand the case for fair trial.

⁵ See <http://www.hum.wa.gov/Employment/WLADEmployment.html>.

RESPECTFULLY SUBMITTED this 1 day of November, 2010.

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CERTIFICATE OF SERVICE

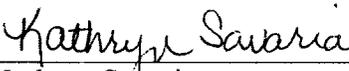
I hereby certify that on November 1, 2010, I caused to be served a copy of the foregoing **BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER** on the following person(s) in the manner indicated below at the following address(es):

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