NO. 94209-9

SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WASHINGTON

JIN ZHU,
Plaintiff-Respondent,

v.

NORTH CENTRAL EDUCATIONAL SERVICE DISTRICT – ESD 171
Defendant-Appellant.

BRIEF OF RESPONDENT

Matthew Z. Crotty, WSBA # 39284
Crotty & Son Law Firm, PLLC
905 W. Riverside Ave, Suite 409
Spokane, WA 99201
Tel: (509) 850-7011
Fax: (509) 703-7957

Michael B. Love, WSBA # 20529
Michael Love Law, PLLC
905 W. Riverside Ave, Suite 404
Spokane, WA 99201
Tel: (509) 309-2787
Fax: (509) 309-2788

Andrew Biviano, WSBA # 38086
Paukert & Troppmann, PLLC
522 W. Riverside, Suite 560
Spokane, WA 99201
Tel: (509) 232-7760
Fax: (509) 232-7762

Attorneys for Plaintiff-Respondent Jin Zhu

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I. INTRODUCTION

ESD 171 asks the Court to make it perfectly legal for an employer to reject a job applicant because that person sued their prior employer for race discrimination. A jury has already found ESD 171 liable for retaliating against Mr. Zhu based on his prior complaint of racial discrimination. ESD 171 now asks the Court to invalidate the jury verdict and declare its retaliation legal, simply because Mr. Zhu's prior race discrimination complaint was against a different employer. The Court should reject ESD 171's attempt to bar those brave enough to oppose workplace discrimination from future employment.

ESD 171 can find no support for its position in the plain text of the WLAD, this Court's prior decisions, or in the decisions of any courts nationwide. Its position is anathema to the stated purpose of the WLAD, which is to be construed liberally to eliminate and prevent discrimination and retaliation against any of the inhabitants of the state, including applicants for employment. All state and federal courts that have squarely addressed the issue presented here, as well as the EEOC, have come down against ESD 171's position. While ESD 171 makes valiant but unavailing efforts to distinguish the multitude of authorities that have rejected its position, it is unable to present a single case, from any jurisdiction, that

addressed a statute analogous to the WLAD and reached the conclusion that it asks this Court to adopt.

The reason for the consensus opposition to ESD 171's position is simple: if employers were legally allowed to exclude job applicants based on prior opposition to discrimination, the entire statutory scheme designed to eliminate discrimination would implode. If the Court were to tell employers in Washington State that they are free to openly reject job applicants who have opposed discrimination in the past, the message sent to future victims and witnesses would be stark: If you stand up for yourself, or for other victims of discrimination, you could be marked as a troublemaker, and your career could be over. How many people would oppose discrimination in such a scenario?

To answer the certified question, the Court should follow the legislature's direction to interpret the WLAD liberally, and hold that the WLAD protects job applicants from retaliation based on prior opposition to discrimination against a different employer.

II. CERTIFIED QUESTION PRESENTED FOR REVIEW

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?

III. STATEMENT OF THE CASE

A. Factual History

Although the facts of this case are not at issue here, they illustrate the significance of the legal issue before the Court. Plaintiff-Respondent Jin Zhu was born in China and immigrated to the United States in 2004.[1] From 2006 to 2012, Mr. Zhu was employed as a math teacher in the Waterville School District ("Waterville") in Waterville, Washington. On September 28, 2010, Mr. Zhu filed a Title VII federal race discrimination and retaliation suit against Waterville School District and its superintendent, captioned: *Zhu v. Waterville School District No.209*, et al., No. 13 2:10-CV-00333-LRS (E.D.WA.). Mr. Zhu settled the case on March 13, 2012, and, as a condition of settlement, resigned his position with Waterville.

Defendant-Appellant ESD 171 is one of nine educational service districts in the state of Washington created by statute to provide cooperative and informational services to local school districts, assist superintendents and the board of education in their statutory and constitutional duties, and provide services to assure equal educational opportunities. RCW 28A.310.010. ESD 171 is a large organization that serves 29 school districts, including the Waterville School District.

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[1] Unless otherwise indicated, all facts are taken from the District Court's *Order Certifying Local Law Questions to Washington Supreme Court.*

Pursuant to its services to Waterville, which included risk management, ESD 171 was involved in the litigation of Mr. Zhu's race discrimination complaint against Waterville. For instance, ESD 171's Assistant Fiscal Director Sally Ryan, who managed Waterville's finances, joined the contingent of Waterville representatives at the March 13, 2012 settlement conference regarding Mr. Zhu's case against Waterville. CP 5 (ECF 39-1, ¶ 34). ESD 171 was also involved in, and aware of, the Waterville litigation in various other ways, including: the discrimination complaint alleged that the nephew of ESD 171's director made racist comments and stated in writing he hoped Mr. Zhu's house would burn down (*Id.* (ECF 39-1, ¶ 25)); at Waterville's request, ESD 171 suspended Mr. Zhu's access to Waterville's email network and transferred information from Mr. Zhu's email account onto ESD 171's server (*Id.* (¶¶ 27, 31)); and ESD 171 helped process the *Zhu v. Waterville* settlement payment. *Id.* (¶¶ 37-38). Other employees of ESD 171, including Superintendent Richard McBride and at least two of the members of a hiring panel that would later evaluate Mr. Zhu's May 2012 employment application and sit in on Mr. Zhu's June 19, 2012, interview, were aware of the Waterville litigation. *Id.* (¶¶ 42-43, 64-65).

ESD 171 posted a job opening announcement on May 25, 2012, for a Math-Science Specialist position, along with minimum and preferred

qualifications. Mr. Zhu was one of five applicants for the position, and one of three chosen to be interviewed. A white male was hired for the position over Mr. Zhu despite ample evidence demonstrating that Mr. Zhu was by far the most qualified candidate and the only one that met the preferred qualifications, with far more education and professional experience, objective data showing improved student performance, strong letters of recommendation, and more detailed and complete answers to interview questions. CP 5 (ECF 39-1 ¶¶ 51-62). As just a few examples of many discrepancies the jury considered:

- ESD 171's June 15, 2012, "screening matrix" for the Math-Science position gave another candidate a "++" rating for the requirement to have a "BA in education or science field" even though the candidate only had a BA in Elementary Education, while Mr. Zhu was given a lower "+" rating despite having a Bachelor's Degree in Chemistry with minors in Mathematics, Physics, and Computer Programming, a Master's Degree (U.S. PhD equivalent) in Semantics with a minor in Statistics and Data analysis, and having completed a Secondary Teacher preparation program from St. Martin's University. *Id.*, ¶¶ 51-52.

- ESD 171's June 15, 2012, "screening matrix" gave another candidate a "+" rating for "Proof of Effective Communication Skills" but gave Mr. Zhu a "-" rating even though the oral interview *had not yet happened* (it was not until June 19, 2012) and nothing in Mr. Zhu's application material concerned ESD 171 about Mr. Zhu's ability to communicate. *Id.*, ¶50.
- One of the primary goals of the Math-Science Specialist position was to improve student test scores among a student population that had 50% of its students failing standardized math tests; the position thus required a demonstrated history of "school improvement." CP 13 (ECF 146, p. 16) ESD 171 knew that 75% of Mr. Zhu's 9th grade math class performed at or above grade level as evaluated under the Iowa Basic Skills Test (compared to less than 50% for the general student population), that 16 out of 18 of his Advance Placement Physics students passed the AP College Board examination, that he had five math and science endorsements on his teacher certificate, had taught over 17 math and science subjects to students of six different grades, and had created his own math and science

curricula. *Id.* The candidate selected for the position had no demonstrated history of raising student test scores and was not even endorsed to teach math or science. *Id.*

- A college professor (who also happened to be a parent of one of Mr. Zhu's students) recommended Mr. Zhu by stating "I have seldom if ever, seen this level of subject depth in any teacher in our public school system. He . . . would be qualified to teach at the university level as well. He has 'raised the bar' in physical science education for our high school. . . . [H]e represents an international standard of excellence that I have not seen in our local science programs." CP 5 (ECF 39-1, p. 22).

In addition to being rejected for this position, Mr. Zhu applied for more than a dozen math and science teaching positions with school districts that are serviced by ESD 171, but was not even given an interview for any of them. *Id.* (ECF 39-1, ¶¶ 99-165). In many circumstances, the applicants chosen over Mr. Zhu had little or no experience in teaching math or science. *Id.*, (¶¶ 116-117).

B. Procedural History

Mr. Zhu filed a lawsuit against ESD 171 pursuant to Washington's Law Against Discrimination, RCW 49.60. Both parties filed summary judgment motions, which were granted in part, and the matter went to a jury trial on the issues of whether ESD 171 discriminated against Mr. Zhu on the basis of race and/or retaliated against him for his prior claim of discrimination against the Waterville School District. The jury found for ESD 171 on the claim of racial discrimination but found ESD 171 liable for retaliating against Mr. Zhu based on his prior protected activity against Waterville and awarded Mr. Zhu "$450,000 + legal fees."

ESD 171 filed a motion for judgment as a matter of law, a new trial, or certification to this Court on the issue of whether the WLAD provides 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. CP 12. The U.S. District Court denied the motions for JMOL and for a new trial, but granted the motion for certification based on its determination that Washington case law does not squarely address the issue presented. *Order Certifying Local Law Questions to Washington Supreme Court* (ECF 158). The District Court indicated that if this Court finds that RCW 49.60.210(1) provides a cause of action to a prospective employee against a prospective employer

not involved in the underlying discrimination claim, the jury verdict will be upheld, but if it finds that the statute does not provide such a cause of action, the jury verdict will be vacated. *Id.*, p. 7.

IV. ARGUMENT

ESD 171 argues that Mr. Zhu should not be protected from retaliation under the WLAD because the statute does not use the words "applicant for employment" when listing those protected under the statute, and because no Washington court has yet to explicitly hold as such. These arguments simply cannot hold up under scrutiny. First, the statutory text is written as broadly as possible, and must be interpreted liberally to protect all people from retaliation, to include job applicants. Second, ESD 171 cannot point to a single case that differs with this analysis, while a number of state and federal cases support Mr. Zhu's position. Third, ESD 171's position plainly violates public policy, as it would obliterate the entire purpose of anti-discrimination laws if future employers are lawfully permitted to retaliate against those who opposed discrimination against their former employer.

A. The Plain Language of the WLAD Protects Job Applicants From Retaliation Based on Past Opposition to Forbidden Practices.

Issues of statutory construction are questions of law subject to de novo review. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190

(2004). The purpose of statutory interpretation is "to determine and give effect to the intent of the legislature." *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). When possible, the Court derives legislative intent "solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Id.* "Plain language that is not ambiguous does not require construction." *Id.*

We must, therefore, begin with the text of the provision in question, RCW 49.60.210(1):

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

There is simply no ambiguity in this statute, which concisely express its intent to protect from retaliation all people who have opposed any form of discrimination. If the legislature had intended to exclude from protection job applicants who filed discrimination complaints against former employers, there is simply no rational explanation for why it chose not to say this and instead used the broadest language possible.

But if any ambiguity remains after reading the plain language of the statute, this Court has instructed us to next consider the "context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *State v. Evans*, 177 Wn.2d at 192. We should thus turn to the definitions of the key terms of this provision:

- "Employer" is defined as "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit." RCW 49.60.040(11). One thus becomes an employer by employing eight or more people. While the statute does exclude from the definition those who are not acting in the interest of the employer, such as coworkers, it does not exclude employers while engaged in the hiring process. ESD 171 is thus an "employer."
- "Person" is similarly broadly defined to include "one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons . . . one or more natural persons [and] further includes any political or civil subdivisions[.]" RCW 49.60.040(19). ESD 171 and Mr. Zhu both meet the definition of "person."

- To "otherwise discriminate" includes the refusal to hire someone, given that the declaration of civil rights includes the "right to obtain and hold employment without discrimination." RCW 49.60.030(1)(a).
- The "practices forbidden by this chapter" include race discrimination under RCW 49.60.180, so bringing a race discrimination lawsuit constitutes "opposing" a forbidden practice.
- Perhaps the most important term is "any," which the legislature chose to use four times, making it illegal for **any employer** to discriminate against **any person** because he or she has opposed **any forbidden practices** in **any proceeding**. "Any" is not defined in the WLAD but is generally defined to mean "unmeasured or unlimited in amount, number, or extent." *https://www.merriam-webster.com/dictionary/any.* Placing qualifiers or restrictions on terms preceded by "any" therefore violates the statute.

The context of the statute in which the provision is found and the statutory scheme as a whole make the meaning and intent of the provision clearer still. The legislature provided guidance on how all ambiguities should be resolved, stating: "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020. The stated purposes of the statute are the "protection of the

public welfare, health, and peace of the people of this state," the ending of "discrimination against any of its inhabitants," and the "elimination and prevention of discrimination in employment." RCW 49.60.010. To make explicit that the statute provides protection to not only employees but also job applicants, the legislature declared as a civil right the right to "obtain and hold employment without discrimination" and contemplated that the statute will apply to "any unfair practice committed by an employer against an employee or a prospective employee." RCW 49.60.030(1)(a), (3) (emphasis added). Finally, as a catch-all provision aimed at those who might attempt to exclude some people from the law's protection, the legislature declared: "Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights." RCW 49.60.020.

ESD 171 conspicuously fails to mention these statutory definitions and instructions. Thus, while it engages in speculation on legislative intent suggested in house and senate bill reports[2], it ignores the explicit

[2] This legislative history is inapposite. The fact that the legislature did not mention job applicants when expanding protections to those who have opposed discrimination in public accommodation and property, credit and insurance transactions in no way suggests that job applicants are not protected. There was no need to mention the addition of job applicant protections when they were already covered by the statute.

legislative intent prominently set forth in the statute itself. Appellant's Brief, pp. 8-11. The reason for this omission is self-evident: the plain language of the WLAD invalidates the entire premise of ESD 171's argument. ESD 171 suggests the Court interpret the statute narrowly and exclude people from its protections, while the legislature explicitly mandates that the Court interpret the WLAD as broadly as possible to protect all inhabitants of the state from any and all discrimination and retaliation.

The Court should simply follow the legislature's instruction to protect from retaliation any person who has opposed discrimination in any proceeding, including job applicants who filed discrimination complaints against former employers. Any other interpretation of the statute is inconsistent with the plain language and expressed intent of the WLAD.

B. Both Binding and Persuasive Case Law Uniformly Holds that Job Applicants Should Be Protected from Retaliation Based on Prior Opposition to Discrimination.

Faced with statutory language opposed to its position, ESD 171 turns to case law, and an alleged absence of case law. It argues that because no Washington court has previously had the occasion to address the precise facts of this case, there is no cause of action here. This is incorrect. Both state and federal decisions have dealt with analogous fact patterns and statutory schemes and have established precedent on which

this Court can rely. ESD 171, by contrast, cannot cite a single Washington case, or a case in any jurisdiction, that dealt with the same facts and law at issue in this case and reached the conclusion it endorses.

1. Judicial Interpretations of the WLAD Consistently Recognize its Broad Reach and Implied Causes of Action.

This Court has already determined that the WLAD's protections apply to job applicants. For instance, in *Scrivener v. Clark College*, the Court held that under the WLAD, it is an unfair practice for an employer to refuse to hire a job applicant on the basis of age. 181 Wn.2d 439, 444 334 P. 3d 541, 544 (2014). While that case interpreted RCW 49.60.180(1) rather than §210, it applied the same definitions for "employer" and other terms, as well as the same statutory scheme. There is no limiting language anywhere else in the statute to suggest that discriminatory hiring is prohibited under §180 but that retaliatory non-hiring is permitted under §210. Nor would this make logical sense when the language of §210 is in fact *broader* than §180, stating that it is illegal for anyone to retaliate against anyone else, in any way, based on opposition to any unfair practices in any proceeding. It also would be entirely inconsistent with the statutory scheme that governs both sections for it to be illegal to discriminate against job applicants based on race, but perfectly legal to retaliate against them based on opposition to racial discrimination.

The Court has also established rules when faced with a statute that does not explicitly resolve the facts of a particular case. *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). *Bennett* is particularly helpful and pertinent to this case because it addressed a similar statute (RCW 49.44.090) as well as a similar question of statutory interpretation. 113 Wn.2d at 919-22. Like the case at bar, the question presented was whether there exists a cause of action when it is not explicitly stated in the statute. *Id.* The court noted that while RCW 49.44 clearly prohibits an employer from refusing to hire based on age, it is silent regarding remedies against an employer engaged in this unfair practice and does not define "employer." *Id.* at 919. Citing both state and federal precedent, the Court recognized its authority to provide an implied cause of action when "the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision." *Id.* at 920, *quoting* Restatement (Second) of Torts 874A (1979).

Borrowing from federal jurisprudence, the Court set forth a three-part test for when an implied cause of action is appropriate: first, the plaintiff should be within the class for whose benefit the statute was enacted; second, the court should determine whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, determine whether implying a remedy is consistent with the underlying

purpose of the legislation. *Id.* The Court found this test to be satisfied in that case, in light of the clear statutory intent to stop age discrimination, and recognized an implied cause of action. *Id.* at 921.

Given that this Court recognized a cause of action in *Bennett*, in the face of significant statutory omissions, it should certainly recognize a cause of action here. Unlike RCW 49.44, the WLAD contains explicit prohibitions, definitions, and remedies, as well as a strong statement of legislative intent and purpose, and thus answers the certified question with its plain language. But even if the Court finds the plain language insufficient, it should find an implied cause of action for job applicants who are denied employment based on their opposition to discrimination in past employment because the *Bennett* three-part test is easily satisfied. First, victims of discrimination and those who oppose discrimination are unquestionably the class for whose benefit the WLAD was enacted. RCW 49.60.010. Second, the explicit legislative intent is the creation of remedies to prevent all discrimination in employment. *Id.* Third, a remedy for job applicants who have been rejected based on having engaged in protected activity is entirely consistent with the underlying purpose of the legislation, as it is an indispensable piece of the legislative scheme. Without it, those who oppose workplace discrimination would be strongly

deterred from coming forward, lest they be forever marked and barred from future employment.

Given this precedent and the WLAD's expansive protections, it is no surprise that when a case with the same essential facts as this one came before the U.S. District Court for the Western District of Washington, neither the parties nor the court felt it necessary to even ask whether the WLAD allows employers to reject job applicants based on their past opposition to discrimination. In *Lechner v. The Boeing Company*, 2017 WL 347080 (W.D. WA. Jan. 24, 2017) (Lasnik, J.), the plaintiff made the precise allegation at issue in this case: that Boeing did not hire her because of her discrimination claim against her previous employer. The court denied Boeing's motion for summary judgment and allowed the claim to proceed to trial. *Id.* As ESD 171 correctly points out, Boeing *did not even argue* that the WLAD did not provide a job applicant a retaliation cause of action against a prospective employer. Appellant's Brief, pp. 32-35. Boeing is, of course, a powerful and sophisticated corporation that retains fully capable counsel; its decision to not even raise this argument thus speaks volumes about the argument's viability. Nor did the *Lechner* court see enough merit to the argument to raise it *sua sponte*. It is reasonable to infer that the parties and court recognized the argument's lack of merit.

Faced with this contrary authority, ESD 171 attempts to utilize inapposite and distinguishable cases and shoehorn them into this case. It relies heavily on *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn.App. 927, 931, 965 P.2d 1124 (1998), *rev. denied* 137 Wn.2d 1029, 980 P.2d 1284 (1999), which held that RCW 49.60.210(1) does not create personal and individual liability for co-workers, and then reasons that this should be equally true for prospective employers.

This reasoning is rejected by *Malo* itself. That case's holding is consistent with the WLAD's definition of "employer," which includes "any person acting in the interest of an employer, directly or indirectly," but which would naturally not include a person who does not act in the interest or on behalf of an employer, such as a co-worker with no supervisory authority. RCW 49.60.040(11). But the court clarified that the statute *is* "directed at entities functionally similar to employers who discriminate by engaging in conduct similar to discharging or expelling a person who has opposed practices forbidden by RCW 49.60." *Id.* at 931.

ESD 171 meets the statutory definition of employer because it employs eight or more people. Even if one were to assume, *arguendo*, that it is not an employer when considering job applicants, it is certainly "functionally similar" to an employer because it determines whether someone is employed. Rejecting applicants who have opposed

discrimination is certainly "conduct similar to discharging or expelling a person" because in essence what ESD 171 did was expel Mr. Zhu from its applicant pool. Just as the defendant in *Scrivener* was considered an employer under the WLAD when it refused to hire based on age, ESD 171 was an employer subject to the Act when it refused to hire based on past opposition to prohibited practices. *Malo* thus undermines ESD 171's position.

ESD 171 then discusses *Warnek v. ABB Combustion Eng'g Servs., Inc.*, 137 Wn.2d 450, 972 P.2d 453, 455-57 (1999) and attempts to analogize it to the present case. No comparisons can be drawn, however, because *Warnek* dealt with workers' compensation laws rather than the WLAD. Worker's compensation laws, set forth in RCW Chapter 51, are dissimilar to the WLAD in virtually every way. Because the right to workers' compensation arises only after someone is hired to do a job, the statutes only govern disputes between employers and employees, and not job applicants. *See* RCW 51.08.180; RCW 51.08.185 (defining "employee" and "worker" to only include those who are "engaged in the employment of an employer under this title"). Perhaps the biggest contrast with the WLAD is found in the statutory scheme and purpose: rather than instructing courts to interpret the statute liberally to protect as many people as possible, the workers' compensation statute is intended to

remove jurisdiction and authority from courts, except when it is expressly provided in the statute. RCW 51.04.010. Indeed, *Warnek* itself noted that the WLAD and Washington's workers' compensation scheme differed because "RCW 49.60.020, provides that the chapter 'shall be construed liberally for the accomplishment of ... [its] purposes.' There is no similar provision in Title 51 RCW. In fact Title 51 RCW by its wording suggests a narrow construction." *Warnek*, 137 Wn. 2d at 461, 972 P.2d at 458. Given that the statutes are virtually photo negatives of each other, the only function worker compensation cases serve in the present analysis is to exemplify how one should *not* interpret the WLAD.

Finally, ESD 171 refers to a number of WLAD cases that used the terms "employers" and "employees," suggesting that this choice of words is intended to limit the statute's protections to current employees and exclude job applicants. *See* Appellant's Brief, p. 12 n.8. This is misleading. In these cases, the courts simply used the terms that reflected the relationship of the litigants before them, and never suggested they were providing an exhaustive list of those protected under the WLAD. In no case has a Washington court stated or implied that the protections of RCW 49.60.210 are limited to current employees and do not apply to job applicants. Rather, it is generally accepted that the "broad language of RCW 49.60.210(1) likewise supports the conclusion that the WLAD does

not limit claims to those brought by employees against employers." *Currier v. Northland Services, Inc.,* 182 Wn. App. 733, 744, 332 P.3d 1006 (2014) (recognizing that provision also protects independent contractors). *See also Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 849, 292 P.3d 779, 787 (2013)(noting that defendant's suggestion to read an employee exclusion into the WLAD would "narrow the protective language and purposes of the WLAD's opposition clause, contrary to the liberal construction mandate of the act. This we cannot do.") (*citing Marquis v. City of Spokane,* 130 Wn.2d 97, 108, 922 P.2d 43 (1996)); *Sambasivan v. Kadlec Med. Ctr.*, 184 Wn. App. 567, 591, 338 P.3d 860, 872 (2014)("[n]othing in its title or content limits the WLAD to labor or employer-employee relations.")(citation omitted).

In short, WLAD jurisprudence uniformly supports the recognition of a cause of action for anyone not hired for a job based on opposition to discrimination in a previous job. While these precise facts have arisen in only one other known WLAD case, the cause of action was so obvious it went unchallenged. *See Lechner, supra.* This Court has already acknowledged the right of job applicants to be free from discrimination, and has recognized an implied cause of action when statutes are unclear. Only the recognition of a cause of action for job applicants will satisfy the

legislative mandate to construe the WLAD liberally in order to eliminate and prevent employment discrimination.

2. Federal Civil Rights Law Recognizes a Cause of Action for Job Applicants Retaliated Against Based on Opposition to Discrimination.

"Washington courts look to federal antidiscrimination law to help them construe the WLAD's provisions." *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 490, 325 P.3d 193 (2014). "Where this [C]ourt has departed from federal antidiscrimination statute precedent, however, it has almost always ruled that the WLAD provides *greater* employee protections than its federal counterparts do." *Id.*, 180 Wn.2d at 492 (emphasis added). *See Lodis,* 172 Wn. App. at 850 ("the WLAD contains a liberal construction mandate, which makes it broader in scope than Title VII"). It is thus appropriate to analyze and incorporate persuasive federal antidiscrimination cases that have considered whether there exists 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.

Both the EEOC and a number of federal circuits courts have squarely addressed the issue, and have uniformly ruled that such retaliation is prohibited. The EEOC Compliance Manual provides that "[i]ndividuals who engage in protected activity include . . . those whose

protected activity involved a different employer (e.g., an applicant who is not hired because she filed an ADA charge against her former employer for failure to provide a sign language interpreter, or because she opposed her previous employer's exclusion of qualified applicants with hearing impairments)." EEOC Enforcement Guidance on Retaliation and Related Issues §II.A.3 (August 25, 2016) *available at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#Actions_Not_Work_Related* (last visited April 18, 2017). Indeed, Example 19 of the Compliance Manual directly applies to the certified question in case:

> An employee files a suit against company A, alleging that her supervisor sexually harassed and constructively discharged her. The suit is ultimately settled. She applies for a new job with company B and receives a conditional offer subject to a reference check. When B calls A, the employee's former supervisor says that she was a "troublemaker," started a sex harassment lawsuit, and was not anyone B "would want to get mixed up with." B then withdraws its conditional offer. These statements support the conclusion that because of the employee's prior sexual harassment allegation, A provided a negative job reference and B rescinded its job offer. Both A and B can be liable for retaliation. *Id.* at §II.C.3, Example 19.

Federal courts have agreed with this interpretation not only because it is consistent with the plain language of Title VII,[3] but also because it is critical to the overall effectiveness of any anti-discrimination remedial scheme, which requires "unfettered access to . . . statutory remedial mechanisms." *McMenemy v. City of Rochester*, 241 F.3d 279, 284 (7th Cir. 2001), *quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). As the *McMenemy* court observed, the interpretation suggested by the defendants in that case (and by ESD 171) would significantly deter an employee's use of remedial mechanisms because "the employee would be subject to lawful retaliation by all concurrent and future employers for protected activities involving his current employer. We think that Title VII protects an employee from *any* employer, present or future, who retaliates against him because of his prior or ongoing opposition to an unlawful employment practice[.]" *Id.* (emphasis in original).

Numerous other federal courts have reached the same conclusion, and for the same reason: the interpretation suggested by ESD 171 would

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[3] "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

deter victims from asserting their rights, and permit employers to discriminate and retaliate with impunity. *See, e.g., Flowers v. Columbia College Chicago*, 397 F.3d 532, 533-34 (7th. Cir. 2005) ("no one may follow the rule 'we do not employ anyone who has ever made a Title VII charge against a prior employer.' . . . No employer may retaliate against someone who makes or supports a charge of discrimination against *any* employer.") (emphasis in original). The Sixth Circuit put it this way:

> As the goal of Title VII is to preserve employment opportunity, we can see no reason to conclude that Congress intended Title VII to prohibit discrimination by a non-employer defendant on the basis of race or sex, and to allow the same non-employer defendant to discriminate against a person who engages in protected activity under Title VII. In both instances the acts of the non-employer defendant have the effect of denying the plaintiff employment based upon impermissible grounds under the Act.

Christopher v. Stouder Mem'l Hosp., 936 F.2d 870, 876–77 (6th Cir. 1991).

ESD 171 may attempt to distinguish these cases based on the fact that Title VII, unlike the WLAD, explicitly references "applicants for employment." 42 U.S.C. § 2000e-3(a). This is a distinction without a difference, however, as the WLAD applies much more broadly than Title VII by protecting not just an enumerated list of persons, but "any" person.

RCW 49.60.210(1).[4] For ESD 171's argument to have merit, one would have to conclude that "applicants for employment" are not "persons." Such a conclusion defies logic.[5]

The *Kumar* case is also instructive. This Court was presented with an instance in which the language of Title VII was more precise than the WLAD, in that Title VII explicitly requires employers to make "reasonable accommodation" for employees' religious practices, whereas the WLAD lacks such an express requirement. *Kumar*, 180 Wn.2d at 492. Lower courts had previously interpreted the absence of express statutory language to mean that no cause of action for religious reasonable accommodation existed in Washington, but this Court disapproved of this analysis. *Id.* at 493-94. Instead, this Court held that it must interpret the statute "so as to give effect to the legislature's intent" and found an implicit duty to accommodate in the WLAD. *Id.* at 496.

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[4] See also the Uniformed Services Employment and Re-employment Rights Act (USERRA)'s anti-retaliation provision, 38 U.S.C. § 4311(b), which bars an employer from taking adverse action against "any person" who "has exercised" a USERRA right. Lawsuits involving retaliatory failure to hire on account of USERRA actions against prior-employers have been litigated. *Hance v. BNSF Ry. Co.*, 645 F. App'x 356, 357 (6th Cir.), *cert. denied*, 137 S. Ct. 200, 196 L. Ed. 2d 130 (2016).

[5] ESD 171's reliance on Fair Labor Standards Act cases (Appellant Brief p. 4, n. 4, p. 5) should also be rejected because the FLSA, like state workers' compensation laws, exists to guarantee the payment of wages, which can only be paid after an employer-employee relationship begins.

Given that this Court finds implicit protections in the WLAD even where the statute is silent, it should certainly recognize protections where, as here, the statute explicitly provides them. In light of the plain language of the statute, the legislative mandate to interpret the text statute broadly, and the EEOC's and federal courts' persuasive interpretations of the less expansive Title VII, the Court should find that the WLAD protects all people from any employer, present or future, who retaliates against him because of his prior opposition to an unlawful employment practice.

3. Decisions from Other States Also Protect Job Applicants from Retaliation Based on Opposition to Discrimination.

ESD 171 boldly claims that "[t]he 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 based upon an applicant's protected activity while employed by a previous employer." Appellant's Brief, pp. 6-7. This is incorrect.

Carter Coal Co. v. Human Rights Com'n, 261 Ill.App.3d 1, 633 N.E.2d 202, 198 Ill.Dec. 740 (5 Dist. 1994) is virtually identical to this case and disposes of virtually every argument raised by ESD 171. The principal issue in *Carter Coal* was "whether an employer can retaliate against a prospective employee because that employee has filed an age-discrimination charge against a previous employer," which the court

answered in the negative. *Id.* at 2. In reaching this holding, the court first acknowledged the defendant's point that the statutory provision at issue did not explicitly provide for a cause of action for failure to hire because the applicant has filed a charge against a former employer[6], but recognized that the "language of a statute must be reviewed as a whole" and found that the statutory purpose creates this cause of action. *Id.* at 5-6. The court rebutted the defendant's (and ESD 171's) argument that "retaliate" only includes situations in which someone is repaying an injury to oneself, noting that retaliation is often used to repay acts committed against a third party. *Id.* at 6-7. The court then engaged in a fulsome and useful discussion of the strong public policy interests supporting its holding, concluding: "A policy that is undermined when an employer discharges a current employee is also undermined when a subsequent employer refuses to hire the same person." *Id.* at 14. Finally, the court parenthetically noted that "because the Illinois Human Rights Act is significantly similar to the Federal Civil Rights Act of 1964" it was appropriate to be guided by the

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[6] The statute provided: "It is a civil rights violation for a person, or for two or more persons to conspire, to:

(A) Retaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination, sexual harassment in employment or sexual harassment in higher education, or because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act." 775 ILCS 5/6-101(A) (1992).

federal case law also recognizing this cause of action. *Id. Carter Coal* is a virtual mirror image of this case, and offers persuasive guidance.

There is also California case law on point. As ESD 171 acknowledges, California has an anti-discrimination statute that is almost identical to RCW 49.60.210(1). Appellant's brief, p. 6 n.6. To wit:

> It is an unlawful employment practice . . . For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

Cal. Gov't Code § 12940(h). A California court has already determined that this statute protects applicants for employee positions against retaliation for protesting workplace discrimination. *Sada v. Robert F. Kennedy Med. Ctr.*, 56 Cal. App. 4th 138, 65 Cal. Rptr. 2d 112, 126 (1997), *as modified on denial of reh'g* (July 18, 1997).

The plaintiff in *Sada* was a nurse who worked for the defendant hospital as an independent contractor, who then applied for a full-time employee position but was not hired. *Id.*, 56 Cal. App. at 145. After she complained to state authorities that she was denied the job based on national origin and ancestry, she was fired as an independent contractor. *Id.* at 146-7. She sued for discrimination and retaliation, and the trial court granted summary judgment for the defendant. *Id.* at 147. On appeal from

the trial court's order, the parties primarily addressed the legal question of whether the statute protected independent contractors. *Id.* at 157-59. The appellate court found it unnecessary to decide whether the act covered independent contractors, however, after concluding that the plaintiff, *as a job applicant,* was protected against retaliation for protesting discrimination. *Id.* at 159.

Because California's law is almost identical to the WLAD, the analysis the court uses in *Sada* can be applied directly to this case:

> As stated, the FEHA's antiretaliation provision makes it unlawful for an employer to "discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this [Act] or because the person has filed a complaint, testified, or assisted in any proceeding under this [Act]." (Gov. Code, § 12940, subd. (f), italics added.) We can think of no reason why the word "person," as used in the antidiscrimination provision, should be interpreted more narrowly for purposes of the antiretaliation provision. Significantly, the Legislature has directed that "[t]he provisions of [the Act] ... be construed liberally for the accomplishment of the purposes thereof." (Gov. Code, § 12993, subd. (a).) One of the primary goals of the prohibition on discrimination—to eliminate bias in hiring—would be undermined if an employer could lawfully retaliate against an applicant because she had complained about discriminatory hiring practices. The antiretaliation provision should not be interpreted in a way that encourages silence among those who reasonably believe that an employer has refused to hire them for prohibited reasons. fn. 27 To effectively remedy discrimination in hiring, an applicant should be able to come forward with her complaint without fear of reprisal. fn. 28 **Consequently, we conclude that the**

> **antiretaliation provision of the FEHA covers applicants for employee positions.** fn. 29

56 Cal. App. 4th at 159-160 (emphasis added).

The court also engaged in an analysis of federal law that reached the same conclusions described above:

> If applicants were not covered by the antiretaliation provision, a prospective employer could lawfully refuse to hire a person because she had previously brought a discrimination charge or action against a former employer. Courts have held that such employer conduct constitutes unlawful retaliation under Title VII. (*See, e.g., Bacon v. Secretary of Air Force* (S.D.Ohio 1991) 785 F. Supp. 1255, 1264-1265, affd. (6th Cir. 1993) 7 F.3d 232; *Barela v. United Nuclear Corporation* (D.N.M. 1970) 317 F. Supp. 1217, 1218, affd. (10th Cir. 1972) 462 F.2d 149.).

56 Cal. App. 4th at 160, n. 28. *Sada* makes clear that Mr. Zhu would have a cause of action under California's identical antidiscrimination statute. *See also Skillsky v. Lucky Stores, Inc.,* 893 F.2d 1088, 1094 (9th Cir. 1990) (finding that California would allow an action for retaliatory discharge against a subsequent employer under the Occupational Health and Safety Act, based on statutory language similar to the WLAD and the deterrent effect of threatened retaliation in future employment); *Fields v. Teamsters Local Union No. 988,* 23 S.W.3d 517, 527-28 (Tex. App. 2000) (holding Texas Labor Code's anti-retaliation provision's use of "any person" makes the state statute *broader* than Title VII's, 42 U.S.C. § 2000e-3 anti-retaliation provision).

While failing to acknowledge these cases directly on point, ESD 171 spends a great deal of time extracting quotes from out-of-state cases that are factually and legally distinguishable from this case and presenting them out of context. Appellant's Brief, pp. 22-30. The primary error, repeated many times, is ESD 171's conflation of workers' compensation and FLSA statutes with antidiscrimination statutes. As already discussed, these statutes involve entirely different schemes, intent, and rules of construction. Rather than unnecessarily devote lengthy discussion to inapposite cases, a brief response is in order:

- *Yardley v. Hosp. Housekeeping Systems, LLC*, 470 S.W.3d 800, 803 (Tenn. 2015), only addressed the Tennessee Workers' Compensation Act, and found no statutory or common law cause of action for retaliatory failure to hire. Mr. Zhu has never alleged that there exists such a cause of action under Washington's workers compensation law or common law, and neither is at issue here. The only question is whether a remedy is available under the WLAD.
- In *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal.4th 1158, 177 P.3d 232, 72 Cal.Rptr.3d 624 (Cal. 2008), the issue was whether a natural person supervisor could be held

personally liable under California's anti-retaliation statute, which is not the question here.

- *Vernon v. State*, 116 Cal.App.4th 114, 10 Cal.Rptr. 121 (Cal.App. 2004), asked whether a firefighter could sue the state as an "indirect or joint employer" based on its issuance of safety standards. It did not analyze California's anti-retaliation statute.
- *Kelly v. Methodist Hosp. of So. Cal.*, 22 Cal.4th 1108, 95 Cal.Rptr.2d 514, 997 P.2d 1169, 1174 (Cal. 2000), is not a retaliation case. The issue was whether a religious exemption to California's version of the WLAD applied.
- In *Rhodes v. Sutter Health*, 949 F.Supp.2d 997, 1002 (E.D.Cal. 2013), the issue was whether two entities were joint employers.
- *Winn v. Pioneer Med. Group, Inc.*, 63 Cal.4th 148, 370 P.3d 1011, 202 Cal.Rptr. 447 (2016), is a wrongful death medical negligence case under California's Elder Abuse Act. It has no bearing on this case.
- *Larkin v. W.C.A.B.*, 62 Cal.4th 152, 358 P.3d 552, 194 Cal.Rptr.3d 80 (Cal. 2015), is distinguishable because it is a worker's compensation case.

ESD 171 then misleadingly discusses a New York case, *Adler v. 20/20 Companies*, 918 N.Y.S.2d 583 (N.Y.App. 2011). Appellant's Brief p. 30. ESD 171 correctly quotes the court's holding that "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." *Id.* at 584. But ESD 171 incorrectly states that the statute at issue, N.Y. Labor Law § 215(1)(a), included language similar to the WLAD, to include terms such as "any other person" or "any employee." Appellant's Brief, p. 30. ESD 171 quotes the *current* version of this law while the 2011 *Adler* decision interprets the 2010 version of the law, which did not contain the "or any other person" language. N.Y Labor Law § 215(1)(a)(2010).

More significantly, the New York Labor Law is not that state's analog to the WLAD, and does not contain the same broad language instructing courts to interpret the statute liberally for the prevention of discrimination. *Id.* Rather, New York Human Rights Law, Executive Law § 296, is that state's version of Title VII and the WLAD, and contains very similar definitions and the same instruction to construe the statute "liberally for the accomplishment of the purposes thereof." NY Exec L § 300 (2016). In analyzing claims under this law, New York courts, like Washington courts, apply the same standards as federal courts. *See*

Aurecchione v. New York State Division of Human Rights, 98 N.Y.2d 21, 25-26 (2002). While the undersigned was unable to identify a New York case that dealt with the precise facts of this case, New York does recognize that retaliation claims are not limited to claims against current employers. *See Landwehr v. Grey Advertising. Inc.*, 622 N.Y.S.2d 17, 18, 211 A.D.2d 583, 584 (1st Dept. 1995) ("There is no requirement that the retaliatory conduct occur against a current employee").

ESD 171 then attempts to find support in Connecticut case law, citing *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). Appellant's Brief, pp. 31-32. This is yet another case that is not helpful in answering the question presented in the case at bar. *Echo House* concerned an allegation of racial discrimination and discharge, rather than an alleged failure to hire based on prior protected activity, and the central question of law was whether the plaintiff could be considered an employee when she was an unpaid intern. 113 A.2d at 468. The only portion of the case that is relevant to the case at bar is the court's specific observation that the Connecticut statute provides protection to "former, current, or *prospective* employees." *Id., citing McWeeny v. Hartford,* 287 Conn. 56, 70, 946 A.2d 862 (2008) (emphasis added).

C. Public Policy Weighs Heavily in Favor of Protecting Job Applicants from Retaliation Based on Opposition to a Prior Employer's Discriminatory Practices.

It is perhaps unnecessary to consider public policy in light of the statute's plain language prohibiting retaliation against any person based on his or her opposition to any prohibited practices. But it should be noted that there is only one statutory interpretation that serves the intent of the WLAD to eliminate and prevent discrimination in employment. Without comprehensive retaliation protection for those who have opposed discrimination, the WLAD is effectively worthless.

As noted by more than one federal court in the cases cited above, a narrow interpretation of retaliation protections would significantly deter an employee from ever filing a discrimination complaint because "the employee would be subject to lawful retaliation by all concurrent and future employers for protected activities involving his current employer." *McMenemy*, 241 F.3d at 284. Practically speaking, employees who oppose workplace discrimination are unlikely to continue to working for the employer that discriminated against them because they are often fired, voluntarily quit, or (as happened here) are required to resign as a condition of settling their discrimination claim. Limiting retaliation protections to only apply to the employer against whom a discrimination claim is

brought would thus make the provision of limited worth, as victims that are forced to find employment elsewhere would have no protection from retaliation. This begs the question: How could anyone rationally make the choice to oppose discrimination in their present employment, knowing that a complaint would likely end their current employment and also (as ESD 171 suggests) legally prevent them from obtaining future employment?

This concern is not theoretical, as the facts of the present case demonstrate. After standing up for himself in the face of racial discrimination while working for Waterville and being made to resign, it was as if Mr. Zhu bore a scarlet "L," for "Litigious," across his chest. He was not only unable to work in Waterville, he was turned down for more than a dozen jobs across the entire North Central Washington region serviced by ESD 171, including several positions in which he was clearly the most, if not the only, qualified applicant. CP 5 (ECF 39-1, ¶¶ 99-165). If ESD 171 is permitted to legally retaliate against him in this manner, this means that 29 school districts are no longer accessible to Mr. Zhu in his career. And given that many employers would likely prefer to not hire employees they deem litigious, it is highly probable that many of the school districts in Washington State would similarly decline to hire Mr. Zhu. In short, Mr. Zhu's courage in standing up to workplace discrimination could be the end of his career.

But the public harm to ESD 171's position does not end with victims of discrimination. The WLAD protects anyone who "has filed a charge, testified, or assisted in any proceeding under this chapter," to include witnesses and anyone else who assists in the enforcement of civil rights. RCW 49.60.210(1). Procuring the cooperation of witnesses is already a difficult proposition in every legal context, particularly when the witnesses have nothing to gain but much to lose by testifying to their employer's discriminatory conduct. If the Court were to rule as ESD 171 suggests, attorneys would have to advise victims and witnesses that their testimony in a WLAD action can legally be grounds to reject them from all future employment. It is difficult to imagine how any victims or witnesses could be persuaded to testify in such a circumstance.

Additionally, the result ESD 171 seeks would conflict with Washington's anti-blacklisting statute, RCW 49.44.010. That statute makes it both a civil and criminal offense to "willfully or maliciously make or issue any statement...that will tend to influence or prejudice the mind of any employer against the person of such person seeking employment." *Id.* Making it legal under the WLAD for a prospective employer to refuse to hire a prospective employee on account of that prospective employee's prior protected activity, while keeping it illegal under the anti-blacklisting statute for the prior employer to prejudice the

decision of the prospective employer is logically inconsistent, would confuse the interchange between RCW 49.60.210 and RCW 49.44.010, and could inhibit enforcement of both statutes.

The only public policy ESD 171 can articulate in favor of its position is an alleged overburdening of the courts and a defendant's supposed difficulty of proof in failure to hire cases. Appellant's Brief, pp. 19-22. This speculation is unfounded. First, ESD 171's reasoning would apply even more strongly to discriminatory failure to hire cases under RCW 49.60.180, as there are many more of these cases, but this statute has not created any such problems for Washington courts or litigants. Second, federal courts have shown no difficulty in handling cases like the one at bar in the Title VII context, nor have federal defendants shown any difficulty in defending themselves. Indeed, there are very few retaliatory failures to hire cases on record under Title VII, evidence of the lack of an overwhelming burden on courts. A likely reason is that plaintiffs, rather than defendants, bears the difficult burden of proof in these cases, as they must prove not only that defendants had knowledge of the prior protected activity but also that this was a substantial factor in the decision not to hire. These cases are few and far between, but in circumstances such as this case, when Mr. Zhu was able to overcome these difficult obstacles, the jury verdict should be upheld.

If the Court were to agree with ESD 171, Mr. Zhu's story would be a cautionary tale for victims of, and witnesses to, discrimination in Washington State, deterring such victims and witnesses from coming forward. The Court should reject ESD 171's request that it be lawfully permitted to reject job applicants who have opposed prior discrimination.

D. A Failure to Hire is an Adverse Employment Action.

Finally, ESD 171 argues that a failure to hire is not an adverse employment action because Mr. Zhu was never employed by the District and thus never had a change in his employment. Appellant's Brief, p. 37. Incorrect. This position is plainly contradicted by the WLAD and by ample case law finding a failure to hire to be an adverse action. *See* RCW 49.60.030 (establishing right to obtain employment); RCW 49.60.180(1) (making it an unfair practice to refuse to hire any person based on improper grounds); *Scrivener*, 181 Wn.2d at 444 (refusal to hire is an unfair practice); *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 493 (2009) ("'Adverse employment action' is simply another way to describe discipline, demotion, or failure to hire."). It is also illogical, since being removed from consideration for a job which one would ordinarily receive based on qualifications is unquestionably a significant change in one's condition of employment. Indeed, it determines whether someone is employed at all.

E. Mr. Zhu Requests Attorney Fees and Expenses on Appeal.

Mr. Zhu respectfully requests that the Court award him attorneys' fees and expenses should he prevail on this certified question. An award of attorneys' fees and expenses is appropriate in this instance as such fees and expenses are recoverable under RCW 49.60.030(2) and RAP 18.1. *Blaney v. Int'l Ass'n of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 217, 87 P.3d 757, 764 (2004), *citing Martini v. Boeing Co.*, 137 Wn 2d 357, 377, 971 P.2d 45, 55 (1999) (plaintiff who prevailed on discrimination suit entitled to reasonable attorney fees at the trial court and on appeal under RCW 49.60.030(2) and RAP 18.1 because she properly requested such fees in her supplemental brief and prevailed on the WLAD issue). Mr. Zhu has already prevailed on the underlying merits of his WLAD retaliation claim given the jury's finding of liability against ESD 171. Accordingly, Mr. Zhu's request is well-founded and not premature.

V. CONCLUSION

The legislature was clear in its intent to provide retaliation protection to all persons who have opposed discrimination, and has instructed this Court to interpret the WLAD liberally to accomplish this goal. Consistent with the plain language of the statute, persuasive federal

precedent, and public policy, the Court should hold that RCW 49.60.210(1) creates 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, and award Mr. Zhu attorney fees and costs on appeal.

Respectfully submitted this 21st day of April, 2017.

Andrew S. Biviano
WSBA # 38086
Paukert & Troppmann, PLLC

Matthew Z. Crotty
WSBA # 39284
Crotty & Son Law Firm, PLLC

Michael B. Love
WSBA # 20529
Michael Love Law, PLLC

Attorneys for Plaintiff-Respondent
Jin Zhu

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that on the 21st day of April, 2017, I caused to be served a true and correct copy of the foregoing Brief of Respondent on the following counsel of record by email, pursuant to an agreement between the parties to accepted service electronically:

Jerry J. Moberg: jmoberg@jmlawps.com

James E. Baker: jbaker@jmlawps.com

Attorneys for Defendant

Dated at Spokane, Washington, this 21st day of April, 2017.

Andrew Biviano

Andrew Biviano