

No. 94209-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JIN ZHU,

Plaintiff-Respondent,

v.

NORTH CENTRAL EDUCATIONAL SERVICE DISTRICT NO. 171,

Defendant-Appellant.

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BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION  
OF WASHINGTON

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**A. INTEREST OF AMICUS CURIAE**

The American Civil Liberties Union of Washington (ACLU-WA) is a statewide, nonpartisan, nonprofit organization of over 75,000 members and supporters, dedicated to the constitutional principles of liberty and equality, including the right to be free from unlawful discrimination, whether in the workplace or elsewhere. The ACLU has participated as direct counsel or amicus curiae in numerous cases challenging discriminatory policies and practices.

**B. ISSUE TO BE ADDRESSED BY AMICUS CURIAE**

Do the purposes and policies embodied in the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, support recognizing a cause of action for job applicants who claim a prospective employer refused to hire them in retaliation for prior opposition to racial discrimination by a different employer?

**C. STATEMENT OF THE CASE**

ACLU-WA relies on the parties' briefs, which have adequately set forth the facts of this case.

## **D. ARGUMENT**

### **1. The purpose of the WLAD is to eliminate discrimination in Washington, including discrimination against prospective employees.**

The overarching purpose of the WLAD is "to deter and to eradicate discrimination in Washington." *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996) (citing *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309–10, 898 P.2d 284 (1995); *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994)); RCW 49.60.010. As the text of the WLAD itself notes, "discrimination threatens not only the rights and proper privileges of [Washington's] inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. In order to ensure that the WLAD will be an effective tool against such discrimination, the statute specifically mandates that it "shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020.

Recognizing the clear and explicit intent of the Legislature, this Court has consistently interpreted the WLAD to provide the broadest possible protection against discrimination. *See, e.g., State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 825, 389 P.3d 543 (2017) ("[A]ll discriminatory acts, including any act 'which directly or indirectly results in any distinction, restriction, or discrimination' [on the basis of protected

characteristics] . . . is an unfair practice in violation of the WLAD.") (quoting RCW 49.60.215); *Blackburn v. State*, 186 Wn.2d 250, 257-59, 375 P.3d 1076 (2016) (emphasizing that the broad language of the WLAD and the compelling public policy interests served by it supported finding a remedy for the race-based discrimination at issue there); *Marquis*, 130 Wn.2d at 108 ("[A] statutory mandate of liberal construction requires that we view with caution any construction that would narrow the coverage of the law."), 109 ("[A] plaintiff bringing a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of the highest priority.") (citing *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991)); *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 491, 325 P.3d 193 (2014) ("Where this court has departed from federal antidiscrimination statute precedent [in analyzing the WLAD] . . . it has almost always ruled that the WLAD provides greater employee protections than its federal counterparts do.") & n.14 (collecting cases).

The Legislature also clearly intended these protections to cover prospective, as well as current, employees. For example, the WLAD protects "[t]he right to **obtain** and hold employment without discrimination." RCW 49.60.030(1)(a) (emphasis added). The statute also explicitly recognizes that a cause of action may lie for an "unfair practice

committed by an employer against an employee **or a prospective employee.**" RCW 49.60.030(3) (emphasis added). Although RCW 49.60.030 addresses discrimination in the first instance rather than retaliation, these provisions demonstrate that the WLAD expressly includes protections for job applicants. Reading the WLAD to protect job applicants from discrimination, but not from retaliation for previously opposing discrimination, would be logically incoherent and would not comport with either the text of the WLAD or its interpretation to date by Washington courts. *See, e.g., Arlene's Flowers*, 187 Wn.2d at 851-52 ("As every other court to address the question has concluded, [laws prohibiting discrimination in public accommodations] do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace.").

Further demonstrating the Legislature's concern with the rights of job-seekers, the WLAD expressly prohibits both discrimination and retaliation by employment agencies. RCW 49.60.200, 210. And this Court has held that an aggrieved party may sue an employer under the WLAD regardless of whether an actual employer-employee relationship ever existed. *Marquis*, 130 Wn.2d at 112-13 (holding that independent contractors may sue for employment discrimination under the WLAD).

Thus, both the explicit legislative intent behind the WLAD and Washington courts' interpretations of the statute demonstrate that the WLAD is squarely concerned with the rights of prospective employees. Even beyond the strong textual reasons for finding a cause of action here, as argued well by Mr. Zhu, *see* Br. of Resp. at 9-14, prospective employees deserve the same rights as others and the same role in furthering a public policy "of the highest priority"—eliminating discrimination in Washington.

**2. The WLAD cannot serve its intended purpose without strong anti-retaliation protections, including for prospective employees.**

As this Court has noted, "enforcement of this State's antidiscrimination laws depends in large measure on employees' willingness to come forth and file charges or testify in discrimination cases." *Allison*, 118 Wn.2d at 86. In order to encourage individuals to fulfill that crucial role, they must be protected against retaliation. *See, e.g., Mackay*, 127 Wn.2d at 309 ("Underlying this State's determination to insulate an employee from retaliation is its resolve to eradicate discrimination."). Without such protection, "[p]eople will be less likely to oppose discrimination by bringing claims or testifying," undermining the purpose of the WLAD. *Allison*, 118 Wn.2d at 94.



The Legislature recognized from the beginning that the WLAD would be rendered largely useless without strong anti-retaliation safeguards. Thus, the anti-retaliation provision, codified at RCW 49.60.210, was included in the very first version of the WLAD enacted in 1949. Laws of 1949, ch. 183, § 7. Protection against retaliation is therefore an integral part of the WLAD's statutory scheme, and is crucial to ensuring that the WLAD functions as the Legislature intended.

Because anti-retaliation protections are necessary to effectively enforce the WLAD, and because the WLAD's mission to eliminate discrimination is such an important public policy, these protections must apply to prospective, as well as current, employees. As discussed above, the WLAD was intended to protect the rights of people seeking work, not just those who are already employed. And because the WLAD largely relies on private individuals to oppose and report discrimination, *see Allison*, 118 Wn.2d at 86, prospective employees must be protected from retaliation, so that people will remain willing to oppose discrimination and participate in WLAD cases. *See id.* at 94. Otherwise, as Mr. Zhu notes, "those who oppose workplace discrimination would be strongly deterred from coming forward, lest they be forever marked and barred from future employment." Br. of Resp. at 17-18.

Holding that the anti-retaliation provision protects prospective employees also comports with the holdings of this Court and the Court of Appeals. Although this Court has not yet addressed the exact circumstances of this case, it has held that independent contractors, not just employees, may sue for discrimination under the WLAD. *Marquis*, 130 Wn.2d at 112-13. And the Court of Appeals has repeatedly relied on *Marquis* in holding that, as with claims of direct discrimination, an employer-employee relationship is not necessary to sustain a WLAD retaliation claim. *E.g.*, *Sambasivan v. Kadlec Medical Center*, 184 Wn. App. 567, 591-92, 338 P.3d 860 (2014) (holding that an independent-contractor plaintiff had a cause of action under the anti-retaliation provision despite the absence of an employer-employee relationship) (citing *Marquis*, 130 Wn.2d at 112-13); *Currier v. Northland Services, Inc.*, 182 Wn. App. 733, 744, 332 P.3d 1006 (2014) ("The broad language of RCW 49.60.210(1) . . . supports the conclusion that the WLAD does not limit [retaliation] claims to those brought by employees against employers.") (citing *Marquis*, 130 Wn.2d at 100-01), *rev. denied*, 182 Wn.2d 1006 (2015).

Thus, ample authority—including the text, structure, and history of the WLAD, and the holdings of this Court and the Court of Appeals—demonstrates that in order for the WLAD to serve its intended purpose, the

anti-retaliation provision must effectively protect those—including both current and prospective employees—who oppose the types of discrimination prohibited by the WLAD.

**E. CONCLUSION**

For the reasons stated above, as well as those argued in Mr. Zhu's brief to this Court, ACLU-WA urges the Court to hold that the alleged conduct of ESD 171 in this case supports a claim against it under the anti-retaliation provision of the WLAD, RCW 49.60.210.

DATED this 28th day of July, 2017.

Respectfully submitted,

*/s/Rabi Lahiri*

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I hereby certify that on July 28, 2017, I caused to be served the foregoing

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July 28, 2017 - 12:41 PM

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**Appellate Court Case Number:** 94209-9  
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### Comments:

Please let me know if anything should be amended in the attached document (Amicus Curiae Brief ACLU) at kmcruer@aclu-wa.org. Thank you!

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