No. 94209-9

THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Jin Zhu,

Plaintiff,

v.

North Central Educational Service District No. 171,

Defendant.

BRIEF OF AMICUS WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTERESTS OF AMICUS CURIAE

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 180 attorneys admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. The Washington Law Against Discrimination ("WLAD") is fundamental to the enforcement of employee rights.

II. STATEMENT OF THE CASE

"Plaintiff Zhu was employed as a math teacher in the Waterville School District in Waterville, Washington…. Plaintiff filed a federal court race discrimination and retaliation suit against Waterville School District and its superintendent.... Plaintiff Zhu settled the federal court litigation… and resigned his position with the Waterville School District as a condition of the settlement agreement." Order Cert. to Supreme Court at 2. Then, he applied for a job as a Math-Science teacher with the Defendant, North Central Educational Service District—ESD 171. *Id*. at 3. But Defendant hired someone else. *Id*. Zhu sued ESD 171 in federal court for, among other claims, retaliatory refusal to hire him based on his protected activity against the Waterville School District. *Id*. at 1.

At trial, "[t]he jury found a substantial factor in ESD 171's decision not to hire Plaintiff Zhu was the fact of Plaintiff Zhu's prior discrimination claim against the Waterville School District…. The jury awarded Zhu $450,000 in damages on his retaliation claim." *Id*. at 2.

After the verdict, the U.S. District Court certified to this Court the following question of first impression under Washington law: "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?" *Id.* at 7.

III. SUMMARY OF ARGUMENT

Plaintiff's brief shows that the language of RCW 49.60.210 that predated the 1985 amendment adding "any other person" was unambiguous: it prohibited an "employer" from "otherwise discriminat[ing] against any person" for engaging in protected activity, which on its face encompasses retaliatory refusal to hire an applicant by an employer based on protected activity at a prior employer.[1] So, looking to legislative history is not necessary, or appropriate. WELA's brief will focus on the damage to public policy at stake from a ruling in favor of the employer and provide a more-in-depth analysis of the opinions of other state's courts and a more detailed showing that refusal to hire amounts to an adverse action.

The Washington Law Against Discrimination prohibits retaliation for exercising a person's right not to be discriminated against on the basis of a broad range of protected classifications, including one's national origin and race. Defendant argues that this prohibition does not apply to

[1] Defendant's attempt to cabin the meaning of "any other person" added in 1985 to mean existing employer is likewise at odds with the Act's definition of "Person," which "includes *any* owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons…." RCW 49.60.040(19) (emphasis added).

its refusal to hire Plaintiff because he sued his prior employer for illegal discrimination based on his national origin. Defendant is wrong.

The purpose of the WLAD is to deter and eradicate discrimination in Washington, and this Court views with caution any construction that would narrow the coverage of the law. A ruling that prospective employers can freely refuse to hire applicants for challenging illegal discrimination committed by a previous employer would severely narrow and undermine the WLAD. It would invite employers to adopt a policy against hiring such applicants and to ask questions about protected activity on job applications and in interviews. This would plainly deter employees from exercising their rights for fear of becoming unemployable. It would announce to employees that they exercise their right to oppose discrimination at their peril. And such a ruling would contradict the statutory construction mandated by this Court, significantly narrowing coverage of the law, and undermining the purpose of the Act as a whole. A more thorough analysis of other states' court opinions supports coverage of employee-applicants, and this Court should hold that refusal to hire is covered by RCW 49.60.210.

IV. ARGUMENT

A. Liberal Construction, the Statute as a Whole, and Public Policy Support Holding Prospective Employers Accountable for Retaliatory Refusals to Hire

1. *The Court Liberally Construes the Terms of the WLAD.*

The legislative purpose of Washington's law against discrimination is set forth in the statute itself. RCW 49.60.010 in relevant part provides:

> The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability ... are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

The Court has recognized that the purpose of the law is to deter and to eradicate discrimination in Washington. *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-10, 898 P.2d 284 (1995). The statute embodies a public policy of the highest priority. *Xieng v. Peoples Natl. Bank*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993).

The statutory mandate of liberal construction requires that the Court view with caution any construction that would narrow the coverage of the law. *Shoreline Community College Dist. No. 7 v. Employment Sec. Dep't*, 120 Wn.2d 394, 406, 842 P.2d 938 (1992).

Defendant's argument would significantly narrow the WLAD's coverage, which was designed to encourage people to oppose violations.

If successful, the argument would put at risk the prospects of a livelihood for a multitude of employees who exercise their statutory rights.

The Court can take judicial notice that employees who prove wrongful termination are rarely reinstated as a remedy. "Reinstatement, although thought of by some as the most appropriate award, is quite rare." Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 Tul. L. Rev. 1401, 1441 (2004) (citing studies that found reinstatement is awarded rarely, such as in less than three percent of cases and in fewer conciliations). Employees who challenge discrimination in the workplace frequently must find new employment.

Such employees are at risk of retaliation by a prospective employer who sees them as potential troublemakers for exercising their civil rights—which the Legislature recognized as a matter of the highest priority for the State. This is true not only for employees who sue their employer but also for employees who leave employment (voluntarily or otherwise) after internally alleging discrimination, harassment, or retaliation, who file such complaints with the Washington State Human Rights Commission, or who resolve disputes through severance packages or settlements.

If those likely thousands of employees knew that prospective employers could demand to know from them or from the Human Rights Commission or through the personnel files of their former employers that they had engaged in "protected" activity for which they could be legally

denied employment, many would refrain from exercising their civil rights to challenge illegal discrimination. The cost of exercising their rights would be too great: they would risk not only suffering loss of their current employment but their future employment as well, for which they would have no recourse. Under such a regime, vast numbers of victims of employment discrimination would decline to complain or litigate potential claims.[2]

2. United States Supreme Court Precedent Provides Persuasive Authority in Support of Mr. Zhu's Argument.

This Court's jurisprudence is consistent with the United States Supreme Court's overarching position on anti-retaliation provisions of federal anti-discrimination laws. Accordingly, federal authority is persuasive. *Antonius v. King County*, 153 Wn.2d 256, 266, 103 P.3d 729 (2004). United States Supreme Court precedents support Mr. Zhu. For example, according to the Court in *Robinson v. Shell Oil Co*., 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), "[t]he primary purpose of Title VII's antiretaliation provision," is to enforce the law by "maintaining unfettered access to statutory remedial mechanisms." The Court held it essential that employers be liable for retaliating against their

[2] By analogy, some data show the harm caused to whistleblowers for engaging in protected activity. Research published in the *New England Journal of Medicine* shows that in over 80% of *qui tam* whistleblower cases in the medical industry, the whistleblower lost his or her job, was blacklisted in his or her chosen career, or otherwise suffered a severe loss of income. Aaron S. Kesselheim, et al., *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*. N. Eng. J. Med. 362, May 13, 2010. This study lends credence to the common-sense conclusion that if prospective employers may legally refuse to hire employees for exercising their rights then they will be deterred them from exercising their rights.

employees post-employment because "it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII—for example, complaints regarding discriminatory termination." *Id*.

Robinson provides additional support for Mr. Zhu's argument. There, the defendant fired plaintiff, who then filed an EEOC charge. *Robinson*, 519 U.S. at 339. When the plaintiff applied for a new job, the defendant provided a negative reference to the prospective new employer. *Id.* The plaintiff alleged that the defendant made the negative reference in retaliation for the EEOC charge. *Id.* The Court held that the term "employees" as used in Title VII's antiretaliation provision included former employees. *Id.* at 346. Notably, the Court did not even consider whether a former employer fit within the term "employer" used in the statute. The Court's holding makes it clear that an employer need not be a *current* employer to be held liable for retaliation under Title VII.

In *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 180 (2005), the Supreme Court spelled out the catastrophe that would befall an anti-discrimination statute lacking a robust, comprehensive curb on retaliation: "If recipients [of federal education funds] were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result." *Id*.

> Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel.

Id. "Without protection from retaliation, individuals who witness discrimination would likely not report it ... and the underlying discrimination would go unremedied." *Id*. at 180-181.

The Defendant's concern that there will be a flood of these claims was unpersuasive to the federal courts that have found refusal-to-hire claims cognizable under Title VII. *See* Zhu's Brief at 23-28. That there are few such cases undercuts the Defendant's argument, and suggests there are likely not many cases because employers know (or believe) such behavior is illegal and because it is difficult for applicants to learn the reason they were not hired. Indeed, finding that RCW 49.60.210 prohibits refusals to hire would likely confirm the reasonable beliefs of most employers and employees, and their counsel. *See, e.g*., Patricia A. Wise, *Understanding and Preventing Workplace Retaliation*, 5 (2015).[3]

3. The Statute as a Whole Supports Mr. Zhu's Argument.

In determining the scope of liability under WLAD, this Court looks not only to its text but also "at the statute in its entirety." *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359, 20 P.3d 921, 927 (2001). The Court starts from the premise that "[t]he overarching purpose of the law is 'to deter and to eradicate discrimination in Washington.'" *Id*.

[3] This treatise advises: "An employer should never ask job applicants or employees about litigation or complaints against previous employers. Any actions alleging discrimination or retaliation against former employers are considered 'protected activity'; no other employer can use this as a basis for treating employees differently or for failing to hire job applicants (which is why it is referred to as 'protected'). For this reason, application forms, interviews, reference checks and personnel files should never include this information. In fact, even if the information is volunteered, employers and prospective employers should completely disregard it." *Id*. at 5.

The Court relied in part on the expansive language of the "aiding and abetting provision of the WLAD, RCW 49.60.220, to find broad coverage of who may be held liable for discrimination, including not only "employers" but also supervisors. *Id*. at 360.[4]

Holding an employer liable for punishing an applicant because he opposed discrimination by his previous employer is likewise supported by this provision, and the purpose of the statute. And even though the previous employer may be held to account for its violations, this Court has explained that "it does not necessarily follow that the Legislature chose to foreclose other options of prevention." *Id*. (rejecting notion that individual supervisor liability under RCW 49.60 is unnecessary or redundant). *Id*.

The language and purpose of the WLAD compels a finding that it covers retaliatory refusal to hire, and this Court should so hold in answer to the certified question.

B. Failure to Hire is an Adverse Employment Action

Defendant argues that failing to hire a prospective employee does not constitute an adverse employment action for a WLAD retaliation claim. But the language of RCW 49.60.210 does not require finding an "adverse employment action." *C.f. Blackburn v. State*, 186 Wn.2d 250, 375 P.3d 1076 (2016) (suggesting in the context of racial staffing that an

[4] The aiding and abetting provision, RCW 49.60.220, provides: "It is an unfair practice for any person to aid, abet, encourage, or incite the commission of any unfair practice, or to attempt to obstruct or prevent any other person from complying with the provisions of this chapter or any order issued thereunder."

adverse action itself need not be found to establish illegal discrimination under the WLAD). Moreover, rejection for a job is plainly an "adverse" action in any layperson's sense of the term.

The United States Supreme Court has adopted a broad definition of "adverse action" under Title VII. In *Burlington Northern & Santa Fe Ry. v. White*, it held that to constitute adverse action, an "employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." 548 U.S. 53, 57, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). Under *Burlington Northern*, courts ask whether a reasonable employee would have been less likely to complain about discrimination if he had known he may face the alleged retaliatory action in response. The Washington Court of Appeals has adopted this standard for WLAD retaliation claims. *See Boyd v. State, Dep't of Soc. & Health Servs*., 187 Wn. App. 1, 14–15, 349 P.3d 864, 871 (2015) ("An employment action is adverse if it is harmful to the point that it would dissuade a reasonable employee from making complaints".).

Moreover, in *Burlington Northern*, the Court said retaliation could be founded on any actions "materially adverse to a reasonable employee or ***job applicant***" if "they could well dissuade a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 57. (emphasis added) (quoted in *Boyd*, 187 Wn. App. at 14–15 ("We conclude

that the antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.")). Interpreting RCW 49.60.210(1) consistent with *Burlington Northern* furthers the purposes of the WLAD, which would make failure to hire an adverse employment action under the WLAD.

Nonetheless, Defendant insists that the legal definition does not include a refusal to hire. It cites *Robel v. Roundup Corp*., 148 Wn.2d 35, 74 n.14, 59 P.3d 611 (2002), for the proposition that this Court has limited adverse actions to "demotion or adverse transfer, or a hostile work environment that amounts to adverse employment action," but the passage Defendant cites comes from a dissenting opinion, and in no way represents an exclusive list. *See id*. ("an actual adverse employment action, *such as* a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action.") (Emphasis added).

Defendant also points out that the Washington Pattern Instruction (WPI) for retaliation does not list refusal to hire as one of the bracketed adverse actions. 6A Wash Practice, Pattern Jury Instructions: Civil 330.05 (Employment Discrimination – Retaliation). Yet, the Committee's "Note on Use" plainly states that "[i]t may be appropriate to substitute other allegedly retaliatory acts in [the proposition devoted to adverse

employment actions]." So, the bracketed phrases defendant cites do not represent an exclusive list, and in any event the WPI is not the law.

Indeed, the very passage of the *Robel* dissent that Defendant cites identifies "a hostile work environment that amounts to adverse employment action," which is not included in the WPI's list of bracketed terms. *See* 148 Wn.2d at 74, n.14. And in *Boyd*, the Court of Appeals approved the trial court's use of an alternative adverse action instruction on WLAD retaliation that adopted the language from *Burlington Northern*. *Boyd*, 187 Wn. App. at 14-15. The WPI in no way limits claimants to an exclusive list of potential adverse actions under which they can show retaliation.

An adverse action under RCW 49.60.210(1) includes any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Boyd*, 187 Wn. App. at 14–15; *Burlington Northern*, 548 U.S. at 68. Defendant cites *Boyd* for the proposition that the *Burlington Northern* standard for adverse actions only applies to current employees, emphasizing the *Boyd* court's use of the term "employee." Nothing in the *Boyd* decision supports this position. In *Boyd*, the plaintiff had been an employee of the defendant, but neither *Boyd* nor *Burlington Northern* in any way limit the standard to current employees, or employees as opposed to applicants, for that matter. Both

cases state that any action by *any employer* that would dissuade a reasonable worker from engaging in protected activity constitutes an adverse action, and that includes applicants.

A reasonable worker would certainly be reluctant to complain of discrimination or harassment if he knew that all prospective employers could legally reject him on that basis. Refusing to hire an individual based on his protected activity while working for another employer easily constitutes an adverse employment action that gives rise to a claim under RCW 49.60.210(1).

C. The Decisions of Other State Appellate Courts do not Provide Persuasive Authority in Support of Defendant's Position

Defendant asserts that no state appellate courts have recognized a cause of action for retaliatory refusal to hire under a similar antiretaliation statute. This is incorrect. Mr. Zhu's brief collects cases from foreign jurisdictions that support his position, and distinguishes the cases cited by Defendant. The following discussion serves to add more detail to those cases for the court's consideration.

The Appellate Court of Illinois recognized a cause of action for retaliatory refusal to hire under an antiretaliation statute that is substantially similar to Washington's. *Carter Coal Co. v. Human Rights Comm'n*, 261 Ill. App.3d 1, 7–8, 633 N.E.2d 202, 207 (Ill. App. Ct. 1994). In *Carter Coal Co*., the court addressed "whether an employer can retaliate against a prospective employee because that employee has filed

an age-discrimination charge against a previous employer." *Id*. at 203. The Illinois Human Rights Act stated at the time that:

> 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 Ill. Comp. Stat. Ann. 5/6-101 (emphasis added).

The court examined the history of the use of the word "retaliate," noting examples such as the United States's retaliation against Iraq for its attack on Kuwait. *Carter Coal Co*., 633 N.E.2d. at 206-07. Indeed, the court remarked, the dictionary does not define the word as punishment for behavior directed at or harmful to the retaliator. *Id*. at 206. The court also examined the language of the Act and concluded that because it did not specify that the protected activity had to be directed toward the alleged retaliator, third parties could violate the Act by refusing to hire a prospective employee who engaged in protected activity with a prior employer. *Id*. at 207. Finally, the court looked at the elements of a prima facie case of retaliation, and found that courts had never held the requirement of a "causal nexus between the protected activity and the adverse act" to require the protected activity to directly affect the retaliator. *Id*. Based on these factors, the court held "that an employer can

be liable for a retaliatory refusal to hire if it refuses to hire a prospective employee in retaliation for that employee's earlier exercise of his or her right to protection under the Illinois Human Rights Act." *Id*. at 213.

The same logic applies to the antiretaliatory provision of the WLAD. Although RCW 49.60.210(1) does not use the term "retaliation," the subchapter's title does, and its text broadly applies to "any employer … or other person."

> 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 ….

RCW 49.60.210(1). The Illinois court's analysis of the term "retaliation" therefore applies with equal force. Similarly, neither the provision nor the analytical framework courts apply when evaluating claims made under it explicitly require the alleged protected activity to directly affect the alleged retaliator. RCW 49.60.210(1) and the antiretaliation provision in the Illinois Act share these important characteristics, and thus *Carter Coal Co*. is persuasive authority.[5]

Defendant points to a recent federal district court case, *Owa v. Fred Meyer Stores*, 2017 WL 89780 (W.D. Wash. Mar. 7, 2017), which

[5] Defendant attempts to distinguish *Carter Coal Co.*, arguing that unlike the Illinois statute, the WLAD's inclusion of the term "other person" includes only "an agent of an employer." Def's Open. Br. at 11. But Defendant *is* an employer. Its argument is really that Zhu was not *its employee*. But the statutory language does not require that. It protects "any person" from retaliation by an employer. That Defendant has never been Zhu's employer has no bearing on the legal analysis in this case. Defendant also relies on *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn. App. 927, 930, 965 P.2d 1124 (1998). But in *Malo*, the Court ruled only that a plaintiff could not hold a *co-worker* liable.

held in the most cursory fashion that "claims for retaliation… require an employee-employer relationship." Only employers hire employees, so *Owa* fails to account for the fact that under the plain language of RCW 49.60.210, the Defendant is self-evidently an employer. *Owa's* extrapolation that there must be an existing employer-employee relationship is untethered to the text, and contrary to the liberal construction and protective purpose of the anti-retaliation provision.

Defendant relies heavily on *Yardley v. Hosp. Housekeeping Sys., LLC*, 470 S.W.3d 800 (Tenn. 2015), for the proposition that when states recognize a cause of action for retaliatory refusal to hire they do so explicitly, and that Washington has not done so in the WLAD. But Defendant misreads *Yardley*. In *Yardley*, the Supreme Court of Tennessee identified at least two state statutes with language substantially similar to the WLAD as examples of states that "expressly allow[] claims for retaliatory failure to hire." *Id*. at 806. The court cites the Illinois statute discussed in *Carter Coal Co.*, and a Maine statute that states that "[i]t is unlawful employment discrimination . . . [f]or an employer, employment agency or labor organization to discriminate in any manner against individuals" due to protected activity. *Id.* (citing 775 Ill. Comp. Stat. Ann. 5/6-101; Me. Rev. Stat. 5 § 4572). These statutes share an important characteristic with RCW 49.60.210(1): they prohibit retaliation against a "person" or "individual," not just against an "employee." As discussed above, this distinguishes RCW 49.60.210(1) from other Washington statutes, and from the antiretaliation statutes of several other states

because its plain language covers "any person" discriminated against for opposing discrimination, not just "employees" of the alleged retaliator. That the *Yardley* court held these substantially similar statutes up as examples of explicit protections for prospective employees against retaliation for protected activity engaged in at a prior employer supports the argument that the WLAD contains the same protections.

Defendant also cites some cases that delve into statutory interpretation, but none stand for the proposition that the provision in question failed to create a cause of action for retaliatory refusal to hire.[6] Likewise, the New York cases Defendant cites provide no guidance because the statute they interpreted prohibited retaliation against any "employee," as opposed to the WLAD's any "person."[7]

Defendant fails to cite a single case in which another state's court interpreted a statutory provision similar to RCW 49.60.210(1) not to protect prospective employees against retaliatory refusal to hire. Defendant cites several cases that do not interpret a statute at all. In

[6] For example, none of the California cases it cited addressed the question before this Court. *See Jones v. Lodge at Torrey Pines P'ship*, 42 Cal. 4th 1158, 1162, 177 P.3d 232 (2008) ("We must decide whether individuals may be held personally liable for retaliation."); *Vernon v. State*, 116 Cal. App.4th 114, 121, 10 Cal. Rptr.3d 121, 127 (2004) (addressing the liability of the state as a joint employer under FEHA); *Rhodes v. Sutter Health*, 949 F. Supp.2d 997, 1002 (E.D. Cal. 2013) (addressing whether defendant was an "employer" under FEHA using a joint employer analysis). None of these cases addressed whether California law creates a cause of action for retaliatory refusal to hire.

[7] *See Adler v. 20/20 Cos.*, 82 A.D.3d 914, 915, 918 N.Y.S.2d 583, 584–85 (2011) (interpreting N.Y. Lab. Law § 215); *Wigdor v. SoulCycle, LLC*, 139 A.D.3d 613, 613, 33 N.Y.S.3d 30, 31 (N.Y. App. Div. 2016), *leave to appeal denied*, 28 N.Y.3d 906, 68 N.E.3d 103 (2016) (same); *Day v. Summit Sec. Servs. Inc.*, 53 Misc. 3d 1057, 1062, 38 N.Y.S.3d 390, 394 (N.Y. Sup. Ct. 2016) (same).

Yardley, for example, the court rejected a common law cause of action for retaliatory refusal to hire, not a statutory one. 470 S.W.3d at 803. The court declined to find an analogy in the state's worker's compensation statute that explicitly "applies to employers and employees," and defines employees as individuals "in the service of an employer." *Id*. at 805.[8]

Finally, Defendant misrepresents the holding of *Comm'n on Human Rights & Opportunities v. Echo Hose Ambulance*, 156 Conn. App. 239, 245–46, 113 A.3d 463, 468 (2015), *aff'd*, 322 Conn. 154, 140 A.3d 190 (2016), which addresses only whether courts should use the "remuneration test" when determining if an individual is an "employee." These cases say nothing about the issue before this Court. Defendant vastly overstates the weight of authority that supports its position.

Interpreting a substantially similar statute, *Carter Coal Co.* held a refusal to hire constitutes illegal retaliation in Illinois. In contrast, Defendant fails to cite any state court decision that holds such claims do not exist under similar statutory language. The lack of contrary authority, combined with the plain language of RCW 49.60.210(1) and public policy

[8] Defendant also relies on cases that merely decline to recognize a common law cause of action. *See Baker v. Campbell Cty. Bd. of Educ*., 180 S.W.3d 479, 482 (Ky. Ct. App. 2005) ("Baker concedes that his proposed cause of action is not expressly permitted by any statute"); *Peck v. Elyria Foundry Co*., 347 F. App'x 139, 148 (6th Cir. 2009) ("review of Ohio law finds no case extending the public policy tort to claims involving a wrongful failure to hire or retaliation."); *Sanchez v. Philip Morris Inc*., 992 F.2d 244, 249 (10th Cir. 1993) ("the district court properly dismissed Appellee's public policy tort claim as Oklahoma has yet to create an exception to the employment-at-will doctrine in the failure to hire context."); *Wordekemper v. W. Iowa Homes & Equip., Inc*., 262 F. Supp.2d 973, 988–89 (N.D. Iowa 2003) ("the Iowa Supreme Court has warned against broad application of the public policy exception"). These cases provide no guidance because they address only common law claims. The WLAD carries the powerful weight of a statutory mandate and a public policy of the highest priority.

considerations of the WLAD show RCW 49.60.210(1) permits retaliatory refusal to hire claims.

V. CONCLUSION

The Court should rule that the WLAD prohibits prospective employers from retaliating against applicants because they engaged in protected activity against a previous employer.

Respectively submitted this 26th day of July, 2017.

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I certify that on the date noted below I electronically filed this document entitled **Brief of Amicus Curiae of Washington Employment Lawyers Association** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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