

**WASHINGTON SUPREME COURT NARROWS EMPLOYERS' OPPORTUNITIES
FOR SUMMARY JUDGMENT ON CLAIMS UNDER THE WASHINGTON LAW
AGAINST DISCRIMINATION ("WLAD")**

On October 19, 2017, the Washington Supreme Court issued a game-changing decision in *Mikkelsen v. Public Utility District No. 1 of Kittitas County*. The decision, reinstating dismissed claims related to an employee's termination, may limit an employer's ability to obtain summary judgment on discrimination and breach of progressive discipline policy claims.

The plaintiff, Kim Mikkelsen, had worked for the PUD for 27 years before she was terminated without warning in 2011. Ms. Mikkelsen sued the PUD alleging gender and age discrimination, as well as violations of the PUD's progressive discipline policy. The trial court dismissed Ms. Mikkelsen's claims on summary judgment, and the Court of Appeals affirmed. The Washington Supreme Court reversed and sent the case back for trial.

One of the key issues was whether plaintiffs asserting WLAD claims must show that they were replaced by someone outside their protected class. Before the Court accepted review, Washington courts had required terminated employees to make a prima facie showing that their position was given to someone who did not share their protected status. For example, plaintiffs alleging gender discrimination were required to show that they were replaced by someone of the opposite sex, and plaintiffs alleging age discrimination were required to show that they were replaced by someone younger.

Although neither party asked the Washington Supreme Court to address the "replacement element" issue, it took this opportunity to reverse existing Washington case law and "clarify" that terminated employees no longer need to satisfy the "replacement element" to survive summary judgment. While evidence that the terminated employee was replaced by someone in the same protected class may still be considered by the jury at trial, the Court held it no longer warrants summary judgment in the employer's favor.

The Court also clarified the extent to which an employee may rely on an employer's "progressive discipline" policy. Progressive discipline policies provide guidance for employee discipline but must be drafted to ensure management retains discretion to deviate from the policy. Absent discretion, the employer risks altering its employees' at-will status and creating an obligation to follow the progressive discipline steps before terminating an employee.

While serving as the PUD interim General Manager, Ms. Mikkelsen championed a progressive discipline policy that incorporated pre-termination steps including verbal and written warnings.

The PUD Board adopted the policy in 2009. The PUD policy expressly reserved management discretion to determine appropriate discipline but also included “employee rights” language the Washington Supreme Court concluded could be interpreted to limit the PUD’s ability to terminate Ms. Mikkelsen without following the pre-termination steps. The “employee rights” language included a mandate that employees be treated “fairly,” and that performance issues be addressed with “an eye to improvement.” The Washington Supreme Court decided that the jury, not the trial court, should determine whether the contradictory “employee rights” language overrode the discretion language and sent the case back to the trial court.

Employers should review their progressive discipline and other personnel policies to make sure that contradictory language does not undercut their discretion in determining appropriate employee discipline.

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