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Blacklist Backlash: Washington Supreme Court Expands Protections for Employees Pursuing Employment Discrimination Complaints

November 10, 2017 – The Washington Supreme Court has significantly expanded the reach of the Washington Law Against Discrimination, the state's main employment discrimination law. *Jin Zhu v. North Central Educational Service District No. 171*, decided yesterday, holds that employers cannot discriminate against job applicants who have lodged a discrimination complaint against a former employer. While sound from a policy standpoint, the decision poses several new challenges for employers.

The *Zhu* case took a circuitous path to the Washington Supreme Court. In 2006, the plaintiff sued his former employer, Waterville School District No. 209, for discrimination under Title VII and 42 U.S.C. § 1983. The plaintiff withstood a motion for summary judgment by the former employer, and the case eventually settled.

Three months later, the plaintiff applied for a position as a math and science teacher with North Central Educational Service District No. 171 ("ESD 171"). The position was awarded to a different candidate, who the plaintiff believed was substantially less qualified. The plaintiff filed a new lawsuit in federal court, alleging that ESD 171 rejected his application in retaliation for his decision to sue a fellow school district. The plaintiff's new claim arose under the Washington Law Against Discrimination ("WLAD"), which, among other things, prohibits employers from retaliating against employees for pursuing discrimination claims, or more generally for opposing any practice that the statute prohibits. RCW 49.60.210(1). The case proceeded to trial, and the jury returned a verdict in the plaintiff's favor.

ESD 171 subsequently filed a Rule 50(b) motion for judgment as a matter of law, arguing that the WLAD does not authorize claims against *prospective* employers because no employment relationship has yet been formed. Rather than deciding this question itself, the federal court took the unusual step of certifying the question to the Washington Supreme Court. The question certified was as follows: **"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 [by] a former employer?"**

The Court answered unanimously in the affirmative. Rejecting ESD 171's argument that retaliation is only actionable in the context of an "established" employment relationship, the Court held that RCW 49.60.210(1) applies across the board to *all* employers, even when no employment relationship has yet been formed. If the statute only applied to current employers, the Court reasoned, employees "might well be dissuaded from opposing discriminatory practices for fear of being unofficially 'blacklisted' by prospective future employers."

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On one hand, this holding makes sense. Employees who have been subjected to unlawful discrimination should not be penalized for exercising their rights under the WLAD. As a matter of policy, it should not matter whether the penalty arose in the context of an existing relationship with a current employer or a potential relationship with a future employer. Regardless of its origin, retaliation will always have a chilling effect on an employee's willingness to oppose discrimination.

On the other hand, the decision poses several challenges for employers. First, it will inevitably lead to "empty chair" lawsuits in which the entity responsible for the underlying discrimination—the former employer—is not a party to the case. As a practical matter, this will make it easier for plaintiffs to make the required showing that they "opposed a practice" forbidden by the WLAD. RCW 49.60.210(1). With the party responsible for the allegedly forbidden practice not present to defend itself, the plaintiff will have a decided advantage. Defendants in these cases will certainly have the option of moving to join the former employer as a necessary party, but there is no guarantee that the court will agree to bring the former employer into the case.

On a more pessimistic note, the decision may allow employees to leverage discrimination by one employer into a new job with a different employer. Employees who have lodged discrimination complaints against a current or former employer now have an incentive to make those complaints known to prospective employers when applying for new jobs. With prospective employers prohibited from taking an applicant's discrimination complaints into consideration, why not make the complaints known? If the position is awarded to someone else, the applicant is poised to assert a retaliation claim.

In view of the Court's recent pronouncement that WLAD cases should rarely be dismissed on summary judgment, *see Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty.*, --- P.3d ---, 2017 WL 4682306 (Oct. 19, 2017), the prospect of being sued by an applicant with a prior discrimination complaint should give employers pause. It seems safe to assume that certain risk-averse employers will choose to hire that applicant over better-qualified candidates in order to avoid a potential lawsuit. And even employers who are willing to take the risk will find themselves in the unenviable position of having to prove a negative: that the applicant's prior discrimination complaint(s) did not factor into their decision.

Perhaps these challenges will turn out to be more theoretical than real. But employers need to be aware of them and take measures to protect themselves against "blacklist backlash." Now more than ever, consulting experienced employment counsel is a must.

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