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In Pre-Holiday Decision Washington Supreme Court Tells Employers "You Better Watch Out . . ."

Washington law prohibits discrimination in employment based on certain protected characteristics—age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification [note that the list is not identical to protected characteristics under federal law and even some local laws, such as Seattle has]. Additionally, retaliating against anyone for opposing practices forbidden by the law is also prohibited. But Washington courts had never been faced with the question of whether the law prohibits a *potential* employer from refusing to hire a job applicant because the applicant had opposed discriminatory practices at a *previous job*. On November 9, 2017, in the case of *Zhu v. N Central Educational Svc. District—ESD 171*, our Supreme Court answered that question and held that such a practice would give rise to a violation of the law.

Facts

Jin Zhu is a U.S. Citizen who emigrated from China in 2004. In 2006, Zhu was hired by the Waterville School District as a math teacher. Zhu filed multiple grievances with Waterville in which he alleged he was being treated in a discriminatory manner by students. Zhu alleged that students were using racial and homophobic slurs to refer to him.

According to Zhu, Waterville retaliated against him for his complaints rather than addressing the students' actions. In 2010, Waterville issued a notice of probable cause for Zhu's discharge, which he challenged. The hearing officer agreed with Zhu that there was no probable cause to discharge him. Zhu then filed suit in federal court alleging Waterville discriminated and retaliated against him in violation of Title VII, which prohibits discrimination in employment. Ultimately, that lawsuit settled, and Zhu resigned from Waterville in 2012 as part of the settlement.

Shortly after resigning from Waterville, Zhu applied for the position of Math-Science Specialist with North Central Educational Service District—ESD 171, which serves 29 school districts in the north-central part of Washington. There were five candidates for the position, only four of whom, including Zhu, met the minimum qualifications. Three candidates, including Zhu, were interviewed by a panel

of four ESD 171 employees, two of whom were aware of Zhu's prior lawsuit against Waterville. Zhu received the lowest rating of the three and the position was given to the highest-rated candidate. Zhu also applied for a temporary position with ESD 171, and for other positions at various schools within ESD 171 but was not hired for any of the positions for which he applied.

Zhu then sued ESD 171 in federal court. He alleged that ESD 171 discriminated and retaliated against him under federal and state law. Upon a motion by ESD 171, the court dismissed the federal law claims as unsupported by the evidence. But the court denied ESD 171's request to dismiss the state law claims, including the retaliation claim. ESD 171 asked the court to reconsider its decision and argued that Washington law held that retaliation claims can only be brought against a current employer of the plaintiff not a prospective employer. The court declined to reconsider, and the case went to trial. The jury awarded Zhu $450,000 in damages solely on his retaliation claim. Zhu had successfully argued that there was evidence calling into question whether the selected candidate was more qualified than Zhu and whether Zhu's qualifications were downplayed because of the prior lawsuit against Waterville.

After the trial, ESD 171 challenged the jury decision. ESD 171 asked the federal trial court to ask the Washington Supreme Court (this is a process available to federal courts facing questions not clearly determined under state law) to decide whether Washington law 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.

Court's Decision

The Washington Supreme Court looked at the history and plain language of the Washington Law Against Discrimination (WLAD) in reaching its conclusion that the statute does in fact prohibit retaliatory discrimination in hiring as well as in existing employment relationships.

The Court began by noting it had previously recognized that "[p]eople will be less likely to oppose discrimination by bringing claims or testifying if this court does not provide them some measure of protection against retaliation." The Court went on to reason that since the inception of the WLAD the law has contained an antiretaliation statute to encourage opposition to discrimination.

The Court also noted the importance of the fact that a plaintiff bringing a discrimination case under WLAD is assuming the role of a private attorney general and in so doing is "vindicating a policy of the highest priority." Both the legislature and courts require that WLAD's provisions be liberally construed to best further the goals of the law.

The Court then went on to examine how the plain language of the law supported its conclusion. The statute currently provides "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." Thus, the Court reasoned, if "(1) ESD 171 is an employer, (2) Zhu is a person, (3) refusal to hire is discrimination, and (4) suing for racial discrimination is opposition to practices forbidden by WLAD" then the statute clearly applies to Zhu's claim.

ESD 171 argued that the law's antiretaliation provision applies only to a plaintiff's current employer and prohibits only adverse actions effecting the plaintiff's current employment. The Court rejected this argument relying on the language, context and structure of the statute as well as policy reasons. The Court said "[i]f prospective employers are allowed to engage in retaliatory refusals to hire, a reasonable employee might well be dissuaded from opposing discriminatory practices for fear of being unofficially 'blacklisted' by prospective future employers."

In concluding, the Court stressed again the importance of protecting individuals from retaliation in order to facilitate and encourage private individuals to file claims and lawsuits to enforce the law.

Lessons

What lessons can employers learn from this case? First, when deciding between job candidates, make sure to apply any rating system consistently. Second, make sure *not* to consider, rely on or even discuss a job applicant's prior protected activities against a different employer. This highlights one of the risks of performing internet research on potential job candidates. The Internet may reveal some protected characteristic about the applicant that was not evident from the application or interview, such as a disability, or previous lawsuit. Once an employer is aware of that information, if the applicant subsequently learns of its discovery after not being hired, that evidence could be used to establish discrimination or retaliation. Finally, keep in mind that Washington also has a statute that prohibits "blacklisting" an individual with the purpose of preventing a person from obtaining employment. However, there is also a statute that provides employers with immunity for any employment reference or information given in response to a request by a prospective employer so long as the information relates to the employee's abilities to perform his or her job, the diligence, skill or reliability the employee showed at work, or any illegal or wrongful act committed by the employee when related to the job. The statute creates a presumption that the information/reference was given in good faith unless the employee can show that the information was knowingly false, deliberately misleading, or made with reckless disregard for the truth.

For questions regarding this article, or any questions regarding HR or employment issues, contact Alan Schuchman at aschuchman@skellengerbender.com or 206-623-6501.