No: 103394-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Lisa A. Branson et al,
Appellants,
v.
Washington Fine Wines & Spirits, LLC,
Respondent.

BRIEF OF AMICUS CURIAE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including Washington. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases like this, that raise issues of concern to the nation's business community.

The Chamber and its members support equal pay in the workplace, and the abuse of Washington's Equal Pay and Opportunities Act ("EPOA") by plaintiffs with no interest in pursuing equal pay has led to unjust and inappropriate results that undermine those efforts at equality. These professional plaintiffs' misinterpretation of "job applicant" has spawned hundreds of class actions that seek hundreds of millions of dollars for those who have suffered no actual injury, based on the exploitation of an ambiguity and lack of clarity over who is

a legitimate "job applicant." Worse, these lawsuits arise out of minor, and often inadvertent, technical violations, or even from errors in job postings disseminated through third parties. This abusive litigation does not align with the purpose of EPOA or other equal pay laws throughout the United States.

To rectify this problem, this Court should give credit to the Washington legislature and interpret EPOA not to expand the universe of plaintiffs beyond those who could establish standing under Washington law. Namely, a "job applicant" should be someone who could demonstrate she falls within the zone of interest of the EPOA and has suffered an injury-in-fact. By interpreting "job applicant" to extend only to those who are actually seeking an offer of employment—by requiring that someone be "a bona fide applicant"—this Court would be affirming the statute's consonance with Washington law and would stem the tide of frivolous litigation.

II. ISSUES OF CONCERN TO AMICUS CURIAE

In this brief, the Chamber focuses on what a plaintiff must prove to be deemed a job applicant within the meaning of RCW 49.58.110(4). Because EPOA plaintiffs who lack any desire to receive a job offer are uninjured by the omission of wage data in a job posting, those plaintiffs lack the injury that is

necessary to maintain a cause of action. The Chamber therefore requests that this Court not expand the class of job applicants who can be plaintiffs under the EPOA to those who lack that injury. The Chamber offers this brief to elaborate and provide its informed opinion on why the Respondent-Defendant's position should prevail.

III. ARGUMENT

A. This Court Should Interpret The EPOA To Require An Injury-in-Fact To File Suit

This Court should make clear that the EPOA's statutory terms do not authorize suits by individuals who have not been harmed in fact and would thus lack standing to sue. To accept the interpretation that Plaintiffs-Appellants and professional tester plaintiffs have relied on would mean the Washington legislature *sub silentio* authorized suits by people whom the law would otherwise say have suffered no harm. That interpretation would discredit the legislature, which this Court ordinarily assumes is familiar with this Court's statutory and constitutional decisions. *Snohomish Cnty. v. Anderson*, 123 Wn.2d 151, 156 (1994). Hornbook standing law makes clear that applicants without a bona fide interest in the job lack standing to sue; the EPOA should not be interpreted to sweep

the uninjured into its litigation. *Lexmark Int.'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 1388 (2014); *Alim v. City of Seattle*, 14 Wn. App. 2d 838, 854 (2020) (explaining if the plaintiff is not directly affected by the enforcement of a statute, the judgment would be an advisory opinion).

The analysis of standing begins with the statute purporting to confer that standing. *Id*. To establish standing for a statutory violation under Washington law, a plaintiff must demonstrate that they: (1) are within the zone of interest protected by the statute; and (2) have suffered an injury-in-fact, economic or otherwise. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 186 (2007); *Trepanier v. City of Everett*, 64 Wn. App. 380, 383 (1992) (dismissing case for lack of standing when plaintiff only alleged threatened injury).

In hundreds of recent EPOA pay transparency cases, including the present matter, plaintiffs have consistently failed to allege facts to satisfy either prong of the standing analysis. They do not allege they fall within the zone of interest to be protected by the EPOA or that they have suffered concrete harm or an injury-in-fact.

Instead, these plaintiffs seek unbounded authority to police any alleged EPOA violations they spot, regardless of whether they have any stake in the litigation beyond a desire for a windfall settlement or judgment. If an employer fails to include a wage scale in a single posting (whether posted by the employer or "scraped" by some third party and posted anywhere on the internet), the employer would be automatically liable for disproportionate penalties of millions of dollars, even when the applicant plainly has no bona fide interest in the underlying job. Indeed, many of these seasoned plaintiffs appear to be applying to positions not because they have any real intention of seeking employment or interest in equal pay, merely to collect penalties. Their intentions are evident from their applications to positions vastly different from each other and their own experience, and in drastically disparate locations. Their failure to establish standing under Washington law should preclude them from maintaining claims under the EPOA.

1. Zone Of Interest

The first prong to establish standing under Washington law is whether the person is "arguably within the zone of interest to be protected or regulated by the statute . . . in question." *Trepanier,* 64 Wn. App. at 382. The courts must

analyze whether the legislature intended to protect the party's interest when taking the action at issue. *Allan v. University of Washington*, 92 Wn. App. 31, 37 (1998), aff'd, 140 Wn.2d 323 (2000).

The original intent of the EPOA, before the enactment of the pay transparency provisions, was to close wage gaps that remained despite the existing Washington Equal Pay Act and to address disparities in advancement opportunities among workers in Washington. See RCW 49.58.005(1). These findings and legislative intent remained unchanged with the adoption of RCW 49.58.110, which was added by the Legislature "to require an employer to provide wage and salary information to applicants and employees." RCW 49.58.005.

EPOA plaintiffs without a bona fide interest in a job are unquestionably outside the statute's zone of interest, because they are not "applicants" or "employees"— there is no realistic possibility they will suffer disparity in pay when they apply to a job solely for the purpose of suing over the lack of pay disclosure. The wages for that job posting are as irrelevant to a contrived "applicant" as they are to anyone else who lacks an interest in the advertised job and therefore chooses not to apply.

They do not meet the first prong to establish standing under the EPOA.

2. Injury-In-Fact

To satisfy the second prong of the standing analysis, a plaintiff must allege an injury-in-fact. *Patterson v. Segale*, 171 Wn. App. 251, 253 (2012). Washington courts rely on federal jurisprudence when evaluating issues of standing. *See Allan*, 92 Wn. App. at 36, (noting that two prongs of Washington's Administrative Procedure Act standing test align with federal injury-in-fact principles).

If the injury is merely conjectural or hypothetical, there is no standing to seek review. *Patterson*, 171 Wn. App. at 253*; accord Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) ("*Spokeo I*"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("*Lujan*"); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 272 (3d Cir. 2016).

Allegations of a "bare procedural violation, divorced from any concrete harm," are insufficient. *Spokeo I*, 578 U.S. at 341. The harm is "concrete" if it is "de facto"; "it must actually exist" and cannot be merely "abstract." *Id.* at 340; *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017)

("*Spokeo II*"); *see also Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 679 (9th Cir. 2021).

In *Magadia*, the Ninth Circuit established a two-part inquiry for a concrete harm. 999 F.3d at 679. First, the court considers "whether the statutory provisions at issue were established to protect . . . concrete interests (as opposed to purely procedural rights)." *Id.* The court then assesses "whether the specific procedural violations alleged in the case actually harm, or present a material risk of harm to, such interests." *Id.; see also Patel v. Facebook Inc.*, 932 F.3d 1264 (9th Cir. 2019) (explaining the statutory provisions of Illinois' Biometric Information Privacy Act "were established to protect an individual's 'concrete interests' in privacy, not merely procedural rights"). Washington courts have adopted the federal requirement that an injury be "particularized" and "concrete" by requiring a plaintiff to allege "specific[] and perceptibl[e] harm." *Trepanier*, 64 Wn. App. at 382–83; *Lujan*, 504 U.S. at 560 (finding injury-in-fact to be an "indispensable element" that adds specificity to disputes by requiring a particular injury caused by the challenged action).

Even assuming the EPOA was established to protect concrete and not merely procedural interests, a failure to

provide that information poses no risk of harm to the interests of plaintiffs who are not actually seeking a job offer. A member of the public is not harmed—and thereby transformed into a plaintiff with a cognizable claim—by failing to receive information that is irrelevant to her. *See, e.g.*, *Magadia*, 999 F.3d at 679 (to be injured, a plaintiff must show "at least that the information had some relevance to *her*"). A plaintiff who has no desire to pursue a job has not suffered a cognizable harm from being deprived of irrelevant information that she does not want and cannot put to any beneficial purpose. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) ("An asserted informational injury that causes no adverse effects cannot satisfy Article III." (internal quotation marks omitted)); *Trepanier*, 64 Wn. App. at 382–83; *Lujan*, 504 U.S. at 560–61. Plaintiffs cannot show an injury-in-fact from a violation of a disclosure requirement where they have no interest in the information a defendant failed to disclose.

A plaintiff who is not a "bona fide" applicant—that is, a plaintiff who applies for a job without any interest in receiving a job offer—has suffered no harms from the omission of information that is necessarily immaterial to her. This Court

should interpret EPOA consonant with that fact and require that a "job applicant" under EPOA actually be seeking a job offer.

3. This Court Should Adopt The Federal Courts' Reading Of Standing In EPOA Cases

The federal courts' treatment of these EPOA claims further confirms that only bona fide applicants have standing to sue. Several courts within the Western District of Washington have ruled that EPOA plaintiffs, with virtually identical complaints to Ms. Branson's, lack Article III standing. *Atkinson v. Aaron's LLC*, 23-CV-1742-BJR, 2024 WL 2133358, at *6 (W.D. Wash. May 10, 2024), modified on reconsideration, 23-CV-1742-BJR, 2024 WL 3199860 (W.D. Wash. June 26, 2024) ("*Atkinson*"); *Wallace v. Marten Transport, Ltd.*, 2:24-cv-00872-RAJ, 2024 WL 4723751 (W.D. Wash. Nov. 8, 2024); *Floyd v. Insight Glob., LLC*, No. 2:23-cv-01680, 2024 WL 2133370 (W.D. Wash. May 10, 2024) (dismissing complaint with prejudice for lack of standing even though plaintiffs alleged without substantiation that they had lost valuable time applying for jobs, applied for jobs in good faith with the genuine intent of gaining employment, and were unable to evaluate the pay for positions, negotiate that pay, and

compare that pay to other available positions in the marketplace).

These courts confirm that EPOA plaintiffs who have not made a bona fide application[1] for employment cannot establish standing by conclusory assertions of "lost valuable time" or that they are unable to evaluate, negotiate, and compare pay. They have not suffered concrete harm because the omission of pay information does not create a risk of harm for an insincere applicant. *See Atkinson*, WL 2133358, at *6. Their alleged "harm" is not concrete, actual or imminent. *Id.; Spokeo I*, 578 US at 341 (requiring actual or imminent harm).

For cases where there is no allegation of tangible harm, such as the present one, the Court should interpret the EPOA consistent with that standing law and not extend "job applicant" to those who are unharmed by alleged violations of the statute.

B. The Legislature Intended To Protect Real Job Applicants, Not Line Attorneys' Pockets

Permitting uninjured members of the public to sue and recover huge damages is not what the legislature had in mind when it amended EPOA to expand the remedies available.

[1] This does not foreclose the possibility that bona fide applicants can establish standing by showing an injury in fact as a result of a missing wage scale in a job advertisement.

Instead, the Legislature indicated that it was expanding the available remedies to address the pernicious issue of unequal pay. Second Substitute House Bill Report 2SHB 1506.

Opportunistic plaintiffs who apply to jobs merely as a means to bring EPOA claims make a mockery of that statutory purpose. They cannot show they were harmed or even risked suffering a harm, such as a wage disparity or actual damages. Instead, they seek to manufacture an ersatz injury so they can claim financial penalties that are supposed to be routed to the people suffering harm under the statute. They maintain that they should be able to identify a non-compliant posting—something that can be achieved by scrolling through LinkedIn or Indeed—click a button, and then file a lawsuit.

But the EPOA was never intended to safeguard against bare procedural violations or omissions. Its purpose is to arm legitimate job applicants with sufficient information to make informed decisions and eliminate pay disparities for employees in Washington. The term "job applicant," introduced with the pay transparency provisions, aims to prevent disparities at the outset of employment relationships—not to penalize employers or incentivize opportunistic lawsuits from individuals who have suffered no actual harm by simply clicking "apply."

Requiring plaintiffs to prove actual damages as part of their burden to qualify as a "job applicant" would align the statute's enforcement with its purpose. Incorporating *Spokeo I* and its concrete harm analysis into this framework would deter frivolous and vexatious claims that coerce employers into punitive settlements for mere omissions that cause no real harm. Instead, those who are genuinely harmed by these omissions would rightfully recover damages directly caused by the violations.

IV. CONCLUSION

For all of the above reasons, the Chamber of Commerce of the United States of America respectfully submits that this Court should affirmatively answer the certified question by adopting a concrete harm requirement as the burden of proof for pay transparency plaintiffs to qualify as "job applicants" under RCW 49.58.110.

This Brief contains 2,511 words, excluding the parts of the Brief that are exempt from the word limit set by RAP 18.17(c).

Respectfully submitted this 30th of December, 2024.

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