

The Honorable Ricardo S. Martinez

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
Seattle Division

CHERYL ENSTAD et al.,

Plaintiffs,

v.

PEACEHEALTH,

Defendant.

No. 2:17-cv-01496-RSM

**PLAINTIFFS' MOTION TO CERTIFY
QUESTIONS TO THE WASHINGTON
SUPREME COURT**

Noted on Motion Calendar: February 23rd,
2018

PLAINTIFFS' MOT. TO CERTIFY QUESTIONS
TO THE WASHINGTON SUPREME COURT
No. 2:17-cv-01496-RSM

AMERICAN CIVIL LIBERTIES
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FOUNDATION
901 FIFTH AVE, SUITE 630
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INTRODUCTION AND RELIEF REQUESTED

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2 In response to Defendant’s motion to dismiss Plaintiffs’ state law claims (Dkt. #25 at
3 18-23) (“Def.’s Mem.”), Plaintiffs respectfully request that the Court certify three dispositive
4 questions of Washington law to the Supreme Court of Washington if it is not inclined to deny
5 Defendants’ motion to dismiss Plaintiffs’ WLAD claims. For factual background, Plaintiffs refer
6 the Court to Plaintiffs’ Complaint (Dkt. #1) (“Compl.”) and Plaintiffs’ Opposition to Defendants’
7 Motion to Dismiss Complaint (Dkt #27 at 3-5) (“Pls.’ Opp’n”).
8

9 Pursuant to RCW 2.60.020, a federal court may certify a question to the Washington
10 Supreme Court when it “is necessary to ascertain the local law of this state in order to dispose of
11 [a] proceeding and the local law has not been clearly determined.” *See also McKown v. Simon*
12 *Prop. Grp. Inc.*, 689 F.3d 1086, 1091-93 (9th Cir. 2012). While the decision to certify “rests in
13 the sound discretion of the federal court,” the U.S. Supreme Court has repeatedly emphasized
14 that certification of state law questions offers clear advantages, including saving time, energy,
15 and resources, and helping to build a cooperative judicial federalism.” *Lehman Bros. v. Schein*,
16 416 U.S. 386, 391 (1974). Moreover, certification is a means “to obtain authoritative answers to
17 unclear questions of state law.” *Toner for Toner v. Lederle Labs., Div. of Am. Cyanamid Co.*, 779
18 F.2d 1429, 1432 (9th Cir. 1986).
19

20 The Ninth Circuit has certified questions to the Washington Supreme Court where a
21 question of law has “‘not been clearly determined’ by the Washington courts” and where “the
22 answer to [the] question is outcome determinative.” *Bylsma v. Burger King Corp.*, 676 F.3d 779,
23 783 (9th Cir. 2012) (quoting RCW § 2.60.020). Certification is particularly appropriate “where
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1 the issues of law are complex and have ‘significant policy implications.’” *McKown*, 689 F.3d at
2 1091 (quoting *Perez–Farias v. Global Horizons, Inc.*, 668 F.3d 588, 593 (9th Cir. 2011)).

3 As discussed in Plaintiffs’ Opposition to Defendant’s Motion to Dismiss, in order to
4 determine whether Plaintiffs have valid state claims, it is “necessary to ascertain” the answer to
5 the following dispositive questions of Washington State law:

- 6 1. Whether, under *Ockletree v. Franciscan Health System*, 179 Wash. 2d 769 (2014)
7 (en banc), the exclusion of religiously affiliated non-profit organizations from the
8 Washington Law Against Discrimination’s definition of “employer”
9 (RCW 49.60.040(11)), applies when the organization employs a person in a non-
10 ministerial position. *See* Pls.’ Opp’n at 20-21.
- 11 2. Whether the Washington Law Against Discrimination’s prohibition on
12 discrimination against “any person in compensation or in other terms or
13 conditions of employment because of” gender identity (RCW 49.60.180(3))
14 includes discrimination on the basis of the gender identity of a dependent or
15 beneficiary. *See* Pls.’ Opp’n at 21-22.
- 16 3. Whether, under *Marquis v. City of Spokane*, 130 Wash. 2d 97 (1996), the
17 Washington Law Against Discrimination protects the beneficiary of an employer-
18 provided insurance policy from discrimination in the making and performance of
19 contracts. *See* Pls.’ Opp’n at 22-23.

22 ARGUMENT AND AUTHORITY

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24 The Court could resolve these questions itself by predicting how the Washington
25 Supreme Court would rule based on existing precedents, and Plaintiffs argue in their Opposition

1 that those precedents are clear. Pls.’ Opp’n at 19-23. Should the Court be in doubt as to the
 2 clarity of that precedent, however, the “federal character of our judicial system recognizes that
 3 matters of state law should first be decided by state courts when possible, not federal courts.”
 4 *Liberty Surplus Ins. Corp. v. Ledesma and Meyer Constr. Co., Inc.*, 834 F.3d 998, 1003 (9th Cir.
 5 2016) (citations omitted). That is particularly true in a case like this, which “potentially affects
 6 swaths of workers in the current Washington economy, and elsewhere, and is therefore a matter
 7 of important public policy.” *Hill v. Xerox Bus. Servs., LLC*, 868 F.3d 758, 763 (9th Cir. 2017).
 8 Certifying these dispositive questions of law to the Washington Supreme Court now “will save
 9 time, energy, and resources and help build a cooperative judicial federalism.” *Durant v. State*
 10 *Farm Mut. Auto. Ins. Co.*, No. 15-1710, 2017 WL 2930512, at *2 (W.D. Wash. July 10, 2017)
 11 (internal quotation marks and brackets omitted).
 12

13 In passing the WLAD, the legislature laid out a “policy of the highest priority,” requiring
 14 “liberal construction” in order to vindicate that policy. *Marquis*, 130 Wash. 2d at 108-09,
 15 (citations omitted). The rights spelled out in the WLAD are not exhaustive,
 16 RCW 49.60.030(1)-(2), and the statutory language plainly states that nothing contained in the
 17 law shall “be construed to deny the right to any person to institute any action or pursue any civil
 18 or criminal remedy based upon an alleged violation of his or her civil rights.” *Marquis*, 922 P.2d
 19 at 49 (citing RCW 49.60.020). The statute’s liberal construction further requires that courts
 20 “view with caution any construction that would narrow the coverage of the law.” *Id.* (citing
 21 *Shoreline Community College Dist. No. 7 v. Employment Sec. Dep’t*, 120 Wash.2d 394, 406, 842
 22 P.2d 938 (1992)).
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1 Here, PeaceHealth asks that the court do exactly that: construe the WLAD narrowly to
2 permit Defendants to impose a facially discriminatory condition of employment onto its
3 employees and their beneficiaries and dependents. The breadth of the religious exemption in the
4 WLAD, the meaning of “because of . . . sexual orientation,” and the scope of employment
5 protections which apply to “any person,” RCW 49.60.180(3), are important questions of state
6 law. A vast number of Washington State citizens are employed by religious healthcare
7 organizations, with thousands employed by PeaceHealth alone, Compl. ¶ 2, and their right to be
8 free from discrimination is implicated by the case at bar. A reading of the WLAD that allows
9 employers to discriminate against employees due to the race, religion, sexual orientation, or
10 gender identity of the employees’ children would drastically narrow the WLAD’s protections,
11 despite the mandate that its protections be construed liberally. RCW 49.60.020.
12

13 Plaintiffs believe that the statutory language of the WLAD and the Washington Supreme
14 Court’s opinion in *Ockletree* make clear that PeaceHealth is not exempt from the WLAD and
15 that both Cheryl and Pax have a cause of action. Should the Court find that there is not sufficient
16 precedent to decide the state law questions, it is important that the Washington Supreme Court be
17 afforded the opportunity to consider these issues.
18

19 **CONCLUSION**

20 For these reasons, Plaintiffs respectfully request that the Court certify the foregoing
21 questions to the Washington Supreme Court.
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1 Dated: 2/5/2018

/s/Lisa Nowlin

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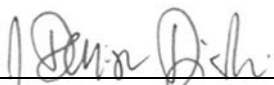
CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, I caused to be electronically filed the foregoing PLAINTIFF'S MOTION TO CERTIFY QUESTIONS TO THE WASHINGTON SUPREME COURT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the Defendants through the following attorneys of record:

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DATED this 5th day of February, 2018.



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