Roberts v. Dudley: An Unnecessary Broadening of the Public Policy Exception to the Employment-at-Will Doctrine in Washington

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Abstract: In Roberts v. Dudley, the Supreme Court of Washington dramatically expanded the previously narrow public policy exception to the employment-at-will doctrine and created a dangerous precedent. The court held that small employers, explicitly exempt from the Washington Law Against Discrimination (WLAD), could be liable at common law for the tort of wrongful discharge in violation of Washington’s public policy against sex discrimination as found in the WLAD. The tort of wrongful discharge in violation of public policy requires a finding of a “clear mandate of public policy.” This Note argues the court should not have found in the WLAD a mandate of public policy sufficiently clear to support the common law tort claim. The court disregarded the plain language of the WLAD, the relevant legislative history, and its own precedent. In dissent, Justice Madsen identified flaws in the majority’s reasoning, but failed to acknowledge that the WLAD’s small-employer exemption cannot block a common law claim based outside of the WLAD. Therefore, although the court’s ultimate conclusion was correct, its use of the WLAD to support an action against an employer expressly exempted by the WLAD threatens other exempted groups and invites the usurpation of legislative power.

In 1996, the Supreme Court of Washington held that Sharon Griffin, a former legal secretary, could not sue her employer under the Washington Law Against Discrimination (WLAD)1 after he discharged her on the basis of her sex.2 Ms. Griffin had alleged that her employer subjected her to a daily barrage of lewd comments regarding women in general and herself in particular.3 Nevertheless, the court found the WLAD did not apply because her employer had fewer than eight employees.4

Four years later, in Roberts v. Dudley,5 the Supreme Court of Washington held that Lynne Roberts, a former veterinary-clinic employee, could sue her former employer in tort for wrongful discharge in violation of public policy after he discharged her on the basis of her sex, even though he employed fewer than eight employees.6 Ms. Roberts argued that the WLAD, a recent Supreme Court of Washington case,7

1. WASH. REV. CODE §§ 49.60.010–.410 (2000).
3. Id. at 61, 922 P.2d at 789.
4. Id. at 61, 922 P.2d at 789.
5. 140 Wash. 2d 58, 993 P.2d 901 (2000).
6. Id. at 77, 993 P.2d at 910.
and Washington’s equal opportunity statute\(^8\) all articulated a public policy against sex discrimination in employment.\(^9\) The *Roberts* court held that each of her three proffered reasons independently manifested the sufficiently clear mandate of public policy required for the common law tort action. It ruled that, although plaintiffs may not pursue claims against employers with fewer than eight employees under the WLAD, the WLAD’s underlying policy against sex discrimination could support a common law tort claim.\(^10\)

This Note contends that the *Roberts* court erred when it found, in a statute explicitly excluding the defendant, a public policy sufficient to support a claim for wrongful discharge in violation of public policy. Part I of this Note introduces the doctrine of employment at will and the common law public policy exception. Part I also addresses the “clear mandate of public policy” necessary for a tort of wrongful discharge in violation of public policy. Part II discusses Washington’s laws against sex discrimination, including the equal opportunity statute, and the history behind the development of the WLAD. It focuses on the limits to the WLAD’s application found in its definitions and interpretive case law. Part III examines both the majority and dissenting opinions in *Roberts*. Part IV argues that the *Roberts* majority erred by finding the WLAD evidences a clear mandate of public policy against sex discrimination by an employer with fewer than eight employees. The court’s reasoning threatens other exempted groups as well as the separation of legislative and judicial power. Part IV also critiques the dissent for disregarding clear mandates of public policy found outside the WLAD.

I. EMPLOYMENT AT WILL AND THE PUBLIC POLICY EXCEPTION

For more than a century, an employment contract of indefinite duration has been presumed to be terminable at will by either party with or without cause. However, courts and legislatures have tempered the harshness of this rule. One of the judicial limitations of the doctrine is the

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8. Women May Pursue Any Calling Open to Men, 1890 Wash. Laws 519–20, § 1 (codified at WASH. REV. CODE § 49.12.200 (2000)). This Note will refer to this statute as the Washington equal opportunity statute.
10. See *id*.
“public policy exception,” a common law tort action barring discharges that violate a public policy. Washington courts require plaintiffs to identify a “clear mandate of public policy” in statutes, case law, or either the United States or Washington Constitutions. When identified in a statute, the purported public policy must not exceed the scope of that statute.

A. The Doctrine of Employment At Will

Although employment at will has been the American default rule for employer-employee relations for more than 120 years, both the judiciary and legislatures have tempered it. Under this doctrine, either party may terminate indefinite-term employment contracts at any time and for any or no reason. The parties are free to modify their relationship by written or oral contract. Until the 1930s, courts struck down attempts to modify this doctrine on the grounds that interfering with the employer-employee relationship would unconstitutionally impede employers’ and employees’ freedom to contract. Congress first began to regulate employer-employee relationships through labor legislation, giving American workers the right to organize unions and bargain collectively. Several decades later, Congress limited at-will employment directly by prohibiting discriminatory discharges in the Civil Rights Act of 1964. Concurrent with federal legislation, the Washington Legislature has taken steps to address workplace discrimination by enacting anti-discrimination laws.
B. Wrongful Discharge in Violation of Public Policy: A Tort Exception to the At-Will Doctrine

State courts nationwide have used tort law to limit the at-will doctrine by holding employers liable for discharging employees on grounds that violate public policy. Washington adopted this exception in Thompson v. St. Regis Paper Co. Since Thompson, the judiciary has refined and clarified what constitutes a clear mandate of public policy sufficient to support this common law tort action.

I. The Development of the Public Policy Exception to Employment At Will

By creating a common law tort for wrongful discharge in violation of public policy, state judiciaries curbed the at-will doctrine’s most troubling aspect: the ability of employers to discharge employees for reasons that run counter to the public welfare. In Petermann v. International Brotherhood of Teamsters, the Supreme Court of California paved the way by establishing an exception to employment at will when it held that considerations of public policy can limit an employer’s right to discharge. The Petermann defendant had discharged the plaintiff for refusing to testify falsely before a legislative committee. The court reasoned that allowing an employer to condition continued employment on the commission of a felony would injure the public welfare. This cause of action for wrongful discharge in violation of public policy became known as the “public policy exception” to the doctrine of employment at will. It prevents employers from discharging employees when the reason for the discharge is inconsistent with a public policy and

22. Id. at 27.
23. Id. at 26.
24. Id. at 27.
the community interests that policy advances.\textsuperscript{26} As of 1994, all but six states had adopted some form of this exception.\textsuperscript{27}

2. \textit{Washington's Adoption of the Public Policy Exception}

In 1984, the Supreme Court of Washington adopted the public policy exception in \textit{Thompson v. St. Regis Paper Co.}\textsuperscript{28} \textit{Thompson} involved a dismissal resulting from an employee's attempt to institute federally mandated accounting procedures.\textsuperscript{29} The court held that discharging an employee for obeying a statutory mandate violated the public policy against bribery and thus gave rise to a cause of action in tort.\textsuperscript{30} The court unanimously joined "the growing majority of other jurisdictions" in recognizing a cause of action for wrongful discharge in violation of public policy.\textsuperscript{31}

By recognizing a tort claim for wrongful discharge in violation of public policy, the \textit{Thompson} court did not disavow the doctrine of employment at will, but rather balanced the interests of employers and employees.\textsuperscript{32} The court recognized employers must maintain the ability to make non-discriminatory personnel decisions to run a business effectively.\textsuperscript{33} On the other hand, employers should not condition continued employment on the commission of illegal acts, which damage the public welfare.\textsuperscript{34} To maintain this balance the court created a test that places the burden of proof on an employee claiming wrongful discharge.\textsuperscript{35} A plaintiff must first demonstrate the existence of a "clear mandate of public policy found in either the letter or purpose of a constitutional, statutory, or regulatory provision or scheme,"\textsuperscript{36} or a policy

\textsuperscript{27} MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 9.9 (1994); see also Greeley v. Miami Valley Maint. Contractors, 551 N.E.2d 981, 986 n.3 (Ohio 1990) (noting at least thirty-nine states have adopted public policy exception).
\textsuperscript{28} 102 Wash. 2d 219, 232, 685 P.2d 1081, 1089 (1984).
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.} at 234, 685 P.2d at 1090.
\textsuperscript{31} \textit{Id.} at 232, 685 P.2d at 1089.
\textsuperscript{32} \textit{Id.} at 232–33, 685 P.2d at 1089.
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{See id.}
\textsuperscript{35} \textit{See id.}
\textsuperscript{36} DiComes v. State, 113 Wash. 2d 612, 617, 782 P.2d 1002, 1006 (1989). The court noted that the employer's conduct need not violate the law to constitute a violation of public policy. \textit{Id.} at 620,
found in a prior judicial decision. Next, the plaintiff must demonstrate why the challenged discharge violates that policy. If the employee establishes a presumption of wrongful discharge by meeting this burden, the employer can rebut the presumption by providing a credible, non-discriminatory explanation for the discharge. Since Thompson, Washington courts have gradually refined the rules for determining when plaintiffs have met their burdens.

C. Judicial Rules for Finding in Statutes a Clear Mandate of Public Policy Sufficient To Support a Claim of Wrongful Discharge

Washington courts have found clear mandates of public policy where an employer discharges an employee for refusing to commit an act contrary to the public welfare, for exercising a right, or for refusing to neglect a public duty. Acts contrary to the public welfare include outright illegal acts and not reporting an employer’s wrongful act. Public duties include responsibilities such as voting and jury duty. Washington courts have also held employers liable for wrongful discharge in violation of public policy where a statute has expressly granted employees the right to engage in concerted action, file worker’s compensation claims, or complain to officials when denied overtime pay.

The Thompson court emphasized the narrowness of the public policy exception. Washington courts have sought to maintain this narrow scope by refusing to extend public policies beyond the explicit terms of

782 P.2d at 1008. However, in the whistle-blowing context, the court decided that employee conduct motivated purely by private interest cannot form the basis for a charge of violation of public policy. Id. at 620, 782 P.2d at 1008.

37. Thompson, 102 Wash. 2d at 232, 685 P.2d at 1089.
38. Id.
39. Id. at 232–233, 685 P.2d at 1089.
40. See Gardner v. Loomis Armored, Inc., 128 Wash. 2d 931, 936, 913 P.2d 377, 379 (1996). Generally, these rights and duties arise from statutes or judicial decisions not directly regulating employment relationships. In Thompson, for example, the Foreign Corrupt Practices Act regulated accounting practices rather than employment relationships. 102 Wash. 2d at 234, 685 P.2d at 1090.
41. See Gardner, 128 Wash. 2d at 936, 913 P.2d at 379.
45. See Thompson, 102 Wash. 2d at 232, 685 P.2d at 1089.
the statutes in which courts find these policies. Two cases illustrate plaintiffs’ difficulties in persuading courts to recognize public policies expanded beyond explicit statutory terms. In *Roe v. Quality Transportation Services*, the court of appeals refused to use a statute regulating a specific aspect of employment relations to find a public policy sufficient to support a claim for wrongful discharge based on a different aspect of employment relations not covered by the statute. In *Gardner v. Loomis Armored, Inc.*, the Supreme Court of Washington limited a statute’s policy to the circumstances the statute regulates.

In *Roe*, the court of appeals refused to recognize a broad right to privacy sufficient to constitute the clear mandate of public policy necessary to support a claim for wrongful discharge. The court found no public policy prohibiting employers from requiring drug testing. The employee alleged her dismissal constituted a violation of Washington’s public policy of protecting private employees’ privacy, a policy manifested in a statute prohibiting employers from requiring any current or prospective employer to take a lie detector test. The court refused to find a clear mandate of policy protecting employees’ broad privacy rights in a statute that regulated only lie detector tests. It noted that the Legislature, although aware of the issue of drug testing, had remained silent on the issue. The court reasoned that the judiciary, unable to hold hearings and debates, was ill-suited to balance properly the interests of employees

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48. *Id.* at 610, 838 P.2d at 132.


50. *Id.* at 942–43, 913 P.2d at 383.


52. *Id.* at 605, 838 P.2d at 129.

53. *Id.* at 609, 838 P.2d at 131 (citing WASH. REV. CODE § 49.44.120 (2000)).

54. *See id.* In *Twigg v. Hercules Corp.*, 406 S.E.2d 52 (W. Va. 1990), the Supreme Court of West Virginia held a similar statute barring lie detector tests would also bar drug tests in most circumstances. See 406 S.E.2d at 55. The *Roe* court distinguished the standards for the public policy exception, noting that the West Virginia standard called only for a “substantial” mandate of public policy as opposed to Washington’s “clear” mandate requirement. *Roe*, 67 Wash. App. at 609, 838 P.2d at 131.

and employers with regard to drug testing.\textsuperscript{56} The \textit{Roe} court also rejected the Washington Constitution's privacy provision as a source of public policy.\textsuperscript{57} The court found this provision was a restraint on government action and not actions by private individuals.\textsuperscript{58}

Similarly, in \textit{Gardner}, then regarded as the Supreme Court of Washington's broadest application of the public policy exception,\textsuperscript{59} the court remained cautious in inferring a clear mandate of public policy from general statutory language. The defendant employer discharged a guard for abandoning his armored truck, in violation of company policy, to rescue a woman from an assailant.\textsuperscript{60} Although the court ultimately found a clear mandate of public policy allowing employees to neglect their job duties to protect human life,\textsuperscript{61} it rejected two of the plaintiff's proposed public policies. First, the plaintiff argued that the Crime Victims, Survivors, and Witnesses Act;\textsuperscript{62} a statute granting limited immunity to citizens assisting law enforcement officials;\textsuperscript{63} and a statute making it a misdemeanor to refuse an officer's request to summon aid\textsuperscript{64} all mandated a public policy encouraging civilians to assist law enforcement officers.\textsuperscript{65} Although the court agreed there was a "limited,\textsuperscript{56} See \textit{id.}.
\textsuperscript{57} \textit{Id.} at 608, 838 P.2d at 130–31 (citing WASH. CONST. art. I, § 7). Article I, section 7 states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Therefore, the court could not establish a public policy of protecting employee privacy from non-public employers and the court held the constitutional provision only applied to the state, not private actors. \textit{Id.} at 608–09, 838 P.2d at 130–31. However, in \textit{Roberts}, four justices indicated they believed the Washington Constitution's Equal Rights Amendment evidenced a public policy against a private employer discriminating on the basis of sex. \textit{See} Roberts v. Dudley, 140 Wash. 2d 58, 77, 993 P.2d 901, 911–12 (2000).
\textsuperscript{58} \textit{See Roe}, 67 Wash. App. at 608, 838 P.2d at 130–31.
\textsuperscript{60} \textit{Gardner}, 128 Wash. 2d at 933, 913 P.2d at 378.
\textsuperscript{61} \textit{See id.} at 944–45, 913 P.2d at 383–84 (reasoning that "countless statutes and judicial decisions" provide ample support for argument that "society places the highest priority on the protection of human life"). Justice Madsen harshly criticized the majority for creating a fifth category of recognized public policy where "this court disagrees with an employer's definition of just cause for termination, as set forth in the workplace rules." \textit{Id.} at 952, 913 P.2d at 387.
\textsuperscript{63} WASH. REV. CODE § 9.01.055 (2000).
\textsuperscript{64} WASH. REV. CODE § 9A.76.030 (2000).
\textsuperscript{65} \textit{Gardner}, 128 Wash. 2d at 942, 913 P.2d at 383.
albeit clear, public policy” in favor of civilians aiding police officers, the court narrowly circumscribed this policy by noting that it did not imply that civilians should “jump into the middle of every criminal situation.”

Second, the court rejected the plaintiff’s claim that his discharge violated the rescue doctrine’s policy of helping those in need. The rescue doctrine, which is codified in Washington, allows an individual injured in the course of rescuing another to recover against the person rescued when the rescuee’s own negligence created the situation. The court held the doctrine’s public policy applied only to those who render emergency care or transportation to persons whose own negligence caused the situation. Although the court recognized that the rescue-doctrine statute supported a broad public policy in favor of aiding others, it held that the legislature limited the application of that policy to the circumstances of the statute. Therefore, because the employer did not discharge the plaintiff for actions specifically protected by these statutes, the court held the discharge was not wrongful because the plaintiff had failed to show that the discharge violated a sufficiently clear mandate of public policy. Thus, under Thompson, a plaintiff must prove not only a public policy’s existence, but also that the statute in which the policy is found protects the particular action for which the plaintiff was discharged.

II. WASHINGTON LAWS AGAINST SEX DISCRIMINATION: THE EQUAL OPPORTUNITY STATUTE, THE EQUAL RIGHTS AMENDMENT, AND THE WASHINGTON LAW AGAINST DISCRIMINATION

Washington has a long-standing, well-established public policy against sex discrimination. This policy dates back more than one hundred years and is found in both statutory law and the Washington Constitution. Today, the Washington Law Against Discrimination (WLAD) deals with the bulk of sex-discrimination claims. Although

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66. Id.
67. Id. at 943, 913 P.2d at 383.
69. See Gardner, 128 Wash. 2d at 943, 913 P.2d at 383.
70. See id. at 943–44, 913 P.2d at 383.
71. See id.
72. See id.
73. WASH. REV. CODE §§ 49.60.010–410 (2000).
the WLAD seeks to eradicate employment discrimination in Washington, the Legislature has limited its scope. The Supreme Court of Washington has recognized the WLAD's explicit exclusion of employers employing fewer than eight employees (small employers).

A. Washington's Policy Against Gender-Based Discrimination: The Equal Opportunity Statute and the Equal Rights Amendment

Washington first prohibited sex-based employment discrimination in 1890, when the Washington State Legislature enacted a statute entitled "Women May Pursue Any Calling Open to Men," which will be subsequently referred to as the equal opportunity statute.\textsuperscript{74} The equal opportunity statute mandates the doors of employment be equally open to both sexes.\textsuperscript{75} Located in a chapter of the Washington Revised Code that deals with private industrial regulation, this statute applies to Washington's private as well as public employers.\textsuperscript{76}

Case law interpreting the equal opportunity statute, albeit sparse, evidences a long-standing intolerance of sex-based discrimination. In 1893, the Supreme Court of Washington held that the equal opportunity statute prohibited a local practice of shutting down, as a "nuisance," any saloon where women were employed.\textsuperscript{77} In 1971, the court of appeals noted that a local ordinance prohibiting "massagists" from giving massages to members of the opposite sex did not violate the statute because it regulated all members of a profession without regard to sex.\textsuperscript{78} Judicial interpretations of the equal opportunity statute are sparse because for much of its existence, social, if not legal, constraints have limited women's employment opportunities.\textsuperscript{79} In addition, since women

\textsuperscript{74} 1890 Wash. Laws 519–20, § 1 (codified at WASH. REV. CODE § 49.12.200). Public office was originally exempt from the requirement of equal opportunity. \textit{Id}. In 1963, the Legislature eliminated this exception and amended the act to prohibit the exclusion of women from work sites on the basis of sex. \textit{See} 1963 Wash. Laws 229, § 1 (codified at WASH. REV. CODE § 49.12.200).

\textsuperscript{75} \textit{See} Roberts v. Dudley, 140 Wash. 2d 58, 67–68, 993 P.2d 901, 906 (2000).

\textsuperscript{76} \textit{See} id. (citing WASH. REV. CODE §§ 49.12.005–902).

\textsuperscript{77} State v. Brown, 7 Wash. 10, 14, 34 P.2d 132, 134 (1893).

\textsuperscript{78} \textit{See} J.S.K. Enters., Inc. v. City of Lacy, 6 Wash. App. 43, 48 n.1, 492 P.2d 600, 603 n.1 (1971).

began more aggressively enforcing their equal opportunity rights, most have been able to pursue discrimination claims under the WLAD.

In 1972, the Washington Legislature and the voters of Washington adopted the Equal Rights Amendment (ERA) to the state constitution. The amendment reads: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Washington courts have acknowledged the ERA absolutely prohibits discrimination on the basis of sex. Thus, Washington's constitution, the bedrock of Washington law, clearly condemns sex discrimination.

B. The Washington Law Against Discrimination

1. The History, Coverage, and Enforcement of the WLAD

When the Washington State Legislature enacted the WLAD in 1949, it declared that practices of discrimination constitute a threat not just to state residents, but also to "the institutions and foundation of a free democratic state." The Legislature did not limit the WLAD's coverage to employment discrimination but included discrimination in credit and insurance transactions in public places. The Legislature also declared the "right to obtain and hold employment without discrimination" to be a civil right. The WLAD created a state agency, the Washington Human Rights Commission (WHRC), with power to eliminate and prevent discrimination in employment and to enforce the civil rights provisions of the state constitution.

The WLAD neither precludes any other cause of action nor repeals any provision of other Washington law; in fact, it expressly preserves pre-existing law. Furthermore, the WLAD contains a clause mandating

80. See id. at 1795–99.
81. WASH. CONST. art. XXXI (1972) (adopted in November 1972 election as Amend. 61).
82. Id. at § 1.
84. 1949 Wash. Laws 183, § 1 (codified as amended at WASH. REV. CODE § 49.60.010 (2000)).
85. WASH. REV. CODE § 49.60.020. This provision contrasts with the worker's compensation statute, which explicitly precludes other actions. See WASH. REV. CODE § 51.04.010 (2000). Until
that courts liberally construe the law to achieve its purposes. For example, in *Marquis v. Spokane*, a case in which a female golf professional alleged her employer discriminated against her on the basis of sex, the Supreme Court of Washington broadly construed the WLAD’s definition of “employee” to include independent contractors. Although the WLAD does not expressly address independent contractors, the court reasoned that the WLAD’s purpose of deterring and eradicating discrimination was of paramount importance and justified construing the statutory term employee to include independent contractors.

Since 1949, the WLAD’s coverage has gradually expanded. Originally, the WLAD made it an unfair employment practice to “discharge or bar any person from employment because of such person’s race, creed, color or national origin.” In 1971, the Legislature added “sex” to the list of protected classes. Initially, the WHRC had exclusive power to enforce the WLAD. Yet the only remedies available to the WHRC were “conference, conciliation and persuasion,” cease-and-

1973, however, plaintiffs who pursued a remedy outside of the WLAD were precluded from simultaneously pursuing a claim within the statute. See 1973 Wash. Laws. 141, § 2.

89. WASH. REV. CODE § 49.60.020. Even absent an express intention of non-exclusivity, where a statute addresses the same issue as a common law cause of action, the statutory remedy is not presumed to replace the common law remedy. See Price v. Kitsap Transit, 125 Wash. 2d 456, 463, 886 P.2d 556, 560 (1994). In contrast, where a statute revises the law and is clearly a substitute, the statute supersedes the common law. See id. Therefore, the legislature must clearly express its intent to abrogate the common law. See id.

90. 130 Wash. 2d 97, 922 P.2d 43 (1996).
91. Id. at 115, 922 P.2d at 53.
93. See id. at 109–10, 922 P.2d at 49–50.
94. Law Against Discrimination, 1949 Wash. Laws 183, § 2 (codified as amended at WASH. REV. CODE § 49.60.030(1)(a)).
95. 1971 Wash. Laws Ex. Sess. 81, § 3, at 551 (codified at WASH. REV. CODE § 49.60.010 (2000)).
97. 1949 Wash. Laws 183, § 8, at 513–14. Conference, conciliation, and persuasion generally describe the procedures undertaken by the WHRC to eliminate unfair practices set out in a complaint. See Frank P. Helsell, *The Law Against Discrimination in Employment*, 25 WASH. L. REV. 225, 226–28 (1950). The procedure includes meeting with the respondent to discuss the situation and explain the law. See id. If this process is unsuccessful, the WHRC appoints a hearing tribunal with the power to make findings of fact and issue and serve a cease-and-desist order. See id. If the cease-and-desist order is disobeyed, the WHRC may seek enforcement through a court order or by criminal proceedings. See id.
desist orders requiring an employer to halt the unfair employment practice, and individual restraining orders. In 1973, the Legislature amended the WLAD to allow an individual employee injured by an employer’s violation of the WLAD to sue for civil damages. The Legislature authorized specific remedies including actual damages, attorneys’ fees, and other remedies authorized by Title VII of the federal Civil Rights Act of 1964.

2. The Limits of the WLAD’s Reach

In enacting the WLAD, the Legislature sought to balance the interests of employers, employees, and society. For example, to protect religious freedom, the definition of employer excludes religious organizations. In addition, the Legislature excluded domestic servants and employees who are either parents or children of their employer. These exemptions reflect the Legislature’s unwillingness to interfere in matters as personal as family relationships or who may enter one’s home. The WLAD also protects small employers’ interests by defining “employers” as those who employ eight or more persons.

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100. Id. Until the 1991 Civil Rights Act, the remedies available under Title VII were limited to back pay and reinstatement. See Lissau v. S. Food Serv., Inc., 159 F.3d 177, 180–81 (4th Cir. 1998). The 1991 provision created a sliding scale ranging from a maximum of $50,000 for employers with between 14 and 101 employees and up to $300,000 for employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3) (1994). For a more detailed history of the statutory development of the WLAD, see Darya V. Swingle, Comment, Personal Liability for Sexual Harassment Under the Washington Law Against Discrimination, 74 WASH. L. REV. 483 (1999).
103. WASH. REV. CODE § 49.60.040(4) (2000).
105. WASH. REV. CODE § 49.60.040(3).
The definition of employer has not changed since 1949 and no legislative history explains the intent behind the exclusion of employers with fewer than eight employees. Recently, two legislative attempts to reconsider the small-employer exemption failed. In 1999, the Legislature proposed broadening the definition of employer to include anyone with one or more employees and adding a positive declaration that all employees are entitled to a workplace free from discrimination. This proposal died in committee. Another proposal would have created a task force to study and make recommendations regarding employment discrimination. This proposal passed the Senate but died in the House Judiciary Committee. Thus, the Legislature has thus far guarded the exemption. The administrative regulations for the WLAD suggest this exemption seeks to protect small employers from the burden of defending discrimination suits and to reduce the WHRC’s caseload. Regardless of the policy underlying the WLAD’s small-employer exemption, the Legislature has never eliminated or changed this minimum number.

To help determine the legislative intent behind the small-employer exemption, the Supreme Court of Washington has looked to the history of the California Fair Employment Practices Act (FEPA), which

106. Compare WASH. REV. CODE § 49.60.040(4), with 1949 Wash. Laws 183, § 3(b), at 507 (codified as amended at WASH. REV. CODE § 49.60.040).
110. 1 Legislative Digest and History of Bills, 56th Leg. Reg. Sess. 51 (Wash. 1999).
111. See S.B. Rep. E.S.B. 5337, 56th Leg. Reg. Sess. 1–2 (Wash. 1999) (reporting that both E.S.B. 5337 and S.B. 5130 were direct responses to court holding that small employers could not be sued under WLAD in Griffin v. Eller, 130 Wash. 2d 58, 922 P.2d 788 (1996)); see also infra Part II.B.3.
113. The WHRC regulations state the exemptions exist “[t]o relieve small businesses of a regulatory burden” and “[i]n the interest of cost effectiveness, to confine public agency enforcement of the law to employers whose practices affect a significant number of persons.” WASH. ADMIN. CODE § 162-16-160(2) (2000). The Supreme Court of Washington has also noted that the guidelines, though persuasive, are of limited value since they were written thirty-three years after the statute’s enactment. See Griffin, 130 Wash. 2d at 69, 922 P.2d at 792.
114. See 1 Legislative Digest and History of Bills, 56th Leg. Reg. Sess. 51; see also Roberts v. Dudley, 140 Wash. 2d 58, 84, 993 P.2d 901, 915 (2000) (Madsen J., dissenting).
115. CAL. GOV’T CODE § 12900 (West 1999).
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closely parallels the WLAD. The California State Assembly exempted employers with fewer than five employees from FEPA for four reasons: (1) because employers should have some small measure of the "so-called freedom to discriminate"; (2) because discrimination on a small scale would be hard to detect and police; (3) because employment situations with five or fewer employees make for close personal relationships, and fair-employment law should not attempt to regulate these relationships; and (4) because the Assembly was primarily interested in eliminating large-scale discrimination by significant employers rather than redressing individual instances of discrimination. This reasoning reflects the California State Assembly's balancing of community interests and public policy in enacting an employment discrimination statute. The Supreme Court of Washington presumed that the Washington Legislature had similar considerations in mind when it included a small-employer exemption in the WLAD.

3. Griffin v. Eller: The Small-Employer Exemption Survived a Constitutional Challenge and the Court Discussed Its Purpose

In Griffin v. Eller, the small-employer exemption survived a constitutional challenge when the Supreme Court of Washington held that the exemption did not violate the privileges and immunities clause of the Washington Constitution. The court affirmed the dismissal of the plaintiff's WLAD claims, holding that no statutory cause of action existed where the statute expressly excluded employers who employed fewer than eight people. The court based its decision on the plain language of the statute as well as previous decisions in which small employers and religious organizations had been held exempt from

116. See Griffin, 130 Wash. 2d at 67 n.1, 922 P.2d at 791 n.1.
118. See Robinson, 825 P.2d at 775 (Cal. 1992).
119. See Griffin, 130 Wash. 2d at 66-67, 922 P.2d at 791.
120. 130 Wash. 2d 58, 922 P.2d 788 (1996).
121. WASH. CONST. art. I § 12.
122. Griffin, 130 Wash. 2d at 61, 922 P.2d at 789. In dissent, Justice Talmadge argued that the definition of employer was intended to be applied only to actions initiated by the WHRC, thereby permitting a private action against employers with fewer than eight employees. Id. at 72-97, 922 P.2d at 794-806 (Talmadge, J., dissenting).
statutory remedies. In dicta, the Griffin court hypothesized that the Legislature might have sought to conserve state resources or shield small businesses from regulatory burdens and private-litigation expenses. It reasoned that these concerns provided a rational basis for distinguishing employers by size; therefore, the WLAD did not violate the privileges and immunities clause.

III. THE COLLISION OF THE WLAD AND THE COMMON LAW TORT OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY IN ROBERTS v. DUDLEY

In Roberts v. Dudley, the Supreme Court of Washington confronted the question of whether a small employer, exempted from the WLAD, could be liable in tort for wrongful discharge in violation of a public policy against sex discrimination. The majority held that a discharge on the basis of sex violated Washington’s public policy against sex discrimination as articulated in the equal opportunity statute, Marquis v. City of Spokane, and the WLAD. In a vigorous dissent, Justice Madsen argued the WLAD’s small-employer exemption muted the clarity of the public policy against discrimination where the defendant had fewer than eight employees; thus, no “clear mandate of public policy” existed in Washington law.

A. Facts and Procedural History

In 1993, Dr. Eric Dudley discharged Lynne Roberts from North End Veterinary Clinic in Tacoma following a four-month maternity leave.

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125. Griffin, 130 Wash. 2d at 64, 922 P.2d at 790. To resolve the state constitutional issue, the court applied the “rational basis test” to determine whether the exemption for small employers violated the privileges and immunities clause of the Washington Constitution. Id.; see also Convention Ctr. Coalition v. City of Seattle, 107 Wash. 2d 370, 378–79, 730 P.2d 636, 642 (1986) (articulating rational-basis test).


127. Id. at 68–70, 922 P.2d at 792–93.


131. Roberts, 140 Wash. 2d at 77, 993 P.2d at 911.

132. Id. at 81, 993 P.2d at 913 (Madsen, J., dissenting).

133. Id. at 60–61, 993 P.2d at 903.
He stated he discharged her due to an "economic slowdown." One year later, Dr. Dudley advertised for Ms. Roberts's former position; when she applied, he refused to rehire her. Ms. Roberts, alleging her pregnancy led to her discharge, brought a common law claim against Dr. Dudley for wrongful discharge in violation of Washington's public policy against sex discrimination.

Dr. Dudley moved for summary judgment, arguing no cause of action existed under the WLAD or any other state law because he had fewer than eight employees. He argued that Griffin's discussion of possible legislative purposes for the WLAD's small-employer exemption constituted a judicial acknowledgement of a public policy protecting small employers from discrimination claims. The trial court agreed and granted summary judgment. The court of appeals reversed. It found that sex discrimination, even by small employers like Dudley, violated a clear mandate of public policy. The court held the WLAD, which explicitly preserves all other causes of action, did not preempt a common law cause of action for wrongful discharge in violation of public policy. The court declared that the ERA, the WLAD, and Marquis v. City of Spokane each provided clear mandates of Washington's public policy against sex discrimination. Accordingly, for the purpose of a common law tort claim, the court held that the small-employer exemption had no effect. The Supreme Court of Washington affirmed the appeals court's decision.

134. Id.
135. Id.
136. Id. at 61, 993 P.2d at 903.
137. Id.
138. Id.; see also Griffin v. Eller, 130 Wash. 2d 58, 66-67, 922 P.2d 788, 791 (1996); supra note 122 and accompanying text.
139. Roberts, 140 Wash. 2d at 61, 993 P.2d at 903.
141. Id. at 659-60, 966 P.2d at 381.
142. Id. at 656, 966 P.2d at 379.
143. WASH. REV. CODE §§ 49.60.010-.410 (2000); see also supra notes 81-83 and accompanying text.
144. 130 Wash. 2d 97, 922 P.2d 43 (1996); see supra notes 90-93 and accompanying text.
145. Roberts, 92 Wash. App. at 659, 966 P.2d at 381.
146. Id.
147. Roberts v. Dudley, 140 Wash. 2d 58, 62, 993 P.2d 901, 903-04 (2000). The majority noted the court should not decide a case on constitutional grounds if it could do so on a non-constitutional basis. Id. at 62 n.2, 993 P.2d at 903-04 n.2. Therefore, the majority did not look to the ERA. See id.
B. The Supreme Court of Washington’s Holding in Roberts v. Dudley

The *Roberts* majority held that Washington has a public policy against sex discrimination, mandated in statutes and judicial precedent, that applies to all employers regardless of the number of employees. With little analysis, the majority held that both *Marquis v. City of Spokane* and the equal opportunity statute established clear mandates of public policy sufficient to support an action in tort for wrongful discharge. In addition, the court found that the WLAD independently constituted a clear mandate of public policy that applied to all employers, regardless of size. Notwithstanding contrary dicta in *Griffin* and the explicit language of the small-employer exemption, the court refused to find a public policy shielding employers with fewer than eight employees from common law claims in the WLAD’s definition section.

The *Roberts* majority held that *Marquis*, which summarized the purpose of the WLAD, constituted a clear judicial mandate of public policy prohibiting discrimination by employers irrespective of the number of employees. The *Marquis* court found a clear mandate of public policy against sex discrimination in the legislative purpose of deterring and eradicating discrimination, WLAD’s liberal construction provision, and the ERA. Thus, the *Roberts* majority found in *Marquis* a clear mandate of public policy against discrimination. In addition to *Marquis*, the *Roberts* majority found the equal opportunity statute, based on its plain language and context, constituted a clear mandate of public policy against sex discrimination.

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148. See id. at 77, 993 P.2d at 911.
149. 130 Wash. 2d 97, 922 P.2d 43 (1996).
152. Id. at 68–73, 993 P.2d at 907–09.
154. See WASH. REV. CODE § 49.60.040(3).
158. Id. at 108, 922 P.2d at 49; see also *Marquis*, 130 Wash. 2d at 109, 922 P.2d at 49.
159. WASH. REV. CODE § 49.60.020; see also supra note 104 and accompanying text.
161. *Roberts*, 140 Wash. 2d at 66, 993 P.2d at 906; see also supra notes 90–93 and accompanying text.
mandate of public policy against sex discrimination sufficient to support a common law tort claim for wrongful discharge.\textsuperscript{162}

The court then reasoned that the WLAD expressed an independent, clear mandate of Washington's public policy against sex discrimination in employment.\textsuperscript{163} It rejected the defendant's argument that it was illogical to allow a common law claim when the public policy is found in a statute specifically exempting the defendant employer.\textsuperscript{164} The majority held the small-employer exemption served merely to limit the statutory remedies.\textsuperscript{165} Based on the language of the purpose\textsuperscript{166} and civil rights sections of the statute,\textsuperscript{167} the majority found the WLAD's public policy to be broader than those remedies.\textsuperscript{168} Therefore, it held that even employers who cannot be held liable under the WLAD can be held liable for violating its policy in a common law tort action for wrongful discharge.\textsuperscript{169}

To support its conclusion, the court cited \textit{Bennett v. Hardy},\textsuperscript{170} a case holding that the WLAD's definition of employer did not apply outside the context of the statute.\textsuperscript{171} In \textit{Bennett}, two sisters sued their former employer, who had never employed eight or more employees at any one time.\textsuperscript{172} The sisters alleged two counts of wrongful discharge in violation of public policy: one based on a public policy against age discrimination and one on a public policy against retaliatory discharge.\textsuperscript{173} The age discrimination policy derived not from the WLAD, but from a statute that, although affording no remedy, made terminating an employee between the ages of forty and seventy because of age an unfair employment practice.\textsuperscript{174} The retaliatory-discharge claim derived from

\textsuperscript{162} \textit{Roberts}, 140 Wash. 2d at 67–68, 993 P.2d at 906. The court, citing \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803), noted that where a statute creates a right of recovery, the judiciary is obligated to devise a remedy. \textit{Roberts}, 140 Wash. 2d at 68, 993 P.2d at 907.

\textsuperscript{163} \textit{Roberts}, 140 Wash. 2d at 68–71, 993 P.2d at 907–08.

\textsuperscript{164} \textit{Id.} at 68–69, 993 P.2d at 906.

\textsuperscript{165} \textit{Id.} at 70, 993 P.2d at 908.

\textsuperscript{166} \textit{Id.} § 49.60.010 (2000).

\textsuperscript{167} \textit{Id.} § 49.60.030.

\textsuperscript{168} \textit{Id.} at 70, 993 P.2d at 908.

\textsuperscript{169} \textit{Id.} at 77, 993 P.2d at 911.

\textsuperscript{170} \textit{Id.} at 912, 784 P.2d 1258 (1990).

\textsuperscript{171} \textit{Id.} at 929, 784 P.2d at 1266.

\textsuperscript{172} \textit{Id.} at 917, 784 P.2d at 1259.

\textsuperscript{173} \textit{Id.} at 916, 784 P.2d at 1259.

\textsuperscript{174} \textit{Id.} at 917, 784 P.2d at 1260; \textit{see also} \textit{WASH. REV. CODE} § 49.44.90 (2000).
Dicomes v. State, 175 which recognized a public policy protecting employees discharged in retaliation for reporting employer misconduct. 176 The Bennett court held the sisters' claims were actionable and that the WLAD's definition section "does not operate to restrict 'employer' as used in the separate chapter, 44.90." 177 In its discussion of the public policy against retaliatory discharge, the court noted the Legislature had adopted this policy in the WLAD. 178 Analogizing from Bennett, the Roberts majority reasoned that the WLAD's definition of employer had no impact on a common law tort action brought independently from the WLAD itself. 179

The Roberts majority sought to distinguish Griffin because the defendant relied heavily on Griffin's language to argue the WLAD's public policy protected small employers from discriminatory discharge claims. 180 The Roberts majority held that the Griffin court had not announced a public policy shielding small employers from discrimination claims, but had merely speculated in dicta that the WLAD's eight-employee floor might exist to shield small employers from regulatory burdens or litigation expenses. 181 The Griffin majority reasoned that the issue was whether a WLAD action could be brought against an employer with fewer than eight employees. 182 Therefore, it concluded Griffin did not control whether a plaintiff could maintain an action against an employer with fewer than eight employees for wrongful discharge in violation of public policy when that policy was found in the WLAD. 183

C. The Dissent

Justice Madsen, joined by Justice Guy, dissented. 184 She argued that the court should not allow a common law action for wrongful discharge

175. 113 Wash. 2d 612, 782 P.2d 1002 (1989).
176. Bennett, 113 Wash. 2d at 924, 782 P.2d at 1263 (citing Dicomes, 113 Wash. 2d at 618–19, 782 P.2d at 1004).
177. Id. at 926, 784 P.2d at 1264.
178. Id.
180. Id. at 74, 993 P.2d at 910.
181. Id. at 75, 993 P.2d at 910.
182. Id. at 74, 993 P.2d at 910.
183. Id. at 75, 993 P.2d at 910.
184. Id. at 80–88, 993 P.2d at 912–17 (Madsen, J., dissenting).
based on a mandate of public policy found in a statute explicitly exempting the defendant employer.185 Justice Madsen’s analysis relied on Thompson v. St. Regis Paper Co.,186 which first established Washington’s standard for wrongful discharge in violation of public policy.187 The Thompson court, she reasoned, intended the public policy exception to be applied “narrowly and cautiously.”188 Justice Madsen contended that the majority failed to find a mandate sufficiently clear to meet the Thompson standard because any public policy against discrimination by an employer with eight or fewer employees was “muted” by the WLAD’s small-employer exemption.189

Justice Madsen singled out the majority’s use of the WLAD as particularly “disingenuous.” 190 Justice Madsen maintained that the majority had overstepped its judicial boundaries when it ignored the WLAD’s small-employer exemption and found a clear mandate of public policy against discrimination applicable to all employers regardless of size.191 She argued the Legislature, not the judiciary, should remedy any injustice resulting from the WLAD’s small-employer exemption. 192 Justice Madsen supported her argument by noting that the Legislature had reaffirmed the policy of protecting small employers from discrimination claims by twice failing to pass proposals to eliminate or consider eliminating the small-employer exemption.193

The dissent also attacked several other aspects of the majority’s reasoning, particularly its “strange” assertion that “a definitions section could not be a source of public policy.” 194 Applying principles of statutory interpretation, Justice Madsen argued that the majority had

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185. Id. at 80, 993 P.2d at 913 (Madsen, J., dissenting).
187. See Roberts, 140 Wash. 2d at 80, 993 P.2d at 913 (Madsen, J., dissenting); see also supra notes 28–31 and accompanying text.
188. Roberts, 140 Wash. 2d at 80, 993 P.2d at 913 (Madsen, J., dissenting).
189. Id. at 81, 993 P.2d at 913 (Madsen, J., dissenting).
190. Id. (Madsen, J., dissenting).
191. Id. (Madsen, J., dissenting).
192. Id. (Madsen, J., dissenting).
193. Id. at 85, 993 P.2d at 915 (Madsen, J., dissenting). The majority responded that such failures do not signify a retraction of a policy against discrimination. Id. at 69 n.9, 993 P.2d at 907 n.9. The court further noted: “[I]f this demonstrates any legislative intent at all, it simply indicates that if the bill had been enacted, the legislature would have removed the small employer ‘exemption’ to the provisions of RCW 49.60.” Id.
194. Id. at 81, 993 P.2d at 913 (Madsen, J., dissenting).
rendered the definitions section of the statute meaningless, a result courts should generally avoid. She argued that the WLAD, as interpreted in Griffin, reflected a balancing of employers' and employees' interests. By ignoring this balance, she argued that the majority rejected the Legislature's judgment in favor of its own.

Justice Madsen further supported her opinion with case law from California, where the Supreme Court of California refused to recognize a public policy based on Fair Employment Practices Act (FEHA) which, like the WLAD, explicitly exempted the defendant employer. In Jennings v. Marralle, the Supreme Court of California refused to allow a tort claim for age discrimination in violation of a public policy when that policy was found exclusively in the California FEHA and where the employer had fewer than FEHA's five-employee statutory minimum. Justice Madsen concluded that the court should have followed Jennings's reasoning and held the WLAD could not constitute a clear mandate of public policy against discrimination when the statute specifically exempted the defendant.

In addition to her critique of the majority's use of the WLAD, Justice Madsen argued the equal opportunity statute did not constitute a clear mandate of public policy against discrimination when the statute specifically exempted the defendant.

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195. Id. at 82, 993 P.2d at 914 (Madsen, J., dissenting) (citing Childers v. Childers, 89 Wash. 2d 592, 596-97, 575 P.2d 201, 205 (1978)). An exception to this rule exists when rendering a section meaningless is necessary to avoid constitutional infirmities. Id. (Madsen, J., dissenting).

196. Id. at 83, 993 P.2d at 914 (Madsen, J., dissenting).

197. See id. at 80, 993 P.2d at 912 (Madsen, J., dissenting).

198. See City of Moorpark v. Superior Court, 959 P.2d 752, 756 (Cal. 1998); Jennings v. Maralles, 876 P.2d 1074, 1076, (Cal. 1994). Justice Madsen also referred to an Oklahoma case that reached a similar conclusion. See Roberts, 140 Wash. 2d at 83-84, 993 P.2d at 914-15 (Madsen, J., dissenting) (referring to Brown v. Ford, 905 P.2d 223, 228 (Okla. 1995)).

199. CAL. GOV'T CODE § 12926(d) (West 1992); see also supra notes 115-18 and accompanying text.

200. Roberts, 140 Wash. 2d at 83-84, 993 P.2d at 914-15 (Madsen, J., dissenting).

201. 876 P.2d at 1074 (Cal. 1994).

202. Roberts, 140 Wash. 2d at 84, 993 P.2d at 915 (Madsen, J., dissenting) (citing Jennings, 876 P.2d at 1076). Justice Madsen also noted another California court's holding that "when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action." Id. (Madsen, J., dissenting) (quoting City of Moorpark, 959 P.2d at 762). The California court in Jennings held that age is not entitled to the broad protection given race or sex. 876 P.2d at 1076. The court concluded that, notwithstanding the inclusion of age in the policy and the civil rights provisions of FEHA, there was no legislative intent to establish a new public policy, the violation of which would give rise to a wrongful termination action in tort. Id.

203. Roberts, 140 Wash. 2d at 84, 993 P.2d at 915 (Madsen, J., dissenting).
policy against discrimination by private employers.\textsuperscript{204} The case law had never applied this law in the context of private employers.\textsuperscript{205} Therefore, she concluded, the equal opportunity statute applied only to government action and could not constitute a clear mandate of public policy against private employers.\textsuperscript{206}

IV. WASHINGTON'S PUBLIC POLICY AGAINST DISCRIMINATION BY EMPLOYERS WITH FEWER THAN EIGHT EMPLOYEES CANNOT BE FOUND IN THE WLAD

Although Washington public policy, as manifested in statutes and the Washington Constitution, condemns sex discrimination by all employers, the Roberts majority’s use of the WLAD marks a sharp and ill-advised departure from the narrow public policy exception to the employment-at-will doctrine introduced by Thompson.\textsuperscript{207} The Roberts majority erred in holding that the WLAD represents a clear mandate of public policy against sex discrimination when the defendant employer has fewer than eight employees. In doing so, the majority dramatically and unnecessarily broadened the public policy exception and misapplied its own precedent. The holding raises serious separation-of-powers concerns and creates the possibility of discrimination lawsuits against other exempt groups, including non-profit religious organizations. The Roberts majority correctly held the equal opportunity statute represented a clear mandate of public policy against sex discrimination.\textsuperscript{208} Washington’s ERA embodies another mandate of that public policy.\textsuperscript{209}

A. The Majority Erred in Finding that the WLAD Contains a Sufficiently Clear Mandate of Public Policy To Support a Common Law Wrongful Discharge Tort Action

Any public policy against sex discrimination by small employers found in the WLAD lacks the requisite clarity to support a tort action for wrongful discharge. Thompson explicitly requires a \textit{clear} mandate of

\begin{itemize}
\item \textsuperscript{204} Id. at 87–88, 993 P.2d at 916 (Madsen, J., dissenting).
\item \textsuperscript{205} Id. at 87, 993 P.2d at 916 (Madsen, J., dissenting).
\item \textsuperscript{206} Id. (Madsen, J., dissenting).
\item \textsuperscript{207} See supra notes 47–71 and accompanying text.
\item \textsuperscript{208} See Roberts, 140 Wash. 2d at 67–68, 993 P.2d at 906–07.
\item \textsuperscript{209} See id. at 77–78, 993 P.2d at 911–12 (Alexander, J., concurring).
\end{itemize}
public policy.\textsuperscript{210} Not only is the public policy found in the WLAD unclear with regard to small employers, it arguably indicates a public policy of not subjecting small employers to discrimination suits. The Roberts majority’s reasoning disregards the clear language and legislative intent of the statute, the implications of its own holding in Griffin, and other precedent where courts refused to apply the broad policy derived from statutes to a situation beyond the statute’s breadth.

1. \textit{The Plain Language of the Small-Employer Exemption and Relevant Legislative History Indicate the Legislature Did Not Intend To Regulate Small Employers Through the WLAD}

The Legislature’s deliberate exemption of small employers from the WLAD clouds the statute’s mandate of public policy with regard to small employers and prevents it from providing the clear mandate required by Thompson. The plain language of the WLAD unequivocally exempts small employers from its coverage.\textsuperscript{211} It is unclear whether the Legislature intended to permit small employers to discriminate, chose simply not to address the problems of small employers in the WLAD, or, as the Roberts majority held, merely intended to limit the remedies of the statute and alleviate the WHRC’s regulatory burden.\textsuperscript{212} This lack of clarity, however, is exactly what precludes the WLAD from representing a clear mandate of public policy with respect to small employers. Thus, one need not reach Justice Madsen’s conclusion that the small-employer exemption actually mandates a public policy of shielding small employers from discrimination suits.\textsuperscript{213} Like religious groups and employment relationships within families, small employers were purposefully excluded from the statute. Whether that purpose is obvious, as in the case of nonprofit religious organizations,\textsuperscript{214} or left unclear, as in the case of the small employer,\textsuperscript{215} courts should not presume the legis-

\textsuperscript{211} Wash. Rev. Code § 49.60.040(3) (2000).
\textsuperscript{212} See Roberts, 140 Wash. 2d at 70, 993 P.2d at 908 ("By this section the legislature narrows the statutory remedies but does not narrow the public policy which is broader than the remedy provided.").
\textsuperscript{213} See Roberts, 140 Wash. 2d at 86, 993 P.2d at 916 (Madsen, J., dissenting).
\textsuperscript{214} See supra note 102 and accompanying text.
\textsuperscript{215} See supra notes 106–19 and accompanying text.
lature's inclusion of the exemption was an oversight. Therefore, the court should not have ignored the small-employer exemption when determining the public policy articulated in the WLAD.

Although limited, the available legislative history buttresses this conclusion. The small-employer exemption has been a part of the WLAD since its original enactment. Despite numerous revisions of the statute, the exemption has survived intact. The Legislature rejected two recent attempts to reconsider the exemption. As Justice Madsen noted, the Roberts majority's assertion that the Legislature's consideration of these bills supports the position that the Legislature intended the small-employer exemption to limit only statutory remedies is absurd. Given that both proposals were introduced in direct response to Griffin's holding that the WLAD provides no cause of action against small employers, the Legislature's failure to alter the definition of employer can only strengthen the dissent's suggestion that the exemption represents a public policy protecting small employers. At the very least, the Legislature's failure to provide a remedy to employees of small businesses contradicts any claim of a "clear mandate" to prevent discrimination by small employers. Had the Legislature felt that employees of small employers should be provided a remedy, it would not have passed up the opportunity to change or eliminate the small-employer exemption.

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216. See, e.g., Childers v. Childers, 89 Wash. 2d 592, 596-97, 575 P.2d 201, 205 (1978) (noting that statutes should not be construed to render provisions meaningless except where necessary to avoid constitutional infirmity or reconcile conflicting statutes); Oak Harbor Sch. Dist. v. Oak Harbor Educ. Ass'n, 86 Wash. 2d 497, 500, 545 P.2d 1197, 1199 (1976) (citing Kelleher v. Ephrata Sch. Dist. No. 165, 56 Wash. 2d 866, 873, 355 P.2d 989, 993 (1960)) (presuming legislature does not engage in "vain and useless acts" and that some significant purpose or object is implicit in every legislative act).

217. See supra note 106 and accompanying text.

218. See id.

219. See supra notes 108-12 and accompanying text.


221. See id. at 70, 993 P.2d at 908.

222. See supra note 193.
2. *The Supreme Court of Washington’s Holding in Griffin Further Undermines the Majority’s Claim of a Clear Mandate of Public Policy*

Despite the *Roberts* majority’s efforts to distinguish its holding from the holding of *Griffin v. Eller*, the reasoning of *Griffin* casts further doubt on the clarity of the mandate of public policy found in WLAD. The *Roberts* majority correctly rebutted Justice Madsen’s assertion that *Griffin* constitutes recognition of a public policy wholly protecting small employers from discrimination suits. However, the majority erred in holding that *Griffin* stands solely for the limitation of the WLAD’s remedies. In *Griffin*, the court explicitly acknowledged that the WLAD did not apply to small employers and, in the context of determining the constitutionality of the small-employer exemption, speculated that the Legislature may have sought to protect small employers from the burdens of excessive litigation. Although this speculation in dicta does not represent judicial recognition of a broad policy protecting small employers, it raises, at a minimum, the possibility that the Legislature intended to free small employers from a duty not to discriminate. The statements in *Griffin*, when combined with the express exemption itself, should have prevented the majority from finding in WLAD a clear mandate of public policy sufficient to satisfy the *Thompson* standard.

3. *The Reasoning of Roberts Violates the Principle of Limiting the Public Policy of a Statute to the Circumstances the Statute Seeks To Regulate*

The majority’s holding represents an about-face from *Roe v. Quality Transportation Services* and *Gardner v. Loomis Armored, Inc.*, previous judicial refusals to read broad public policies into statutes that regulate narrow sets of circumstances. Unlike *Roe*, where the court

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223. 130 Wash. 2d 58, 922 P.2d 788 (1996); see also supra notes 180–83 and accompanying text.
224. See *Roberts*, 140 Wash. 2d at 86, 993 P.2d at 916.
225. See id. at 81, 993 P.2d at 913 (Madsen, J., dissenting).
226. See id. at 70–71, 993 P.2d at 908.
227. See supra notes 122–25 and accompanying text.
228. See supra note 126 and accompanying text.
231. See supra notes 47–72 and accompanying text.
refused to apply a policy derived from a statute to circumstances the Legislature had chosen not to address, the Roberts majority interpreted the Legislature's silence as to whether small employers could discriminate as an invitation to provide its own remedy. In Gardner, the court held the public policies of assisting police officers and encouraging rescues, mandated by the statutes plaintiff cited, were limited to the statute's specific circumstances. In contrast, the Roberts majority found the policy of the WLAD to be broader than the circumstances the statute was intended to regulate, that is, employment relations at businesses with eight or more employees.

4. The Roberts Dissent Correctly Criticized the Majority for Finding a Clear Mandate of Public Policy by Reading One Section of the WLAD Outside Its Context

As the dissent noted, the majority's use of the WLAD's purpose section violated the principle that a court should ascertain a statute's legislative purpose by construing the whole statute in order to avoid unintended consequences. By reading the WLAD's purpose section without considering the constraints found elsewhere in the statute, the court attempted to justify its conclusion that small employers are liable for violating the policy of a statute that expressly excludes them. In doing so, the Roberts majority stripped the WLAD of its internal limitations, most notably the statutory definition of employer. From the remnants of the dismantled statute, the court inferred a broad policy against discrimination. It then concluded that because the discharge violated the WLAD's broad purpose, the policy could encompass facts falling outside the statute's scope. The majority's removal of the purpose section from its context obscures the fact that the small-employer exemption clouds the policy of the WLAD with regard to small employers.

235. See Roberts, 140 Wash. 2d at 70, 993 P.2d at 908.
237. See supra notes 163–69 and accompanying text.
B. Bennett Does Not Support the Majority’s Finding of a Clear Mandate of Public Policy Against Discrimination by Small Employers

_Bennett v. Hardy_ 238 does not support the majority’s decision to disregard the WLAD’s definition section when determining the boundaries of the WLAD’s public policy. The court correctly cited _Bennett_ for the proposition that the definition section of the WLAD does not bar a common law action against an employer with fewer than eight employees. 239 However, the plaintiff in _Bennett_ never contended the WLAD represented a clear mandate of public policy against either age or retaliatory discrimination. 240 The _Bennett_ court simply held that the WLAD’s definition of employer could not limit the public policy found outside of the WLAD. 241 This holding differs dramatically from the _Roberts_ court’s holding that the definition section of the WLAD does not limit the policy found in the WLAD itself. 242

Contrary to the majority’s assertion, _Bennett_ does not support the argument that the WLAD can form a basis for public policy where the employer is excluded from the WLAD’s coverage. 243 Having already established, without citing the WLAD, that a public policy against retaliatory discharge existed, the _Bennett_ court noted in dicta that the Legislature had explicitly chosen to adopt this policy into the WLAD. 244 By taking this minor premise out of context, the _Roberts_ majority wrongly supported its unprecedented finding that a clear mandate of public policy can be found in a statute expressly exempting a potential target of that policy.

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238. 113 Wash. 2d 912, 784 P.2d 1258 (1990).
239. _Roberts_, 140 Wash. 2d at 72, 993 P.2d at 908.
240. See supra notes 177–79 and accompanying text.
241. _Bennett_, 113 Wash. 2d at 926, 784 P.2d at 1264.
242. _Roberts_, 140 Wash 2d at 68–71, 993 P.2d at 907–08.
243. See supra note 179 and accompanying text.
244. See supra note 178 and accompanying text.
C. The Roberts Majority's Use of the WLAD Represents a New Application of the Tort of Wrongful Discharge in Violation of Public Policy and the Doctrine of Separation of Powers

The Roberts majority, in a rush to accomplish the equitable goal of holding all employers liable for sex discrimination, opened a Pandora's box of legal and policy problems. In addition to threatening religious organizations and family businesses with greater tort liability, the court's holding considerably broadens the public policy exception to the employment-at-will doctrine. The result is a decision that not only undermines the legislative purpose of the WLAD, but greatly expands the role of the court as a policymaking body, a role it should not play. The holding also introduces tort causes of action for all other discriminatory actions prohibited by the WLAD.

The Roberts court's holding raises serious separation-of-powers issues by using the public policy exception to fill a gap deliberately left in the statute by the Legislature. The Roe court recognized this problem and refused to find a policy protecting employees from drug testing because the Legislature, while aware of the issue, chose not to regulate it. In the case of the WLAD, the Legislature had not merely passively ignored an issue, as it did with employee drug testing, but actively created a specific exemption for certain employers. This is distinct from the situation found in Thompson, where a legislative act inadvertently affected employment relations while regulating an unrelated area of law. The WLAD both directly regulates employment relationships and provides remedies for violations of the rights it creates. In the WLAD, as Justice Madsen noted, the Legislature reached a balance between the rights of employees and employers, a balance reflecting the Thompson standard. The Roberts decision, therefore, represents a new application of the tort of wrongful discharge in violation of public policy: filling statutory gaps where the court determines the statutory remedy does not adequately reflect the Legislature's intent.

247. Supra Part I.C.
249. E.g., id. at 78–79, 993 P.2d at 912 (Talmadge, J., concurring).
The implications of *Roberts* illustrate why courts should construe public policies narrowly and limit the policies' scope to the scope of the statutes from which they are drawn. After *Roberts*, other exempt groups, particularly religious organizations and persons employing spouses, children, or parents, are vulnerable to suits for wrongful discharge in violation of the WLAD's public policy. Washington courts must now balance a common law action based on the WLAD against the policies insulating family members or religious groups from discrimination claims. The exemption for nonprofit religious and sectarian organizations, however, represents a legislative desire to uphold separation of church and state, a fundamental tenet of American democracy. Had Roberts accused a fundamentalist church of discharging her based on her conversion to another religion, the court could not have so blithely disregarded the policy set forth in the definition section. Nevertheless, under *Roberts*, a religious employer who discriminates, although protected from the WLAD's statutory remedies, may be liable in common law tort for wrongful discharge in violation of the WLAD's policy against religious discrimination.

Furthermore, although the majority held that *Roberts* supports tort claims only for wrongful discharges and not for other manifestations of employment discrimination, the court's reasoning is inconsistent. In discussing the equal opportunity statute, the court reasoned that where the Legislature created a right without a remedy, the judiciary must create a remedy. The WLAD expressly creates a broad right to be free of discrimination in employment extending beyond discharges to failure to hire, failure to promote, and wrongful demotions. If small employers are not exempt from this policy and the judiciary has a duty to create a remedy where the Legislature has failed to do so, the *Roberts*

250. *Id.* at 79, 993 P.2d at 912 (Talmadge, J., concurring).
251. See WASH. REV. CODE § 49.60.040(3) (2000).
252. See *id.* § 49.60.040(4).
253. See Farnam v. CRISTA Ministries, 116 Wash. 2d 659, 676-677, 807 P.2d 830, 838 (1991) (regarding Christian nursing home exempt from WLAD-based cause of action arising from discharge for religion-based objection to removing feeding tubes from patients); see also U.S. CONST. amend I.
254. See WASH. REV. CODE § 49.60.010.
255. *Id.* § 49.12.200.
257. See WASH. REV. CODE § 49.60.180.
court's judicial remediation means that a job applicant of a small employer could also sue in tort for discriminatory failure to hire. 258


Justice Madsen's rejection of both the equal opportunity statute and the ERA, on the grounds that they do not apply to private employers, was unfounded. The plain language of these statutes strongly evinces a public policy against treating men and women differently. As the Roberts majority noted, the language of the equal opportunity statute as well as its location in a chapter regulating the industrial practices of private corporations indicates it is applicable to private and public employers. No case law or legislative history indicates private employers are beyond its reach.

Justice Madsen, although correct in her concern about the majority's use of the WLAD, erred in arguing the small-employer exemption mutes Washington's public policy against sex discrimination. As the Bennett court found, the WLAD's explicit provision that it not repeal any other anti-discrimination laws 259 prohibits the application of the small-employer definition beyond the WLAD. 260 Therefore, a wrongful-discharge claim based on a clear mandate of public policy drawn from a statute other than the WLAD would be enforceable against any employer, provided there was not a similar provision exempting the employer from the scope of that statute. 261 The Supreme Court of California employed this line of reasoning in Jennings v. Marrall 262 where it held that, had the plaintiff identified a public policy against age discrimination outside FEHA, then FEHA's small-employer exception would not block a common law wrongful discharge claim. 263

A legally sound middle ground exists between the majority's distortion of the WLAD's policy and the dissent's refusal to recognize a

259. WASH. REV. CODE § 49.60.020.
260. See supra notes 170-79 and accompanying text.
261. See supra notes 201-02 and accompanying text.
262. 876 P.2d 1074 (Cal. 1994).
263. See id. at 1076.
broad policy against sex discrimination in Washington. The court should have reached the same result on much narrower grounds by allowing an action for wrongful discharge in violation of public policy based on the public policy against sex discrimination in the equal opportunity statute. The Legislature, through the equal opportunity statute, created a right to be free from sex discrimination in employment but trusted the courts to remedy employers’ violations of that policy.264 Because case law is so sparse,265 the Roberts dissent’s objection that cases interpreting the equal opportunity statute have all been applied only to public employers is unpersuasive.266 Based on Bennett, the court could have addressed the WLAD only to note that its small-employer exemption cannot block a common law action based on a separate statute. Unlike the WLAD, the equal opportunity statute contains no limiting provision exempting any employers—public or private, large or small—from the duty to allow women the same employment opportunities given to men.267 Therefore, under the equal opportunity statute, even a small employer such as Dudley has a duty not to discriminate on the basis of sex. A discharge on that basis is tortious and violates the public policy of Washington.268 Rather than reading the WLAD to imply a broader public policy than its remedies allow, thereby jeopardizing other exempted groups, the court should have used the equal opportunity statute to achieve the same result.

Although the judiciary prefers not to decide cases on constitutional grounds,269 the Washington Constitution’s ERA provides a second mandate of public policy against sex discrimination in employment. Again, the clear language of the amendment ensures women receive equal treatment. In Guard v. Jackson,270 the Supreme Court of Washington explicitly recognized that the ERA unequivocally condemns sex discrimination.271 Thus, the ERA also creates a mandate of public policy against sex discrimination sufficient to meet Thompson’s clarity requirement for a tort of wrongful discharge in violation of public policy. Either the equal opportunity statute or the ERA would have been

264. WASH. REV. CODE § 49.12.200; see also supra notes 74–78 and accompanying text.
265. Supra notes 74–79 and accompanying text.
267. Supra note 76 and accompanying text.
268. Roberts, 140 Wash. 2d at 67, 993 P.2d at 906.
269. Id. at 62 n.2, 993 P.2d at 904 n.2.
271. Id. at 330–31, 921 P.2d at 547.
sufficient grounds for upholding an exception to employment at will in \textit{Roberts}.

V. CONCLUSION

Given \textit{Thompson}'s "clear mandate" and the plain language of the small-employer exemption, the \textit{Roberts} majority's justifications for determining that the WLAD is a sufficiently clear mandate of public policy to support a tort of wrongful discharge are not convincing. Although the WLAD may indicate a general policy against employment discrimination, the exemption for small employers, held constitutionally sound and surviving years of statutory revisions, should have precluded the court from finding a clear mandate of public policy in the WLAD against sex discrimination by small employers. Instead, \textit{Roberts} gives courts free rein to create remedies and public policies where they see fit, by dissecting statutes without the support of legislative history or case law. It also unnecessarily exposes other exempted groups to tort liability. Ironically, the court could have avoided these problems by finding that the WLAD's definitions do not insulate small employers from common law tort claims based on other laws' public policies against discrimination. Instead, it chose to set a precedent that broadened the holding of \textit{Thompson} to give Washington courts the ability to construe public policy too broadly and thereby threaten the balance of powers on which the government is founded.