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DIVISION II
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DAVID TAFOYA AND FARIS TAFOYA,

Appellants,

v.

WASHINGTON STATE HUMAN RIGHTS COMMISSION,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Washington State Human Rights Commission (Commission) seeks to hold landlords David and Faris Tafoya (collectively the Tafoyas) accountable for the sexual harassment of their tenant Mary Gossard (Ms. Gossard). The Tafoyas seek to avoid responsibility for their actions by ignoring the evidentiary record and misapplying the Washington Law Against Discrimination, RCW 49.60.010, *et seq.* (the WLAD).

This Court should reject the Tafoyas' attempt to characterize their conduct as a matter of a few offensive comments, as well as their narrow construction of the WLAD. The Administrative Law Judge (ALJ) properly applied the WLAD in finding that the Tafoyas engaged in sexual harassment against Ms. Gossard and then retaliated against her after she complained about their behavior. Substantial evidence supports these findings. This Court should affirm the ALJ's Final Order in all respects.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether a landlord unlawfully discriminates against a tenant by creating a hostile living environment, where substantial evidence demonstrates the tenant was subjected to repeated, unwanted sexually suggestive comments and physical touching?
2. Whether a landlord unlawfully retaliates against a tenant, where, after the tenant reported discriminatory conduct, substantial evidence demonstrates the landlord took a series of adverse actions affecting the tenant's use and enjoyment of the rental property?

III. COUNTERSTATEMENT OF THE CASE

A. The Commission's Authority To Investigate Complaints

The Legislature established the Commission to eliminate and prevent discrimination in a variety of settings, including in real property transactions. RCW 49.60.010. A person alleging discrimination in violation of the WLAD may file a complaint with the Commission. RCW 49.60.230. The Commission may also issue its own complaint if it has reason to believe that any person has engaged in an unfair practice. RCW 49.60.230(1)(b). The Commission is required to investigate housing discrimination complaints. RCW 49.60.230(2); RCW 49.60.240(1)(c). Upon completion of an investigation, the Commission issues written findings. RCW 49.60.240(2). If the evidence does not support the charge of discrimination, the Commission issues a finding of “no reasonable cause” to believe discrimination occurred. *Id.* If the Commission finds that there is reasonable cause to believe discrimination occurred, it seeks to resolve the complaint by agreement. RCW 49.60.240(3). If no agreement is reached as to the unfair practice alleged, the complaint is referred for a hearing conducted before an ALJ pursuant to the state Administrative Procedure Act (APA), RCW 34.05.410 *et seq.* Following a hearing, a preliminary decision is issued. After a thirty-day time period that allows for the receipt of comments from the parties regarding the

preliminary decision, an ALJ issues the final decision. WAC 162-08-291; WAC 162-08-298; WAC 162-08-301. A request for judicial review of that decision, if any, can be taken to the superior court. RCW 49.60.270.

B. Factual Statement

In February 2006, Ms. Gossard responded to the Tafoyas' newspaper ad for a rental home. AR 426-27.¹ The rental home sat on the same property as the Tafoyas' residence. AR 431. The Tafoyas agreed to rent the property to Ms. Gossard and a lease was signed, effective March 1, 2006. AR 33-38. Both David and Faris Tafoya were listed in the lease as landlords. *Id.* The Tafoyas allowed Ms. Gossard to move in on February 17, 2006. AR 433. From the day Ms. Gossard moved into the rental home, Mr. Tafoya subjected her to repeated, unwanted sexual touching and other sexual gestures. Examples of this conduct from the record include:

- On the day Ms. Gossard moved into the rental home, Mr. Tafoya hugged her twice. AR 811-12, 436, 626. During one of the hugs, he grabbed her buttocks. AR 626, 812.
- Mr. Tafoya poked Ms. Gossard in the stomach and told her she looked like the Pillsbury Doughboy. AR 509.

¹ "AR" refers to the Certified Administrative Record. The Commission's Final Findings of Fact, Conclusions of Law, and Decision and Order ("Final Order") is at AR 359-97. "CP" refers to the Thurston County Superior Court's Clerk's Papers.

- Ms. Gossard knocked on the Tafoyas' door and Mr. Tafoya answered completely naked. AR 458-59.
- Mr. Tafoya invited Ms. Gossard into his RV to look at some art. AR 470-471. Inside, Ms. Gossard saw sexually charged paintings, including one of Ms. Tafoya in a bikini touching herself and another of a naked woman with her legs spread open. AR 470-71. Mr. Tafoya pushed Ms. Gossard onto the bed and sat down next to her. AR 471. Ms. Gossard fled immediately and shortly thereafter called a sexual abuse hotline. AR 471.

Mr. Tafoya also subjected Ms. Gossard to a series of unsolicited sexual comments, examples of which include:

- During the lease signing, Mr. Tafoya asked Ms. Tafoya if she minded if he chased Ms. Gossard around a pond on the property. Ms. Gossard told Mr. Tafoya that was not okay with her. AR 461.
- On the day Ms. Gossard moved into the Tafoyas' rental home, Mr. Tafoya made comments about women being stupid. AR 435.

- Mr. Tafoya once told Ms. Gossard, “I’ve seen your pussy” after Ms. Gossard answered the front door of the rental home. AR 442.
- When Ms. Gossard had an overnight visitor, Mr. Tafoya suggested that she was a prostitute. AR 468.
- Mr. Tafoya told Ms. Gossard that his wife was going through menopause and that they did not have sex. AR 508-09.
- Mr. Tafoya told Ms. Gossard the he “couldn’t get her out of his mind.” He also told her, “I’ve been thinking about you a lot.” AR 437-39.
- Mr. Tafoya called Ms. Gossard while she was playing the piano in her home and said, “[y]our piano playing was beautiful. I made love to you several times while I was listening to you. I could even taste you.” AR 452.
- Mr. Tafoya called Ms. Gossard late one night and invited her over for drinks telling her that he wanted to “party.” AR 453-55, 474-75.
- On another occasion, Mr. Tafoya called Ms. Gossard and asked her to come over to his house. AR 462. Ms. Gossard replied that she was in her bathrobe. AR 462. Mr. Tafoya said that she could come over in her bathrobe. AR 462-63.

- Mr. Tafoya told Ms. Gossard that he liked pornography and that on some nights he thought of her, watched pornography, and masturbated. AR 459-60.

Mr. Tafoya's comments and actions made Ms. Gossard feel uncomfortable and threatened and she repeatedly rejected them. AR 437-39, 453, 459-63, 475-76. Ms. Gossard also called Ms. Tafoya and told her about Mr. Tafoya's behavior, at which point Ms. Tafoya accused Ms. Gossard of pursuing Mr. Tafoya. AR 478-79.

Shortly thereafter, Ms. Gossard filed a complaint with the Commission in June 2006 based on the conduct of the Tafoyas. AR 40, 483-84. Within a month of filing her complaint with the Commission, the Tafoyas began taking adverse actions against Ms. Gossard. The Tafoyas locked gates on the property barring Ms. Gossard's access to a pond and garden that she had previously been allowed to access. AR 494-95. They prevented Ms. Gossard from accessing berry bushes after having previously given her permission to pick from them. AR 849-50. They stopped mowing the yard of her rental home. AR 489-90. They locked Ms. Gossard's bicycle in a storage shed. AR 492-94. They threatened to throw rocks at Ms. Gossard's cat. AR 496-97. They took down chicken wire that had been put up on the fence along the road to prevent Ms. Gossard's cat from going into the road. AR 498-99. In mid-July, the

Tafoyas informed the Commission's investigator that they intended to evict Ms. Gossard. AR 712.

Additionally, the Tafoyas made direct contact with Ms. Gossard's estranged husband, Scott MacGregor. AR 847-48. Ms. Gossard had previously told the Tafoyas that she had a protection order against Mr. MacGregor and that she did not want him to know where she lived because she feared that Mr. MacGregor would hurt her. AR 363, 449. In spite of that information, the Tafoyas contacted Mr. MacGregor while Ms. Gossard was still living on the rental property. AR 847-48. The Tafoyas then sent a letter to the Commission with information about Ms. Gossard they obtained from Mr. MacGregor. AR 60, 848-49. Finally, in late August 2006, Ms. Gossard moved out of the Tafoyas' rental property based on their behavior towards her. AR 510-11.

C. Procedural History

Ms. Gossard filed a complaint against the Tafoyas with the Commission alleging discrimination and retaliation under the WLAD. AR 40. After conducting an investigation of Ms. Gossard's complaint, the Commission issued an Amended Complaint and Notice of Hearing. AR 5-9. The Amended Complaint alleged that the Tafoyas committed unfair practices against Ms. Gossard by engaging in a series of discriminatory and retaliatory acts in violation of the WLAD. AR 5-9.

After an administrative hearing, the ALJ's Final Order concluded that the Tafoyas had sexually harassed Ms. Gossard in violation of RCW 49.60.222(1)(b), (f), and (k), and had retaliated against her for her complaint in violation of RCW 49.60.2235. The Final Order also concluded that Ms. Tafoya aided and abetted Mr. Tafoya's acts of harassment and retaliation in violation of RCW 49.60.220. Based on conflicting testimony at the administrative hearing, the Final Order expressly found that Ms. Gossard's testimony was credible and corroborated by other witnesses and that the Tafoyas' denials and descriptions of the incidents were not credible. AR 377.

Following these determinations, Ms. Gossard was awarded monetary damages of \$13,422.74,² including damages of \$10,000 for humiliation and emotional distress. The Tafoyas were also ordered to pay a civil penalty of \$10,000. AR 389-94.

The Tafoyas timely petitioned for judicial review in Thurston County Superior Court. CP 3-44. Following briefing and argument of the parties, the superior court reduced Ms. Gossard's inconvenience damages from \$1,320.00 to \$1,012.00 but affirmed the Final Order in all other

² The monetary damages included damages of \$707 for a moving truck and piano mover, inconvenience damages of \$1,320, \$1,120.75 for the cost of Ms. Gossard to attend the hearing, \$209 for Ms. Gossard's documented time in participating in the investigation and hearing process, and \$66 for therapy sessions.

respects. CP 101-04. The Tafoyas thereafter filed a Notice of Appeal of the Final Order. CP 105-11.

After that Notice of Appeal, the superior court entered an Order of Judgment for \$23,114.75 against the Tafoyas. CP 137-38. The Tafoyas timely appealed that Order of Judgment. CP 139-43. The two separate appeals were consolidated for consideration.

IV. STANDARD OF REVIEW

Judicial review of an agency order is governed by the APA. RCW 34.05.570. The party asserting the invalidity of the agency's action has the burden of demonstrating such invalidity based on the grounds outlined in RCW 34.05.570(3). RCW 34.05.570(1)(a)-(b), (3). When reviewing an agency's decision, an appellate court sits in the same position as the superior court and applies the standards of review directly to the agency record. *Tapper v. State Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

Questions of law are reviewed *de novo*. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982). Notwithstanding the *de novo* standard of review for questions of law, courts grant substantial weight to an agency's interpretation of the statutes it administers. *Pub. Utility No. 1 of Pend Oreille County v. State Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). Here, the Commission

is charged with, and has expertise in, administering the WLAD and the court should accord substantial weight to the Commission's application of that law. *See* RCW 49.60.010; RCW 49.60.120.

In order for a finding to be reviewed by this Court, an appellant must assign error to a specific finding; otherwise, the finding is considered a verity on appeal. RAP 10.3(g). The standard of review for an agency's factual findings is the "substantial evidence" test. *See* RCW 34.05.570(3)(e). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the order. *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.2d 1156 (2002). The substantial evidence standard is "highly deferential" to the agency fact finder. *ARCO Prods. Co. v. Wn. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). When reviewing an agency's factual findings, the court does not reweigh the evidence but instead is limited to assessing whether the evidence satisfies the applicable burden of proof. *Ancier v. Dep't of Health*, 140 Wn. App. 564, 574, 166 P.3d 829 (2007). The reviewing court accepts the fact-finder's determinations of witness credibility. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

V. ARGUMENT

Mr. Tafoya violated the WLAD by sexually harassing Ms. Gossard through his repeated and unsolicited sexual comments and through his physical touching of her. His conduct should be imputed to Ms. Tafoya, who herself aided and abetted Mr. Tafoya's harassment of Ms. Gossard. The Tafoyas compounded their violations by engaging in a series of retaliatory acts against Ms. Gossard when she complained about the discriminatory conduct to the Commission. The Tafoyas' arguments to the contrary are not supported by the record or the law.

A. **The Tafoyas Discriminated Against Mary Gossard In A Housing Transaction On The Basis Of Her Gender**

The Tafoyas violated three sections of the WLAD when they sexually harassed Ms. Gossard. First, they violated RCW 49.60.222(1)(b), which makes it unlawful to "discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith." A real estate transaction includes the rental of real property. RCW 49.60.040(21). Second, the Tafoyas violated RCW 49.60.222(1)(f), which makes it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny a dwelling, to any person; or to a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or to any

person associated with the person buying or renting.” Finally, the Tafoyas violated RCW 49.60.222(1)(k), which makes it unlawful to “attempt to do any of the unfair practices defined in this section.” As discussed further below, the Tafoyas’ sexual harassment of Ms. Gossard violated each of these sections by interfering with the terms, conditions, or privileges associated with renting their property.

1. Sexual harassment is a form of gender discrimination prohibited under the WLAD.

a. An overview of the WLAD.

The Washington State Legislature enacted the WLAD to address discrimination on the basis of “race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap.” RCW 49.60.010. The WLAD applies to real estate transactions, including the renting of real property. RCW 49.60.222. The Legislature mandated that the state’s anti-discrimination laws “shall be construed liberally.” RCW 49.60.020. The WLAD embodies a public policy of the “highest priority.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996). Washington courts have consistently acknowledged the requirement to broadly construe the WLAD to effectuate its purposes of deterring and eradicating discrimination. *Blaney v. Int’l Ass’n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203,

214, 87 P.3d 757 (2004); *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 246, 59 P.3d 655 (2002).

The federal Fair Housing Amendments Act of 1988 (FHAA) is the federal counterpart to the WLAD's fair housing provisions. 42 U.S.C. § 3601, *et seq.* The Commission works with the Department of Housing and Urban Development (HUD) to eliminate housing discrimination. HUD refers housing cases to the Commission for investigation and enforcement and provides funds necessary to perform investigations. As a prerequisite to working with HUD, Washington's fair housing laws must be, and must remain, substantially equivalent to the FHAA in rights protected and remedies available. 42 U.S.C. § 3610(f); 24 C.F.R. § 115.101. Both the FHAA and the WLAD prohibit discrimination in housing and provide remedies for unlawful or unfair practices.

b. Sexual harassment in the housing context under the WLAD.

The WLAD and the FHAA prohibit gender-based discrimination in the rental of a dwelling and in the provision of services in connection with a rental property. RCW 49.60.222; 42 U.S.C. § 3604(b). No Washington cases to date have addressed sexual harassment as a form of gender-based discrimination under the WLAD in the housing context. Federal courts,

however, have long recognized a cause of action for sexual harassment in the housing context under the FHAA – specifically, under 42 U.S.C. § 3604(b), the federal counterpart to RCW 49.60.222(1)(b). *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993) (recognizing that sexual harassment in the housing context may create a hostile housing environment claim); *Quigley v. Winter*, 598 F.3d 938, 946 (8th Cir. 2010) (concluding that a claim for hostile housing environment created by sexual harassment is actionable under the FHAA); *Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997) (recognizing that sexual harassment in the housing context can violate the FHAA); *Williams v. Poretzky Management, Inc.*, 955 F.Supp. 490, 495 (D.Md. 1996) (recognizing sexual harassment as actionable under the FHAA); *Beliveau v. Caras*, 873 F.Supp. 1393, 1397 (C.D.Cal. 1995) (concluding that sexual harassment is a form of discrimination regardless of context).

In instances where Washington statutes and regulations have the same purpose as their federal counterparts, Washington courts may look to federal decisions to determine the appropriate construction. *Fahn v. Cowlitz County*, 93 Wn.2d 368, 376, 610 P.2d 857 (1980). Moreover, because the fair housing sections of the WLAD are patterned after the FHAA, decisions interpreting the FHAA are persuasive authority for the construction of the fair housing sections of the WLAD. *See Xieng v.*

Peoples Nat. Bank of Washington, 120 Wn.2d 512, 518, 844 P.2d 389 (1993) (concluding that federal case law is relevant in a national origin discrimination claim under the WLAD); *Allison v. Housing Auth.*, 118 Wn.2d 79, 88, 821 P.2d 34 (1991) (finding that federal cases may be used as guidance in a discharge claim under the WLAD); *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988) (finding it proper to look to federal cases in an age discrimination claim under the WLAD). Based on the above, a cause of action for sexual harassment as a form of gender-based discrimination under the WLAD should be formally recognized by this Court.

2. The elements of a sexual harassment claim under the WLAD should mirror the elements of a sexual harassment claim in the employment setting.

In Washington, there are four elements necessary to prove sexual harassment in the workplace; the harassment must: 1) be unwelcome; 2) be because of sex; 3) affect the terms or conditions of employment; and 4) be imputable to the employer. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985). As to the first element, the harassment must be unwelcome, in that the employee did not solicit or incite it, and be undesirable or offensive to the employee. *Id.* As to the second element, gender must be the motivating factor for the unlawful discrimination. *Id.* As to the third element, the harassment must be

sufficiently severe and pervasive. *Id.* As to the fourth element, where someone personally participates in the harassment, or knew or should have known of the harassment, the element is proven. *Id.*

As Washington courts and federal courts look to employment discrimination cases for guidance when considering similar issues in other discrimination contexts, it is proper for the Court to adopt the test used in workplace sexual harassment cases to sexual harassment cases brought in the housing context. *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 632, 911 P.2d 1319 (1996); *Honce*, 1 F.3d at 1088-89; *Williams*, 955 F.Supp. at 495-6. Applying the workplace sexual harassment elements to the housing context, the proposed test requires the Commission staff to prove that the Tafoyas' conduct: was unwelcome; was based on Ms. Gossard's gender; and affected the terms, conditions, or privileges of Ms. Gossard's housing. The test also requires proof that the harassing conduct should be imputed to the Tafoyas because they either personally participated in the conduct, or knew or should have known about it.

3. The Tafoyas' conduct satisfies every element of a sexual harassment claim.

The improper conduct directed at Ms. Gossard by the Tafoyas' satisfies each element required to prove sexual harassment in the housing context. First, Mr. Tafoya made unwelcome advances to Ms. Gossard,

which included inappropriate sexual comments, invitations, and touching. Ms. Gossard repeatedly informed Mr. Tafoya that his conduct was inappropriate and unwanted. AR 437-39, 452-53, 459-63. Second, Mr. Tafoya's harassment of Ms. Gossard was based on her sex because the actions were of a sexual nature, including his grabbing of her buttocks, answering his door naked, and showing her nude paintings. AR 458-59, 470-71, 626, 812. Additionally, the record demonstrates that Mr. Tafoya subjected other female tenants to offensive conduct. AR 78-87, 621-28, 649-53.

Third, Mr. Tafoya's conduct was sufficiently severe and pervasive to affect the terms, conditions, and privileges of Ms. Gossard's tenancy. In determining whether harassment is sufficiently severe or pervasive, "the fact finder must examine the evidence from both the objective perspective and from the point of view of the victim." *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *aff'd in relevant part, vacated on other grounds*, 900 F.2d 27 (1990) (sexual harassment employment discrimination claim under Title VII).

To be considered severe or pervasively hostile, the harassing conduct must create an environment that a reasonable person would find hostile or abusive. *Harris v. Forklift Systems*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (sexual harassment employment

discrimination claim under Title VII). The victim must also subjectively perceive the environment to be abusive. *Id.* Proof of psychological injury is not necessary and no single factor is required. *Harris*, 510 U.S. at 22. Rather, an abusive environment may be established by looking at all the circumstances of the harassment including the frequency of the discriminatory conduct, its severity, and whether it is physically threatening or humiliating. *Harris*, 510 U.S. at 23. Courts have recognized that sexual harassment in a housing environment is a complete invasion of a person's life and may have more severe effects than harassment in the workplace. *Williams*, 955 F.Supp. at 498; *Beliveau*, 873 F.Supp. at 1397 (C.D.Cal.1995).

Here, over the course of just a few months, Ms. Gossard endured numerous sexual innuendos, comments and overtures made by Mr. Tafoya that were both severe and pervasive in nature. Mr. Tafoya's sexual comments to Ms. Gossard included: his suggestion that she was a prostitute; that he imagined himself making love and tasting Ms. Gossard; and that he masturbated while thinking about Ms. Gossard and watching pornography. AR 452, 459-60, 468.

Ms. Gossard was also subjected to Mr. Tafoya's sexualized actions, including: his answering the door naked; his grabbing of Ms. Gossard's buttocks; and his pushing Ms. Gossard down on a bed in his RV

after showing her paintings of a sexual nature. AR 458-59, 470-71, 626, 812. As articulated by one federal court, “[t]here are few clearer examples of classic sexual harassment than an unpermitted, allegedly intentional, sexual touching.” *Beliveau*, 873 F. Supp. at 1398 . A reasonable person would find that Mr. Tafoya’s unwelcome sexual comments and touching of Ms. Gossard were both pervasive and severe, and led to a hostile living environment for her. Ms. Gossard subjectively found these actions to be offensive as well. AR 435, 437-39, 443, 453, 455, 459-63, 475-76.

The fourth element of a sexual harassment claim in a housing context requires that the conduct be imputed to the landlord. As Mr. Tafoya engaged in the improper conduct and was a landlord of the property, no imputation is necessary as to him. Further, as co-landlord of the rental property, Ms. Tafoya knew or should have known about her husband’s conduct. In addition, she learned of the harassment directly from Ms. Gossard and did nothing to stop it. *Glasgow*, 103 Wn.2d at 407; *see also Williams*, 955 F. Supp. at 496-97 (noting that under the Fair Housing Act conduct is imputable to a landlord if the landlord knew or should have known of harassment and took no effectual action to correct it). Under these circumstances, Mr. Tafoya’s violation of RCW 49.60.222(1)(b) should be imputed to Ms. Tafoya.

4. The Tafoyas' narrow construction of the WLAD ignores the plain language of the statutes and must be rejected.

The Tafoyas suggest that discrimination may not be alleged under RCW 49.60.222(1)(b) unless the complainant is denied the opportunity to rent or otherwise reside in the subject property. Apls' Br. at 22.³ In so arguing, the Tafoyas ignore the plain language of the statute, which prohibits discrimination in the "terms, conditions, and privileges" of a rental transaction. RCW 49.60.222(1)(b). The Tafoyas' narrow construction also conflicts with the mandate that the WLAD be construed liberally so as to effectuate its purpose. Federal courts confronting such an argument have specifically held that that 42 U.S.C. § 3604(b), the parallel provision to RCW 49.60.222(1)(b), does cover post property acquisition conduct. *The Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009) ("The inclusion of the word "privileges" implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling.").

By subjecting Ms. Gossard to sexual harassment, the Tafoyas' behavior altered the conditions and privileges associated with Ms. Gossard's rental of the property. She was deprived of her ability to live in her own home free from the constant fear of disturbance or torment by her

³ All citations to the "Apls' Br." are to the Appellants' Amended Opening Brief dated July 9, 2012.

landlord. The Tafoyas disregard that a discrimination claim may exist relating to the conditions or privileges associated with renting a dwelling, and likewise fail to address the ALJ's findings that their conduct met each of the elements of a sexual harassment claim.

The Tafoyas also argue that they did not violate RCW 49.60.222(1)(f) because they never "made unavailable or denied a dwelling to Gossard." Apts' Br. at 22. In so arguing, the Tafoyas again ignore the plain language of the WLAD. RCW 49.60.222(1)(f) specifically prohibits discrimination in the sale or rental of property "*after* it is sold, rented, or made available. . . ." RCW 49.60.222(1)(f) (emphasis added). Finally, the Tafoyas generally assign error to the conclusion that they violated RCW 49.60.222(1)(k), but fail to address RCW 49.60.222(1)(k) in their briefs.⁴

For the reasons discussed previously, the evidence supports the fact that the Tafoyas violated RCW 49.60.222(1)(b), (f), and (k) through their sexual harassment of Ms. Gossard during the time she resided on their rental property.

⁴ "If a party fails to support assignments of error with legal arguments, they will not be considered on appeal." *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn. 2d 619, 818 P.2d 1056 (1991) citing *Schmidt v. Cornerstone Ins., Inc.*, 115 Wn.2d 148, 795 P.2d 1143 (1990). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533 (1998) citing *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

B. The Tafoyas Retaliated Against Ms. Gossard For Complaining About Their Discriminatory Conduct In Violation Of State Law

The Tafoyas assign error to the conclusion that they retaliated against Ms. Gossard in violation of RCW 49.60.2235, but they neither assign error to the supporting findings of fact, nor discuss the retaliation issue in their briefs. Nevertheless, the Commission provides the following in response to the Tafoyas' assignment of error.

1. The Tafoyas took adverse actions against Ms. Gossard.

Both the WLAD and the FHAA prohibit retaliation in fair housing cases and make it unlawful to coerce, intimidate, threaten, or interfere with any person on account of that person having exercised or enjoyed his or her rights under the fair housing laws. RCW 49.60.2235; 42 U.S.C. § 3617. To establish a prima facie case of retaliation under the WLAD, it must be shown that: (1) the complainant engaged in a protected activity; (2) the respondent accused of discrimination subjected the complainant to an adverse action; and (3) there is a causal link between the protected activity and the adverse action. *See Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 482, 205 P.3d 145 (2009) (employment discrimination claim under the WLAD); *see also Walker v. City of Lakewood*, 272 F.3d 1114, 1128 (9th Cir. 2001). Challenging or opposing discriminatory practices is a protected activity. *Burchfiel*, 149 Wn. App. at 482. Reporting

discrimination is also a protected activity. *Davis v. West One Automotive Group*, 140 Wn. App. 449, 460, 166 P.3d 807 (2007).

Each element of a retaliation claim has been established. First, Ms. Gossard engaged in protected activity by reporting Mr. Tafoya's harassing conduct to Ms. Tafoya and by filing a complaint against the Tafoyas with the Commission. AR 40, 478-79, 483-84. Second, after engaging in this protected activity, evidence in the record demonstrates that the Tafoyas retaliated against Ms. Gossard through a number of adverse actions which directly affected her use and enjoyment of the rental property. For example, the Tafoyas locked gates that limited Ms. Gossard's access to the pond and garden on the rental property, threatened Ms. Gossard's cat, locked Ms. Gossard's bicycle in a storage shed, and took down chicken wire that had been put up on the fence along the road to prevent Ms. Gossard's cat from going into the road. AR 494-95, 492-94, 498-99. The Tafoyas also telephoned Ms. Gossard's estranged husband while Ms. Gossard was residing on their rental property, potentially compromising Ms. Gossard's safety. AR 847-48.

The evidence in the record demonstrates the causal link between Ms. Gossard engaging in a protected activity and the Tafoyas' adverse actions. The series of retaliatory actions occurred shortly after Ms. Gossard complained to Ms. Tafoya and to the Commission, and occurred

very close in time to each other.

2. The Tafoyas offer no legitimate, non-retaliatory reason for subjecting Ms. Gossard to adverse actions.

Once a prima facie case of retaliation is established, the burden shifts to the respondent to articulate a legitimate, non-retaliatory reason for subjecting the complainant to the adverse action. *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 618-19, 60 P.3d 106 (2002) (employment discrimination claim under the WLAD). If the respondent articulates such a reason, the complainant bears the ultimate burden of demonstrating that the reason given by the respondent is mere pretext for the retaliatory motives. *Id.* Because the person accused of retaliation will rarely reveal his or her motive, circumstantial evidence may be used to demonstrate a retaliatory purpose. *Vasquez v. State*, 94 Wn. App. 976, 985, 974 P.2d 348, *review denied*, 138 Wn.2d 1019, 989 P.2d 1143 (1999). One of the primary factors supporting retaliatory motivation is proximity in time between the protected activity and the adverse action. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991). A complainant is not required to prove that retaliation was the *sole* reason for the respondent's adverse actions. It is only required to prove that retaliation was at least a substantial factor. *Allison*, 118 at 85-96.

The Tafoyas have never provided a legitimate non-retaliatory

reason for their actions against Ms. Gossard. The evidence overwhelmingly establishes that retaliation was a substantial factor behind the Tafoyas' adverse actions. The Tafoyas do not dispute the factual findings relating to retaliation.

Rather than countering the factual findings, the Tafoyas summarily conclude that they did not retaliate against Ms. Gossard because there is no evidence of "interference with respect to entering into the rental agreement" or evidence of "interference with Gossard's use of that land." Apts' Br. at 22. The WLAD does not limit a finding of retaliation to such circumstances pertaining to the rental agreement. The pertinent issue is whether the Tafoyas engaged in adverse actions against Ms. Gossard affecting her enjoyment of the rental property after she complained about their conduct. On that issue, the record below is saturated with evidence of the Tafoyas' bad acts against Ms. Gossard following her complaints, and the Tafoyas fail to advance any basis upon which to justify their actions or to reverse that finding.

C. Ms. Tafoya Aided And Abetted Mr. Tafoya's Discriminatory Conduct And Retaliation Against Ms. Gossard In Violation Of The State's Anti-Discrimination Law

It is a violation of the WLAD to aid or abet any other violation of the WLAD. Specifically, "[i]t is an unfair practice for any person to aid, abet, encourage, or incite the commission of any unfair practice." RCW

49.60.220. To aid and abet an unfair practice, one must have more than mere knowledge that discrimination has occurred. *Rody v. Hollis*, 81 Wn.2d 88, 94, 500 P.2d 97, 101 (1972) (en banc). Substantial proof of some level of participation for the purpose of assisting housing discrimination is required. *Id.*

Here, Ms. Tafoya knew about her husband's discriminatory conduct because Ms. Gossard specifically disclosed the conduct to her during a phone conversation. AR 478-49. Rather than taking Ms. Gossard's report seriously, Ms. Tafoya accused Ms. Gossard of attempting to establish a sexual relationship with Mr. Tafoya. *Id.* In addition, Ms. Tafoya took no action following her conversation with Ms. Gossard and did not investigate the allegations. Instead, she retaliated against Ms. Gossard by participating in a phone conversation to Ms. Gossard's estranged husband and sending a letter to the Commission based on that conversation. AR 60, 847-49. The evidentiary record supports the conclusion that Ms. Tafoya aided and abetted her husband's discriminatory conduct and retaliation against Ms. Gossard.

D. The Tafoyas' Discriminatory Conduct Towards Ms. Gossard Does Not Constitute Protected Free Speech

On appeal, the Tafoyas defend their conduct by characterizing it as protected free speech. This defense must be rejected due to the nature of

the sexually charged remarks directed specifically at Ms. Gossard by Mr. Tafoya as part of a pattern of harassing behavior. Speech used to engage in discriminatory conduct is not protected by either article I, section 5 of the Washington Constitution or the First Amendment.

As a preliminary matter, it should be noted that under state law, the Washington Constitution could provide greater protection than the federal constitution in some contexts. *See State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). Here, the Tafoyas neither raised nor argued the issue of whether article I, section 5 of the Washington Constitution provides more protection for their allegedly protected speech than does the First Amendment. They simply assert the protection. Therefore, the following discussion will address both federal and state cases on this topic. *See O'Day v. King County*, 109 Wn.2d 796, 802, 749 P.2d 142 (1988).

The WLAD does not abridge Mr. Tafoya's right to express his viewpoints and opinions; it only prohibits discriminatory conduct. The Washington Supreme Court has specifically discussed that discrimination laws seek to punish discriminatory conduct, not speech:

We find that the malicious harassment statute is similar to the various antidiscrimination laws governing employment practices, public accommodation, and housing. Such laws punish discriminatory acts committed "because of" the victims' protected status and are directed at discriminatory conduct rather than discriminatory thought or speech.

State v. Talley, 122 Wn.2d 192, 206, 858 P.2d 217 (1993). As explained by the U.S. Supreme Court in *R.A.V. v. St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), whether spoken words are constitutionally protected is context driven: “[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets) . . . speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.” *R.A.V.*, 505 U.S. at 389; *see also Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1525 (M.D. Fl. 1991) (“Potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.” (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984))).

The state constitution does not protect speech used to harass or create a hostile environment. *See Mills v. Western Washington University*, 150 Wn. App. 260, 208 P.3d 13 (2009) (reversed on other grounds). In *Mills*, the Court of Appeals rejected a free speech defense to sexual harassment, and held that various conduct by the accused, including sexual innuendo, was not protected by either the First Amendment or article I, section 5 of the Washington Constitution. *Id.* at 274. Further, simply because speech is included in harassing conduct does not immunize the

perpetrator's conduct. *See Rodriguez v. Maricopa County Community College*, 605 F.3d 703, 710 (9th Cir. 2010). Instead, where speech is not expressive because it does not “seek to disseminate a message to the general public,” but instead seeks to “intrude upon a targeted listener” in an especially offensive way, that speech is not protected. *Id.* (quoting *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3rd Cir. 2001)).

The sexual comments at issue here are not expressive of a viewpoint or opinion, and were specifically targeted at Ms. Gossard rather than the general public. The Tafoyas assert that “David Tafoya is accused of using inappropriate language. . . .” Aplt's' Br. at 25. Mr. Tafoya did not, however, simply make a few off-color remarks. He called Ms. Gossard a prostitute, told her that he had seen her “pussy,” told her he imagined himself making love to her and tasting her, and told her that he masturbated while thinking about her. It is a gross mischaracterization of the record to call this series of sexually charged comments merely inappropriate.

The Tafoyas' defense relies unpersuasively on a criminal case, *State v. Reyes*, 104 Wn.2d 35, 700 P.2d 1155 (1985). They argue *Reyes* “held that the use by a student against a teacher of the words ‘white mother fucker’ was protected speech” Aplt's' Br. at 26. *Reyes* did not reach the issue of whether the student's words were protected free

speech. *Reyes*, 104 Wn.2d at 35. Rather, *Reyes* held that the criminal statute under which the defendant had been charged was unconstitutionally overbroad and not susceptible to narrowing. *Id.* at 42. Unlike the facts here, the *Reyes* decision considered a criminal statute explicitly intended to punish speech,⁵ and involved a single isolated comment. *Reyes*, 104 Wn.2d at 38. The WLAD was enacted to eradicate discriminatory conduct, not punish speech, and no single comment is relied upon here to prove sexual harassment.

The Tafoyas' reliance on two other criminal cases, *Pasco v. Dixon* and *Cohen v. California* is similarly misplaced. Aplt's Br. at 26-27. The *Pasco v. Dixon* decision held that the criminal code provision at issue, which penalized disorderly conduct through the use of abusive, lewd, vulgar or obscene language, was constitutional, but that the prosecution had failed to carry its burden of proof. 81 Wn.2d 510, 519, 523, 503 P.2d 76 (1972). The *Cohen v. California* decision, addressed a criminal conviction based solely on one incident of expressive speech, not upon any separately identifiable conduct. 403 U.S. 15, 19, 91 S. Ct. 1780, 29. L. Ed. 2d 284 (1971).

⁵ The statute in *Reyes* made it a misdemeanor to "insult or abuse a teacher anywhere on the school premises while such teacher is carrying out his official duties. . . ." 104 Wn.2d at 40.

The record sufficiently establishes that Mr. Tafoya's sexual comments are not protected free speech. Further, even if Mr. Tafoya's sexual remarks could be excused, which is not possible here, Mr. Tafoya's remaining conduct was sufficiently severe and pervasive to create a hostile living environment for Ms. Gossard and would alone constitute a violation of the WLAD. By grabbing Ms. Gossard's buttocks while hugging her, inviting her to view sexually graphic artwork, and pushing her down on the bed in his RV, Mr. Tafoya engaged in conduct well beyond the protections of the First Amendment or article 1, section 5 of the Washington State Constitution.

E. The Final Order Is Supported By Substantial Evidence

While not disputing the vast majority of the sixty-eight separate findings of fact made in the Final Order, the Tafoyas assign error to Findings of Fact 5, 17, 24, and 63. Aplt's Br. at 4-6. These findings relate to Mr. Tafoya chasing Ms. Gossard around the pond, Mr. Tafoya's comment to Ms. Gossard stating "I've seen your pussy," Mr. Tafoya pushing Ms. Gossard down on the bed in his RV, and Ms. Gossard's claim that she suffered emotional distress. Other than referencing Mr. Tafoya's denials of the conduct during his testimony at hearing, the Tafoyas offer no discussion as to why these findings are not supported by substantial evidence.

Substantial, credible evidence supports each finding. Ms. Gossard testified in detail about each of the above described incidents and the emotional distress she suffered. AR 435, 437-39, 443, 453, 455, 459-63, 475-76, 528. Due to the differences in the testimony of the Tafoyas and Ms. Gossard, a credibility determination was made about the witnesses. The ALJ specifically found that Ms. Gossard was credible and that the Tafoyas' denials and descriptions of the evidence were not credible. AR 377. Ms. Gossard's credibility was reinforced by the testimony of former female tenants Jessica Everson and Lisa Grieco, who were also subjected to unwanted comments and conduct of a sexual nature by Mr. Tafoya. AR 78-87, 621-28, 649-53. For example, in addition to making numerous unwelcome sexual comments to her, Ms. Everson testified that Mr. Tafoya hugged her and grabbed her buttocks. AR 626.

There is no basis to disturb the Final Order's factual findings. The Tafoyas cite no contradicting testimony or other evidence in the record that would explain the basis for their assignments of error. The Tafoyas are simply repeating the same argument made during the administrative hearing – they should be believed and Ms. Gossard should not. The presiding ALJ already made that determination and her credibility findings should be honored. *McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

The Tafoyas also argue that the Final Order is arbitrary and

capricious. Aplt's Br. at 7. The Tafoyas, however, do not address this issue elsewhere in their briefs. In any event, there is no basis to reverse any portion of the Final Order as arbitrary or capricious. An arbitrary or capricious decision is one that is willful and unreasoned, which disregards facts and circumstances. *Pierce County Sheriff v. Civil Service Com'n of Pierce County*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). The Final Order is not manifestly unreasonable and is based on sound application of law to the record. Each finding of fact carefully cites to evidence in the record upon which that finding relies. There is no basis to disturb the Final Order's findings under the arbitrary and capricious standard.

F. Under The WLAD, The Tafoyas Are Liable To Ms. Gossard For The Emotional Distress She Suffered

1. Damages for emotional distress are available to Ms. Gossard as a victim of sexual harassment under the WLAD.

A victim in a fair housing case is entitled to actual damages, as provided in the WLAD:

(1) When a reasonable cause determination has been made under RCW 49.60.240 that an unfair practice in a real estate transaction has been committed and a finding has been made that the respondent has engaged in any unfair practice under RCW 49.60.250, the administrative law judge *shall promptly issue an order for such relief suffered by the aggrieved person as may be appropriate, which may include actual damages as provided by the federal fair housing amendments act of 1988 (42 U.S.C. Sec. 3601 et seq.)*

RCW 49.60.225(1) (emphasis added). Thus, the damages available under the WLAD are the same as those available in a federal fair housing discrimination case.⁶ Complainants in federal fair housing cases have been awarded actual damages for emotional distress, embarrassment, and humiliation. *See Hamilton v. Svatik*, 779 F.2d 383, 388-389 (7th Cir. 1985); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1203 (5th Cir. 1982); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552-53 (9th Cir. 1980).

An award of humiliation and emotional distress damages in the amount of \$10,000 in favor of Ms. Gossard is proper considering the Tafoyas' extreme conduct. The Tafoyas' unfair practices, including both their discrimination and retaliation, caused Ms. Gossard significant distress. AR 435, 437-39, 443, 453, 455, 459-63, 475-76, 528. Ms. Gossard's emotional distress began almost immediately after moving in, became increasingly onerous as time went on, and culminated with her

⁶ The federal fair housing amendments act of 1988 states that a court

(A) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this title as is necessary to assure the full enjoyment of the rights granted by this title; (B) *may award such other relief as the court deems appropriate, including monetary damages to persons aggrieved*; and (C) may, to vindicate the public interest, assess a civil penalty against the respondent in an amount not exceeding \$50,000 for a first violation.

42 U.S.C. § 3614(d)(1) (emphasis added).

being forced from the home she rented. Ms. Gossard's testimony, as well as the circumstances of the Tafoyas' conduct, fully support the award of damages for emotional distress.

2. The WLAD does not require medical evidence to recover damages for emotional distress.

Victims of sexual harassment or discrimination in a real estate transaction are entitled to actual damages for emotional distress without any medical evidence of mental or physical symptoms or proof of consequent monetary loss. *Negron v. Snoqualmie Valley Hospital*, 86 Wn. App. 579, 587-8, 936 P.2d 55 (1997) (finding that in a discrimination case alleged under the WLAD, medical testimony is not necessary to establish causation of actual damages, including emotional distress and mental anguish). Instead, damages awarded for humiliation and emotional distress may be "established by testimony or inferred from the circumstances." *Phiffer*, 648 F.2d at 552-53; *see also Negron*, 86 Wn. App. at 588 (finding that emotional distress and mental anguish may be proved by non-expert testimony). That the amount of damages is incapable of exact measurement does not bar recovery for the harm suffered. *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983).

The Tafoyas' reliance on tort law to attack the award of emotional distress damages is misplaced. The Tafoyas cite *Conrad v. Alderwood*

Manor, 119 Wn. App. 275, 78 P.3d 177 (2003), which involved negligence and neglect in a wrongful death action, as well as *Haubry v. Snow*, 106 Wn. App. 666, 678, 31 P.3d 1186 (2001), which involved a claim for negligent infliction of emotional distress. It is true that most personal injury plaintiffs are not entitled to emotional distress damages or inconvenience damages unless they present medical evidence or prove a consequent monetary loss. However, this is a fair housing case under the WLAD, not a tort action. Ms. Gossard was properly awarded emotional distress damages commensurate with the Tafoyas' discriminatory behavior.

3. RCW 26.16.190 is inapplicable because Ms. Tafoya is primarily liable under the WLAD.

The Tafoyas argue that Ms. Tafoya may not be held liable for damages pursuant to RCW 26.16.190. As discussed above, Ms. Tafoya is directly liable to Ms. Gossard through: the imputation of Mr. Tafoya's discriminatory conduct in violation of RCW 49.60.222(1)(b), (j), and (k); her retaliation against Ms. Gossard in violation of RCW 49.60.2235; and for aiding and abetting Mr. Tafoya's discriminatory conduct in violation of RCW 49.60.220. Each basis, alone, establishes her primary liability under the WLAD and renders RCW 26.16.190 inapplicable. RCW 26.16.190 immunizes the separate property of an *innocent* spouse from

recovery for the liability of the injuries committed by the offending spouse. That statute does not apply here as Ms. Tafoya has failed to establish that she is an “innocent” spouse. Further, even if Ms. Tafoya could establish her innocence and prove Mr. Tafoya should be solely liable under the WLAD, RCW 26.16.190 does not shield one-half of the Tafoyas’ marital community property from being available to satisfy a judgment.

VI. CONCLUSION

Based on the foregoing, the Commission respectfully requests that the Court affirm the Final Order establishing the Tafoyas’ violations of the WLAD and awarding penalties and damages.

RESPECTFULLY SUBMITTED this 9th day of August, 2012.

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STATE OF WASHINGTON

NO. 43003-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BY
DEPUTY

DAVID AND FARIS TAFOYA,
husband and wife,

Appellants,

v.

STATE OF WASHINGTON HUMAN
RIGHTS COMMISSION,

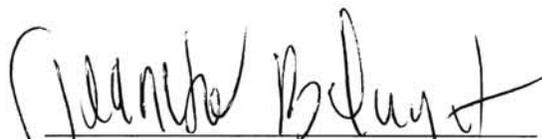
Respondent.

CERTIFICATE OF
SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on August 9, 2012, I caused to be served a true and correct copy of the *Brief of Respondent* and this *Certificate of Service* by placing same in the U.S. mail with proper postage affixed to:

Don W. Taylor
Owens Davies Fristoe Taylor & Schultz PS
1115 W Bay Dr NW Ste 302
Olympia, WA 98502-4658

DATED this 9th day of August, 2012, at Olympia, Washington.


JEANETTE BALUYUT
Legal Assistant

ORIGINAL