

No: 88062-0

SUPREME COURT OF THE STATE OF WASHINGTON

James Kumar, Ranveer Singh, Asegedew Gefe, and Abbas Kosymov,

Petitioners,

v.

GATE GOURMET, INC.,

Respondent.

APPELLANT'S BRIEF

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I. Introduction

Employees of Gate Gourmet, Inc., were required to consume meals provided by Gate Gourmet during their shifts. Gate Gourmet offered one entrée choice, which usually contained meat, and one vegetarian choice. Gate Gourmet's vegetarian choices sometimes contained meat products. Entrée meals included meats that are forbidden by various employees' sincerely held beliefs. After an employee informed Gate Gourmet of the offending dish, Gate Gourmet switched its meals to a non-offending meat. Gate Gourmet, however, subsequently switched its meal back to an offending meat product, without informing employees.

Based on *Short v. Battle Ground School District*, 169 Wn. App. 188, 279 P.3d 902 (2012), the superior court dismissed Kumar's and other plaintiffs' (Kumar) claims for failure to accommodate religion, disparate impact, civil battery, and negligent infliction of emotional distress. *Short* improperly held that claims for failure to accommodate religion are not permitted under Washington's Law Against Discrimination¹ (WLAD). The text and history of WLAD, along with implications on the

¹ RCW 49.60.010 *et seq.*

Washington Constitution, supports implying a duty on employers to reasonably accommodate religion.

Washington Courts look to Title VII of the Civil Rights Act, 42 U.S.C. 2000e *et seq*, to determine the scope of WLAD. From its implementation, the duty to accommodate was implicit in Title VII and the only struggle, which was later decided through legislation, was to determine the precise test.

The superior court decision also extends *Short* far too broadly to dismiss claims that are undisputedly recognized by Washington law. In dismissing Kumar's lawsuit, the superior court in effect determined that employers owe no duty under Washington law to accommodate or respect the religious and sincerely-held beliefs of their employees, and that this absence of legal duty overrides recognized statutory and common law causes of action that would otherwise protect individuals from what they perceive as damaging their bodies, violating their consciences, or poisoning their souls.

II. Assignment of Error

1. The trial court erred in granting Defendant Gate Gourmet's 12(b)(6) motion and dismissing the complaint with prejudice.

III. Issues Pertaining to Assignment of Error

1. Whether under state law, such as WLAD Chapter 49.60 RCW, employers may refuse to accommodate employees' creeds and sincerely held religious beliefs?
2. Whether there are any facts, real or hypothetical, that would lead to a finding that Gate Gourmet's actions disparately impacted the class in violation of WLAD?
3. Whether there are any facts, real or hypothetical, that may sustain Kumar's claims of battery?
4. Whether there are any facts, real or hypothetical, that may sustain Kumar's claims for negligent infliction of emotional distress?

IV. Statement of the Case

A. The Superior court dismissed all claims under CR 12(b)(6).

Plaintiffs to a class action lawsuit ("Kumar") filed a complaint in King County Superior Court against Gate Gourmet, Inc. CP at 13. Kumar amended the complaint. CP at 13-29. The amended complaint asserted causes of action for: (1) failure to accommodate as a violation of WLAD under RCW 49.60.010 *et seq*; (2) disparate impact as a violation of

WLAD under RCW 49.60.180; (3) civil battery; and (4) negligent infliction of emotional distress.² CP at 25, 26, 28.

Rather than respond to the pleadings and the averments in the amended complaint, Gate Gourmet moved to dismiss the complaint under Civil Rule 12(b)(6). CP at 58. Therefore, when the superior court ruled on the motion the parties had not conducted any discovery and no responsive as filed. Kumar opposed the motion and requested in the alternative leave to amend the complaint again. CP at 88.

The superior court granted dismissal of all claims with prejudice under CR 12(b)(6), noting, “The C[our]t grants the motion based on the C[our]t of Appeals decision in Short v. Battleground[³] and the state of the law on religious accommodation.”⁴ CP at 118 – 120. (emphasis original). Kumar timely appealed for direct review.

² The amended complaint also reserved the right to add a claim for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, once administrative remedies requisite to filing under that statute had been exhausted. CP at 25.

³ *Short v. Battle Ground School District*, 169 Wn. App. 188, 279 P.3d 902 (2012).

⁴ Judge Mary Yu issued the order. CP at 118 - 120. She is a celebrated judge, receiving the Washington State Bar Association’s 2011 Outstanding Judge of the Year Award in part for her service to the bench and for special contributions to the legal profession at any level of the court. *Judge Mary I. Yu Receives 2011 Outstanding Judge of the Year Award*, http://www.wsba.org/News-and-Events/~media/Files/News_Events/News/Press%20releases/yu%20outsta

B. Kumar asserted claims allowed by Washington law and alleged facts sufficient to satisfy a CR 12(b)(6) motion.

1. Many Gate Gourmet employees held sincere beliefs regarding food ingredients and preparation techniques.

The class members in this suit are or were employed by Gate Gourmet. CP at 16. Gate Gourmet provides food and beverage catering services to the airline and railroad industries with operations throughout the world. CP at 58. The acts at issue involve meals Gate Gourmet served to its employees; these occurred on SeaTac Airport property. CP at 17.

Due to security and business reasons, employees were not permitted to bring their own food to the worksite. CP at 17. Similarly, employees cannot leave for breakfast, lunch, or dinner. CP at 17. Therefore, the employer agreed to supply a “well balanced and wholesome” meal. CP at 17. Given how the meals are prepared and the contents of certain dishes, the meal did not benefit each employee equally.

Some Gate Gourmet employees hold sincere religious, spiritual, or philosophical beliefs regarding food they consume. CP at 16. These

nding%200911.ashx (last viewed January 9, 2013). Judge Yu was recognized in part for her contributions to the dialogue on the disparate treatment effects of criminal justice system practices on communities of color. *Id.* One practical effect of the order was to ripen the use for appellate review.

employees represent potential classes of employees: Jewish, Muslim, Hindu, Ethiopian Christian Orthodox, and vegetarian. CP at 16. Their beliefs involve both the content of the food and sometimes its method of preparation. CP at 18.

Specifically, Ethiopian Orthodox Christians do not eat pork products. CP at 18. They also do not eat meat and dairy products on fasting days, which occur periodically throughout the year. CP at 18. Their Lent is a forty day period of fasting. CP at 18. Jewish employees observe the kashrut. CP at 18. Followers of Islam may only eat lawful, or halal, food. CP at 18. Cows are sacred animals in Hinduism, so most Hindus do not eat beef. CP at 18. Many class members also adhere to vegetarianism (see below) due to principles of non-violence and karma. CP at 18. Vegetarians may sincerely hold such beliefs for spiritual and philosophical reasons, and such beliefs occupy in the life of their possessors a place parallel to that filled by God in other contexts. CP at 18-19.

- 2. Employees could work hungry or violate their consciences, while others were unknowingly violating their consciences based on Gate Gourmet's representations of ingredients.**
 - a. Gate Gourmet supplied meals that violated employees' beliefs.**

Gate Gourmet offered employees two meal options- one "entrée," invariably involving a meat plate, and one "veggie choice." CP at 19. Given that the employees could neither bring food to work, nor leave to eat, employees faced the "choice" to eat one of these two meal options or to forego eating during their entire work day. CP at 17-18. In effect, Gate Gourmet employees were forced to consume meals provided by the employer.

Much of the food offered by Gate Gourmet was inconsistent with dietary restrictions imposed by the employee's beliefs. CP at 19-20. Even the vegetarian options were not prepared consistent with the religious and sincerely held spiritual and philosophical beliefs. CP at 20. For example, refried beans contained pork lard and may also have contained pieces of pork product. CP at 19-20. Other vegetarian meals were prepared using animal by-products, such as chicken broth or stock, animal fats or oils, dairy products, and eggs. CP at 19-20. Additionally, Gate Gourmet did

not label food that it served, nor did it warn that some meals may contain certain products, such as beef, pork, and other meats. CP at 20.

Gate Gourmet also did not inform employees that it used the same utensils for all meat dishes. CP at 20. The utensils, even if cleaned between usages, cannot be purged of their “non-kosher” or forbidden character, and therefore offend members of the class. CP at 20. Similarly, the kitchen failed to maintain separate surfaces for preparing meat and vegetarian dishes, which would offend various employees’ beliefs. CP at 20.

Upon learning of food preparation and content issues, Mr. Kumar raised his dietary concerns with Gate Gourmet. CP at 20. Specifically, he complained that beef and pork meatballs were offensive and requested a change in ingredients. CP at 20.

b. Gate Gourmet changed one aspect, but later reverted back to practices that offended employees’ sincere beliefs without informing employees of the change.

In response to Mr. Kumar’s complaints, Gate Gourmet took one action, changing its beef and pork meatballs to turkey meatballs. CP at 20. A few months later, Mr. Kumar discovered that Gate Gourmet changed back to pork and beef meatballs, which did not fit with the class’s

religious and sincerely held beliefs. CP at 20. Gate Gourmet did not inform employees of this change. CP at 20. The employees' subsequent attempts to procure accommodation for their religious beliefs were ignored. CP at 20.

Given restrictions, the employees' only alternative to eating Gate Gourmet provided meals that offended their beliefs was to forego food during their shift. This was not a true alternative and violates their promise to provide a hearty meal. The change in ingredients, combined with the lack of a true vegetarian option that often contained forbidden meats, managed to offend every class member. Further, the preparation methods also offended class members. Class members may never know how long they were eating the offensive ingredients or improperly prepared food.

V. Argument

A. Standard of Review

The standard of review for the dismissal of a complaint under CR 12(b) is de novo; because dismissal is a question of law. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).

“CR 12(b)(6) motions should be granted sparingly and with care and only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Tenore*, 136 Wn.2d at 330 (internal quotations omitted). When

reviewing a complaint dismissed under CR 12(b)(6), the Court accepts the factual allegations in the complaint as true. *Tenore*, 136 Wn.2d at 330. Further, “[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff’s claim.” *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

Additionally, plaintiffs should be freely allowed to amend complaints in lieu of dismissal with prejudice, if it appears that by doing so the plaintiffs may state a cause of action and not cause prejudice to the defendant. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 350, 670 P.2d 240 (1983).

B. State law and WLAD permits claims against employers for failure to accommodate an employee’s religion.

Based on *Short*, the superior court dismissed Kumar’s failure to accommodate claims under WLAD. Failure to accommodate is a permitted claim under federal law. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 64-65, 837 P.2d 618 (1992). Employees asserting a religious failure to accommodate claim must establish a prima facie case with evidence of: (1) a sincerely-held or bona fide religious belief conflicting with the employment requirement; (2) employee informing employer of the belief; and (3) employee’s discharge due to the employee’s refusal to

comply with the employer's requirement. *Hiatt*, 120 Wn.2d at 64-65.

This third requirement has been held as satisfied merely by an employee showing the employer threatened or subjected the employee to discriminatory treatment. *Lawson v. Washington*, 296 F.3d 799, 804, (9th Cir. 2002) (analyzing Washington law). After an employee establishes its prima facie case, the burden shifts to an employer to show either: (1) it attempted a good faith accommodation of the employee's religious practices; or (2) it could not accommodate the employee's religious practices without undue hardship. *Short*, 169 Wn. App. at 199.

WLAD applies to an important set, not covered by the Constitution or federal law: private employers with eight or more employees.⁵ RCW 49.60.040(11). Therefore, it is crucial to definitively answer under state law whether employees in that set can fail to accommodate the reasonable and inexpensive requests of employees. The Court of Appeals opinion in *Short* incorrectly interpreted *Hiatt*, the Washington Constitution, and WLAD. Based on the text and history of the statute, state law permits employees to bring a claim against their employers for failing to accommodate religious beliefs.

⁵ The Constitution requires government to accommodate employees' religion and federal law requires large employers to accommodate employees' religion. See e.g., *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 144 (1987); 42 U.S.C. §2000e.

1. *Hiatt* declined to address whether plaintiffs may assert a claim for a failure to accommodate under WLAD.

This Court acknowledged that religious accommodation under WLAD is an “important and complex question” with “constitutional implications” when it previously left the issue unresolved.⁶ *See Hiatt*, 120 Wn.2d at 63.

Importantly, the Supreme Court noted that it “specifically disapprove[d] that portion of the Court of Appeals decision in this case which assumes that our state statute against discrimination on *creed* is identical to the federal law” protecting *religion*. *Id.* at 64 (emphasis added). Because briefing was inadequate on whether WLAD implicitly requires a duty to accommodate and the parties failed to address the constitutional implications of implying such a duty, the Court reserved its decision on whether WLAD implicitly required accommodation of

⁶ In *Hiatt*, the superior court granted summary judgment for an employer against an employee claiming failure to accommodate his religion. *Id.* at 58. The Court of Appeals reversed summary judgment, holding the employer’s duty to accommodate under state law was identical to the federal standard, and that issues of material fact prevented summary judgment. *Hiatt v. Walker Chevrolet Co.*, 64 Wn. App. 95, 822 P.2d 1235 (1992). This Court reversed, holding that the plaintiff failed to establish an element of the federal failure to accommodate claim, declining to address whether the federal and state standards are identical. *Hiatt*, 120 Wn.2d at 63, 67. The more controversial issue at the time was how to balance the rights of religion or creed with the rights of others. *Id.* at 63 n.7.

religion. *Id.* at 63. No Supreme Court decision has updated the *Hiatt* holding on religious discrimination.

2. The *Short* decision needlessly opined a change in Washington law.

Division II of the Washington Court of Appeals in *Short* found the duty to accommodate was not implied in WLAD. *Short*, 169 Wn. App. at 208. The *Short* opinion relied on: (1) the textual differences of Title VII and WLAD; and (2) the federal law amendment in 1972, which explicitly added failure to accommodate language, compared to the absence of any state law amendment. *Short*, 169 Wn. App. at 200-01.

Contrary to *Short*, the text of WLAD and federal court and Equal Employment Opportunity Commission (EEOC) interpretations of Title VII before the 1972 amendment support implying the duty to accommodate into WLAD.

3. The text of WLAD and pre-1972 amendment interpretations of Title VII support implying a duty to accommodate religion.

WLAD was enacted in 1949. RCW 49.60.180 makes it an unfair practice for an employer “To discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.”

Guidelines developed by the State Human Rights Commission have not addressed whether employers must, or may not, accommodate religious beliefs.

The federal counterpart to WLAD is Title VII of the Civil Rights Act of 1964. Former 42 U.S.C. §2000e *et seq* (1964). Title VII protects employees from unfair employer practices, including discrimination of any individual with respect to terms, condition, or privileges of employment because of race, color, religion, sex or national origin. 42 U.S.C. §2000e-2(a)(1). In response to varying interpretations of the duty to accommodate religion, it was amended in 1972 to define religion as:

The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.
42 U.S.C. §2000e(j).

Contrary to *Short*, these textual differences and the presence of a later amendment to Title VII do not justify holding that WLAD does not support a claim for failure to accommodate. Instead, a closer look at the history of the respective statutes supports implying a duty.

a. Courts look to Title VII to interpret WLAD.

Washington passed the WLAD fifteen years before the U.S. Congress passed Title VII. *Hiatt*, 120 Wn.2d at 62. Washington courts

interpreting WLAD, however, still look to federal interpretations of Title VII for guidance when interpreting WLAD. *See Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988).

Interpretations of Title VII, before it was amended to specifically clarify the burden to accommodate religions in the workplace, support implying a duty to accommodate under WLAD.

b. Before its 1972 amendment, Title VII interpretations support implying a duty to accommodate under WLAD.

Like WLAD, Title VII of the Civil Rights Act of 1964 always implied a duty to accommodate religion in the workplace.. Former 42 U.S.C. §2000e *et seq.* Amendments to Title VII were later made in response to cases trying to balance rights and regulations imposed by the Equal Employment Opportunity Commission (EEOC).

For example, in 1966 the EEOC issued guidelines declaring the employer had a duty “to accommodate to the reasonable religious needs of employees ... where such accommodation can be made without serious inconvenience to the conduct of the business.” 29 CFR §1605.1 (1967). By 1967, the EEOC guidelines changed to require an employer, short of “undue hardship,” to make “reasonable accommodations” to the religious needs of employees. 29 CFR §1605.1(b) (1968); *see e.g., Trans World*

Airlines, Inc. v. Hardison, 432 U.S. 63, 64, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). Those regulations properly interpreted the statutory language of Title VII before the duty to accommodate was clarified explicitly by amendment. *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972).

The extent of the required accommodation, however, remained unsettled when the U.S. Supreme Court affirmed, by equally divided Courts, decisions in *Dewey v. Reynolds Metals Co.*, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1970), and *Cummins v. Parker Seal Co.*, 429 U.S. 65, 97 S.Ct. 342, 50 L.Ed.2d 223 (1976). These cases wrestled with how to articulate a duty, not whether there was a duty.

The statutory change to Title VII, adding specific language on accommodating religion was in part “to resolve by legislation” issues raised in *Dewey*. *TWA*, 432 U.S. at 73 (citing 118 Cong.Rec. 706 (1972)). The *TWA* Court decided a controversy under the 1967 EEOC guidelines and not under the 1972 amendment. *Id.* at 76. It wrote, “The employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines.” *Id.* at 75.

Title VII was amended to add language specifically articulating the duty to accommodate religion. Based on prior court decisions, some duty

to accommodate employee's religious beliefs were imposed by the original Title VII statute. The added language was necessary, not because the duty to accommodate was controversial, but to strike a balance between employees' right to practice their religion against and the employer's right to conduct business and their fellow employees' rights to a different religion or lack of one.

The duty to accommodate was always implicit in the original statute and the only struggle was to determine the precise test. When non-sectarian sincerely-held beliefs were held on par with religious beliefs, it resolved any fear that religion was being elevated in violation of the Establishment Clause of the First Amendment. Therefore, the later amendment of Title VII to explicitly contain text regarding a duty to accommodate cannot and should not be used to argue WLAD does not contain a similar duty.

Instead, the interpretations of the original Title VII language support allowing a failure to accommodate claim under WLAD, which looks to interpretations of Title VII.

4. WLAD already prohibits discrimination; recognizing claims for failure to accommodate logically flow from disparate impact and disparate treatment claims.

WLAD, like Title VII, prohibits disparate impact and disparate treatment against a protected class. *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 909 (1986) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct 849, 28 L.Ed.2d 158 (1971)). An employee may call to an employer's attention that an employment policy disparately impacts the employee and he or she may request a change of policy as an accommodation. An employer that rejects the requests knowing it will impact a protected class, while a reasonable alternative would avoid the discrimination, would at some point be intentionally discriminating against the employee. Thus, while the "duty to accommodate" may not be expressly written in the text of WLAD, it is a necessary inference in the general prohibition against discrimination. It is a logical consequence of anti-discrimination laws.

Rather than wait until an employer's discriminatory practice occurs long enough to rise to the level of disparate treatment or disparate impact, this Court should imply a duty to accommodate to clarify employer's duties and prevent elevated discrimination.

5. Washington’s Constitution protects freedom of religion.

a. Implying a duty does not infringe on Washington’s Constitution.

Implying a duty to accommodate does not run afoul of the Washington Constitution, rather, implying a duty would enhance Washington’s Constitution. The purpose of the WLAD is to fulfill “the provisions of the Constitution of this state concerning civil rights.” RCW 49.60.010. The Washington Constitution explicitly provides for religious freedom: “*Absolute* freedom of conscience in *all matters* of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion.” Wa. Const., Art. I §11. The practice of discrimination against Washington inhabitants due to their creed (i.e. religious or sincerely-held beliefs) “threatens not only the rights and proper privileges of [Washington’s] inhabitants but menaces the institutions and foundation of a free democratic state.” *Id.*

Implying a duty to accommodate would not infringe on our state’s Constitutional provisions of absolute freedom of conscience. Reasonable accommodations do not impose the employee’s creeds on others, while still protecting the employee’s own freedom of conscience.

b. Public policy supports implying a duty to accommodate religion.

Public policy supports implying a duty to accommodate because: (1) it provides stronger protection of our state's citizen's sincerely-held beliefs and creeds; and (2) it provides employers with a better framework to address employee requests.

First, in *Grant v. Spellman*, 99 Wn.2d 815, 664 P.2d 1227 (1983), the Washington Supreme Court held that a person could exercise his sincerely held, personal beliefs, in the context of government employment despite the fact that the individual did not adhere to a recognized religious denomination. *Grant*, 99 Wn.2d at 820. Justice Williams concurred with the result, but wrote separately regarding the duty to accommodate. *Id.* at 324 (J. Williams, concurring.) Approving of federal law, he wrote, “Failure to accommodate religion when the government could achieve its legitimate goals while granting religious exemptions [results in] hostility toward religion rather than [epitomizing] the essence of neutrality.” *Id.* (citing L. Tribe, *American Constitutional Law* 852 (1978)). When the law looks at whether government discriminates against a person for their religious beliefs, the law imposes a duty to accommodate. There is no public policy justification to analyze government discrimination differently from employment discrimination.

Second, reasonable accommodation of religion is a necessary and relaxed application of the two classic protections from WLAD: protection against disparate treatment⁷ and disparate impact.⁸ If an employee suffers in the terms and conditions of employment by either disparate treatment or disparate impact, the employer is liable. The duty to accommodate would be a reasonable method to balance religious and non-religious rights in the workplace. Reasonable accommodation is a lesser imposition than the other two classic WLAD protections.

Under the reasonable accommodation analysis, the employee must come forward and explain the belief and the conflict. Without the requirement to come forward and seek a reasonable accommodation, an employee suffering religious discrimination might proceed directly to a disparate impact analysis. The requirement to come forward and explain the belief and the conflict is an employer-friendly relaxation of anti-discrimination laws and it would promote intra-workplace solutions.

⁷ Disparate treatment is clear and intentional discrimination against an employee based on religious grounds. *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 909, 726 P.2d 439 (1986).

⁸ Disparate impact claims stem from facially neutral policies that fall more harshly upon the protected class. *E-Z Loader Boat Trailers, Inc.*, 106 Wn.2d at 909.

C. The superior court erred in dismissing claims recognized by Washington law and supported by real or hypothetical facts.

Even if this Court rejects Kumar's duty to accommodate claims, the superior court erred in dismissing the remainder of Kumar's claims under CR 12(b)(6) based on *Short* and Washington's failure to accommodate laws. *Short* applied strictly to failure to accommodate under WLAD, it did not bar claims for: (1) disparate impact under WLAD; (2) civil battery; or (3) negligent infliction of emotional distress. Those claims are all recognized under existing Washington law. Facts and averments in the complaint, along with hypothetical facts, support permitting Kumar to bring those claims.

1. Real and hypothetical facts support Kumar's disparate impact claim.

Disparate impact is recognized as a claim by Washington law. *See e.g., E-Z Loader Boat Trailers, Inc.*, 106 Wn.2d at 909 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct 849 (1971)). Disparate impact occurs when a facially neutral policy falls more harshly upon the protected class. *Id.* Plaintiffs must prove: (1) a facially neutral employment policy and (2) the policy falls more harshly on a protected class. *Oliver v. Pacific Northwest Bell Telephone Co., Inc.*, 106 Wn.2d 675, 679, 724 P.2d 1003. Previously, Washington required employment practices to be

nondiscretionary in order to satisfy the facially neutral prong. *Oliver*, 106 Wn.2d at 680. The nondiscretionary requirement is likely no longer needed.

The Court in *Shannon v. Pay 'N Save Corp.*⁹ cited federal authority interpreting Title VII, that a disparate impact theory is only to be applied to “an employment practice that includes objective treatment,” *i.e.*, that does not “turn on discretionary decisions.” *Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 733 709 P.2d 799 (1985). However, since *Shannon*, federal law has changed. The U.S. Supreme Court has stated that one can challenge subjective practices under the disparate impact approach. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). Thus, the *Shannon* court, if it performed the same analysis of federal law after 1988 that it did in 1985, would have come to a different conclusion regarding the “subjective and discretionary” policies.

Further, Washington law does not require the pleading of every fact necessary to establish the elements. Rather, it is a short, plain statement putting the defendant on notice of the claim. CR 8(a). Certain matters, such as fraud, must be pled with more specificity. CR 9.

⁹ 104 Wn.2d 722, 709 P.2d 799 (1985).

Accepting the facts as true, the amended complaint establishes the employer, adopted a facially neutral policy- serving the same two meals to all employees; and this policy fell more harshly on Kumar because various employees were either denied the benefits of the meal, forced to violate their sincerely-held beliefs, or perhaps most shockingly, unknowingly violated their sincerely-held beliefs.¹⁰

Claims under WLAD for disparate impact are recognized by Washington law. The amended complaint combined with hypothetical facts, are sufficient to support a claim for disparate impact. The superior court erred in dismissing Kumar's claims under CR 12(b)(6).

2. Real or hypothetical facts support Kumar's claim for battery.

Kumar's complaint contains a cause of action for civil battery. Battery is a civil cause of action permitted by Washington law. An actor is liable for battery if he acts intending to cause a harmful or offensive contact with another person, and an offensive contact with that person results. Restatement (Second) Torts § 18; *see e.g. Orwick v. Fox*, 65 Wn. App. 71, 85, 828 P.2d 12 (1992) ("Battery" encompasses both "harmful"

¹⁰ The potential existence of discrimination based on national origin, due to the strong ties of many of the beliefs to different nations, also may establish hypothetical facts on which to sustain the disparate impact claim.

and “offensive” bodily contact.) “All that is necessary is that the actor intend to cause the other, directly or indirectly, to come in contact with a foreign substance in a manner which the other will reasonably regard as offensive.” Restatement (Second) Torts § 18 cmt. c.. No “application of force” is necessary to establish civil battery. *Accord* Restatement (Second) Torts, § 19 (spitting in the face is an example of offensive contact). Furthermore, battery is an intentional tort, so no showing of actual damages need be made, as nominal damages may apply.

Facts in the complaint and hypothetical facts are sufficient to overcome the low bar for defeating a CR 12(b)(6) motion. Gate Gourmet acted to cause the class members to come into contact with food offensive to their religious beliefs. Employees could either consume this food, or forego a meal during their entire shift. CP at 17-18. This food either included undisclosed ingredients that were not expected for the type of dish served or food prepared inconsistent with various employees’ beliefs. CP at 19-20. In fact, Gate Gourmet switched to offensive ingredients for its meals that employees were in essence required to consume. CP at 20-21. Gate Gourmet made this switch without informing employees, even though it knew or should have known the ingredients were offensive to some employees’ religious beliefs. CP at 20-21. There also exists facts

alleged that the consumption of meat can cause physical harm to the body and increase the risk of certain diseases.¹¹ CP at 21.

Gate Gourmet cannot escape liability by arguing that the employees fed themselves the offensive food, when the food was supplied by Gate Gourmet and no reasonable alternative to that food was available. Because civil battery is a claim allowed under Washington law and real and hypothetical facts support a claim for battery, the superior court erred in dismissing Kumar's battery claim under CR 12(b)(6).

3. Real or hypothetical facts support Kumar's claim for negligent infliction of emotional distress.

Gate Gourmet's actions may also constitute the negligent infliction of emotional distress, which is recognized under Washington law. A plaintiff can recover for negligent infliction of emotional distress if the plaintiff proves: duty, a standard of care, proximate cause, damage, and objective symptomatology. *Strong v. Terrell*, 147 Wn. App. 376 387, 195 P.3d 977 (2008).

¹¹ The physical dangers associated with meat consumption, or consumption of food in violation of religious and closely held beliefs, may cause actual physical stress and injury. CP at 21. The class has been unable to ascertain the relevant facts as discovery has not yet begun in this case.

An employer owes a duty to others with respect to risks or hazards whose likelihood made a policy unreasonably dangerous.¹² *Snyder v. Medical Services Corp. of Eastern Wash.*, 145 Wn.2d 233, 245, 35 P.3d 1158 (2001). Conduct is unreasonably dangerous when its risk outweighs its utility. *Id.* The amended complaint avers that the risk of Gate Gourmet's conduct outweighed its utility. *See* CP at 25. Gate Gourmet's conduct represented a threat to the religious and sincerely held beliefs of the class, and the utility of the employment policy was that the people in charge prefer the taste of the non-kosher, non-halal, or non-vegetarian meals.

Furthermore, the Court could look to both Chapter 49.60 RCW and Title VII as evidence of the standard of care. The duty at common law exists regardless of whether that federal statute was pleaded. The amended complaint also avers proximate cause and damage. *See* CP at 25-29. Objective symptomatology for all various class members would be articulated in discovery. In the meantime, one could easily think of hypothetical facts that would support this element.

¹² Below, Gate Gourmet claimed that the class did not adequately plead duty. CP at 72. It mischaracterized the alleged duty as one "to maintain a stress-free environment." CP at 72.

Washington law recognizes claims for negligent infliction of emotional distress. Facts alleged in the amended complaint, which this Court accepts as true, along with hypothetical facts are sufficient to permit a claim. Dismissal under CR 12(b)(6) is not appropriate.

VI. Conclusion

This Court should overrule *Short v. Battle Ground*, and hold that under WLAD employers owe a duty to reasonably accommodate religion in the workplace. This duty is supported by the text of WLAD and the original text, court interpretations, and EEOC interpretations of Title VII before its 1972 amendment. This Court should permit duty to accommodate claims under WLAD and state law.

Employers similarly are not immune from previously recognized causes of actions, simply because an employee also alleged a duty to accommodate claim under WLAD. Any set of hypothetical facts can defeat a motion under CR 12(b)(6). The class has pled facts sufficient to sustain each cause of action. Even in the absence of such averments, there exists ample hypothesis that could support the claims and allow the class to have its day in court. Because Gate Gourmet adopted policies that disparately impact employees with sincere dietary beliefs, intentionally caused the offensive bodily contact with its employees, and adopted

policies that negligently inflicted emotional distress, this Court should reverse the superior court's dismissal of the claims under CR 12(b)(6).

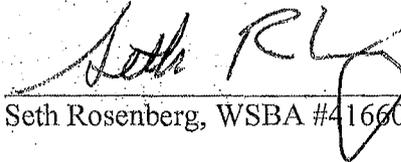
Respectfully submitted this 11 day of January, 2013.

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Declaration of Service

I caused a copy of the foregoing Opening Brief to be served on the following in the manner indicated below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 14th day of January, 2013, at Seattle, Washington.



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