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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.

APPELLANTS' REPLY BRIEF

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A. RESTATEMENT OF THE CASE

Gate Gourmet is the world's largest independent provider of catering and provisioning services for airlines and railroads. It is the core business behind GateGroup, which profited 216.7 million Swiss Francs (\$231.6 million USD) in 2010, serving more than 200 million meals from 120 airports around the globe. The location at issue is at SeaTac Airport, Washington.

Petitioners are employees of Respondent Gate Gourmet. CP at 16. For security and business reasons, employees are not allowed to bring their mid-shift meal, CP at 17, and they cannot leave for breakfast, lunch, or dinner. *Id.* Instead, the employer agrees to provide a "hearty meal." However, this meal is provided in a way that does not benefit everyone equally.

Employees brought their dietary concerns to the attention of Gate Gourmet. CP at 20. Gate Gourmet ignored them and refused to alter the ingredients and preparation of its food offerings. In one instance, the company intentionally reverted to offensive foods after accommodating the employees' religions for a brief period. *Id.* These facts support claims under the Washington Law Against Discrimination (WLAD), RCW 49.60 *et seq.*, for failure to accommodate and disparate impact

discrimination, as well as common law torts of battery and negligent infliction of emotional distress.

Gate Gourmet moved to dismiss under CR 12(b)(6) on the basis that it was free to disrespect certain religions. In Washington, any real or hypothetical facts not inconsistent with the complaint will defeat a 12(b)(6) motion. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750 (1995). In dismissing Petitioners' lawsuit, the trial court determined that employers owe no duty under Washington law to accommodate the religious and sincerely-held beliefs of their employees, and that this absence of legal duty overrides 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. Superior Court Judge Yu handwrote, "The court grants the motion based on the Court of Appeals decision in *Short v. Battle Ground* and the state of the law on religious accommodation."

The employees contend that implying a duty to accommodate is consistent with case law and makes for sound public policy. It is good for both employees and employers. It promotes a dialogue that encourages respect and tolerance. It is good for Washington.

The multinational employer, who must eventually reform to comply with federal law, wants to distort our state law to avoid liability

for a single case. Gate Gourmet advances no policy argument why its position should be adopted. Its position would hurt Washington by discouraging communication about our differences, and exposing employers to unfair liability. Its position is that Washington employers enjoy a safe harbor for disrespect.

Washington is not a fringe haven for intolerance. Rather, it is a vanguard of civil rights. The public policy embodied in our Constitution and statutes codifying and extending civil rights support finding that employers do, in fact, have a duty to make reasonable accommodation for their employees' religions, and that they cannot adopt policies that disparately impact protected groups. Similarly, the common law of torts protects them through claims for battery and negligent infliction of emotional distress. The trial court's decision being in error, this court should reverse the order of dismissal and remand this action.

B. The duty to accommodate is implicit in the WLAD and supported by the Washington Constitution and public policy.

1. Duty to Accommodate has always been implicit in anti-discrimination jurisprudence.

Gate Gourmet contends that the federal jurisprudence cited in the Employees' opening brief is inapplicable to this case because Title VII expressly articulates the duty to accommodate the religious beliefs of its

employees, whereas the Washington Law Against Discrimination (WLAD) does not contain identical language.

This argument ignores that the duty to accommodate was implied in Title VII even before its amendment in 1972. The EEOC, which merely interprets the statute, issued regulations in 1965 and 1967 interpreting Title VII as requiring accommodation of an employee's religion, despite the absence of an express duty set forth in the statute. 29 CFR § 1605.1 (1965) and 29 CFR § 1605.1(b) (1968); *see also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75-76 (1977) (construing Title VII under 1967 EEOC guidelines, holding that the duty to accommodate is clear, if ill-defined).

Gate Gourmet misstates the holding of *Dewey v. Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970). It contends that *Dewey* declined to impose a duty to accommodate employees' religions based on statutory language. (Resp. Br. at 16). *Dewey* holds differently, and is distinguishable. That case raised several issues, including: (1) whether it was reasonable to accommodate religion when it conflicted with an explicit agreement between a union and management; (2) whether arbitration offered finality; and (3) how to articulate the boundaries of the

duty to accommodate.¹ Gate Gourmet's citation in its response brief is to the denial of rehearing, not to the opinion of the court, which are articulated in separate sections of the written opinion. As the *TWA* case recognizes, the issues in *Dewey* were resolved by legislation. *TWA*, 432 U.S. at 73-74. However, *TWA* also states that the EEOC regulations at issue were proper interpretations of the original statute. *Id.* at 69-70.

The U.S. Constitution requires the government to accommodate employees' religion. See e.g., *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 144 (1987). Federal law requires mid-sized and large employers to accommodate employees' religion. 42 U.S.C. § 2000e. The WLAD, in contrast, applies to an important set: private employers with eight or more employees. RCW 49.60.040(11). Employers in this set need to know whether they must accommodate the creeds of their employees or not. Small businesses with fewer than 50 employees make up 96.2% of Washington's employers and 41% of its

¹ The Sixth Circuit held that the trial court improperly applied the second of the EEOC guidelines, when it should have applied the first. *Id.* at 329. This was an important distinction because the dispute in *Dewey* related to the workweek's interference with an employee's religion, and the first EEOC guidelines explicitly exempted a "normal workweek" from the accommodation analysis. *Id.* at 329-30.

private-sector jobs.² The WLAD covers an important set of businesses and permits redress distinct from federal law.

2. Washington protects civil rights.

The Washington Constitution is, at times, more protective of civil rights than the U.S. Constitution. Our state constitution grants “absolute freedom of conscience in all matters of religions sentiment, belief and worship.” Wa. Const., Art. I § 11. The practice of discrimination against Washington inhabitants based on their creeds (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.* The purpose of the WLAD is to fulfill “the provisions of the Constitution of this state concerning civil rights.” RCW 49.60.010. Washington passed the WLAD fifteen years before the U.S. Congress passed a federal civil rights act. *See, e.g. Hiatt*, 120 Wn.2d at 62. *Gate Gourmet* implies that this law prohibits only intentional discrimination against an employee’s religion.

The knowing and considered refusal to accommodate religion, such as that alleged here, can be considered intentional discrimination. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 604, 606 (9th Cir. 2004)

² <http://www.washingtonpolicy.org/publications/facts/snapshot-small-businesses-washington>, last accessed March 14, 2013, 12:14 PM.

(recognizing that claims for religious discrimination can be asserted under theories including disparate treatment, hostile work environment, and failure-to-accommodate claims); *cf. Duvall v. County of Kitsap*, 260 F.3d 1124, 1140-41 (2001) (a conscious decision not to accommodate a disability may be intentional discrimination under the ADA). It is precisely this type of conduct against which the state constitution is designed to protect, and against which public policy has been established.

Gate Gourmet's reliance on *Hiatt* for the proposition that WLAD does not contain a duty to accommodate is misplaced. The court in *Hiatt* specifically declined to reach this question because it was inadequately briefed. Courts do not rely on cases that fail to specifically raise or decide an issue. *In re Electric Lightwave, Inc.*, 123 Wn.2d 531, 541.

Gate Gourmet cites the Human Rights Commission's and state legislature's inaction in requiring employers to accommodate their employees' religious beliefs. The legislative silence as to whether there exists a duty to accommodate under Washington law is not conclusive evidence that such duty does not exist. *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 540-41 ("Legislative silence by itself is not dispositive" just as courts "do not rely on cases that fail to specifically raise or decide an issue.") (internal citations omitted). Instead, in the absence of administrative guidance on the language of the statute, it is the duty of the

court to interpret the statute and to state what the law is. *Washington State Human Rights Commission ex rel. Spangenberg v. Cheney School Dist.* No. 30, 97 Wn.2d 118, 121 (1982). The Court should recognize the statutory duty to accommodate religion in the workplace, and this would be consistent with the statement of legislative purpose contained in RCW 49.60.010 which is to extend Constitutional civil rights to the private employment context. Using federal jurisprudence as guidance, the court is free to use federal jurisprudence as guidance and to adopt “those theories and rationales which best further the purposes and mandates of our state statute.” *Grimwood*, 110 Wn.2d at 361-62.

3. *Short* should be distinguished or overturned.

Short stated an improper holding and should be overturned or limited. The plaintiff in *Short* claimed she was fired because her religion forbade lying. While no employee should have to violate their conscience with respect to the truth, recognizing a cause of action in the employment setting may be treacherous and hard to police in the pleadings stage. That scenario is very different from a plaintiff whose religion forbids consumption of certain food, and who is forced or deceived by his or her employer to eat such food.

Next, the *Short* court relied, as Gate Gourmet does here, on legislative inaction. *Short*, 169 Wn. App. at 203. As stated above, the

state legislature has provided a statute, and the Court has to interpret the law. The policy of accommodation of religion was implicit in the WLAD as it was in Title VII. In other words, recognizing a claim for failure to accommodate would not be filling a void in legislation, but rather fulfilling the law's purpose through interpreting and applying that legislation. *Short* was ill-considered and should be overturned or limited.

4. Implying a duty to accommodate is good policy.

The duty to accommodate is an important mid-point between the absence of a duty and the imposition of liability. The duty to accommodate promotes a conversation initiated by the employee. Before the employee comes forward, the employer may not know the employee holds a particular creed, or perceives disrespect or an obstacle to success. The duty to accommodate encourages employees to educate and communicate with their employer about their differences.

Without the duty to accommodate, the employer may be surprised by liability. Employers are liable for disparate impact when a facially neutral policy falls more harshly upon an employee because of his or her protected class. An employer may be surprised to learn about a conflict between company policy and employees' creeds, and the education may come in the form of civil liability instead of intra-company communication. Yet, under Gate Gourmet's view, no amount of

communication or education can make them show its employees the same respect it shows its customers, who may request such special meals as vegetarian, kosher, gluten free, and other custom dishes.

Anti-discrimination statutes have always implied the duty to accommodate. The only issue was how to articulate that duty, because the duty balances the rights of one employee against another, and employees versus employers. Now, we have found a point to balance these rights.

C. The disparate impact claim is supported by the facts in the First Amended Complaint.

Gate Gourmet cites three reasons for the dismissal of the disparate impact cause of action: (1) that the claim is merely derivative; (2) that employees suffered no adverse employment action, and (3) that the food policy is discretionary, and therefore cannot be discriminatory. All three arguments fail.

The employees have stated a cause of action for disparate impact. Gate Gourmet dismisses this argument as “derivative” of the failure-to-accommodate claim, yet it is an independent cause of action. Plaintiffs establish this claim when they show a facially neutral employment policy falls more harshly on a protected class. *Oliver v. Pacific Northwest Bell Telephone Co., Inc.*, 106 Wn.2d 675, 679 (1986). Disparate impact is adequately pleaded where (1) the meal policy is facially neutral and

(2) falls more harshly on the class of plaintiffs by contravening their religious tenets. A claim for relief has been sufficiently stated.

1. WLAD does not require an adverse action; Employees suffered one nonetheless.

Gate Gourmet cites no Washington case for the contention that an adverse employment action is a necessary element in a disparate impact claim under WLAD. Instead, it relies on a case from the D.C. Circuit construing a claim under the Age Discrimination in Employment Act (ADEA) (*Aliotta v. Bair*, 614 F.3d 556 (D.C. Cir. 2010)); a case from the Ninth Circuit, arising in Arizona, also construing the ADEA (*Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000)); and an obscure opinion from the District of Nebraska construing Title VII and the Nebraska Fair Employment Practices Act (*Reyes v. Pharma Chemie, Inc.*, 116 Fair Empl. Prac. Cas. (BNA) 69 (D. Neb. September 11, 2012)). The adverse action element is not incorporated in Washington disparate impact case law.

The meal policy discriminates in the terms and conditions of employment based upon the employees' creeds. It is therefore unlawful discrimination. *See, e.g., Tyner v. State*, 137 Wn. App. 545, 564 (2007) (loss of pay or benefits constitutes adverse employment action); *see also Aliotta v. Bair*, 614 F.3d 556, 566 (D.C. Cir. 2010) (defining "adverse employment action" as "a decision causing significant change in

benefits.”) In fact, the policy at issue has the potential adverse impact of forcing the protected class to work a full shift without a meal break in violation of Washington law. WAC 296-126-092.

2. Gate Gourmet’s purported ability to choose to discriminate should not shield it from liability for discrimination.

Gate Gourmet’s third argument to avoid a claim for disparate impact is if an employer is *able* to implement a non-discriminatory policy, but *chooses* not to do so to the detriment of an entire class of employees, no cause of action exists because the discrimination is the result of a choice of the employer.

As a matter of fact, we do not know whether the menu or its changes were pursuant to a discretionary policy. The complaint alleges that the employer changed the ingredients for its spaghetti and meatballs from pork and beef meatballs to turkey meatballs. Later, without telling the employees, the company changed back to pork and beef. This surreptitious change in ingredients, and the lack of a true vegetarian option, manages to offend every class member in a single serving—and they may never know how long they were eating it. It may be that contracts or policies are in effect that require the provision of certain foodstuffs. Such facts, real or hypothetical are adequate to support the

cause of action. However, because the company food policy disparately impacts the protected class, the cause of action is sustainable.

To support its argument, Gate Gourmet mischaracterizes the nature and requirement of a “subjective or discretionary” act.³ In *Oliver*, 106 Wn.2d 675, the policy was not facially neutral because the discipline policy based on dishonest conduct had no automatic consequences that would apply to each employee but fall more harshly on the minority groups. The employer could choose what discipline resulted from dishonest conduct. In *Shannon v. Pay ‘N Save Corp.*, 104 Wn.2d 722 (1985), there was no policy in place respecting the hiring and promotion of women, but the plaintiff there was denied a promotion subjectively, based on her gender.

Here, the policy at issue is the food offerings provided by Gate Gourmet. The employees do not dispute that Gate Gourmet at one point

³ Such intentional discrimination, suggested by Gate Gourmet’s motion, would support a cause of action for disparate treatment, if not disparate impact. The traditional disparate treatment model “requires proof of discriminatory motive; a plaintiff will have great difficulty, under that theory, attacking practices fair in form but discriminatory in operation. . . . However, discriminatory motivation can be readily inferred when solely subjective [policies] result in the exclusion of a protected class.” *Shannon v. Pay ‘N Save Corp.*, 104 Wn.2d 722, 733 (1985). Thus, if Gate Gourmet’s contention is that the disparate impact analysis does not apply because the company intentionally discriminated against the class of plaintiffs, then the plaintiffs should be allowed to amend their complaint to include disparate treatment, rather than face dismissal. CP at 84-85.

changed the menu to accommodate their religious requirements, and then reverted back to impure foods. However, these changes affected all employees, regardless of creed or origin; the reversion to beef-and-pork meatballs fell more harshly on the class of plaintiffs. The policy was facially neutral because it affected all employees. The fact that the ingredients may have been altered at the direction of Gate Gourmet does not shield the company from liability for the impact on the class.

D. Battery is either “harmful” or “offensive” bodily contact.

Gate Gourmet argues that the employees’ claim for civil battery fails for three reasons: (1) there was no “bodily contact upon another;” (2) there was no “application of force;” and (3) there is no showing of requisite intent. In fact, the First Amended Complaint suffers from none of these deficiencies, and the trial court erred in dismissing the claims.

1. The provision of tarnished or offensive food constitutes an offensive bodily contact.

Gate Gourmet radically misstates the tort of battery as requiring the “intentional infliction of harmful bodily contact upon another.” (Resp. Br. At 29) (citing *Garatt v. Dailey*, 46 Wn.2d 197, 200 (1955)). Rather, “[t]o be liable for battery, the defendant must have done some affirmative act, intended to cause an unpermitted contact. ‘(I)t is enough that the defendant sets a force in motion which ultimately produces the result.’”

Mink v. Univ. of Chicago, 460 F.Supp. 713 (D.C. Ill. 1978) (quoting W. Prosser, *Law of Torts*, § 9, at 35 (4th ed. 1971)). Moreover, “proof of the technical invasion of the integrity of the plaintiff’s person by *even an entirely harmless, but offensive*, contact entitles him to vindication of his legal right by an award of nominal damages, and the establishment of the tort cause of action entitles him also to compensation for the mental disturbance inflicted upon him.” *Id.* (emphasis added).⁴

According to *Gate Gourmet*, the fact that the employees fed themselves bars the claim of civil battery because battery requires the tortfeasor to come into “bodily contact upon another.” Were this true, no act of deception, such as poisoning, would void consent and give rise to a claim for battery. This is contrary to black letter law. *Cf. Jimenez-Nieves v. United States*, 682 F.2d 1, 4 (1st Cir. 1982) (citing Restatement (Second) of Torts, ch. 22, scope note at p. 54) (inducing person to eat chocolates that are poisoned is considered a battery).

⁴ A battery occurs if the defendant has set in motion forces or a chain of events that lead to a harmful or offensive contact with the plaintiff. (e.g., Restatement (Second) Torts § 18, com. c, pp. 30-31; 1 Dobbs, *The Law of Torts* (2001) § 31, pp. 61-62; 1 Harper et al., *The Law of Torts* (3d ed.1995) § 3.3, pp. 3:10-3:11; Prosser & Keeton, *The Law of Torts* (5th ed.1984) p. 40.)

The fact that Gate Gourmet knowingly exposed the Employees to food, the content of which was misrepresented to them or mislabeled, satisfies the offensive touching element of the tort.

2. No application of force is required for the tort of battery.

Gate Gourmet's second contention relates to its first, and states that the tort of battery requires an application of force. It relies on a case construing the criminal battery statute, repealed by Title 9A of the Revised Code of Washington, for this specious argument. The term "application of force" is not used in cases of tortious battery,⁵ as is clear in the cases adopting the Restatement (Second) of Torts, discussed in the previous section. *See, e.g., Orwick*, 65 Wn. App. at 85. Even Black's Law makes this distinction. BLACK'S LAW DICTIONARY 146 (7th ed. 1999) (defining criminal battery as requiring the "application of force to another, resulting in harmful or offensive contact," yet the tort as "intentional and offensive touching of another without lawful justification.") No

⁵ "Application of force" appears to be a term of art in criminal law. It appears in case law describing the crimes of assault and battery (*see, e.g., State v. Humphries*, 21 Wn. App. 405, 409 (1978) (spitting in the face is an application of force for crime of battery); of breaking and entering (*see, e.g., State v. Jackson*, 59 Wn.2d 117, 119 (1962) (breaking is the "application of force to remove some obstacle to entry"); and in the Washington Criminal Code under the definition of "deadly force" (RCW 9A.16.010(2)) ("Deadly force" means the intentional application of force through the use of firearms or any other means reasonably likely to cause death or serious physical injury.")

application of force is required for the common law tort of battery.

Having said that, Gate Gourmet may have also committed criminal battery.⁶ The complaint states a cause of action for battery.

3. Gate Gourmet offered the food knowing that it was offensive to the Employees.

Gate Gourmet's final argument regarding the battery claim is that the complaint fails to allege the requisite intent to cause any bodily harm, or that it knew with substantial certainty that harmful bodily contact would occur. The complaint actually avers that Gate Gourmet intended "to commit an act of unwanted contact [including] by the offering of food with the intent that another eat it." CP at 26. Further, Gate Gourmet switched back to pork and beef meatballs without informing its employees (CP at 27), and "intentionally offered them the food, intending that the Class Members would eat it, and precluding them from bringing other food to work." CP at 27. Intent need not have been pleaded, but was clearly so in the First Amended Complaint.

⁶ In *State v. Bland*, 71 Wn. App. 345, 356 (1993) (overruled on other grounds), the court described the crime of battery to include "administering a poison or other deleterious substance, by communicating a disease, or by applying a caustic chemical," and "may be perpetrated in even more indirect ways, such as exposing a helpless person to the inclemency of the weather, or threatening sudden violence and thereby causing another to jump from a window or a moving automobile." (citations and internal quotations omitted).

Gate Gourmet cites *Garratt v. Dailey*, 46 Wn.2d 197, 201-02 (1955) for its assertion that a defendant must be substantially certain that a harmful contact will occur as a result of an intentional act. *Garratt* involved the actions of a five-year-old boy in moving a chair as the plaintiff was sitting down. The court stated that “[a] battery would be established if ... it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. . . . Without such knowledge, . . . there would be no liability.” *Id.* at 202.

Here, the complaint stated that Gate Gourmet knew that its food offerings offended the employees’ beliefs. CP at 27. It stated that Gate Gourmet knew or should have known that eating impure food would be offensive or harmful to the class. CP at 27. As the company was aware of the sensibilities of the Employees, it had such knowledge as to establish the substantial certainty that its intentional action in providing mislabeled or misrepresented food to its employees would cause offensive contact. At a minimum, the complaint states a cause of action for which relief may be granted.

E. Election not to assert a federal claim does not disprove existence of duty for the purposes of negligent infliction of Emotional Distress.

Gate Gourmet recognizes that a duty⁷ exists at federal law to accommodate religious beliefs to avoid injuring its employees. This duty also exists at common law. *See, e.g., Chea v. Men's Wearhouse, Inc.*, 85 Wn. App. 405, 412 (1997) (employer can be held responsible when its negligent acts injure an employee, and such acts are not in the nature of employee discipline). Nevertheless, Gate Gourmet argues that the Employees have failed to establish duty in their negligent infliction of Emotional Distress claim, based on the Employees' election not to pursue a claim for violation of Title VII. To restate the argument, Gate Gourmet claims that a duty would exist had the employees elected to pursue their federal claim, but their decision to forego the federal claim renders the common law duty non-existent.

For the purposes of negligence, the determination of whether a duty exists is a question of law. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48 (1996). Either statutory provisions or common law

⁷ Respondents claim that Appellants' election to bring their claims under Washington state law, as opposed to federal law, "doomed" their case, positing that while federal law imposes a duty on employers to reasonably accommodate employees' religious beliefs, the Washington Law Against Discrimination, RCW 49.60.010, *et seq.*, does not. (Respondent's brief, p. 2).

principles may provide the basis for a duty. *Id.* at 49. “An individualized duty upon which liability can be founded exists where a statute or ordinance indicates a ‘clear intent’ to identify and protect a ‘particular and circumscribed class of persons’ of which the plaintiff is a member.”

Stannik v. Bellingham-Whatcom County Dist. Bd. Of Health, 48 Wn. App. 160, 163 (1987) (quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 676 (1978)).

In other words, a duty⁸ established by a statute, and supported by negligence case law, exists independently of that statute.

An employer may not negligently injure his employee through unreasonably dangerous conduct. The imposition of a duty is supported by the Washington Constitution, Art. I § 11, and by the purpose established in the Washington Law Against Discrimination. Finally, the duty is set forth with specificity in Title VII. The meal policy does not relate to employee discipline; it is part of the terms of employment that are extended in a discriminatory way. The employer’s disrespect under these facts states a claim for which relief may be granted.

⁸ The determination of duty requires “considerations of logic, common sense, justice, policy, and precedent.” *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243 (2001). “The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a plaintiff’s interests are entitled to legal protection against the defendant’s conduct.” *Taylor v. Stevens County*, 111 Wn.2d 159, 168 (1988).

F. Given the existence of a duty, the negligent infliction claim stands.

Gate Gourmet proposes that the negligent infliction of emotional distress claim fails because there is “no duty for an employer to provide employees with a stress-free workplace.” *Snyder*, 145 Wn.2d at 243. Gate Gourmet misstates the duty. The class of plaintiffs does not expect a “stress-free workplace,” and does not allege that failure to provide a stress-free workplace results in a claim for damages. Unlike the plaintiff in *Snyder*, the Employees here have suffered emotional distress from a breach of a recognized duty of care imposed by law. The employees are a protected class under Title VII and WLAD. They were foreseeably endangered by Gate Gourmet’s actions in knowingly providing them with food offensive to their religions, particularly where Gate Gourmet did not inform them of the ingredients in the food.

This is not a matter of an insignificant workplace dispute, or of discipline; it is a matter of religious discrimination, and therefore, “a matter of state concern.” RCW 49.60.010. Gate Gourmet’s efforts to downplay the import of its deliberate discrimination should be disregarded: the duty not to discriminate or harm exists, and breach of that duty gives rise to a claim for negligence. Its actions amount to a poison of the soul and a violation of the class’s consciences and religious tenets.

Contrary to Gate Gourmet's contention, a negligent infliction of emotional distress claim can exist in an employment context. *See, e.g. Goodman v. Boeing Co.*, 127 Wn.2d 401, 406-07, 899 P.2d 1265 (1995) (affirming a jury verdict for both negligent infliction of emotional distress and duty to accommodate disability claims in employment context); *Chea*, 85 Wn. App. at 412 (affirming a jury verdict for both negligent infliction of emotional distress and discrimination claims in employment context). The claim asserted in this case is neither related to employee discipline, nor a personality dispute in the workplace. It is the failure to meet the standard of care in the context of employment under the classic utility test.

As Gate Gourmet concedes, an employer is obligated to refrain from particular conduct to those who are foreseeably endangered by the conduct, with respect to those risks whose likelihood make the conduct unreasonably dangerous. *Snyder*, 145 Wn.2d at 245 (quoting *Hunsley v. Giard*, 87 Wn.2d 424, 436 (1976)). Gate Gourmet had a duty not to mislead or compel the employees into ingesting food that it should have known would cause them emotional and mental suffering. This suffering was manifested in objective symptomatology and is likely to require religious ablution or other cleansing.

The employees have adequately pleaded the theory of negligent infliction of emotional distress. The trial court erred when it granted the motion to dismiss.

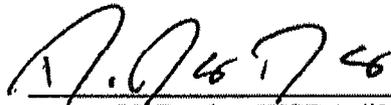
G. CONCLUSION

Gate Gourmet contends that, while it must cater to meet the dietary needs of its world-wide customer base, it need not respect its Washington employees' creeds. Employees believe this state respects the dignity of all creeds, and one's creed should not be a barrier to enjoying the benefits of employment. The duty to accommodate creeds in the workplace is required under our Constitution, which is extended to the private employment context in our statutory Law Against Discrimination. The duty to accommodate promotes the rights of employees and encourages civil discourse about our differences while protecting employers from surprise and unfair liability. Similarly, our common law of torts protects our dignity, even in the employment context.

This Court should overrule or limit the Court of Appeals in *Short v. Battle Ground*, and reverse the order of dismissal and remand this case.

Respectfully submitted this 14 day of March, 2013.

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Declaration of Service

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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 March, 2013, at Seattle, Washington.



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