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No. 75057-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHRISTOPHER H. FLOETING

Appellant

v.

GROUP HEALTH COOPERATIVE

Respondent

BRIEF OF RESPONDENT

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A. INTRODUCTION

Respondent Group Health Cooperative ("GHC") is a member governed, nonprofit health care system organized under the laws of the State of Washington and based in Seattle. GHC operates Northgate Medical Center, where Appellant Christopher Floeting ("Floeting") attended his medical appointments.[1]

Floeting is a member and patient of GHC. Floeting claims that on numerous occasions between July 2012 and September 2012, a female Patient Access Representative, referred to herein as TT, sexually harassed him while he was on the GHC Northgate campus.[2] Floeting lodged a complaint with GHC on September 11, 2012. In it, he detailed one conversation of a sexual nature and another regarding TT's mental health. He also expressed concerns about TT's work performance and professionalism. An investigation was already under way into TT's behavior and that investigation was expanded to include Floeting's allegation. GHC terminated TT two weeks later, on September 25, for violations of various GHC policies.

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[1] Appellant's opening brief repeatedly refers to Floeting as Reverend Floeting. Floeting admits he has had no religious training. He obtained an online certificate designating him as a reverend two weeks after completing an online form and submitting a $40 payment. CP 329-338.

[2] As TT is not a party to the lawsuit, the parties have agreed to refer to her in this way to protect her anonymity.

Nearly three year after TT's termination, Floeting filed a lawsuit in King County Superior Court against GHC. In it, he alleged that GHC was liable to him for damages for sexual harassment and negligent supervision stemming from his alleged encounters with TT. GHC moved for summary judgment, asking the court to dismiss both claims on the grounds that although Floeting may have experienced inappropriate conduct on the part of TT (the most egregious of which he never reported or raised until his lawsuit), Floeting did not have actionable claims for sexual harassment or negligent supervision. The trial court agreed and granted GHC's motion, dismissing both claims. This appeal arises from the trial court's order.

Floeting does not assign error to the trial court's dismissal of his claim for negligent supervision. His appeal is limited to his claim for sexual harassment in a place of public accommodation. GHC respectfully asks this Court to affirm the decision of the trial court concluding that Floeting cannot, as a matter of law, establish a claim for sexual harassment in a place of public accommodation under the Washington Law Against Discrimination ("WLAD"), RCW ch. 49.60 et seq. because: (1) the WLAD does not encompass such a claim; (2) the test offered by Plaintiff to establish a claim ignores 30 years of sexual harassment case law, and is therefore invalid on its face; and (3) applying established legal principles

in both sexual harassment and public accommodation jurisprudence. Floeting has not raised a genuine issue of material fact that would permit his claim to proceed.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

GHC believes that the issues pertaining to Floeting's assignment of error are best stated as follows:

1. Whether the WLAD expressly creates a cause of action for sexual harassment in a place of public accommodation.

2. If the WLAD can be interpreted to include a claim for sexual harassment in a place of public accommodation, whether Floeting's proposed prima facie test is consistent with the test for sexual harassment uniformly applied by Washington courts in other contexts, specifically that the conduct complained of is unlawful only if it was: (1) unwelcome; (2) because of sex; (3) sufficiently severe or persistent to deny the plaintiff an established right under the WLAD; and (4) imputable to the defendant.

3. Whether under the appropriate test, Floeting can demonstrate the existence of a genuine issue of material fact warranting reversal of the trial court's decision dismissing his claim for sexual harassment.

C. STATEMENT OF THE CASE

Floeting has been a member of GHC for nearly 35 years. CP 48. He attended appointments at the Northgate facility approximately three times per month. CP 46, 48. Floeting checked in for his appointments with a number of Patient Access Representatives ("PARs") during this time, including TT, whom he had known for many years. CP 49. Floeting

had never had any issues with TT until the summer of 2012 when he claimed TT subjected him to inappropriate comments when he was on site. CP 49, 50.

TT was hired as a PAR at GHC Northgate in May 2001. CP 60. Prior to the summer of 2012, GHC had not received any member complaints about TT. *Id.* In addition, there had been no cause to initiate disciplinary action against TT or any concerns about TT's fitness to perform her job. *Id.*

1. Critical Dates

a. *July 2012*

Floeting had medical appointments at the Northgate facility on July 2, 11 and 24. CP 60, 79-89. TT checked him in on the 11th and 24th. CP 73, 75.

On Friday, July 27, GHC was alerted to a Facebook post in which TT appeared to discuss suicide. CP 60, 91, 93-94. TT's supervisor, Mary Kelly, who was dealing with a family emergency, informed a fellow co-worker, Michelle Paige, of TT's post. *Id.* Paige volunteered to reach out to TT. *Id.* Paige went to TT's home to check on her. *Id.*

On Monday, July 30, TT initiated an internal complaint against Kelly and Paige alleging they had inappropriately accessed records to find

her home address and other personal information. CP 60, 96-98. The situation prompted a conversation between GHC personnel, including the PARs supervisor, and TT about TT's well-being. *Id.* TT went on medical leave for the rest of the week, beginning July 31. CP 102, 104.

b. *August 2012*

TT remained on medical leave through August 3 and was again on leave August 9 and 10; hospitalized August 17-20 and on leave thereafter until August 27. CP 104. Floeting had medical appointments on August 1, 15 and 23. CP 78-79, 82. August 15 was the only day in August that TT's work schedule coincided with Floeting's appointments. *Id.*

On August 2, while TT was on leave, GHC received a complaint about TT from one of its members, KK.[3] CP 111. This was the first complaint GHC received about TT from a GHC member. CP 61. GHC's transcription of the complaint reads as follows:

> Member contacted Member Quality to register a "harassment" complaint about a staff member at Northgate Medical Center. Member states a staff member named [TT] who works as a PAR, has been calling and harassing him for six or seven months. Member said she leaves messages "crying" saying she is going to "kill herself" and she "hates her job." When asked why she would be calling him, member said he has no idea. Member said there has never been a personal relationship between him and [TT]. Member states [TT] called, or texted, him at least 25 times on

[3] As KK is not a party to the lawsuit, the parties have agreed to refer to him in this way to protect his anonymity.

> 7/26/12, which caused him to get in trouble at his job. Member said he thinks [TT] is "on drugs."

CP 111.

That same day, Mark Bresnick, GHC's Patient Access and Business Operations Manager, initiated an internal investigation to determine whether TT had inappropriately accessed KK's medical records to obtain his contact information in violation of GHC policies. CP 114-115. GHC's Privacy Manager determined TT's access had been legitimate and in the normal course of her job duties. *Id.*

On August 8, GHC decided an investigatory meeting with TT was appropriate to discuss the allegations levied by KK. CP 114-15, 117. As TT, a union member, was out on leave again from August 9-10, the investigation meeting was scheduled for August 17, to allow TT time to arrange for union representation. CP 104, 114-15, 117. On August 16, the day before the investigation meeting, KK contacted GHC saying he had not had any calls or correspondence from TT since August 3, 2012, the day after he filed his complaint. CP 119.

Although TT had not made contact with KK between August 3 and August 16, GHC proceeded with the investigation meeting as scheduled. CP 62. TT attended the meeting with her union representative. *Id.* At the

meeting. TT informed GHC that she did not recall when she got KK's cell phone number, but said he gave it to her, as well as to other staff members. CP 121. TT said KK had come to her house to fix her car and that her daughter occasionally worked on KK's computer for him. *Id.* TT denied KK's characterizations of their interactions and offered to provide her phone records. *Id.* GHC indicated this would be helpful. *Id.*

Following the August 17 meeting, later that day GHC helped get TT into a hospital for observation, where she remained until August 20. CP 62, 105-06, 123. Upon her discharge from the hospital, TT remained on medical leave until she received clearance from her medical provider to return to work on August 27. *Id.*

On August 23, Stephanie Hansley (a manager involved in the investigation) contacted KK to follow up on his complaint following the meeting with TT. CP 125. During this conversation, KK admitted to giving TT his cell phone number; however, he claimed he had never given his home phone number out. *Id.* KK also acknowledged a relationship with TT outside of the Northgate facility, which included him working on her car. *Id.* During the call, KK said TT had made inappropriate sexual comments to him. *Id.* This was the first time GHC learned that any of TT's communications with KK may have been sexual in nature. CP 63,

125. KK agreed to bring in his phone records to support his version of events by the end of the month. CP 125.

KK provided his cell phone records on August 31. CP 127. That same day, Hansley sent an email to TT saying that if GHC did not receive TT's phone records by September 5, the investigation would move forward without them. CP 63.

c. *September 2012*

Floeting had appointments at the Northgate facility on September 5, 17 and 28. CP 84, 88.

On September 6, TT advised Hansley that she could not get her phone records. CP 63. Hansley immediately informed Ted Scott, Senior Human Resource Consultant at GHC, of this information. *Id.* Scott replied that the investigation conducted thus far indicated a possible violation of GHC policies regarding inappropriate interactions with KK, particularly KK's newly reported allegations that some comments were sexual in nature. *Id.* Scott proposed that they have another meeting with TT to address KK's new allegations. *Id.*

On September 11, before the second investigation meeting regarding KK's complaint occurred, Floeting called TT's co-worker about

TT. CP 129. This was the first complaint made by Floeting. A summary of Floeting's call, in relevant part, reads as follows:

> Patient CF called and asked to speak to a manager[.] [S]ince you were gone: I took the call. This patient wanted the phone number to where he could report a concern and that he wanted to make sure that it was kept confidential. I gave this patient the number and then the patient [proceeded] to tell me some information that was sensitive to the patient. Patient states that [TT] spoke about some troubles she was having with one of her coworkers and gave Michelle's name. Also stated that was concerned about a conversation that this patient had with [TT]. [TT] stated that she has tried to kill herself in the past and mentioned her time in a psychiatric ward. Another conversation: [TT] talked about a time that she locked her boyfriend in a room, danced in front of her boyfriend watching a porno film. This information made this patient very uncomfortable and felt that it was actually sexual harassment. Made sure that I knew that CF had morals and felt very uncomfortable. Really wants this to stop. Other things that this patient talked about was that many times when this patient comes in and checks in with [TT] it turns out that [TT] did not check patient in and ends [up] waiting for sometimes hours.

CP 129.

Floeting called Customer Service to register his complaint. CP 131. Saying TT's behavior had become "problematic and uncomfortable" for him, he cited the following exchanges, which echoed those in his initial call:

> ...1) She started talking to him, during a check-in, about her relationship with her boyfriend, about a movie he wanted to watch in the bedroom and that she learned it was a porno movie. Member said this conversation made him feel very uncomfortable, it was extremely inappropriate and he was embarrassed because

> others could hear her. 2) She told him that "GH thinks I'm ok, but I'm not. Police have had to remove me from my house and admit me to a hospital because I have mental issues." 3) At a later time, she saw him in the clinic and continued the conversation about her mental status. 4) He inquired about PAR "Michelle" who was no longer sitting by [TT]. He said [TT] went into detail describing a union situation and that she had personal problems with Michelle, so they were separated from each other. Member said this was way too much information and again, he was very uncomfortable.

CP 131.

The next day, September 12, Supervisor Mary Kelly called Floeting to follow up. CP 135. Kelly documented the call, in relevant part, as follows:

> [Floeting] wanted to file a sexual harassment complaint against [TT]. He stated approximately 3 months ago he was checking in for an appointment and [TT] started to chat with him about a weekend she spent with her boyfriend. She told him that her boyfriend had put a pornographic DVD on and wanted her to watch it. She enjoyed it. After the DVD her boyfriend and [TT] had a really good time.
>
> When she checks him in, over 80% of the time she does it wrong. She becomes distracted, talking about personal things. The treatment center told him no labels come when [TT] checks him in and they don't know he is there. When anyone addresses it with her she hands it off to someone else to deal with. She is rude and insubordinate with others.
>
> About a month ago she told him while checking in again for another appointment that GH does not think she is crazy but she is crazy. When she goes to the hospital they keep sending her home and then the police have to come and pick her up and take her home. She has spent time in a psychiatric ward. And she had tried to kill herself before. The patient told her he had to get going and

> walked away. It appeared that she must have taken her break or something like that, because then she showed up in the pharmacy waiting area and proceeded to tell him more of the story. He does not recall what he did but he knew he wanted her to stop and get away from her.
>
> 9/5 Chris came in and [TT] was sitting at Michelle Paige's desk and Chris asked where Michelle was. [TT] told him that there was a big grievance between herself and Michelle and administration won't dare [p]ut them together.

CP 135.

On September 13, Hansley received news of Floeting's complaint. CP 64. In light of Floeting's complaint, GHC agreed to consolidate the investigation and schedule a meeting with TT to address both complaints as soon as possible. *Id.*

The final investigation meeting with TT took place on September 19. CP 137-40. At the meeting, TT was presented with a copy of GHC's sexual misconduct policy and a copy of the new complaint by Floeting. *Id.* TT denied all the allegations relating to Floeting. However, she did not have a plausible explanation for what appeared to be her handwriting on the back of an appointment card KK provided to GHC. *Id.* TT encouraged GHC to speak to a co-worker, saying the co-worker might be able to support her version of events with regard to her patient interaction. *Id.*

TT was out sick and on vacation on Thursday, September 20 and Friday, September 21. CP 107. During that time, GHC spoke to the co-worker who said she had not heard any conversations between patients and TT. CP 65. However, the co-worker said TT might be making patients uncomfortable. *Id.* Because of the two complaints referencing comments and interactions that were inappropriate and unprofessional, and the results of GHC's investigation, GHC terminated TT. CP 65. As to Floeting's complaint, GHC determined that TT's comment about watching pornography with her boyfriend violated Group Health Policy "02-0125 Customer Service," which states that all "rude or otherwise inappropriate behavior by staff is not acceptable." CP 142-44. TT's last day at the Northgate facility was Tuesday, September 25. CP 108.

2. Floeting's October 2015 Deposition

At his deposition, Floeting said TT started subjecting him to "somewhat" offensive conduct in early July 2012. CP 49. He described the concerning conduct as "little comments here and there" such as: "Hi, good looking," "Good morning good looking," and "Don't you bring your girlfriends coffee?" *Id.* Floeting said he found the comments offensive because he didn't "feel somebody in her capacity should be saying those kind of things to the public." *Id.* Floeting only had two appointments in

July (July 11 and July 24) that overlapped with TT's work schedule. CP 73, 77. Neither Floeting nor the other member, KK, had made any report to GHC at that time.

Floeting testified that the "real offensive things" started in August, which he described as TT offering up intimate details about her weekend. CP 50. Floeting claims TT said she had locked her boyfriend in the bedroom to watch pornographic movies, do drugs and have sex the whole weekend. *Id.* Floeting claims TT told him that he "should have been there," which was not included in his reports made on September 11 and 12, 2012. CP 53. Floeting testified he was "kind of flabbergasted" by the comment. CP 51. TT only worked on one of Floeting's August appointment days (August 15).[4] CP 79.

Floeting testified that the next interaction took place on September 5. CP 53. In his September 11 and 12, 2012 reports to GHC, he described an interaction with TT on September 5 as follows: "9/5 Chris came in and [TT] was sitting at Michelle Paige's desk and Chris asked where Michelle was. [TT] told him that there was a big grievance between

[4] Floeting testified that he believed the conduct occurred on either the 24th or 25th of August, which was when TT was on medical leave. This testimony also contradicts Floeting's September 12, 2012, statement to Mary Kelly that the offensive conduct started "three months" before September 12, 2012. CP 135.

herself and Michelle and administration won't dare [p]ut them together." CP 135.

During his deposition, however, Floeting testified that he encountered TT in a hallway by the public restrooms when she leaned into him and whispered said, "I bet you have a big cock. I'd like to see it." CP 53. Floeting said that TT placed herself in such a way that he felt she was rubbing herself against him intentionally. CP 54. When asked why Floeting failed to mention this encounter at the time he made his 2012 complaint, Floeting testified that he did not want to repeat the "foul, graphic descriptive language" to any female employee of GHC. CP 54-55. However, he offered no explanation for why he originally said he encountered her at the check-in desk and then three years later said he encountered her in the hallway on that day.

Floeting testified he had other undefined encounters with TT that gave rise to his complaint and that those encounters occurred on September 11 (a date when Floeting did not have an appointment), September 17 and September 28 (three days after TT was terminated). CP CP 55. However, when pressed in his deposition to provide details, Floeting refused and walked out of the deposition. *Id.* Then, a few days after the deposition, Floeting presented GHC's counsel with corrections to

his deposition. In them, he said nothing happened on September 28. CP 58.

Floeting also testified that he communicated with the other complainant KK on multiple occasions prior to filing the present lawsuit. CP 47. He said that the two exchanged stories and talked about possibly filing a joint lawsuit against GHC. *Id.*

At the time GHC made its decision to terminate TT's employment, the only information GHC had in its possession relating to Floeting was: (a) an allegation that TT had mentioned a weekend where she and her boyfriend had watched a pornographic movie (there were no mention of drugs at the time of the original complaint); (b) an allegation that TT made comments about trying to kill herself; (c) an allegation that TT was having problems with a co-worker; and (d) concerns about errors when she checked him in. CP 65.

Although Floeting testified that other encounters occurred on September 11, 17 and 28, it is undisputed that Floeting's last day of employment was September 25. Floeting did not have a medical appointment on September 11, and TT did not check Floeting in for his appointment on the 17th. If Floeting did, in fact, have an uncomfortable encounter with TT on the 17th, he never brought it to GHC's attention and

refused to provide any details about the alleged encounter in his deposition.

D. ARGUMENT

1. Standard of Review.

This matter is before this court following a grant of summary judgment dismissing Floeting's claims in their entirety. Review of a grant of summary judgment is de novo. *Bank of Am. NT & SA v. David W. Hubert*, 153 Wn2d 103, 111, 101 P.3d 508 (2004). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

2. The WLAD does not expressly create a claim for sexual harassment in a place of public accommodation.

RCW 49.60.030 generally bans discrimination on the basis of sex. RCW ch. 49.60 does not define "discrimination," but specific subparts of the statute identify situations in which people enjoy the right to be free from discrimination, which include:

> (a) The right to obtain and hold employment without discrimination;
>
> (b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination; [and]

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination.

RCW 49.60.030(1).

Thus far, Washington courts have held that sexual harassment constitutes unlawful discrimination when it acts as a barrier to sexual equality in only two of the five situations identified above, including in the workplace and in real estate transactions, but not including places of public accommodation. The elements of a claim for sexual harassment are not defined by statute. They have been developed by the courts. *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 693 P.2d (1985) (workplace); *Tafoya v Human Rights Comm'n*, 177 Wn. App 216, 223-24; 311 P.3d 70 (2013) (real estate).

Floeting alleges that certain acts and conduct of TT detailed above constitute sexual harassment in a place of public accommodation. Specifically, Floeting claims that TT's sexually charged commentary

denied him the full enjoyment of the Northgate facility in violation of RCW 49.60.030(1)(b), as well as RCW 49.60.215, which makes it an unfair practice for any person, in a place of public accommodation, "to commit an act which directly or indirectly results in any distinction, restriction, or discrimination" based upon a patron's "race, creed, color, national origin, sexual orientation, sex," or other prescribed status. However, Floeting concedes that no Washington appellate court has interpreted the WLAD to encompass his cause of action. App Br 1. Floeting asks this Court to create a new cause of action, in this case of first impression.

The Court should not expand the WLAD to include a claim for sexual harassment in a place of public accommodation as the treatment specifically prohibited by the public accommodation statute cannot be interpreted to include unwelcome sexual innuendo or overture. The Court should also reject the test proposed by Floeting to establish a claim for sexual harassment under the WLAD.[5] Contrary to Washington law,

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[5] Floeting's test, discussed in detail herein, would allow a plaintiff to establish a claim for sexual harassment in a place of public accommodation under the WLAD by showing: (1) that plaintiff was denied the right to purchase services offered by a place of public accommodation "without being subjected to acts causing him, directly or indirectly, to be treated as not welcome, accepted, desired or solicited on the basis of sex"; or (2) that plaintiff was denied admission to a place of public accommodation "without being subjected to acts causing him, directly or indirectly, to be treated as not welcome, accepted, desired, or solicited on the basis of sex"; or (3) that the place of

Floeting's test would relieve him from proving that TT's conduct was sufficiently severe or persistent to deny him an established right under the statute or that the conduct can be imputed to GHC.

3. The treatment prohibited by RCW 49.60.040 cannot be interpreted to include unwelcome sexual innuendo or commentary.

RCW 49.60.030(1)(b) guarantees, in relevant part, the right to be free from unlawful discrimination in a place of public accommodation because of an individual's protected class status. This includes "the right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement." RCW 49.60.030(1)(b).

"Full enjoyment" is defined as the right to:

> purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any [protected class] to be treated as not welcome, accepted, desired, or solicited.

RCW 40.60.040(14).

As noted by the Supreme Court, "The language of this section reveals the legislature's concern that no person should be treated as 'not

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public accommodation "committed an act that directly or indirectly resulted in any distinction, restriction or discrimination against him on the basis of sex." App Br 17, 23.

welcome, accepted, desired or solicited'" in a place of public accommodation. *MacLean v. First Northwest Indus. of Am., Inc.*, 96 Wn.2d 338, 343-44, 635 P.2d 683 (1981).

In addition, RCW 49.60.215 provides, in pertinent part:

> It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination . . . except for conditions and limitations established by law and applicable to all persons, regardless . . . of any sensory, mental, or physical disability. . . .

Floeting is unequivocally incorrect that RCW 49.60.040(14) and RCW 49.60.215 should be construed as setting forth separate rights owed to a patron of a place of public accommodation. App Br 17. As Division Two of this Court stated, the statutes are to be "read in harmony" and "[a]fter factoring in the definition of 'full enjoyment,' if it is found that the refusal or withholding of admission or use was motivated by race or color, an unlawful distinction, restriction, or discrimination has been proved." *Evergreen Sch. Dist. v. Wash. State Human Rights Comm'n*, 39 Wn. App. 763, 777, 695 P.2d 999 (1985). *Evergreen* addressed a claim of race discrimination in a place of public accommodation. However, the requirement that the refusal or admission of use be motivated by protected class status should apply equally here.

Rather than a stand-alone right, RCW 49.60.215 is a causation element. In other words, "there must be some causal nexus between the act complained of and the resulting discrimination in order for the act to be an unfair practice under RCW 49.60.215." *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 640, 911 P.2d 1319 (1996).

RCW 49.60.215 makes treatment the basis for liability, not the complainant's subjective feelings. *Evergreen*, 39 Wn. App. at 772. More specifically:

> [I]t is not enough that some hasty, chance or inadvertent word or action may offend or even make one *feel* unwelcome. Personal sensitivities differ greatly from one individual to another. The Legislature could not have intended to proscribe mere rhetoric that is subjectively offensive to a particular person. Rather, the test is objective and requires a finding of a particularized kind of treatment, consciously motivated by or based upon the person's race or color.

Id. at 772-73 (emphasis in original).

Accordingly, a cause of action for sexual harassment in a place of public accommodation would require that a plaintiff prove that conduct constituting sexual harassment caused the individual to be treated as "not welcome, accepted, [or] desired" because of his or her sex, such that it resulted in the refusal or withholding of admission or use of a place of public accommodation. However, in a sexual harassment case, the treatment at issue is *not* consciously motivated by a desire to make a

person feel "not welcome, accepted, desired, or solicited" in a place of public accommodation because that person is a man or a woman. The treatment is motivated by the harasser's personal sexual gratification and attention toward a particular individual. This is an important distinction.

Undeniably, sexual harassment has the ability to make someone feel uncomfortable, threatened and disgusted among many other things. But, the law instructs that the proper inquiry in these cases is not how the victim feels in response to the treatment in question, e.g., "offend or even make one *feel* unwelcome," but whether the treatment was intended to exclude or discourage or prohibit the offended party from accessing the place of public of accommodation because of his or her sex, race, disability or other protected class status. *Evergreen*, 39 Wn. App. at 772.

Floeting has not offered any evidence that he was subjected to treatment that was intended to exclude or deter him from accessing the Northgate facility. Instead, he alleges that he was subjected to sexually charged commentary that made him feel uncomfortable on a few occasions in 2012 while he was accessing the facility. No matter how broadly the WLAD is to be interpreted, the Court would have to ignore prior interpretations of the statute's "treated as" provision to allow Floeting's claim to proceed. For this reason, GHC asks the Court to find that RCW

49.60.040 and RCW 49.60.215 cannot be interpreted to include a claim for sexual harassment in a place of public accommodation under the circumstances presented here. As there is no legal basis for Floeting's claim, there is no genuine issue of material fact that would warrant a reversal.

4. Floeting's proposed test is legally insufficient as it would relieve him of proving that conduct complained of prevented him from accessing or using the GHC Northgate facility on equal footing with women.

This court may also uphold the decision of the trial court dismissing Floeting's claim on the grounds that the prima facie test proffered by Floeting is inconsistent with every Washington case defining and analyzing sexual harassment as a form of discrimination under the WLAD.

Floeting's proposed test for sexual harassment in a place of public accommodation advocates three distinct avenues to prove a claim:

(1) That he was denied the right to purchase services offered by GHC without being subjected to acts causing him, directly or indirectly, to be treated as not welcome, accepted, desired or solicited because he was a man; <u>or</u>

(2) That he was denied admission to GHC's accommodations, advantages or privileges without being subjected to acts causing

him, directly or indirectly, to be treated as not welcome, accepted, desired or solicited because he was a man; or

(3) GHC, or an agent/employee of GHC, committed an act that directly or indirectly resulted in any distinction, restriction or discrimination against him because he was a man.

App Br 17.

Floeting uses the statutory definition of "full enjoyment" in RCW 49.60.040 (14) to create the first two proposed avenues (read in isolation) and the "unfair practice" language of RCW 49.60.215 (also read in isolation) to create the last proposed avenue.

In *Evergreen*, Division Two examined a claim of racial discrimination in public accommodations, holding that it was error for the Human Rights Commission to "plac[e] total emphasis on the phraseology 'distinction, restriction, or discrimination,' and ignoring the rest of the statute," as Floeting does here. 39 Wn. App. at 776. The Court noted: "In common usage, the words are synonymous and may connote anything from the salutary to the reprehensible, thus leaving it to the unbridled whim and caprice of the Commission to determine their meaning in a given case." *Id.* at 776-77.

The *Evergreen* court stated that "when the terms are read in harmony with the rest of the statute, their meaning is clear." *Id.* at 777. The statute's primary thrust is to the refusing or withholding of admission to places of public accommodation and the use of their facilities on an equal footing with all others. After factoring in the definition of "full enjoyment," if it is found that the refusal or withholding of admission or use was motivated by race or color, an unlawful distinction, restriction, or discrimination has been proved. *Id.* at 777 (emphasis added). See also *MacLean*, 96 Wn.2d at 349 (Utter, J., dissenting) ("Their purpose [public accommodation laws] 'is to make *equal access* to [public] places . . . a *public* right'") (emphasis added).

Accordingly, to be actionable under the WLAD, the conduct in question must have the *discriminatory* effect of denying admission or use of the place of public accommodation on equal footing with others. Floeting's reliance on an Oregon case[6] decided under an Oregon statute to interpret the phrase "distinction, restriction, discrimination" in RCW 49.60.215 as creating an right of recovery, separate from the definition of "full enjoyment," ignores the fact that *Evergreen* expressly addressed Greyhound in reaching its conclusion that the language of RCW

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[6] *King v. Greyhound Lines, Inc.*, 656 P.2d 349 (Or Ct App 1982).

49.60.040(14) and RCW 49.60.215 must be read together and that RCW 49.60.215 does not create an independent right to recovery. *Evergreen*, 39 Wn. App at 776-77.

Floeting also relies on an unpublished case from the Western District of Washington, *Allen v. Educ. Cmty. Credit Union*,[7] as support for a claim of sexual harassment in a place of public accommodation where access was not denied. In *Allen*, the plaintiff shared office space with a man named Canaday. The two were not co-workers, as they worked for separate companies; plaintiff purchased financial services from Canady. The plaintiff maintained that she was subjected to unlawful sexual harassment in the office (a place of public accommodation) when she purchased those services, so she sued Canady's employer, DFC (which was owned and operated by Canaday's mother).

Judge Pechman denied DFC's motion for summary judgment on the claim for sexual harassment in a place of public accommodation. She ruled the WLAD had "two definitions pertaining to discrimination in a place of public accommodation" — one based on a proprietor's denial of full enjoyment (RCW 49.60.040(9)) and another related to a proprietor's denial of access; and plaintiff's claim could proceed on the denial of full

[7] 2006 WL 149775.

enjoyment prong as a "consumer claim," not a sexual harassment claim under the WLAD. *Id.* at 20.

In her ruling, Judge Pechman did not harmonize the provisions of RCW 49.60.040(14), which defines "full enjoyment of" to include: 1) "the right to purchase any service, ... sold on, or by, any establishment to the public," and; 2) "the admission of any person to accommodations, ... or privileges, of any public ... accommodation." However, both must be accomplished "without acts directly or indirectly causing persons of any particular ... sex ... to be treated as not welcome, accepted, desired, or solicited." *Evergreen,* 39 Wn. Ap at 777. Again, there is no additional free-floating standard for "full enjoyment" separate from the Legislature's definition of that term in RCW 49.60.040. Yet, Floeting's case in based entirely on that premise.

Further, despite Floeting's claims to the contrary, *Allen* does not stand for the proposition that employment sexual harassment cases like *Glasgow v. Georgia Pacific Corp.*[8] should have no bearing on a public accommodation sexual harassment case. Judge Pechman wrote nothing that either expressly or impliedly rejects *Glasgow's* application or suggests

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[8] 103 Wn. 2d 401, 693 P.2d 708 (1985).

that Allen was relieved of proving that Canady's conduct was actionable sexual harassment sufficiently significant to violate the law.

5. Floeting's proposed test would also relieve him of proving harassment.

Floeting ignores a critical element of any claim for sexual harassment – namely that a plaintiff must prove that he or she was actually subjected to sex-based harassment and that the harassment had the discriminatory effect of denying that person a right under the WLAD (specifically, admission to or use of the Northgate facility).

In advocating for his proposal, Floeting blatantly rejects any requirement that he prove that TT's behavior was severe or pervasive, claiming that standard "is an explicit type of unfair practice in the employment setting, but not in the context of public accommodations." App Br 21. In other words, it would not matter whether TT's comments were casual, isolated or trivial, or whether they were sufficiently severe to have created a hostile environment. Rather, he would be entitled to recover damages if *any* GHC employee said anything that made him *feel* uncomfortable because he was a man.

In essence, Floeting is advocating for a definition of "full enjoyment" that is synonymous with "his complete satisfaction." This standard would set the bar of what constitutes unlawful sexual harassment

in a place of public accommodation so low that a patron of any place of public accommodation could claim "discrimination" if a clerk asked the patron out on a date or referred to the individual as "looking good" in the jeans he or she was trying on. This has been expressly rejected by Washington courts. See *Kahn v. Salerno,* 90 Wn. App 100, 118, 951 P.3d 321 (1998) (holding that laws against discrimination are "not directed against unpleasantness *per se*.") As the Supreme Court noted in *Kahn*, "There is a line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing. Simple vulgarity does not give rise to a cause of action." *Id.*

Although mimicking the language of RCW 49.60.040(14) and RCW 49.60.215, Floeting's test ignores established interpretations of the definition of "full enjoyment" and rejects the seminal case on sexual harassment in Washington, *Glasgow v. Georgia Pacific*. In *Glasgow*, the plaintiff-employees alleged that certain acts of other employees constituted sexual harassment; that this alleged harassment, which was known to exist by various of the employer's supervisory personnel, created a hostile and intimidating work environment, thereby depriving them of the opportunity to work free of sexual discrimination; and that this discrimination caused them severe physical, mental and emotional distress. 103 Wn.2d at 405.

The Court held that where sexual harassment as a working condition — unlike Floeting's status as a patron — "unfairly handicaps an employee against who it is directed in his or her work performance and acts as a barrier to sexual equality in the workplace," it violates RCW 49.60.180(3). To establish a claim, a plaintiff must carry the burden of proof as to each of the following elements: (1) the conduct was unwelcome, (2) the conduct was because of sex, (3) the conduct affected the terms or conditions of employment, and (4) the harassment can be imputed to the employer. *Id.* at 406-07.

Expanding on these elements, the *Glasgow* Court held that to be unwelcome, the conduct must be uninvited in the sense that the plaintiff-employee did not solicit or incite it, and in the further sense that the employee regarded the conduct as undesirable or offensive. *Id.* Second, the criterion that the conduct be because of sex, requires that the gender of the plaintiff be the motivating factor for the unlawful discrimination. *Id.* Third, the conduct must be sufficiently pervasive or severe so as to alter the terms or conditions of employment and create an abusive working environment. *Id.* And finally, harassment can only be imputed if the employer: (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action.

This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the workplace as to create an inference of the employer's knowledge or constructive knowledge of it and (c) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment. *Id.*

The first three "conduct" elements address whether the behavior in question constitutes unlawful harassment under RCW ch. 49.60. The last element allows a plaintiff to recover damages for the harassment from a third-party employer that did not, itself, participate in the harassment. Unless all four elements are met, a claim for sexual harassment must fail.

Floeting argues that the test announced in *Glasgow* is inapplicable to his case because its four-part test was "developed to enforce separate and distinct provisions of the WLAD that express different rights and prohibitions than the provisions pertaining to public accommodations." App Br. 20. Floeting argues that because *Glasgow* defined what constitutes unlawful sexual harassment discrimination under RCW 49.60.030(1)(a) and 49.60.180(3) , which speak to "terms and conditions" of employment, this Court cannot use the same framework to determine

what constitutes unlawful sexual harassment discrimination under the public accommodation statute because the phrase "terms and conditions of employment" are not included in RCW 49.60.030(1)(b), RCW 49.60.040 and 49.60.215. *Id.*

This distinction is of no significance. All of the provisions of RCW ch. 49.60 discuss different situations in which an individual has a right to be free from discrimination. But Floeting does not explain how these differences warrant a complete rejection of the established threshold for the type of conduct that constitutes sexual harassment – specifically that the conduct was sufficiently severe or pervasive to create an abusive environment.

Further, this argument does not address the fact that the *Glasgow* framework was recently applied in the context of a real estate transaction, despite different statutory language. In *Tafoya v. Human Rights Comm'n*, the plaintiff-renter alleged that she had been subjected to sexual harassment by landlord, depriving her of the right to be free from discrimination in the terms, conditions or privileges of sale or rental of a dwelling under RCW 49.060(1)(c). 177 Wn. App. at 223-24.

In *Tafoya*, Division Two of this Court did not invent a new standard for determining whether sexual harassment had occurred in the

rental context. It expressly adopted the four-part test from *Glasgow*, stating that "where there is not an established standard for establishing discrimination in a certain context, *we will often rely on the standards from employment discrimination cases*." *Id.* at 226 (emphasis added).

Using the *Glasgow* analytical framework, the Court held that the plaintiff-renter would have to prove that the landlord's conduct: (1) was unwelcome; (2) was because of the renter's sex; (3) was sufficiently severe or pervasive to affect the terms, conditions, and privileges of the rental property (including the renter's use and enjoyment of the property); and that (4) the harassment was imputable to the landlord (and in this case his ex-wife as well). *Id.* Floeting's proposed test is contrary to the law and must be rejected.

6. Floeting's proposal for an employer's strict liability for alleged harassing behavior of an employee should be rejected.

Floeting argues that he should not have to prove that TT's actions are imputable to GHC in order to hold the company liable, because "[t]hat is not a required element for claims alleging discrimination in place of public accommodation." App Br. 22. In support of this proposition, Floeting once again refers to *Allen*. There, Judge Pechman, reasoned that in a public accommodation case, "the supervisory status of the

discriminating employee is much less relevant than it is in an employment discrimination case" and where most people would be mistreated by non-supervisory employees, "a rule that only actions by supervisors are imputed to the employer would result, in most cases, in a no liability rule." *Allen* at 20-21. In deciding that the case could proceed as a "consumer claim," rather than a WLAD claim, Judge Pechman advocated for a general agency theory of liability, such that an employer could be held responsible for the discriminatory acts of its employees if her or she was acting within the course and scope of their employment at the time. *Id.*

Curiously, Floeting does not advocate for this general agency theory on appeal as he did below. In fact, there is no mention of what standard the court should adopt. Floeting apparently abandoned his general agency theory because Washington law is clear that where a servant steps aside from the master's business to affect some purpose of his own, such as engaging in sexual harassment, the master is not liable. *Kuehn v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979); *Thompson v. Everett Clinic,* 71 Wn. App. 548, 860 P.2d 1054 (1993); *Niece v. Elmview Group Home*, 131 Wn. 2d 39, 48, 939 P.2d 420 (1997).

Washington courts also hold that when an employee's conduct involves a personal objective unrelated to the employer's business, that

conduct is outside the scope of employment even if the employee's position provides the opportunity for his or her wrongful conduct. *Bratton v. Valkins*, 73 Wn. App 492, 498, 500-01, 870 P.2d 981 (1994) (holding that a teacher's sexual relationship with a student was outside the scope of employment even though his position as a teacher provided the opportunity for his wrongful conduct toward a student). Similarly, that the employee may appear to be acting within the scope of his or her authority does not support vicarious liability. *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 669, 719-20, 985 P.2d 262 (1999) (holding that two priests' sexual molestation of an altar boy was outside the scope of their employment even though they were acting within their authority from the victim's perspective).

Based on these rules, Washington courts uniformly have held as a matter of law that an employee's intentional sexual misconduct is not within the scope of employment. *C.J.C.*, 138 Wn.2d at 718-20; *Niece*, 131 Wn.2d at 42, 53-59 (staff member at a group home sexually assaulted a disabled woman); *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App 537, 543, 184 P.3d 646 (2008) (nursing assistant at hospital engaged in sexual activity with former psychiatric patients); *Bratton*, 73 Wn. App at 498-501 (teacher engaged in a sexual relationship with a student); *Thompson*, 71

Wn. App at 550-53 (staff physician at clinic engaged in sexual activity with patients). "Neither current Washington case law nor considerations of public policy favor the imposition of respondeat superior or strict liability for an employee's intentional sexual misconduct." *C.J.C.*, 138 Wn.2d at 720. Under a general agency theory, Floeting's claims must fail.

Notably, Washington courts already have set forth the standard that applies when determining whether a defendant employer could be held liable for sexual harassment perpetrated by a *non-supervisory* employee. As previously noted, *Glasgow* states:

> To hold an employer responsible for the discriminatory work environment created by a plaintiff's supervisor(s) or co-worker(s), the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action. This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the workplace as to create an inference of the employer's knowledge or constructive knowledge of it and (b) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment.

See *Glasgow* at 407.

This negligence standard should apply in this case, as it does in any workplace sexual harassment case – and as it did in *Tafoya*.

If Floeting is, in fact, advocating for strict liability for places of public accommodation, this would lead Washington down the rabbit hole.

Any employee of a place of public accommodation could walk past a patron on her way out of the facility and make an off-hand comment such as, "Hi handsome," and the business could be liable for sexual harassment discrimination. This absurd result would be possible under Floeting's proposed test, because: (1) the comments do not need to be sufficiently severe as to create a hostile environment, they just have to be subjectively unwelcome; (2) the comments do not have to deny the patron access or use of the facility and (3) the place of public accommodation is on the hook for all of its employees' conduct regardless of when or where it occurs on the premises, and regardless of whether the business knew about it or had any opportunity to take corrective action. Floeting cites no authority for such an extreme result. It should be rejected.

7. Floeting cannot demonstrate the existence of a genuine issue of material fact warranting reversal.

Floeting maintains that TT made sexually explicit comments "nearly every time he visited the clinic" between July 2012 and September 2012. App Br 4. Noting that TT was at work during ten of Floeting's 12 visits to the clinic during this time frame, counsel asks the court to infer 10 encounters of this nature. App Br 4. However, this inference is not supported by the undisputed evidence, including Floeting's own testimony, and should be disregarded. See *Wash. State Physicians Ins.*

Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993). Despite Floeting's best efforts to create an issue of fact, he cannot ignore his own deposition testimony, the declaration he offered in support of his opposition to GHC's motion for summary judgment and the clinic records.

At deposition, Floeting was specifically asked to identify all of the dates on which he had an encounter with TT that gave rise to his complaint. He testified to five instances: August 23rd or 24th, September 5, September 11, September 17 and September 28. CP 55. A few weeks after his deposition, Floeting amended his testimony saying nothing happened on September 28. CP 58. Accordingly, only four instances remained; and Floeting affirmed in his deposition and in his supporting declaration that none of the encounters he had in the month of July "sent up red flags" stating that the "crux of everything or the real offensive things" started in August - specifically August 15. CP 49-50, 174.

As to the first incident, it is undisputed TT was out on medical leave on August 23 and 24. With this information at his disposal, Floeting changed his version of events stating in his declaration that after reviewing his medical records, he now believes the first encounter occurred on August 15 when TT told him she had spent the weekend watching pornographic movies with her boyfriend. Although this conversation was

unprofessional and inappropriate, it occurred on a single occasion, and it did not dissuade, or otherwise prevent Floeting from attending his medical appointment that day.

As for the next encounter, on September 5, Floeting acknowledged TT did not check him in on that day. CP 53. Rather he says in a hallway, away from reception, TT approached him and said, "Um, I bet you have … a big cock I'd like to see it." *Id.* Floeting testified that the encounter was in passing and that he was able to obtain services without further incident. *Id.* Floeting never reported this encounter to GHC when he made his complaint on September 11, 2012; instead it was raised for the first time in this lawsuit. *Id.* In fact, when Floeting made his complaint on September 11, 2012, he maintained that he had a different type of experience with TT on September 5, specifically that she complained to him about a grievance between herself and a co-worker. CP 135.

Inexplicably, in his declaration in support of his opposition to GHC's motion for summary judgment and again here on appeal, Floeting claims he had multiple disturbing interactions between August 15 and September 5, including invitations for oral sex and instances of unwelcome physical contact, such that the conduct was so persistent, he started to avoid checking in with TT. App. Br. 5-7. These statements not

only contradict his deposition testimony, but also his own medical records showing he had only one appointment during this time, on August 23, a date that TT *was out on medical leave*. Furthermore, Floeting has never articulated any incidents with TT on September 11, the day he filed a complaint that was limited to the prior comment about the pornographic movie, TT's statements about her co-workers and the amount of time it took her to check him in. TT undisputedly did not work on any of the days Floeting had an appointment from August 16 to September 4; and even assuming *arguendo* Floeting encountered TT on September 17, the clinic records confirm it was not during the check-in process.

But, regardless of whether the Court is inclined to consider some or all of Plaintiff's purported facts, none of the allegations submitted by Floeting, either in his complaint, in his declaration or in his deposition testimony meet the standard for unlawful harassment in *Glasgow*. First, there is no evidence that the comments were based on sex as many of the comments were focused on TT's mental health and her issues with co-workers. Second, there is no evidence that the remarks were objectively harassing, as opposed to being subjectively offensive to Floeting and mere vulgarity. Finally, the remarks were not made with the intent to discourage or deny Floeting's access and use of the GHC facility. In fact,

Floeting attended each of his appointments on the days he contends he was harassed by TT, and kept coming back to the facility even after several incidents of what he considered to be sexual harassment.

Even if Floeting could meet the burden of proving harassment, TT's conduct cannot be imputed to GHC. It is undisputed that GHC's first awareness of any issues regarding TT's inappropriate sexual comments with any patients was on August 23, 2012, when KK reported that TT had made sexually explicit comments to him. GHC immediately investigated this claim, which TT denied. Plaintiff did not bring a complaint until September 11, 2012, and TT was terminated for her actions by September 25. Given her union status (which required GHC to follow guidelines for discipline of union employees) and as an employee who was apparently suffering from a mental breakdown, under any measure, GHC took prompt action, which undisputedly forever removed TT from the Northgate facility. On these facts, liability for TT's alleged actions cannot be imputed to GHC.

E. CONCLUSION

GHC respectfully asks this Court to affirm the decision of the trial court concluding that Floeting cannot, as a matter of law, establish a claim

for sexual harassment in a place of public accommodation under the Washington Law Against Discrimination ("WLAD"), RCW 49.60 et seq.

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Respectfully submitted this 28th day of October, 2016.

KARR TUTTLE CAMPBELL

By: _____
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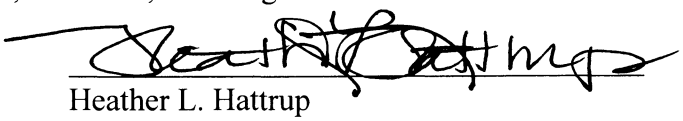
Attorneys for Respondent Group Health Cooperative

CERTIFICATE OF SERVICE

The undersigned certifies that on Friday, October 28, 2016, I caused to be served the foregoing document to:

Hank Balson Wendy W. Chen Public Interest Law Group, PLLC 705 Second Ave., Ste. 1000 Seattle, WA 98104 206-838-1800 ***Attorneys for Appellant***	☒ ☐ ☒ ☐ ☐	Via U.S. Mail Via Hand Delivery Via Electronic Mail Via Overnight Mail CM/ECF via court's website

I declare under penalty of perjury under the laws of the state of Washington on Friday, October 28, 2016, at Seattle, Washington.



Heather L. Hattrup