FILED
SUPREME COURT
STATE OF WASHINGTON
12/8/2017 2:22 PM
BY SUSAN L. CARLSON
CLERK

No. 95205-1

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

CHRISTOPHER H. FLOETING,

Respondent,

v.

GROUP HEALTH COOPERATIVE,

Petitioner.

ANSWER TO PETITION FOR REVIEW

Hank Balson, WSBA #29250
Wendy W. Chen, WSBA #37593
Attorneys for Respondent

Public Interest Law Group, PLLC
705 Second Ave., Suite 1000
Seattle, WA 98104
(206) 838-1800

TABLE OF CONTENTS

Table of Authorities ii

INTRODUCTION..1

STATEMENT OF THE CASE..2

ARGUMENT..3

A. The ruling below does not conflict with *Glasgow*. 4

B. The ruling below does not conflict with a decision of the Court of Appeals. 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Barnett v. Sequim Valley Ranch,
174 Wn. App. 475, 302 P.3d 500 (2013) 12

Evergreen Sch. Dist. v. Wash. State Human Rights Comm'n,
39 Wn. App. 763, 695 P.2d 999 (1985) 4, 10, 12

Glasgow v. Georgia-Pacific Corp.,
103 Wn.2d 401, 693 P.2d 708 (1985) 1, 5, 14

Marquis v. City of Spokane, 130 Wn.2d 97, 922 P.2d 43 (1996) 9

Nast v. Michels, 107 Wn.2d 300, 730 P.2d 54 (1986) 9

Seattle v. Williams, 128 Wn.2d 341, 908 P.2d 359 (1995) 7

State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009) 11

State v. Heritage, 152 Wn.2d 210, 95 P.3d 345 (2004) 11, 12

State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003) 7

State v. Trey M., 186 Wn.2d 884, 383 P.3d 474 (2016).................. 11

Totem Taxi v. N.Y. State Human Rights Appeal Bd.,
65 N.Y.2d 300, 491 N.Y.S.2d 293,
480 N.E.2d 1075 (N.Y. 1985) 8

Statutes

RCW 49.60.020 9

RCW 49.60.030(1)(b)... 10

RCW 49.60.040(14) 11

RCW 49.60.040(19) 6

RCW 49.60.180 .... 5, 7

RCW 49.60.180(3) 5

RCW 49.60.215 .... passim

RCW 49.60.215(1) 6, 7, 10

INTRODUCTION

The Washington Law Against Discrimination (WLAD) prohibits certain forms of discrimination in various environments, including employment and public accommodations. While the overarching goal of the law is to deter and eradicate discrimination, the legislature adopted different rules to achieve that goal in different contexts. In this case, the Court of Appeals addressed the standards of liability when a business is accused of discriminating against a customer in a place of public accommodation. In *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 693 P.2d 708 (1985), this Court established standards to determine liability in cases involving allegations of employment discrimination. Although the standards adopted in these two cases are not the same, the rulings do not conflict, as the Petitioner argues, because they are based on different portions of the WLAD.

Contrary to the Petitioner's second argument, the Court of Appeals adopted an objective test to determine when offensive sexual conduct by an employee in a place of public accommodation rises to the level of unlawful discrimination. The test does not conflict with any decisions by this Court or the Court of Appeals.

The unanimous decision by the Court of Appeals does not warrant review by this Court. It is well-grounded in the statutes governing public

accommodation discrimination, does not conflict with other appellate case law, and furthers the purpose of the WLAD to deter and eradicate discrimination.

STATEMENT OF THE CASE

Plaintiff Christopher Floeting filed this action in July 2015, seeking redress for having to endure months of lewd and offensive sexual conduct directed at him by a Group Health Cooperative (GHC or "Group Health") employee when he visited his clinic for medical appointments or to fill prescriptions. He asserted that the harassment constituted sex discrimination in a place of public accommodation, in violation of the WLAD, RCW 49.60.010 *et seq*.

Group Health (now Kaiser Permanente), the defendant below, filed a motion for summary judgment, arguing (1) that sexual harassment in a public accommodation is not actionable under the WLAD, (2) that if such a claim exists, then the plaintiff must prove the same elements required for an employment sexual harassment claim; and (3) that Rev. Floeting's claim should be dismissed as a matter of law because he failed to prove those elements. The trial court granted Group Health's motion with a boilerplate order that did not offer any insight into the court's reasoning.

The Court of Appeals (Div. 1) reversed the trial court's ruling. It held that the WLAD prohibits sexual harassment in places of public

accommodation. It further held that the applicable statute makes businesses and other places of public accommodation directly liable for unlawful discrimination by their agents and employees. Finally, it held that plaintiffs challenging discrimination in a public accommodation must prove the alleged discrimination by both an objective and subjective standard. Group Health challenges only the portions of the ruling pertaining to business liability for the actions of employees and the standard for deciding what constitutes illegal discrimination in a place of public accommodation.

ARGUMENT

Contrary to Group Health's arguments, the Court of Appeals opinion does not conflict with this Court's decision in *Glasgow v. Georgia-Pacific Corp. Glasgow* established what an employee must prove in order to hold an employer liable for harassment by a coworker. This case, on the other hand, addresses a company's liability for harassment by one of its employees against a customer in a place of public accommodation. The different situations are governed by different statutes. The *Glasgow* decision was based on the language of one provision of the WLAD, while the ruling in this case was based on the language of another. The difference in the decisions reflects the difference in the statutes, not a deviation from judicial precedent.

The opinion below also does not conflict with the Court of Appeals' decision in *Evergreen Sch. Dist. v. Wash. State Human Rights Comm'n*, 39 Wn. App. 763, 695 P.2d 999 (1985), as Group Health alleges. Both decisions require courts to use an objective test to determine whether offensive words or actions rise to the level of unlawful harassment. The test articulated by the Court of Appeals in this case requires a jury to decide what a reasonable person would feel under circumstances similar to the plaintiff's. Washington courts have held that this is an objective test.

The decision below is directly tied to the language of the WLAD and does not conflict with any authority from this Court or the Court of Appeals. Although discrimination is certainly an issue of substantial public importance, the lower court's ruling is well-grounded and furthers the WLAD's purpose to deter and eradicate discrimination. The Court should decline review.

A. The ruling below does not conflict with *Glasgow*.

Relying directly on the statutory language of the WLAD, the Court of Appeals held that business proprietors are liable for the acts of their employees and agents when those acts result in discrimination, as defined by the statute. Opinion at 11-14. Contrary to Group Health's argument, that holding does not conflict with this Court's decision in *Glasgow v.*

Georgia-Pacific Corp., as *Glasgow* involved a different statute than the one at issue here.

Glasgow was an employment sexual harassment case. RCW 49.60.180(3) makes it illegal for "any employer . . . [t]o discriminate against any person in compensation or in other terms or conditions of employment because of . . . sex." In *Glasgow*, the plaintiffs sought damages from their corporate employer for harm they suffered as a result of a coworker's sexual harassment. Since the statute only addressed unfair practices by an "employer," this Court had to decide under what circumstances a hostile work environment created by a coworker could be attributed to the employer. The Court held as follows:

> 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.

Glasgow, 103 Wn.2d at 407.

In contrast, the statute at issue here is RCW 49.60.215 (unfair practices of places of public resort, accommodation, etc.). That statute provides, in 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 . . . in any place of public resort,

> accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of . . . sex . . . .

RCW 49.60.215(1) (emphasis added). The term "person" is broadly defined to include individuals, partnerships, corporations, cooperatives, owners, proprietors, managers, agents, employees, and others. RCW 49.60.040(19). In other words, in a place of public accommodation, any person, including a business, engages in an unfair practice when the person or its agent or employee discriminates against a patron.

The Court of Appeals explained the significance of the statute's wording as follows:

> It is an unfair practice for "any person or the person's agent or employee" to commit a forbidden act. *See* RCW 49.60.215(1). This language attributes responsibility for the agent's or employee's discriminatory act to the "person" (employer) without mention of the doctrines of vicarious liability or respondeat superior. In this way, the legislature chose to fight discrimination in public accommodations by making employers directly responsible for their agents' and employees' conduct.

Opinion at 12. If the legislature did not intend to make businesses liable for the discriminatory acts of their employees, there would have been no reason for it to include the phrase "or the person's agent or employee" in the first sentence of the statute. If the intent was merely to let the reader know that an individual store employee, for example, could be personally liable for discriminating, the legislature could have accomplished that by

stating simply that it is an unfair practice "for any person" to commit a forbidden act, the construction it chose for cases involving employment discrimination. *See* RCW 49.60.180. ("It is an unfair practice for any employer to . . . .") The definition of "person" itself makes clear that individual agents and employees are already subject to the rule, so the phrase "or the person's agent or employee" would be redundant. Such a reading of the statute would violate the well-established principle that courts must give meaning to every word in a statute and avoid rendering any language superfluous. *See Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359 (1995); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.") (internal quotation marks and citation omitted). If the Court gives meaning to every word in the statute and avoids redundancy, the only reasonable reading of RCW 49.60.215(1) is that a "person" (Group Health in this case) is liable for its own discriminatory acts, as well as the discriminatory acts of its agents and employees. To the extent Group Health believes that the same liability standards should apply in public accommodation cases as in employment cases, their arguments are better directed to the legislature, which has the authority to rewrite the statute.

Group Health's reliance on the *Totem Taxi*, a New York case from over thirty years ago, is misplaced, as the New York statute at issue in that case was different than the Washington statute at issue here. The New York statute prohibiting discrimination in public accommodations applied to "any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation." *Totem Taxi v. N.Y. State Human Rights Appeal Bd.*, 65 N.Y.2d 300, 305, 491 N.Y.S.2d 293, 295, 480 N.E.2d 1075, 1077 (N.Y. 1985). In other words, the statute applied to "any person," which was defined to include owners, proprietors, agents, employees, etc. In contrast, the Washington legislature did not merely define a person liable under the statute to include these categories; it also made a person liable for unfair practice committed by "the person's agent or employee." RCW 49.60.215. Since Washington's public accommodation statute is different than New York's, it is not surprising that the Court of Appeals' conclusion in this case is different than the decision in *Totem Taxi*.

Finally, the Petitioner's reference to cases holding that an employee's sexual misconduct does not fall within the scope of his or her employment is not on point. *See* Pet. at 9. All five cases cited by Group Health dealt with liability for claims governed by common-law tort theories. Liability in this case, however, is based on statute. Therefore,

common-law principles do not govern. *See Nast v. Michels*, 107 Wn.2d 300, 312, 730 P.2d 54 (1986) ("[U]nambiguous statutes are to be read in conformity with their obvious meaning, *without regard to previous common law*.") (emphasis in original).

This Court has held that the purpose of the WLAD is to deter and eradicate discrimination in Washington. *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996). The legislature has directed that "[t]he provisions of [the WLAD] . . . be construed liberally for the accomplishment of the purposes thereof," and that courts "view with caution any construction that would narrow the coverage of the law." RCW 49.60.020. Viewed in this light, and with the requirement to give all words in the statute meaning and avoid redundancy, RCW 49.60.215 can only be read to make businesses and other "persons" responsible for the discriminatory acts of their agents and employees. Since the lower court's ruling is tied specifically to the statute governing public accommodation discrimination, it does not conflict with *Glasgow* and does not require review.

B. The ruling below does not conflict with a decision of the Court of Appeals.

The Court of Appeals decision does not conflict with the ruling in *Evergreen Sch. Dist. v. Wash. State Human Rights Comm'n*, as Group

Health contends. *See* Pet. at 15-19. Both cases require a plaintiff in a public accommodation case to establish discrimination according to an objective standard.

Quoting *Evergreen*, the lower court explicitly acknowledged that actionable discrimination requires something more than "mere rhetoric that is subjectively offensive to a particular person." Opinion at 15 (quoting *Evergreen*, 39 Wn. App. at 772-73).

To determine what constitutes unlawful discrimination, the Court of Appeals relied directly on the language of the WLAD. Opinion at 14-15. RCW 49.60.215(1) declares it to be an "unfair practice" (i.e., illegal) 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" in a place of public accommodation. RCW 49.60.030(1)(b) provides that the right to be free from unlawful discrimination includes "[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement." The legislature defined "full enjoyment" to include:

> 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 particular . . . sex . . . to be treated as not welcome, accepted, desired, or solicited.

RCW 49.60.040(14).

Synthesizing the statutory terms and the need for an objective standard by which to judge unlawful discrimination, the Court of Appeals held as follows:

> To be actionable, the asserted discriminatory conduct must be objectively discriminatory. By this we mean that it must be of a type, or to a degree, that a reasonable person who is a member of the plaintiff's protected class, under the same circumstances, would feel discriminated against (as described in subsections .040(14) and .215(1)).

Opinion at 16. "This is an objective standard." *Id. See also State v. Trey M.*, 186 Wn.2d 884, 888, 383 P.3d 474 (2016) (identifying the "reasonable person" standard as an objective test); *State v. Heritage*, 152 Wn.2d 210, 217, 95 P.3d 345 (2004) (same).

GHC objects to the court's use of the word "feel" in articulating the standard, arguing that that word somehow transforms the objective standard into a subjective one. Pet. at 15-18. Group Health is wrong. Objective legal standards often ask a jury to determine how a reasonable person would feel (or what she or he would believe) under circumstances similar to the plaintiff's. *See*, *e.g.*, *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009) (In evaluating whether a "seizure" has occurred

under article I, section 7 of the Washington Constitution, "[t]he relevant question is whether a reasonable person in the individual's position would *feel* he or she was being detained." This standard is a "purely objective one.") (emphasis added; citations omitted); *State v. Heritage*, 152 Wn.2d at 217 ("We determine applicability of constitutional protections by an objective test: the *belief* of a reasonable person in the defendant's position.") (emphasis added; citation omitted); *Barnett v. Sequim Valley Ranch,* 174 Wn. App. 475, 485, 302 P.3d 500 (2013) ("To establish constructive discharge, an employee must show that an employer engaged in a deliberate act, or a pattern of conduct, that made working conditions so intolerable that a reasonable person would have *felt* compelled to resign. . . . This is an objective standard . . . .") (emphasis added; citations omitted).

Group Health incorrectly asserts that the Court of Appeals' ruling leaves businesses vulnerable to liability for any offensive conduct by an employee, no matter how trivial. Pet. at 18-19 ("Focusing on feelings and eliminating the constructs of severity or pervasiveness provide[s] no real distinction between merely annoying and illegal conduct."). To the contrary, the court explicitly noted, "[I]t is not enough that some hasty, chance or inadvertent word or action may offend or even make one *feel* unwelcome." Opinion at 15 (quoting *Evergreen*, 39 Wn. App. at 772-73)

(emphasis in original). Rather, the asserted discriminatory conduct "must be of a type, or to a degree, that a reasonable person who is a member of the plaintiff's class, under the same circumstances, would feel discriminated against (as described in subsections .040(14) and .215(1))." *Id*. at 16. The fact that the court did not use the phrase "severe or pervasive" (a phrase applicable in employment harassment cases) in formulating the test does not make the test subjective. The "reasonable person" test, formulated for judging public accommodation harassment cases, necessarily requires a plaintiff to demonstrate discriminatory conduct that is sufficiently egregious that a reasonable person in the plaintiff's class would feel discriminated against, as defined by the statute. To the extent isolated words or inadvertent conduct would not be considered "severe or pervasive" in the employment context, they likely would not cause a "reasonable person" to feel unwelcome, unaccepted, or otherwise discriminated against in a public accommodation.

GHC's reference to the court's discussion of a subjective standard is not persuasive. *See* Pet. at 17-18. Acknowledging that the WLAD provides a cause of action for "[a]ny person *deeming himself or herself injured* by any act in violation of this chapter," the Court of Appeals held that "the cause of action afforded by subsection .030(2) includes both an objective and subjective component." Opinion at 16 (emphasis in

original). Therefore, in *addition* to proving discrimination according to an objective standard, a plaintiff also "must establish the plaintiff's *subjective* perception of being discriminated against by the act of sexual harassment." *Id*. (emphasis in original). In other words, in addition to proving that a reasonable person would have felt discriminated against by the defendant's conduct, a plaintiff also must prove the he or she *personally* felt discriminated against. Similarly, this Court in *Glasgow* held that a plaintiff must show that s/he subjectively "regarded the conduct as undesirable or offensive" in order to sustain a claim for sexual harassment in employment. 103 Wn.2d at 406. Rather than diminish the plaintiff's burden of proof, this requirement increases it.

The lower court ruling requires plaintiffs to prove claims of public accommodation harassment by both an objective and subjective standard. The ruling is consistent with *Evergreen* and does not warrant review by this Court.

CONCLUSION

The Court of Appeals opinion is grounded in the WLAD provisions that apply specifically to public accommodations. Since the language of these provisions is different from the language used in the provisions governing employment discrimination, it is not surprising that judicial test for public accommodation harassment formulated by the

lower court in this case is not identical to the test for employment harassment established in *Glasgow*. The two cases do not conflict.

The decision below requires plaintiffs like Rev. Floeting to prove unlawful harassment according to an objective standard, based on how a reasonable person would perceive the allegedly discriminatory conduct. This is consistent with the language of the WLAD and with the Court of Appeals' opinion in *Evergreen*.

There are no conflicts between the lower court's ruling and the Washington decisions cited by the Petitioner. The ruling is consistent with the statutory provisions on which it is based and furthers the WLAD's policy to deter and eradicate discrimination in Washington. The opinion does not warrant this Court's review.

Respectfully submitted this 8th day of December, 2017.

PUBLIC INTEREST LAW GROUP, PLLC

s/ Hank Balson
Hank Balson, WSBA #29250
Wendy W. Chen, WSBA #37593
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on this date I caused the attached brief to be delivered to the following parties using the methods listed:

Walter E. Barton (e-mail and first-class mail, postage prepaid)
Medora A. Marisseau (e-mail and first-class mail, postage prepaid)
Celeste M. Monroe (e-mail and first-class mail, postage prepaid)
Karr Tuttle Campbell
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
gbarton@karrtuttle.com
mmarisseau@karrtuttle.com
cmonroe@karrtuttle.com

Sara L. Ainsworth (e-mail, with party's prior consent)
sainsworth@legalvoice.org

Robert S. Chang (first-class mail, postage prepaid)
Seattle University School of Law
901 12th Ave
Seattle, WA 98122-4411

Marsha J. Chien (e-mail, with party's prior consent)
MarshaC@atg.wa.gov

Lindsay L. Halm (e-mail, with party's prior consent)
halm@sgb-law.com

Dated this 8th day of December, 2017.

PUBLIC INTEREST LAW GROUP, PLLC

s/ Hank Balson
HANK BALSON, WSBA #29250

BUDGE & HEIPT, PLLC

December 08, 2017 - 2:22 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95205-1
Appellate Court Case Title:	Christopher H. Floeting v. Group Health Cooperative
Superior Court Case Number:	15-2-18015-1

The following documents have been uploaded:

- 952051_Answer_Reply_20171208142202SC606803_5110.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- cmonroe@karrtuttle.com
- hhattrup@karrtuttle.com
- kmejia@karrtuttle.com
- mmarisseau@karrtuttle.com
- wendy@chenkins.com

Comments:

Sender Name: Hank Balson - Email: hank@budgeandheipt.com
Address:
705 2ND AVE STE 910
SEATTLE, WA, 98104-1716
Phone: 206-624-3060

Note: The Filing Id is 20171208142202SC606803