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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 APPELLANT

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INTRODUCTION

This appeal concerns a person's right, under the Washington Law Against Discrimination (WLAD), Chapter 49.60 RCW, to seek redress for sexual harassment committed in a place of public accommodation. Washington courts have explicitly recognized sexual harassment as a form of unlawful sex discrimination in an employment setting and during the course of real estate transactions. However, our courts have not yet addressed this form of discrimination occurring at a place of public accommodation.

Appellant Rev. Christopher Floeting filed this action in July 2015, seeking redress for having to endure months of lewd and offensive sexual comments and behaviors by a Group Health Cooperative (GHC or "Group Health") employee when he visited the organization's Northgate Clinic for medical appointments or to fill prescriptions. He asserted that the harassment constituted sex discrimination in a public accommodation, in violation of the WLAD.

Respondent Group Health filed a motion for summary judgment, arguing (1) that sexual harassment in a public accommodation is not actionable under the WLAD,[1] (2) that if such a claim exists, then the Plaintiff must prove the elements required for a sexual harassment claim

in an employment setting; and (3) that Plaintiff'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.

On appeal, Rev. Floeting asks this Court to acknowledge that sexual harassment in a place of public accommodation can constitute unlawful sex discrimination under the WLAD. He also asks the Court to hold that the elements of such a claim are based on the law's provisions pertaining to public accommodations, not those that pertain to employment. Finally, he asks the Court to reverse the summary judgment ruling on the ground that his evidence, if accepted as true, could cause a reasonable jury to find that he suffered unlawful discrimination by Group Health.

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[1] Group Health retreated from this argument during the summary judgment hearing.

ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Did the trial court err in dismissing Plaintiff's discrimination claim on summary judgment when the fact and inferences, viewed in Plaintiff's favor, showed that he was repeatedly sexually harassed in a place of public accommodation?[2]

B. Issues Pertaining to Assignments of Error

1. Does the WLAD prohibit sexual harassment by a place of public accommodation?

2. Should a plaintiff alleging discrimination by a place of public accommodation be required to prove the same elements as a plaintiff alleging discrimination in an employment setting when those claims are governed by separate and distinct provisions of the WLAD?

3. Viewing the facts and inferences in his favor, could a reasonable jury find that Plaintiff was sexually harassed at his doctor's office when the receptionist went out of her way, on multiple occasions, to taunt him with lewd sexual solicitations and offensive physical contact?

STATEMENT OF THE CASE

Rev. Floeting has been a Group Health patient for over 35 years. CP 173 ¶ 2. In 2012, he visited Group Health's Northgate Medical Center to obtain health care service on a near-weekly basis. A close friend's daughter, Deiona Harris, whom he considers a niece, accompanied him to

[2] Rev. Floeting is not appealing the dismissal of his negligent supervision claim.

the clinic. CP 174 ¶ 3. Between July and September 2012, T.T.,[3] a patient access representative (PAR) at the clinic, harassed Rev. Floeting nearly every time he visited the clinic, subjecting him to sexually explicit comments, sexual advances, and unwanted touching. CP 174-80.

At first, T.T. flirted with Rev. Floeting, which he did not welcome or reciprocate. She greeted him, "Hi, good looking." She teased, "Don't you bring your girlfriends coffee?" CP 174 ¶ 5; CP 246:23 – 247:14. She told him he had a "nice butt." CP 187 ¶ 3. He was bothered by the comments, but he did not want to make any waves for his wife, who was a GHC employee at the time, so he did not complain. CP 174-77 ¶¶ 5, 11, 12, 14. Unfortunately, T.T.'s harassment escalated. She was at the clinic working ten out of the twelve times he visited it between July and September 2012. CP 70-89, 100-09; CP 192 ¶ 5; CP 352-54. She sought him out to harass him nearly every time. CP 175 ¶ 8; CP 188 ¶ 5.

During two visits he made in mid-August, T.T. subjected Rev. Floeting to many disturbing comments. She talked about being crazy and on drugs. She told him that Group Health was aware of her mental health

[3] The parties have agreed to refer to this former Group Health representative by her initials because the case involves sensitive facts about her personal health.

issues but did not care. CP 174 ¶ 6. On August 15,[4] T.T. checked him in for an appointment. CP 79. She asked him about his weekend, and he responded politely. She then subjected him to a barrage of explicit details about her weekend with her boyfriend. She told him she had locked her boyfriend in the bedroom to watch pornographic movies, do drugs, and have sex all weekend long. She told him he should have been there. CP 174 ¶ 6; CP 188 ¶ 4; CP 249:5 – 250:4. T.T.'s comments upset Rev. Floeting greatly, as they did Ms. Harris, who heard T.T.'s rant. CP 174 ¶ 6; CP 188 ¶ 4. He was offended by her sexually explicit remarks. He was humiliated that she made the crude remarks to him in his niece's presence. He was insulted that she would think of him as someone who would be interested in these types of sexual conversations or activities. *Id.; see also* CP 251:19 – 252:4, 253:4-15.

After this interaction, Rev. Floeting and Ms. Harris did their best to avoid T.T. While they sometimes were been able to avoid checking in with her, they were not able to avoid all contact with her. She intentionally sought him out, finding him sitting in the waiting room, standing in line, or walking down the hallway. T.T. seemed to appear out of nowhere to hit on Rev. Floeting. It got to the point where he became anxious before each

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[4] During his deposition, Rev. Floeting testified that he thought this incident likely occurred on August 23 or 24, *see* CP 248:3-15, but after looking at his medical records, he believes it actually happened on August 15. CP 174 ¶ 6; CP 79.

visit to the clinic, and when he was there, he was worried about running into T.T. CP 175-76 ¶¶ 8, 10; CP 188 ¶¶ 5-6.

During this period, Rev. Floeting had several disturbing interactions with T.T. Although he does not recall the exact date of each incident, as they all happened within several weeks' time, he well remembers T.T.'s words and actions and how they made him feel. One time, she snuck up behind him and whispered something to the effect of, "You have a nice ass, and I want to squeeze it." Although Ms. Harris did not hear what T.T. whispered in Rev. Floeting's ear, she clearly saw on his face how much the comment upset him. CP 175 ¶ 8; CP 188 ¶ 5. Several times, T.T. sat down next to him in the waiting room, leaned in, pressed her breasts against him, and told him, for example, how much she liked him or how "hot" he made her. She used vulgar, sexually explicit language. She boasted about her sexual prowess and asked about his. She asked if he liked sex. She asked if he liked blowjobs. She invited him to lunch so she could demonstrate a "real blowjob" on a hot dog for him. He told her she was inappropriate. He reminded her he was married and clergy. She ignored his rebukes, telling him to let her know if he was interested in having sex with her. *See* CP 175-77 ¶¶ 7-8, 10, 15; CP 188-89 ¶¶ 5, 7, 9. He did not welcome or appreciate her advances; rather, he felt violated, disgusted, and humiliated. CP 175-76 ¶¶ 8, 10.

In addition to the outrageous sexual comments, T.T. also told Rev. Floeting intimate details about her life and work. She told him about her drug use. She told him she was "crazy," revealing that she had been in and out of the hospital. She told him about conflicts with coworkers in great detail. In combination with her lewd sexual advances toward him, these attempts at developing a personal relationship made Rev. Floeting extremely uncomfortable. He dreaded facing her every time he needed health care services at Northgate. CP 175-76 ¶¶ 9-10; CP 188 ¶ 6.

Rev. Floeting became increasingly troubled by T.T.'s worsening behavior. In September, T.T. approached him and Ms. Harris in the clinic, pressed herself against him, and said something to the effect of, "I bet you have a big cock." She told him she wanted to see it. CP 254:10-20. Shortly after that, on September 11, he mentioned to a PAR named Michelle Paige that he was trying to avoid T.T. because of her sexual harassment. Ms. Paige told him another male patient had made a similar harassment complaint about T.T., but Group Health still had not taken any action against her.[5] Rev. Floeting was incredulous that the company knew T.T.

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[5] The other patient, identified as K.K., complained to Group Health on August 2, 2012, that T.T. had been making harassing phone calls to him. CP 61 ¶ 9; CP 111-12. Three weeks later, on the 23rd, GHC reached out to K.K. for the first time, asking for more information about his allegations. He explained that, when T.T. called, she swung between crying about hating her job and wanting to kill herself and engaging in sexually-explicit talk and propositioning him. CP 62-3 ¶ 15; CP 121, 125. On or before August 31, K.K. provided GHC with telephone records documenting T.T.'s calls to him, along with a

had harassed another male patient but had done nothing to protect him or others from similar misconduct. Ms. Paige encouraged him to complain. He had been reluctant to complain earlier because of concerns about how it might affect his wife's employment, but he did not want T.T. harassing him or anyone else going forward. CP 176 ¶ 11; CP 188 ¶ 8.

Rev. Floeting told Anna Sutton, lead PAR, that he wanted to make a sexual harassment complaint about T.T. He relayed a few examples of the troubling interactions he had with her. He told her how badly he wanted the harassment to stop. Ms. Sutton told him she would let her manager, Mary Kelley, know of his concerns. Three days later, on September 14, Ms. Sutton emailed her a short summary of her conversation with Rev. Floeting to Ms. Kelley. *See* CP 63 ¶ 23; CP 129. Rev. Floeting disputes that the email is a "transcript," as Mr. Jeon asserts, or that it is a complete recounting of his conversation with Ms. Sutton. *See id.*; CP 176 ¶ 12. On its face, the email appears to be a mere summary, concluding with, "Other things that this patient talked about was…," but listing only one issue.

Ms. Sutton also gave Rev. Floeting a phone number for GHC's customer service line. CP 176 ¶ 12. Rev. Floeting called the line that

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business card with the phrase "large and long hehehe" written in T.T.'s handwriting. CP 63 ¶ 19; CP 139.

afternoon. He asked to speak with a manager, expressing concern about jeopardizing his wife's position in Group Health's legal department, and reported that T.T. was sexually harassing him, again relaying a few examples of her offensive conduct. He asked GHC to protect patients from her. He also asked that his identity remain confidential, if possible, as he was concerned about T.T. retaliating against him for complaining about her. CP 177 ¶ 13; *see also* CP 63 ¶ 23; CP 131-32. Rev. Floeting disputes that GHC's electronic note summarizing his complaint is a complete and accurate description of the phone call. For example, it does not document the concern he expressed about his wife's employment. CP 177 ¶ 13.

The next day, Ms. Kelley called Rev. Floeting to follow up on the concerns he had expressed to Ms. Sutton. Again, he provided examples of T.T.'s harassment. Although he was not comfortable repeating T.T.'s explicit language, he made sure to state that his complaint was about sexual harassment. CP 177 ¶ 14. He believed Ms. Kelley well understood the nature of his complaint without the explicit details. *Id.* Indeed, Ms. Kelley noted that T.T. allegedly told Rev. Floeting that after watching a pornographic DVD, T.T. and her boyfriend "had a really good time." CP 134-35. The obvious inference, drawn in Plaintiff's favor, is that this comment referred to them having sex. Moreover, the fact that Rev. Floeting was complaining primarily about T.T. sexually harassing him

was documented not only in Ms. Kelley's notes,[6] but also those of Ms. Sutton and customer service. CP 129-35. Notably, Rev. Floeting's complaint led Group Health almost immediately to believe that T.T. may have violated its sexual misconduct policy. CP 356. The conversation between Rev. Floeting and Ms. Kelley was brief, lasting a matter of minutes. He suggested that Group Health should restrict T.T.'s patient contact. He stressed that he wanted his report to be handled confidentially. She agreed and said she would take care of it. CP 177 ¶ 14; *see also* CP 134-35. Apparently, with everything she already knew about T.T., Ms. Kelley did not see a need to ask him for additional details about what T.T. had done to harass him.

Rev. Floeting returned to the clinic with Ms. Harris on September 17. CP 86; CP 178 ¶ 16; CP 189 ¶ 9. Both were distressed to see T.T. working there and incredulous that GHC had not reassigned her from the check-in desk. CP 178 ¶ 16; CP 189 ¶ 9. Although she did not check him in, T.T. managed to find Rev. Floeting in the waiting room. She sat down next to him, leaned into him, and told him she knew he had complained about her, but she did not care. She suggested he was making a mistake in

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[6] Her notes do not appear complete and accurate. For example, Rev. Floeting disputes telling her that T.T. harassed him "approximately 3 months ago" and speculates Ms. Kelley mistakenly typed "months" instead of "weeks." CP 177 ¶¶ 14-15. And as reflected in Mary Maloy's September 19 meeting notes, he told Ms. Kelley how upset T.T.'s comments made his niece (written as nephew). CP 306.

rejecting her because she gave "the best blowjobs." Rev. Floeting was angry and told her to leave him alone. She laughed, boasting that GHC could not do anything to her, and told him to let her know if he changed his mind. Disgusted, Rev. Floeting and his niece stood up and walked away. *Id.*

On September 19, Group Health met with T.T. to discuss additional allegations from K.K. and new allegations received from Rev. Floeting on September 11. CP 139-40; CP 305-09. Between August 17 and September 19, GHC did not take any action whatsoever to protect either complainant from T.T.'s misconduct *See* CP 218:1-14, 219:4-8, 220:3-10, 221:2-6, 236:1-11, 240:20 – 241:6.

Rev. Floeting was relieved to learn later in October 2012 that Defendant had finally removed T.T. from the Northgate clinic. He was troubled, though, that the company took so long after receiving the other patient's complaint to take action and that, other than the short phone call with Ms. Kelley, no one from GHC followed up on his complaint to get more information or to let him know about the outcome of his complaint. CP 178 ¶ 17.

ARGUMENT

The Washington Supreme Court has held that the purpose of the WLAD, to deter and eradicate discrimination in Washington, is a public policy of the highest order. *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996). Given the law's strong commitment to eradicating discrimination, including discrimination based on sex, there is no reason to believe that the Legislature intended to outlaw sexual harassment in certain settings, but to allow it in others. The Court should recognize that sexual harassment can constitute unlawful sex discrimination in a place of public accommodation.

Because the WLAD contains specific provisions addressing discrimination by public accommodations, provisions that are separate and distinct from those pertaining to discrimination in an employment setting, the elements required to prove a claim for sexual harassment in a public accommodation should be based on the former statutory provisions, not the latter.

Finally, the Court should find that the facts in the record, viewed in Mr. Floeting's favor, could cause a reasonable jury to find in his favor on his claim against Group Health. Therefore, the Court should reverse the lower court's summary judgment ruling and remand this case for further proceedings.

A. Standard of Review

The Court of Appeals reviews a trial court's order granting summary judgment *de novo*, engaging in the same inquiries as the trial court. *Drinkwitz v. Alliant TechSystems, Inc.*, 140 Wn.2d 291, 295, 996 P.2d 582 (2000). Summary judgment is appropriate if, after viewing "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," the Court finds there is no genuine issue of material fact, that reasonable persons could reach but one conclusion, and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). The burden is on the moving party to demonstrate the absence of any genuine issue of material fact. *Atherton Condo Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). "Making the same inquiry as the trial court, the appellate court must view the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party . . . ." *Youngblood v. Schireman*, 53 Wn. App. 95, 99, 765 P.2d 1312 (1988). "The trial court has no discretion; if there is any justifiable evidence supporting a verdict in favor of the nonmoving party, the question is for the jury." *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 521, 20 P.3d 447 (2001) (citation omitted).

B. Sex discrimination by places of public accommodation, including sexual harassment, is illegal under the WLAD.

> The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right.

RCW 49.60.030(1). This right to be free from discrimination applies in a variety of contexts, including but not limited to employment, public accommodations, and real estate transactions. *Id.*

It is undisputed that the WLAD protects people from sexual harassment in employment and real estate transactions. *See Kahn v. Salerno*, 90 Wn. App. 110, 117-18, 951 P.2d 321 (1998) ("Washington's Law Against Discrimination, ch. 49.60 RCW, protects employees from sexual harassment . . . ."); *Tafoya v. Human Rights Comm'n*, 177 Wn. App. 216, 225, 311 P.3d 70 (2013) ("[W]e . . . hold that sexual harassment is an unfair practice in a real estate transaction and is actionable under the WLAD."). In this case, Rev. Floeting seeks to challenge the sexual harassment he suffered in a place of public accommodation, Group Health.[7]

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[7] Group Health acknowledges that its Northgate clinic is a place of public accommodation under the WLAD. *See* RP at 13:14-17.

The United States District Court for the Western District of Washington has recognized sexual harassment as a form of unlawful discrimination in a place of public accommodation under the WLAD. *See Allen v. Educ. Cmty. Credit Union*, No. C06-16MJP, 2006 U.S. Dist. LEXIS 34191, at *16-21 (W.D. Wash. May 24, 2006) (reversing summary judgment for defendant on plaintiff's claim of sexual harassment in a place of public accommodation). Although Washington appellate courts have not yet addressed such a claim, Group Health "agrees that the right to be free from discrimination embodied in the [WLAD] could include such a claim." CP 313:3-5; *accord* RP at 12:14-21 ("[W]e agree that the WLAD could likely be interpreted to include this cause of action because it is . . . interpreted broadly and we think that it makes sense . . . [.]").

Recognizing sexual harassment as one form of unlawful discrimination in a place of public accommodation is consistent with the WLAD's purpose to "deter and eradicate discrimination in Washington," and with its "clear mandate to eliminate *all* forms of discrimination." *Int'l Union of Operating Eng'rs, AFL-CIO, Local 286 v. Port of Seattle*, 176 Wn.2d 712, 721, 295 P.3d 736 (2013) (internal quotation marks and citation omitted; emphasis added). It is also consistent with the Legislature's command that "[t]he provisions of [the WLAD] . . . be construed liberally for the accomplishment of the purposes thereof," and

with the requirement that courts "view with caution any construction that would narrow the coverage of the law." RCW 49.60.020; *Marquis*, 130 Wn.2d at 108 (citation omitted).

C. The elements of a claim for discrimination by a public accommodation are different than those of a claim for discrimination by an employer, reflecting the distinct statutory requirements under the WLAD.

In order to determine whether a place of public accommodation has subjected a customer to illegal discrimination under the WLAD, one must start by looking at the relevant statutory language. *See State v. Young*, 125 Wn.2d 688, 694, 888 P.2d 142 (1995) ("When interpreting a statute, . . . the primary objective is to carry out the intent of the Legislature. To determine the intent, we must look first to the language of the statute itself.") (citations omitted). The relevant statutory provisions in this case are as follows:

> The right to be free from discrimination because of . . . sex . . . is recognized as and declared to be a civil right. This right shall include, but not be limited to: . . . [t]he right to the *full enjoyment* of any of the accommodations, advantages, facilities, or privileges of any place of public . . . accommodation . . . .

RCW 49.60.030(1)(b) (emphasis added).

> "Full enjoyment of" includes 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) (emphasis added).

> It shall be an unfair practice for any person[8] 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).

Thus, according to the statute, Rev. Floeting can establish a violation of the WLAD by proving any one of the following:

1. That he was denied the right to purchase services offered by Group Health without being subjected to acts causing him, directly or indirectly, to be treated as not welcome, accepted, desired, or solicited on the basis of his sex; or

2. That he was denied admission to Group Health's accommodations, advantages, facilities, or privileges without being subjected to acts causing him, directly or indirectly, to be treated as not welcome, accepted, desired, or solicited on the basis of his sex; or

3. That Group Health, or an agent or employee of Group Health, committed an act that directly or indirectly

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[8] The statute defines "person" as "one or more individuals, partnerships, associations, organizations, *corporations*, *cooperatives*, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or *employee*, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof." RCW 49.60.040(19) (emphasis added).

> resulted in any distinction, restriction, or discrimination against him on the basis of his sex.

While there are no Washington cases analyzing a sexual harassment claim under these statutes, the United States District Court for the Western District of Washington considered such a claim in 2006. *See Allen v. Educ. Cmty. Credit Union, supra* at 15. In that case, the plaintiff's employer required her to share space with and purchase financial services from a contracted financial service provider who worked for a different employer. She alleged the financial representative sexually harassed her on multiple occasions. She filed suit, asserting various claims, including one for discrimination in a place of public accommodation under the statutes discussed above. The plaintiff claimed that while purchasing financial services, she was subjected to sexual harassment by the defendant's employee. "In other words, she was denied the 'full and equal enjoyment' of the services others enjoyed." *Id.* at *19. After finding that the financial service provider was a "place of public accommodation," the court distinguished this type of discrimination claim as "more of a consumer claim than an employment sexual harassment claim." *Id.* at *20. The court concluded the plaintiff's allegations regarding the harassment were sufficient to defeat the defendant's motion for judgment on the pleadings with respect to the public accommodations claim. *Id.* at *21.

Another case the Court can look to for guidance in analyzing a harassment claim arising in a place of public accommodation is *King v. Greyhound Lines, Inc.*, 656 P.2d 349 (Or. Ct. App. 1982). In *King*, which dealt with racial harassment at a bus station, the plaintiff, a black man, was subjected to racist insults from a Greyhound ticket agent when he tried to return a bus ticket. The agent, who suspected the plaintiff hadn't actually purchased the ticket he was trying to return, said to him, "Nigger, where did you get this ticket?" He also told the plaintiff, "Now, boy, you get the person who purchased the ticket, and I'll be glad to refund it." Using language almost identical to the language used in Washington's anti-discrimination statute, Oregon's public accommodations law provided:

> All persons within the jurisdiction of this state shall be entitled to the *full and equal accommodations, advantages, facilities and privileges* of any place of public accommodation, *without any distinction, discrimination or restriction* on account of race, religion, sex, marital status, color or national origin.

Id. at 350 n.1 (emphasis added).

The trial court ruled that the agent's racist insults did not constitute discrimination within the meaning of the statute. *Id.* The Court of Appeals reversed that decision, holding as follows:

> [T]he statutory prohibition against "distinction, discrimination or restriction" on the basis of race encompasses more than the outright denial of service. It also proscribes serving customers of one race in a manner different from those of another race.

Id. at 351. "To argue that plaintiff received 'full and equal' accommodations even though he suffered racial slurs and animadversions in the course of the transaction is analogous to arguing that separate accommodations may be equal accommodations." *Id.*

Like the Greyhound ticket agent in *King*, Group Health's patient representative provided Rev. Floeting with inferior service on account of his sex, forcing him repeatedly to endure insulting, offensive remarks and physical contact in order to access Group Health's medical services.

Group Health urged the trial court to judge this case using the standards that apply to employment discrimination claims. *See* CP 30-33. However, those standards were developed to enforce separate and distinct provisions of the WLAD that express different rights and prohibitions than the provisions pertaining to public accommodations. *Compare* RCW 49.60.030(1)(a) (declaring a right to "obtain and hold employment without discrimination") *with* RCW 49.60.030(1)(b) (declaring a right to "the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage or amusement"); and *compare* RCW 49.60.180(3) ("It is an unfair practice for any employer to "discriminate against any person in compensation or in other terms or conditions of employment because of . . . sex . . . .") *with*

RCW 49.60.215(1) ("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 . . . .").

Ignoring these statutory distinctions, Group Health attempted to graft the standards for sexual harassment claims in the employment context onto provisions governing discrimination in a place of public accommodation. For instance, the company argued that Rev. Floeting should be required to show that T.T.'s offensive comments and behaviors were "severe and pervasive"[9] in order to prove unlawful discrimination. *See* CP 30-32. However, that standard is used to evaluate whether alleged harassment is severe enough to affect the "terms or conditions of employment," on the basis of sex, which, as cited above, is an explicit type of unfair practice in the employment setting, but not in the context of public accommodations. *See Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985).

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[9] Later courts deciding workplace harassment cases have expressed this standard as "severe *or* pervasive." *See, e.g.*, *Haubry v. Snow*, 106 Wn. Ap. 666, 675, 31 P.3d 1186 (2001).

Group Health further invoked employment discrimination standards to argue that Rev. Floeting must demonstrate that T.T.'s actions are imputable to Group Health in order to hold the company liable in this case. *See* CP 33. Again, this is an element a plaintiff must prove to establish an employer's liability for sexual harassment. *See Glasgow*, 103 Wn.2d at 406-07 (identifying the required elements "[t]o establish a *work environment* sexual harassment case") (emphasis added). That is not a required element for claims alleging discrimination in a place of public accommodation. *See*, *e.g.*, *Allen* at *20-21. The court in *Allen* cited to a Fifth Circuit case to explain the rationale for this distinction:

> [I]n a public accommodation case the supervisory status of the discriminating employee is much less relevant than it is in an employment discrimination case . . . Also, in a public accommodation case . . . a rule that only actions by supervisors are imputed to the employer would result, in most cases, in a no liability rule. Unlike the employment context it is rare that in a public accommodation settings [sic] a consumer will be mistreated by a manager or supervisor. Most consumer encounters are between consumers and clerks who are non-supervisory employees.

Id. (quoting *Arguello v. Conoco, Inc.*, 207 F.3d 803, 810 (5th Cir. 2000)).

Considering the language of the WLAD provisions governing discrimination in public accommodations, the purposes of the law, and the Legislature's explicit mandate that the statute be construed liberally to

accomplish those purposes, this Court should hold that Rev. Floeting can establish his claim under the WLAD by showing:

1. That he was denied the right to purchase services offered by Group Health without being subjected to acts causing him, directly or indirectly, to be treated as not welcome, accepted, desired, or solicited on the basis of his sex; or

2. That he was denied admission to Group Health's accommodations, advantages, facilities, or privileges without being subjected to acts causing him, directly or indirectly, to be treated as not welcome, accepted, desired, or solicited on the basis of his sex; or

3. That Group Health, or an agent or employee of Group Health, committed an act that directly or indirectly resulted in any distinction, restriction, or discrimination against him on the basis of his sex.

D. The jury, and not the trial court, should decide whether the facts Rev. Floeting alleges demonstrate a violation of the WLAD's public accommodations provisions.

Viewing all facts and inferences in the light most favorable to Rev. Floeting, a reasonable jury easily could conclude that Group Health subjected him to acts that resulted in distinction and discrimination on the basis of sex, including acts by T.T. that caused him to be treated as not welcome, accepted, desired, or solicited, thereby denying him the full enjoyment of Group Health's services and facilities due to his sex. T.T. targeted Rev. Floeting with multiple lewd and offensive remarks and actions over the course of roughly three months. She detailed sexual

encounters with her boyfriend. She told him how much she liked him. She talked about his penis. She offered him oral sex. She pressed her breasts against his body. She touched his arm in a sexually-suggestive manner. She also subjected him to unwelcomed, intimate details regarding her mental health history and conflicts with her co-workers. There is no evidence that T.T. similarly shared such personal information with any female patients. She did, however, share similar information – as well as sexually explicit comments – with another male patient, which further supports an inference that the treatment Rev. Floeting received at Group Health was motivated by his sex.

Rev. Floeting should be allowed to present these facts to a jury to decide whether or not Group Health violated the WLAD.

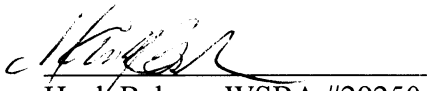
CONCLUSION

In keeping with the WLAD's "clear mandate to eliminate all forms of discrimination," *Int'l Union of Operating Eng'rs, supra* at 15, and the requirement to "view with caution any construction that would narrow the coverage of the law," *Marquis*, 130 Wn.2d at 108 (citation omitted), the Court should recognize sexual harassment as a form of unlawful discrimination by a place of public accommodation. The elements of such a claim should be governed by the distinct statutory provisions pertaining

to public accommodations, not those pertaining to employment settings. Given the evidence supporting Mr. Floeting's claim against Group Health for the sexual harassment he experienced there, the court should reverse summary judgment and remand this case to the trial court so that a jury may determine the outcome.

Respectfully submitted this 30th day of August, 2016.

PUBLIC INTEREST LAW GROUP, PLLC



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CERTIFICATE OF SERVICE

I certify that on this date I caused to be delivered via first-class mail, postage pre-paid, a copy of the attached Brief of Appellant to:

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Dated this 30th day of August, 2016.

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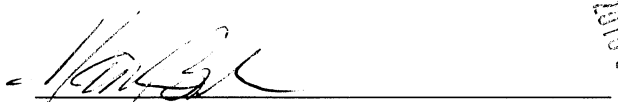

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