

NO. 43003-7-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DAVID TAFOYA AND FARIS TAFOYA

Appellants,

v.

WASHINGTON STATE  
HUMAN RIGHTS COMMISSION

Respondents.

APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY  
THE HONORABLE CHRISTINE POMEROY, JUDGE  
THURSTON COUNTY SUPERIOR COURT CAUSE NO. 11-2-00387-3

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APPELLANTS' AMENDED OPENING BRIEF

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This an appeal from the Superior Court of the State of Washington for Thurston County which on April 13, 2012 entered the Order of Judgment.

On April 27, 2012 Appellants' filed their Notice of Appeal from the Order of Judgment. CP 137 - 143.

### **I. PRELIMINARY STATEMENT**

Appellants, David Tafoya and Faris Tafoya, jointly, will hereinafter be referred to as "Tafoya". Appellant, David Tafoya, singly, will hereinafter be referred to as "David" and Appellant, Faris Tafoya, singly, will hereinafter be referred to as "Faris". The Washington State Human Rights Commission will hereinafter be referred to as the "Commission", and Mary Gossard, the complainant will hereinafter be referred to as "Gossard". Reference to the Administrative Record ("AR") will be by reference to the Bates Number assigned to the page or pages involved.

### **II. ASSIGNMENTS OF ERROR**

1. Tafoya assigns as error the making by the Administrative Agency and the entry of Finding of Fact 5 which reads as follows:

"At the time the Tafoyas and Ms. Gossard were signing the lease, Mr. Tafoya asked Ms. Tafoya if Ms. Tafoya minded if he chased Ms. Gossard around the pond. AR 63, 416. Ms. Tafoya did not say anything. Ms. Gossard responded that it was not okay that he chase her around the pond. AR 63. Ms. Gossard felt his comment was inappropriate. Mr. Tafoya said he could not recall making the statement. AR

416; Exhibit C-8, page 6. Ms. Tafoya denied hearing the statement. Exhibit C-7.” AR 00362.

2. Tafoya assigns as error the making by the Administrative

Agency the entry of Finding of Fact 17 which reads as follows:

“When Mr. Tafoya brought dinner to Ms. Gossard after she broke her ankle, he said “I’ve seen your pussy.” Ms. Gossard felt this comment was gross, wrong, and inappropriate. AR 44. Ms. Gossard believes her facial expression told Mr. Tafoya his comment was not welcome. AR 44 - 45.” AR 00365.

This statement was made after David had seen Gossard’s cat.

3. Tafoya assigns as error the making by the Administrative

Agency and the entry of Finding of Fact 24 which reads as follows:

“On one occasion, Mr. Tafoya invited Ms. Gossard to see his art in his RV. Ms. Gossard saw that the paintings were of sexual subjects, including Ms. Tafoya in a bikini touching herself and a woman with her legs spread open. Mr. Tafoya pushed Ms. Gossard onto the bed and sat down next to her. AR 72 - 74. Ms. Gossard left immediately. This incident frighten Ms. Gossard. AR 75. At the hearing, Mr. Tafoya denied that he ever showed Ms. Gossard his RV or invited her into it. AR 419. In his interview with Ms. Rasmussen, Mr. Tafoya stated the picture of Ms. Tafoya showed her in a bikini with her hand on her belly. Mr. Tafoya also stated that, if Ms. Gossard had seen those pictures, she must have gone into the RV by herself and was trespassing. Mr. Tafoya denied he pushed Ms. Gossard onto the bed. Exhibit C-8, pp. 7 - 8.” AR 00366.

4. Tafoya assigns as error the making by the Administrative

Agency and the entry of Finding of Fact 63 which reads as follows:

“The Commission also requests Ms. Gossard be awarded \$25,000 for emotional distress, both while she was living in

the Tafoyas' rental property and after she was forced to leave by the Tafoyas' actions. AR 129 - 130. Ms. Gossard gave the following explanation for that claim:

I was put under a lot of stress in my education. I was gaining weight. I was not sleeping. I was afraid. I was feeling invalidated. I was angry. I was humiliated. I was subjugated to things that nobody should be subjugated to, making it very stressful. AR 130

Ms. Gossard's emotional distress continues to the present.”  
AR 00376.

5. Tafoya assigns as error the making by the Administrative Agency and the entry of Conclusions of Law 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 and 56.

6. Tafoya assigns as error the entry of the Decision and Order and all parts thereof.

7. Tafoya assigns as error the making by the Superior Court for Thurston County and the entry of Finding of Fact 2, which reads as follows:

“The Administrative Record establishes that David Tafoya engaged in a pattern of sexually harassing conduct toward tenants including Mary Gossard and former tenants.” CP 101 - 104.

8. Tafoya assigns as error the making by the Superior Court for Thurston County and the entry of Finding of Fact 3, which reads as follows:

“The administrative record establishes that Faris Tafoya knew or should have known that David Tafoya engaged in sexually harassing conduct and behavior and that Faris Tafoya had a duty to prevent such conduct.” CP 101 - 104.

9. Tafoya assigns as error the making by the Superior Court for Thurston County and the entry of Conclusions of Law 2, 3, 4, 5, 7 and 8. CP 101 - 104.

10. Tafoya assigns as error the making by the Superior Court for Thurston County and the entry of the Order, which reads as follows:

“IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Findings of Fact, Conclusions of Law and Decision and Order issued by Administrative Law Judge Alice Haenle, Office of Administrative Hearings, Docket No. 2001-HRC-0002 is affirmed with the above amendment and the Petitioners David and Faris Tafoya for judicial review is denied.” CP 101 - 104.

11. Tafoya assigns as error the entry of the Order of Judgment on April 13, 2012. CP 137 - 138.

### **III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

The issue pertaining to the assignments of error are as follows:

1. Did the Administrative Agency and its Administrative Law Judge: (a) erroneously interpret or apply the applicable law; (b) is the order outside of the statutory authority of the Administrative Agency; or (c) is the order arbitrary or capricious; or (d) is the Administrative Agency action supported by substantial evidence.

Appellants maintain that the answer to the issues are: (a) yes; (b)

yes; (c) yes; and (d) no.

#### **IV. PROCEEDINGS IN THE SUPERIOR COURT**

The case was heard on December 2, 2011 before the Honorable Christine A. Pomeroy, Judge. She ruled in favor of the Human Rights Commission. The Findings of Fact, Conclusions of Law and Order on Judicial Review was entered on January 5, 2012. An appeal followed on January 27, 2012. Thereafter upon the application of the Respondent, an Order of Judgment was entered on April 13, 2012. Notice of Appeal was filed from this Order of Judgment on April 27, 2012. CP 137 - 138, and CP 139 - 143.

#### **V. FACTS**

1. Testimony of Gossard: Gossard testified that around the beginning of February, 2006 she became aware of the Tafoya rental. She obtained the information from a newspaper advertisement. She spoke over the telephone directly with David and he invited her to come and look at the rental unit. She found the unit a very reasonable accommodation for a very modest price. She found David a little bit eccentric, perhaps a little bawdy. AR 00424 - AR 00427.

She met David at the property. Faris was not present.

A few days after she viewed the rental she moved in. It was approximately February 17, 2006. She had not signed a lease with the Tafoyas by that date.

During the course of moving, David offered to help her move her piano which she accepted. AR 00433 - AR 00435.

Faris was not present. AR 00437.

After she moved into the rental, Gossard moved empty boxes to the basement. As she was descending the steps to the basement, she fell severely injuring her left foot. She screamed for help and David responded. He assisted her out of the basement and called 911. The paramedics came and placed ice packs upon the injured area, stabilized it and took her to the hospital. After she had been treated at the hospital, she called David and he took her to her home. AR 00440 - AR 00441.

The following day she got a call from David to see if she wanted him to bring breakfast to her. She accepted and David brought her breakfast. Later on that night, David showed up again with dinner. David had seen her cat and made a comment "I have seen your pussy". AR 00442.

Gossard's treatment for her injury included the use of crutches, the installation of a boot on her ankle. The boot was similar to a half cast. She wore the boot approximately three months. AR 00444.

Because of the injury, Gossard had to withdraw from Evergreen College. AR 00445.

Gossard and Faris signed the lease agreement on March 1, 2006.

Towards the end of April, 2006, Gossard noticed that David was at

home. She called the Tafoya residence and talked to David as to whether or not she could have the use of their landline phone line in connection with a teaching position that she had obtained with Carrot Korea. She needed the land line to teach english to Korean students. David said that he needed to talk it over with Faris. Faris called back and informed Gossard that she could not use their telephone landline. Faris then hung up on Gossard. Gossard called her back and stated "I need to tell you what is going on with your husband and his comments that he has been making to me and his inappropriate touch and how I don't feel good in this situation and how I don't know what to do." Faris responded "Oh, no. This is absolutely untrue." Faris further stated "You are the one that is coming on to my husband and you are the one hanging around my husband and its you. It is not him that is being the one that who is trying to get involved in a sexual context." AR 00478 - AR 00479.

On May 1, 2006, Gossard obtained instructions for completing a housing discrimination complaint against the Tafoyas. AR 00480.

Tafoyas wanted Gossard to move out and Gossard wanted to move from the premises. At the end of August and the beginning of September, Gossard found a new residence and moved from the premises. AR 00510.

Complaints against David: During the moving into the rental, David said to Gossard "will you get out of here", "will you get out of my head". On two occasions David hugged Gossard. However his hands

were on Gossard's buttocks. David showed Gossard that he had a gun and that he had a permit to carry it. The gun was lying on the counter in the Tafoya home. David told Gossard that he used it to kill varmints that were after his chickens and small animals on the property.

Shortly after Gossard moved upon the rental property, she played the piano. David called her and told her that "your piano playing is beautiful". Gossard claims David then said "I made love to you several times while I was listening to you, I could even taste you". Gossard thought that David sounded drunk on the phone. She states that she protested the comments other than the quality of her piano playing. David denied that he told Gossard that he wanted to make love to her or that he was in love with her. David is impotent.

The complaints against David are set forth in Findings of Fact 18 through 26. David denies these allegations. CP 10 - 11.

2. Testimony of David Tafoya: With respect to the complaint of the hug, David stated that Gossard never objected to it. AR 00812.

With respect to the playing of the piano he did inform Gossard that he heard it and enjoyed it. He denies saying he made love to or wanted to make love to Gossard. AR 00813.

He did go upon the rental property when Gossard fell and called 911 on her behalf. He brought her breakfast and dinner the next day. He took her to Evergreen College and to a doctor's appointment.

With respect to the comment that he would chase her around the pond. He has no recollection of making such a statement. It is doubtful that he made the statement as you can't get around the pond because its a swamp.

He called Gossard to watch the meteor shower. She said she was in her bathrobe. He responded he didn't care. That is the only time he made that comment.

One time she had a person overnight and he commented that one of her clients spent the evening. He thought it was in connection with part of a healing practice she had, using some sort of triangle-sounding whatever.

He denies inviting her to the RV. If she was in the RV she was there without permission. He was concerned with her cat and his baby chickens. He requested that the cat stay in her (Gossard's) yard. He trimmed the tree to prevent the cat from getting to the chickens.

He never mowed the lawn while the tenant was at home. He did mow the lawn one time when she left.

David informed Gossard of the boundaries of the property and he further informed her that his backyard was his wife and his private area. He complained about her coming over into his private area. He complained that she would be at the front door knocking all the time, phoning every day, this notwithstanding that he had advised her that they wanted a landlord - tenant relationship.

He denied ever being naked around her. He never told Gossard that he was in love with her.

He had no conversations with respect to raspberries. He told her the pump house was not a storage area. He found out that she had used it because the water pipe was broken and he wasn't informed of the same.

Gossard did make a complaint to the county with respect to the insulation in the pump house. He removed the insulation. He later replaced the insulation. He used fireworks to scare the geese and he did use his pistol to shoot at varmints that invaded the chicken house. AR 00816 - AR 00832.

3. Times Faris Met Gossard: Faris first met Gossard the second day after she looked at the property. The next time she met Gossard was the day Faris and Gossard signed the lease. On this day Faris hugged Gossard. Hugging is a common form of greeting within the Tafoya family.

The next time she saw Gossard was taking out the garbage and Gossard asked her if she needed help.

The next time was when Gossard requested to use Tafoya's landline. AR 00861 - AR 00863.

## **VI. SUMMARY OF ARGUMENT**

Tafoya maintains that the Final Findings of Fact, Conclusions of Law, and Decision and Order and the Order of Judgment of the

Administrative Agency are the result of: (a) an erroneous interpretation and application of the law; (b) is outside of the statutory authority of the agency; and (c) is arbitrary and capricious; and (d) are not supported by substantial evidence.

## VII. ARGUMENT

1. Review of Administrative Agency Decisions: The court's review of an agency's order in an adjudicated proceedings is governed by RCW 34.05.570(3) which provides in part that the court must grant relief if the agency has erroneously interpreted or applied the law, or if the order is unconstitutional, or the order is not supported by substantial evidence, or is outside the statutory authority, or is arbitrary or capricious. When a party asserts that an agency's action is not supported by substantial evidence the court examines the record to determine if sufficient evidence exists to persuade a fair minded person of the correctness of the order. The court does not weight witnesses credibility or substitute the court's judgment for the agency's findings of fact, even though the agency's findings are recitations of evidence rather than findings of ultimate facts.

The court applies *de novo* review to the statutory interpretation questions. Legislative intent is determined primarily from the statutory language viewed in the context of the overall legislative scheme. If the statute's meaning is plain on its face the court gives effect to that plain meaning. *Brown v. DSHS*, 145 Wn. App. 177, 185 P.3d 1210, pp. 182 -

183.

2. Liability of Faris: A judgment against a wife is erroneous insofar as it imposes personal liability on the wife if there is no evidence to support the personal judgment against her. *Douglas Northwest v. O'Brien and Sons*, 64 Wn. App. 661, 828 P.2d 565, (1992).

RCW 34.05.570(3) provides in part that the appellate court must grant relief if the administrative agency has erroneously interpreted or applied the law or if the order is unconstitutional, is outside of the statutory authority, or is arbitrary and capricious. *Brown v. DSHS*, 145 Wn. App. 177, 185 P.3d 1210.

When a party asserts that an agency's action is not supported by substantial evidence, the court examines the record to determine if sufficient evidence exists to persuade a fair minded person of the correctness of the department's order. Substantial evidence is required.

The court applies de novo review to statutory interpretation questions. Legislative intent is determined primarily from the statutory language viewed in the context of the overall legislative scheme. If the statute's meaning is plain on its face the court gives the effect to that plain meaning. *Brown v. DSHS*, supra at pp. 182. The application of the tests to the orders of the administrative agency are: (a) outside the statutory authority of the administrative agency; (b) arbitrary and capricious; (c) is the agency's action supported by substantial evidence; and (d) has the

agency correctly determined the law. This requires a de novo examination.

Faris was incorrectly and erroneously adjudged at fault and liable for damages. Findings of Fact 30, 31, and 32. CP 12, 13 and 14. Finding of Fact 32 states as follows:

“Ms. Tafoya had very little contact with Ms. Gossard, since Ms. Tafoya was often at work or at her son’s house with her granddaughter. Most of the information Ms. Tafoya had about Ms. Gossard’s interactions with Mr. Tafoya came from what Mr. Tafoya told her. Ms. Tafoya stated the following during her interview with Ms. Rasmussen:

Even when she told me these things, that he was calling her (I was at work, at my son’s house with my granddaughter, it seemed silly. She is our kid’s age. I took it with a grain of salt, took it as “this is not true”. I didn’t accuse my husband when I told him. I said, “You’re not going to believe what Mary just said to me on the phone.” To this day, I feel the same way about it. Either she has made this up, for whatever reason, or she took a half truth of what David has said. He could have said it in jest, or kidding, and then she created something out of that. But to this point in time, there’s no truth in it. Anything we do is not retaliation against her. . . . If he was bothering her, why was she continually coming over to our backyard, and calling. Why isn’t she looking for another place to live?

And David and I are very open. Everything she said, he told me.

He'd call me on the phone, "she came to the front door." He would call me at work, he would say -- it was kind of making us, I don't know, that relentlessness is not part of our lifestyle. . . . For her to call, come to our door every single day, not even friends or family do that. So that relentless contact became too much. . . . I know David; he would not knowingly try to have any kind of relationship for himself or for them as a couple.

Ms. Tafoya relied on what Mr. Tafoya had told her about Ms. Gossard's actions over the previous months. Ms. Tafoya had very little first-hand knowledge about Mr. Tafoya's contacts with Ms. Gossard." Finding of Fact 32. CP 13 and 14.

The finding of personal liability on the part of Faris is not supported by substantial evidence and is contrary to the language of RCW 26.16.190 which provides as follows: "for all injuries committed by a married person or domestic partner, there shall be no recovery against a separate property of the other spouse or other domestic partner except in cases where there would be joint responsibility if the marriage or the state registered domestic partnership did not exist."

This statute shielded the innocent spouses' separate property and community property from process. This rule was changed by the Washington Supreme Court in the case of *deElche v. Jacobsen*, 95 Wn.2d 237, 622 P.2d 835 (1980). In this case, Mrs. deElche, her ex-husband and

Mr. Jacobsen and his wife were socializing aboard the Jacobsen 36' community owned sailboat. Mrs. deElche decided to leave when the other three started drinking heavily. She went to bed aboard her ex-husband's boat which was tied up alongside the Jacobsen's boat. Later that evening, Mr. Jacobsen left his community owned boat in an intoxicated state and went aboard the deElche boat and forcibly raped Mrs. deElche. As a result of the civil trial, Mrs. deElche was awarded a judgment against Mr. Jacobsen separately. Since prior to the incident the Jacobsen's had validly executed a community property agreement Mr. Jacobsen had no separate property. Under the existing Washington law the judgment was uncollectible since it was community property and deemed exempt from judgment arising from separate torts.

The Washington court reversed the precedent, and imposed the following rule with respect to liability.

1. The rule for dealing with tort recoveries for married persons is one which will impose liability upon the community when the tort is done for the community benefit, and protect the property of the innocent spouse if the tort was separate, and at the same time allow recovery by the victim of the solvent tortfeasor.

2. Tort which can properly be said to be done in the management of the community business or for the benefit of the community, will remain community torts with the community and the

tortfeasor separately liable.

3. For torts not in the management of the community business or for its business, such as the forcible rape committed in the deElche case, the tortfeasor (Mr. Jacobsen) should be primarily liable. If there is not sufficient separate property, then the tortfeasor's half interest in community personal property shall first become liable.

The Supreme Court extended the deElche rule to community real property when they stated

“Expansion of the rule in deElche will properly allow the victim of a separate tort to execute his or her judgment against the tortfeasor's interest in community real property in the event that the tortfeasor's separate property and share of community personal property are insufficient to satisfy the judgment.” *Keene v. Edie*, 131 Wn.2d 822, 935 P.2d 588 (1997) at pp. 835.

3. Statutes Involved: RCW 49.60.030(c), which is part of the declaration of civil rights, provides that the “right to be free from discrimination because of race, creed, color, national origin, sex, . . . sexual orientation, is a civil right. The right includes but is not limited to (c) the right to engage in real estate transactions without discrimination . . .”

RCW 49.60.220 states that it is an unfair practice for any person to aid, abet, encourage or incite the commission of an unfair practice or

attempt to obstruct or prevent any other person from complying with the provisions of the act.

RCW 49.60.222 describes an unfair practice as (1)(b) to discriminate against a person in the terms, conditions or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith.

(1)(f) to discriminate in the sale or rental or otherwise make unavailable or deny a dwelling to any person; or to a person residing in or intending to reside in that dwelling after it is sold, rented or made available; or to any person associated with the person buying or renting.

(1)(k) to attempt to do any unfair practice found in the section.

RCW 49.60.2235 makes it an unlawful practice to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of or on account of his or her having exercised or enjoyed or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of rights regarding real estate transactions secured by RCW 49.60.030, RCW 49.60.040, and RCW 49.60.222, RCW 49.60.223 and RCW 49.60.224.

Specifically, the Tafoyas are accused of violating RCW 49.60.222(1)(b) and (f).

Gossard must prove that the Tafoyas discriminated against Gossard, in the terms, conditions or privileges of a real estate transaction

or in the furnishing of facilities or services in connection therewith. Or they must prove a violation of (1)(f) that the Tafoyas discriminated in the rental of a real estate unit or otherwise made unavailable or denied a dwelling to Gossard, or, if they seek recovery under RCW 49.60.2235, they must prove that the Tafoyas engaged in an unlawful practice of coercing, intimidating, threatening or interfering with Gossard in the exercise of or enjoyment of her rights regarding a real estate transaction.

The Tafoyas submit: (1) that they did not discriminate against Gossard with respect to the renting of their rental real estate to her; (2) they did not discriminate against Gossard in the terms and conditions or privileges of the renting of the real estate to her; (3) they did not discriminate in the furnishing of facilities or services in connection with the real estate transaction; and (4) they did not discriminate in the rental of the real estate which Gossard was entitled to occupy or otherwise make the real estate unavailable.

4. Statute: Gossard through the state has elected to bring an action under RCW 49.60.220 which states that it is an unfair practice for any person to incite the commission of an unfair practice or attempt to obstruct or prevent any other person from complying with the provisions of the act. Specifically that portion of the act that pertains to this case, if any, is RCW 49.60.222, which describes a real estate unfair practice.

(1)(b) as the discrimination against a person in the terms,

conditions or privileges of **real estate transaction** or in the furnishing of facilities or services in connection therewith. There is absolutely no evidence that the Tafoyas engaged in any practices which are prohibited by Section (1)(b). There is no issue concerning the fact that Gossard obtained possession of the rental area and resided upon it.

Or Tafoyas are accused of violating (1)(f) in that they discriminated in the sale **or rental or otherwise made unavailable or denied a dwelling to Gossard** after it had been rented to her. There is no evidence supporting a cause of action by reason of this statute.

RCW 49.60.2235 makes it an unlawful practice to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of or on account of his or her having exercised or enjoyed or on account of his or her having aided or encouraged or aided any other person to exercise or enjoy rights regarding real estate transactions secured by RCW 49.60.030, 040, 222 - 224.

There is no evidence that shows that there was any interference with respect to entering into the rental agreement between Gossard and the Tafoyas, or to the land that was included within the rental agreement, or any interference with Gossard's use of that land that she was entitled to occupy in accordance with the rental agreement.

In the opinion of Tafoya, these statutes are not the most artful statutes. However, they are governed by the principal *expressio unius est*

*excluso alderius*. The starting point for the analysis is “where a statute specifically designates the things upon which it operates, there is an inference that the legislature intended all omissions. *Pers. Restraint of Acron* 122 Wn.Ap. 886, 95 P.3d 1272, (2004) at pp. 890.

Even if the legislature did not intend to omit things from the statute, the courts must leave it to the legislature to correct the error. Appellate courts do not supply omitted language even when the legislature’s omission is clearly inadvertent, unless the omission renders the statute irrational. “To do so would [be] to arrogate to ourselves the power to make legislative schemes more perfect, more comprehensive and more consistent.” Thus where the legislature’s omission “did not undermine the purpose of the statute [but] simply kept the purposes from being effectuated comprehensively,” the court will not read omitted language into the statute. *Pers. Restraint of Acron*, supra at pp. 891.

There appears to be no real estate discrimination cases in Washington to date. However, it is interesting to note that the Court in *Honce v. Vigil*, 1 F.3d 1085 (10<sup>th</sup> Circuit 1993) in discussing hostile housing environment states in part as follows:

Ms. Honce raises the related claim that Mr. Vigil’s harassment created a hostile housing environment. In the employment context and employer violates Title VII by creating a discriminatory work environment, even if the employee loses no tangible job benefits, because

the harassment is a barrier to equality in the workplace. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986) (employer forcing plaintiff to engage in sex in the workplace created hostile environment). Applied to housing, a claim is actionable when the offensive behavior **unreasonably** interferes with use and enjoyment of the premises. (Emphasis ours.) The harassment must be “sufficiently severe or pervasive” to alter the conditions of the housing arrangement. See *Hicks*, 833 F.2d at 1413. It is not sufficient if the harassment is isolated or trivial. *Meritor Savings Bank*, 477 U.S. at 65, 106 S.Ct. at 2404. “[C]asual or isolated manifestations of a discriminatory environment . . . may not raise a cause of action.” *Hicks*, 833 F.2d at 1414 (quoting *Bundy v. Jackson*, 641 F.2d 934, 943 n. 9 (D.C.Cir.1981)). *Honce v. Vigil*, supra, at page 1090. (Emphasis ours).

Although, it pertained to harassment in the work place, *Glasgow v. Georgia-Pacific*, 103 Wn.2d 401, 693 P.2d 708 (1985), does offer some guidance in looking at these harassment cases.

The court indicated that the act does not impose a duty upon the employer to maintain a pristine working environment. Rather it imposes a duty upon the employer to take prompt and appropriate action when it knows or should know of co-employees’ conduct in the workplace amounting to sexual harassment (an undefined term). *Glasgow v. Georgia-Pacific*, supra at pp. 406.

The court further stated: Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law. The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether the harassment at the workplace is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee is a question to be determined with regard to the totality of the circumstances. *Glasgow v. Georgia-Pacific*, supra at pp. 406-407.

The evidence in this case shows that Faris never ventured onto the premises rented to Gossard. David ventured onto the premises rented to Gossard when she moved into the premises, when he rendered assistance to her when she injured her foot, when he made a couple of minor alterations or repairs to the rental building, when he mowed the lawn once, and when he entered upon the premises to repair the broken plumbing so that water was restored to the property.

5. Free Speech: The term sexual harassment is not defined in RCW 49.60. David Tafoya is accused of using inappropriate language in the presence of and directed to Gossard. This is denied. However, the use of inappropriate language is not addressed in RCW 49.60. Is language, even though it may be inappropriate, susceptible to the application of protected speech? The Tafoyas assert that it is. Although it involved a

criminal statute designed to punish anyone who shall insult, or abuse a teacher anywhere on the school premises, the Washington State Supreme Court in *State v. Reyes*, 104 Wn.2d 35, 700 P.2d 115 held that the use by a student against a teacher of the words “white mother fucker” was protected speech and the conviction vacated. The Court held that insults not amounting to “fighting words” though insolent, or contemptuous, are not inherently likely to lead to a breach of the peace.

The Court pointed out that Article 1 Section 5 of the Washington Constitution states that “every person may freely speak, write and publish, on all subjects, being responsible for the abuse of that right”. Freedom of speech is a preferred right under the Washington Constitution, citing *State v. Coe*, 101 Wn.2d 364, 679 P.2d 353 (1984). Furthermore, restraint imposed upon a constitutionally protected medium of expression is presumptively unconstitutional, citing *Fine Arts Guild, Inc. v. Seattle*, 74 Wn.2d 503 - 506, 445 P.2d 602 (1968). *State v. Reyes*, supra at pg. 43. The raucous language supposedly used by David (which he denies) is within the protection of the right of speech under the Constitution.

Other cases involving freedom speech are *Pasco v. Dixon*, 81 Wn.2d 510, 503 P.2d 76 (1972) where the defendant uttered to the police “shit, you pigs got no right”. The court noted that the record makes clear that this statement was not made under circumstances of public disorder, violence or danger then existing or threatened. The record is devoid of

proof that the remark was made with design to create a public disturbance or to offend the other occupants of the park, except perhaps the police officers. The crime that the defendant was convicted of, i.e. disorderly conduct, was reversed and dismissed. *Cohen v. California*, 403 U.S. 15 (1971), the defendant was convicted of violating a part of the California Penal Code for wearing a jacket bearing the words “Fuck the Draft” the court stated that the issue flushed by this case was whether California can excise as “offensive conduct” one particular scurrilous epithet from the public discourse either upon the theory that it is inherently likely to cause violent reaction or upon the more general assertion that the State is acting as guardians of public morality may properly remove this offensive word from the public vocabulary. The court held that the states cannot make this single four-letter word, expletive a criminal offense and reversed the conviction.

Under the real estate transactions and the statutes the Tafoyas submit that it is not sufficient that the conduct is merely offensive. This is a rule in employment situations stated in *Adams v. Able Building Supply, Inc.*, 114 Wn.Ap. 291, 57 P.3d 280, (2002) at pp. 296.

The Tafoyas submit that under the real estate transaction, the standard is “to constitute a hostile environment, the frequency and severity of the offensive conduct must be such as to affect the terms and conditions of the real estate transaction. It is not sufficient that the conduct is merely

offensive.

It requires a determination as to whether the conduct was sufficiently pervasive so as to alter the conditions of the real estate transaction and create an abusive environment. That requires looking at the totality of the circumstances. In addition to its frequency and severity, it is necessary to look at whether the conduct involved words alone or included physical intimidation or humiliation and whether the conduct involved or interfered with the tenant's rights under the real estate transaction and are the words used protected by freedom of speech.

But as the Court said in *Adams v. Able Building Supply, Inc.* “a civil rights code is not ‘a general civility code’”. *Faragher v. City of Boca Raton*, 524 U.S. 775, 778, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) quoting from *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). The conduct must be so extreme as to amount to a change in the terms and conditions of employment. The conduct must be both objectively abusive (reasonable person test) and subjectively perceived to be as abusive by the victim. *Adams v. Able Building Supply, Inc.* supra, at pg. 297.

The *Adams* Court further stated “to establish as offensive conduct that constitutes sex discrimination, Ms. Adams must show that the conduct was (a) directed at women and (b) motivated by an animus against them as women. . . . it is not sufficient to show that the employee suffered

embarrassment, humiliation or mental anguish arising from non-discriminatory harassment. The dispositive question is whether Ms. Adams would have been subjected to harassment if she had been a man.” *Adams v. Able Building Supply, Inc.* supra, at pgs. 297 - 298.

In *Adams v. Able Building Supply, Inc.* apparently men and women were equally subjected to the unpleasantness of the supervisor therefore the hostile environment discrimination claim failed.

In making a determination in this case, it is necessary to separate which conduct is sexual harassment (a term which is not defined in the statute) from all other conduct. The Tafoyas deny that there was any sexual harassment. Then it is necessary to determine whether this specific conduct was motivated by a dislike against women, and was so extreme as to affect the terms of the real estate transaction. Finally, it is necessary to consider whether or not the speech used is within the constitutional protection.

The Tafoyas deny allegations asserted by Gossard in their complaint. This denial is based upon the belief of the Tafoyas that such allegations never occurred. However, the trier of fact must weigh the evidence to determine whether or not Gossard proved her case. Then, after reviewing the evidence, is the agency’s action declaring a discrimination in a real estate transaction supported by substantial evidence. The Tafoyas contend that it does not.

No complaints were made by Gossard until Tafoya denied Gossard permission to come into their home to use their land line telephone to make overseas calls of unknown number or length in duration to Korea.

6. Proof of Injury: A person asserting injury is required to prove that the conduct complained of in a natural and continuous sequence, unbroken by any independent cause produced the injury complained of and without which the ultimate injury would not have occurred. *Conrad v. Alderwood Manor*, 119 Wn.App. 275, 78 P.3d 177 (2003) at pg. 281.

In *Haubry v. Snow*, 106 Wn.App. 666, 31 P.3d 1186 (2001), Haubry asserted the trial court committed error by dismissing her claim for negligent infliction of emotional distress. “A plaintiff alleging negligence must establish a duty, a breach, proximate cause, and damage or injury. An employee may recover damages for emotional distress in an employment context but only if the factual basis for the claim is distinct from the factual basis for the discrimination claim.” Here there is no separate defensible claim because the factual basis for emotional distress is the same as the sexual harassment or discrimination claim, and are not supported substantial evidence.

Even if Haubry some how based her claim on separate facts, the claim is subject to certain limitations. A claim for the negligent infliction of emotional distress also requires that Haubry established that the

emotional distress is manifested by objective symptoms. To satisfy the objective symptomatology requirement established in the case of *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976), Haubry's emotional distress must be susceptible to medical diagnosis and proved with medical evidence. Under *Hegel v. McMahon*, 136 Wn.2d 122, 132, 960 P.2d 424 (1998), nightmares, sleep disorders, intrusive memories, fear and anger such as Haubry has claimed existed may in fact be sufficient. However, in order for these symptoms to satisfy the objective symptomatology requirement they must constitute a diagnosable emotional disorder. Thus there must be objective evidence regarding the severity of the distress and the causal link between the actions of the employer and the subsequent emotional reaction of the employee. Here Haubry submitted no medical evidence in the record to support her claim. The trial court did not err in dismissing Haubry's claim for negligent infliction of emotional distress. *Haubry v. Snow*, supra, at pp. 678 - 679.

The question of injury and causation is a question requiring medical testimony. There are fields of opinion testimony in which the expert must be licensed and there are others where the expert need not be licensed. In the license field, the law presumes that the licensed witness is an expert and the non-licensed witness is not, thus physicians and surgeons with unlimited licenses are competent to give expert testimony in the entire medical field. Physicians and surgeons of experience are

presumed to be acquainted with all matters pertaining to their profession and to be competent to testify as to the same. *Kelly v. Carroll*, 36 Wn.2d 482, 219 P.2d 79 (1950) at pg. 491.

Persons who are not licensed to practice medicine are not qualified to testify as to matters in the realm of medicine and surgery. *Kelly v. Carroll*, supra at pp. 490 - 491.

### VIII. CONCLUSION

Tafoya respectfully request this Court to reverse the decision of the Administrative Agency as adopted by the Superior Court of Thurston County.

DATED this 9 day of July, 2012.

OWENS DAVIES FRISTOE  
TAYLOR & SCHULTZ, PS



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The original and one copy of this document was properly addressed and sent by ABC Legal Services, to the following individuals on July 9, 2012.

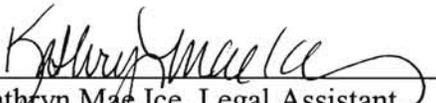
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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington

Date: July 9, 2012

  
Kathryn Mae Ice, Legal Assistant

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