

No. 95205-I

No. 75057-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHRISTOPHER H. FLOETING,

Appellant,

v.

GROUP HEALTH COOPERATIVE,

Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT

A. The Washington Law Against Discrimination prohibits sex discrimination – including sexual harassment – in places of public accommodation.

Group Health conceded below that “the right to be free from discrimination embodied in the [WLAD] could include” a claim for sexual harassment in public accommodations. 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 . . . [.]”). However, its position on appeal is that this Court should not recognize such a claim, “as the treatment specifically prohibited by the public accommodations statute cannot be interpreted to include unwelcome sexual innuendo or overture.” Br. of Respondent at 18.

GHC makes the following assertions in support of its argument:

[A] cause of action for sexual harassment in a place of public accommodation would require that a plaintiff prove that conduct constituting sexual harassment caused the individual to be treated as “not welcome, accepted, [or] desired” because of his or her sex, *such that it resulted in the refusal or withholding of admission or use of a place of public accommodation.*

Id. at 21 (emphasis added).

[T]he proper inquiry in these cases is not how the victim feels in response to the treatment in question, . . . but whether the treatment was *intended* to exclude or discourage or prohibit the offended party from accessing

the place of public of accommodation because of his or her sex, race, disability or other protected class status.

Id. at 22 (emphasis added) (citing *Evergreen Sch. Dist. v. Wash. State Human Rights Comm'n*, 39 Wn. App. 763, 772, 695 P.2d 999 (1985)).

These statements suggest that a plaintiff alleging discrimination in a place of public accommodation must prove he was denied access to the public accommodation or that he experienced treatment there that was intended to prevent or discourage him from accessing the place because of his race, sex, etc. Group Health's narrow interpretation of the WLAD is not supported by the plain language of the statute or the cases on which it relies.

Denying somebody access to a place of public accommodation on account of his or her sex, race, disability, etc. is just one form of illegal discrimination under the WLAD. By its plain language the law also prohibits denying someone the "full enjoyment" of such places (RCW 49.60.030(1)(b)), "commit[ting] an act which directly or indirectly results in any distinction, restriction, or discrimination" (RCW 49.60.215), and "the requiring of any person to pay a larger sum than the uniform rates charged other persons" at a place of public accommodation, "except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex,

[etc.]” (RCW 49.60.215). These are just some of the types of discrimination prohibited under the WLAD, demonstrating that the law’s protections are not as narrow as GHC argues. The statute explicitly contemplates other forms of discrimination that are not explicitly set forth therein. *See* RCW 49.60.030(1) (affirming that the right to be free from discrimination because of race, sex, etc. “shall include, *but not be limited to*” the specific examples set forth in the statute) (emphasis added).

Moreover, nothing in the statute requires a plaintiff to prove a defendant “intended to exclude or discourage or prohibit the offended party from accessing the place of public of accommodation because of his or her sex, race, disability or other protected class status,” as GHC suggests. *See* Br. of Respondent at 22. Such a requirement also cannot be found in *Evergreen*, the case GHC cites to support this suggestion. *Id.*

Given the broad language of RCW 49.60.030(1), refusing to limit the forms of unlawful discrimination to those enumerated in the statute, as well as the WLAD’s explicit requirement that its provisions be construed liberally to accomplish the law’s purpose to eliminate and prevent discrimination (*see* RCW 49.60.010 - .020), and the fact that courts have found sexual harassment to constitute unlawful sex discrimination in the contexts of employment and real estate transactions, this Court should

recognize a right under the WLAD to be free from sexual harassment in places of public accommodation.

B. The standards for a public accommodation sexual harassment claim should be grounded in the statutes governing persons' civil rights in those settings, and not simply copied from the case law developed to address sexual harassment in employment.

Rev. Floeting's proposed standards for establishing a claim of sexual harassment by a public accommodation are consistent with the terms of the WLAD and the case law interpreting the statute. Furthermore, they do not preclude a court – including this Court – from fashioning a reasonable rule to distinguish actionable harassment from the kind of casual, isolated, or trivial comments that someone might find offensive but that do not, by themselves, constitute illegal harassment.

1. The standards proposed by Rev. Floeting are grounded in the relevant statutes and comport with applicable case law.

Rev. Floeting's proposed standards are derived *directly* from the statutes that the Legislature adopted specifically to address civil rights violations in places of public accommodation. *See* Br. of Appellant at 16-18. Moreover the proposed standards are consistent with the limited authority interpreting those statutes – including *Evergreen, supra*, the primary case on which GHC relies.

The only case either party has cited in which a court has addressed a sexual harassment claim under the WLAD's public accommodation provisions is *Allen v. Educ. Cmty. Credit Union*, No. C06-16MJP, 2006 U.S. Dist. LEXIS 34191 (W.D. Wash. May 24, 2006). *See* Br. of Appellant at 18. Like Rev. Floeting, the plaintiff in *Allen* claimed she was subjected to crude and offensive sexual comments by the defendant's employee when she interacted with him for the purpose of purchasing the defendant's services. *Allen* at *19. In analyzing the plaintiff's claim as a potential violation of the WLAD's prohibitions against discrimination in public accommodations, the United States District Court explained that the plaintiff's claim was that she "was denied the 'full and equal enjoyment' of the services other[] [customers] enjoyed." *Id.* In other words, the Court characterized the plaintiff's claim as an alleged violation of RCW 49.60.030(1)(b), which guarantees Washingtonians the right to "full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public . . . accommodation . . ." without discrimination on the basis of sex.

The District Court's analysis in *Allen* is logical and it furthers the Legislature's stated purpose of eliminating and preventing discrimination in places of public accommodation. *See* RCW 49.60.010. Rev. Floeting's proposed standards for establishing a sexual harassment claim against a

place of public accommodation comports with that analysis, defining the claim, in part, based on the language of RCW 49.60.030(1)(b). The only difference is that Rev. Floeting's proposed standards are more detailed, incorporating the Legislature's definition of "full enjoyment" under RCW 49.60.040(14). *See* Br. of Appellant at 17 (paragraph (1) and (2)).

Group Health implies that the plaintiff's sexual harassment claim in *Allen* proceeded as a "consumer claim" rather than as a violation of the WLAD. Br. of Respondent at 26-27. This is a mischaracterization of the Court's ruling. The District Court did not liken the plaintiff's claim to a consumer claim in order to remove it from the ambit of the WLAD. Rather, having found that the defendant's business was a place of public accommodation and that the plaintiff purchased its services, the Court suggested that the claim was more like a consumer claim than an employment sexual harassment claim for the purpose of imputing the harasser's actions to the defendant. *See Allen* at *20-21.

GHC relies heavily on *Evergreen* to support its arguments against Rev. Floeting's proposed standards for public accommodation sexual harassment claims. However, Rev. Floeting's proposed standards are consistent with Division Two's ruling in that case. As GHC points out, the *Evergreen* court wrote that the primary thrust of RCW 49.60.215 (one of the statutes on which Rev. Floeting bases his proposed standards) "is to

the refusing or withholding of admission to places of public accommodation, and the use of their facilities on an equal footing with all others.” *Evergreen*, 39 Wn. App. at 777. Rev. Floeting does not take issue with this statement. His claim in this case is that Group Health’s employee, T.T., harassed him repeatedly based on his sex, thereby preventing him from using the organization’s facilities and services on an equal footing with other (female) GHC members.

Group Health further relies on *Evergreen* to dismiss the relevance of *King v. Greyhound Lines, Inc.*, 656 P.2d 349 (Or. Ct. App. 1982), a case where the Oregon Court of Appeals interpreted that state’s public accommodations statute, which used language similar to Washington’s, to provide a claim for a black Greyhound customer who was subjected to a single instance of racial insults and disparate treatment when he tried to return a bus ticket. However, in *Evergreen*, the Washington Court of Appeal discussed *King* favorably, stating that the case is “informative . . . because Oregon’s Public Accommodations Act uses our statute’s terms: ‘distinction, discrimination, or restriction.’” *Evergreen*, 39 Wn. App. at 774. The reason the *Evergreen* court did not reach the same result as the *King* court is not because it found *King* to be irrelevant or unpersuasive. To the contrary, the Court asserted, “Confronted with the same facts, we would have no difficulty reaching the same result under our statutes.” *Id.*

Instead, the Court distinguished the facts in *King* from the facts in *Evergreen*, characterizing the alleged discrimination in the latter case as “a random, inadvertent reference to a real or imagined racial characteristic . . . [which was] not abusive, . . . not directed at the complainant, and . . . not accompanied by disparate treatment because of race or color.” *Id.* at 775. The facts alleged by Rev. Floeting are not remotely similar to the facts alleged in *Evergreen*.

2. Rev. Floeting’s proposed standards allow for an appropriate rule, specific to the public accommodation context, to separate actionable harassment from other, less serious conduct.

Group Health argues the Court should reject Rev. Floeting’s proposed standards because they omit the requirement, well established in the context of employment discrimination, that alleged harassment be sufficiently “severe or pervasive” to in order to constitute illegal harassment under the WLAD. *See* Br. of Respondent at 28-33. This argument does not accurately reflect Rev. Floeting’s position.

Rev. Floeting does not oppose a reasonable rule – appropriate for the public accommodation context – to separate actionable harassment from comments and actions that are possibly offensive, but relatively minor. However, he does oppose GHC’s insistence that the rule be the

same one courts have developed to address sexual harassment in the employment setting.

If the Court decides to subject public accommodation harassment claims to the same test used for employment harassment claims, it will be inviting future courts and litigants to rely heavily on employment discrimination jurisprudence to define Washingtonians' rights and responsibilities in public accommodations settings, settings that may or may not be analogous depending on the circumstances. Instead, the Court should establish a test that encourages the development a more thoughtful and purposeful body of law to protect the civil rights of Washington residents and visitors specifically in public accommodations. For example, the Court could require public accommodation plaintiffs to demonstrate comments or actions by a public accommodation or its agent or employee that would cause a reasonable person in the plaintiff's position to feel unwelcome, not accepted, not desired, or not solicited on the basis of his or her sex, race, religion, disability, etc.

3. T.T.'s actions against Rev. Floeting should be imputed to Group Health.

In deciding whether or not T.T.'s conduct should be imputed to Group Health, this Court should follow the rationale expressed by the District Court in *Allen* and hold that businesses and other places of public

accommodation are liable for illegal discrimination committed by their agents and employees. *See Allen* at *20-21. Such a rule is explicitly contemplated by RCW 49.60.215, which states, “It shall be an unfair practice for any person *or the person’s agent or employee* to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, . . . except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin,” (emphasis added). Moreover, the rule makes sense in light of the fact that in the context of public accommodations, unlike the employment context, people typically interact with non-managerial employees. In addition people who experience harassment or discrimination by a place of public accommodation are less likely to have the knowledge or motivation to complain because, unlike places of employment, people do not necessarily return to places of public accommodation on a regular basis, nor do they have ready access to the persons who are in a position to address their complaint.

C. The facts alleged by Rev. Floeting preclude summary judgment for Group Health.

In its attempt to establish an absence of disputed issues of material fact, Group Health places great emphasis on Rev. Floeting’s imperfect memory regarding the specific dates on which he experienced harassment

by T.T. While GHC's evidence on this point may be a legitimate basis for cross-examination, it does not invalidate the evidence Rev. Floeting presented regarding the repeated acts of crude, offensive, sexual conduct he was forced to endure when he visited his doctor's office.

"[S]ummary judgment should rarely be granted in employment discrimination cases." *Johnson v. Dep't of Soc. & Health Servs.*, 80 Wn. App. 212, 226, 907 P.2d 1223 (1996). If the Court recognizes a claim for sexual harassment in a place of public accommodation, it should reverse the lower court's summary judgment ruling and remand this case for further proceedings so that a jury can decide whether the conducts alleged by Rev. Floeting establishes such a claim.

CONCLUSION

For the reasons set forth above and in his opening brief, Rev. Floeting respectfully asks this Court to reverse the summary judgment for Group Health and to remand this case to the trial court.

Respectfully submitted this 28th day of November, 2016.

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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 Reply Brief of Appellant to:

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