

No. 95205-1

No. 75057-7-1

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CHRISTOPHER H. FLOETING

Appellant

v.

GROUP HEALTH COOPERATIVE

Respondent

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GROUP HEALTH COOPERATIVE'S RESPONSE TO AMICUS  
CURIAE BRIEF OF THE ATTORNEY GENERAL

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## I. INTRODUCTION

The Attorney General (“AG”) asks this Court (1) to interpret the Washington Law Against Discrimination (“WLAD”) as encompassing a claim for sexual harassment in a place of public accommodation and (2) to reject decades of jurisprudence regarding sexual harassment and instead apply a disparate treatment test to determine whether sexual harassment occurred in Appellant Floeting’s case. For the reasons set forth herein, GHC respectfully requests this Court reject the AG’s arguments.

## II. ARGUMENT

### A. **The plain language of the public accommodation statute does not encompass a claim for sexual harassment.**

For this Court to hold that the WLAD encompasses a claim for sexual harassment in a place of public accommodation, it must find authority in the plain language of the public accommodation statutes. RCW 49.60.030(1)(b) guarantees the right to be free from unlawful discrimination in a place of public accommodation because of an individual’s protected class status. This includes the right to the “full enjoyment” defined, in relevant part, as the right to purchase services and commodities offered by any establishment to the public and to be admitted to any place of public accommodation without acts “directly or indirectly

causing persons of any protected class to be treated as not welcome, accepted, desired, or solicited.” RCW 49.60.040(14).

In evaluating whether someone has been “treated as” not welcome or accepted under the statute, the court does not look to how the victim felt in response to the allegedly discriminatory conduct. *Evergreen Sch. Dist. v. Wash State Human Rights Comm’n*, 39 Wn. App 763, 773, 695 P.2d 999 (1985). Instead, the law instructs that the trier of fact must decide whether the offending party intended to exclude, discourage or prohibit the victim from access or use on equal footing with others due to their protected class status. *Id.*

Importing a sexual harassment claim into the public accommodation statute is irreconcilable with this type of discriminatory intent. That is because the motivation of the harasser is not to exclude, discourage or prohibit certain customers because of their gender. Rather, the harasser’s motivation is personal sexual gratification.

Further, the “rights” protected by the public accommodations statute—the right of access to and the right to purchase goods and services from a place of public accommodation, without being treated as unwelcome, not accepted or not desired—are different than the rights protected by laws prohibiting sexual harassment. Sexual harassment laws

protect the right to be free from unwelcome sexual advances, requests for sexual favors or other verbal or physical harassment of a sexual nature. The current version of the public accommodations WLAD statute is not a vehicle for this new claim. It is the role of the Legislature, not the courts, to expand the WLAD to include a claim for sexual harassment in a place of public accommodation.

**B. Sexual harassment in a place of public accommodation cannot be determined based on the liability standards applicable to a disparate treatment claim.**

The AG argues that sexual harassment in a place of public accommodation should be analyzed like disparate treatment discrimination in places of public accommodation. AG Br. 7. The AG offers no authority for abandoning thirty years of jurisprudence applied to sexual harassment claims arising under the WLAD. See *Glasgow v. Georgia Pacific*, 103 Wn.2d 401, 693 P.2d 708 (1985). This Court should refuse the AG's invitation to deviate here.

To date, Washington courts have held that sexual harassment operates as a barrier to sexual equality in two contexts - in the workplace (*Glasgow*, supra at 405) and in real estate transactions (*Tafoya v. Human Rights Comm'n*, 177 Wn. App. 216, 311 P.3d 80 (2013)). Although both cases found the right to be free from discrimination (in employment and in

the use and enjoyment of rental property), neither case applied the liability standards for determining disparate treatment gender discrimination.

That is because sexual harassment does not involve “adverse action” or being “treated as unwelcome,” as in disparate treatment claims. While all forms of discrimination – whether due to harassment or disparate treatment – involve being treated differently to some extent, in the harassment context, there is a legal difference between merely annoying conduct and actionable harassment. *Glasgow* and *Tafoya* instruct that legally actionable conduct is that which is sufficiently severe or pervasive such that it creates an abusive environment effectively denying the patron access to the facility or use of the services, in the case of a sexual harassment in a place of public accommodation.

The AG relies on *Fell v. Spokane Transit Authority*, 128 Wn. 2d 618, 649, 911 P.2d 1319 (1996). That case involved a claim of disability discrimination in a place of public accommodation. The essence of the discrimination at issue in *Fell* was that disabled patrons were denied services comparable to those provided to non-disabled patrons. The court in *Fell* applied the well-established test for disparate treatment and rejected the request by plaintiffs that greater services be offered to disabled patrons as compared to non-disabled riders. Since the conduct at issue

involved plaintiffs not receiving the same services as non-disabled patrons, applying the disparate treatment liability standards was completely in keeping with Washington law. Nothing in *Fell* involved conduct creating an abusive environment or sexual harassment. *Fell* simply does not apply to a situation involving alleged sexual harassment in a place of public accommodations.

Contrary to the AG's assertion that Washington courts frequently apply *Fell* and "have no difficulty determining whether plaintiff sufficiently proved harassment," no court in this state has ever applied *Fell* to a hostile environment and/or sexual harassment case. AG Br. 9-10. In *Dibiasi v. Starbucks Corp*, No. CV-07-276-LRS, 2009 WL 1505379 the plaintiff asserted a claim for disability discrimination in a place of public accommodation. This issue was the plaintiff received treatment comparable to what non-disabled patrons received, the identical issue as in *Fell*. *Spry v. Peninsula Sch. Dist.*, No 46782-8-II, 2016 W1 1329431, involved a claim of "intentional racial discrimination." *Id.* at \* 13. Following the well-worn test for disparate treatment, the court ruled that plaintiff must show "the defendant discriminated against plaintiff by not treating him in a manner comparable to the treatment it provides to persons outside that class." *Id.* at \*14. Similarly, in *Disnute v. City of Puyallup*,

No. 3:10-cv-05295-RBL, 2012 WL 1237575 and *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 20 P.3d 447 (2001), the courts addressed plaintiffs' claims for racial discrimination in a place of public accommodation and again determined whether the plaintiffs were treated comparably to others outside their protected class. *Id.* at \*3.

None of the cases relied upon by the AG addressed a claim of harassment. Floeting has not made a claim for gender discrimination in a place of public accommodation. His only claim is for sexual harassment in a place of public accommodation. This a distinct claim, as recognized by *Glasgow* and *Tafoya*. The standards in those cases should apply here, including that to be actionable, the conduct be sufficiently severe or pervasive such that it effectively denies the ability to access or obtain goods and services from a place of public accommodation.

The AG contends the "severe or pervasive" requirement of *Glasgow* and *Tafoya* should not apply in public accommodation sexual harassment cases. While the AG acknowledges that "an isolated instance of sexual conduct may be insufficient to provide discrimination in an ongoing employment relationship," they posit that a single interaction should violate the WLAD's prohibition against discrimination in a public

accommodation “because of the abbreviated nature of the contact between a customer and a business.” AG Br. 12.

In Washington, it is well-established that the laws against discrimination are “not directed against unpleasantness per se.” *Kahn v. Salerno*, 90 Wn. App 110, 118, 951 P.3d 321 (1998). As the *Kahn* court held, “There is a line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing. Simple vulgarity does not give rise to a cause of action.” *Id.* GHC acknowledges that it is possible to have a single sufficiently severe interaction that could give rise to a harassment claim. However, eliminating the “severe or pervasive” standard simply because the time spent in obtaining the service may be limited, would relieve a plaintiff from having to show that actionable conduct was something more than unpleasant, mildly offensive or vulgar. The fact that contact in public accommodation cases may be abbreviated does not justify the AG’s position.

The AG’s maintains that courts often find liability for harmful and degrading conduct in the public sphere. AG Br. 14. For this proposition, the AG relies on an Iowa case interpreting an Iowa state statute which involved a claim for race discrimination, not harassment. *Kirk v. Fashion Bug #3253, Inc.*, 479 F. Supp 938, 966 (N.D. Iowa 2007). They also cite

an unpublished Massachusetts case under a Massachusetts statute also involving allegations of race discrimination which denied plaintiffs services, subjected them to unreasonably long wait times and racially derogatory statement that reflected discriminatory animus of the defendant. *La Reine Boutique v. Mass Conn'n Against Discrimination*, No 08-P-621, 2009 WL 648888 (2009). They finally rely on two Chicago Commission on Human Rights decisions applying the Chicago Human Rights Ordinance, 2-160-070, which does not track the language of the WLAD and neither involved a claim of sexual harassment. *Craig v. New Crystal Rest.*, No 92-PA-40, 1995 WL 907560; *Miller v. Drain Experts*, No 97-PA 29 1998 WL 307868.

The AG also maintains “no other jurisdiction with statutory language similar to the WLAD has imposed a pervasiveness requirement in the public accommodation context.” AG Br 13. The only decision cited for this sweeping proposition is by the Massachusetts Commission Against Discrimination interpreting a local ordinance in a claim involving sexual orientation discrimination. See *Cf. Barbot v. Yellow Cab Co.*, No. 97-SPA-0973, 2001 WL 1805186. This decision does not support the AG’s claim that sexual harassment claimants in a place of public

accommodation under the WLAD need not show the conduct was severe or pervasive to be actionable.

The AG has provided no authority to support the abandonment of the “severe or pervasive” standard set forth in *Glasgow* and *Tafoya*. Notably, Legal Voice, who also filed an amicus brief in this case, agrees the “severe or pervasive” standard should apply here. This Court should affirm the decision of the trial court dismissing Floeting’s claim.

C. **The “employer knowledge” requirement should apply in any sexual harassment claim in a place of public accommodation.**

The AG argues this Court should decline to impose the same “employer knowledge” requirement that applies in sexual harassment cases in both the employment and real estate contexts on the grounds there is “no statutory basis for [GHC’s] proposed construction.” AG Br. 17.

The AG relies on RCW 49.60.215. It provides in relevant part:

It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination...except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, 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.

The AG argues that by expressly prohibiting an “employee” from committing any act that directly or indirectly results in any distinction, restriction or discrimination” on the basis of protected class status, the statute imposes strict liability on a place of public accommodation for its employees’ harassing conduct. *Id.* at 18. This interpretation is wrong for two reasons. First, it misinterprets the statute. Second, it would require this Court to ignore well-established law holding that an employer cannot be held strictly liable for the sexual misconduct of its employees.

1. **RCW 49.60.215 does not impose strict liability on employers.**

The applicable language of the statute provides: “It shall be an unfair practice for any person or the person’s agent or employee to commit an act. . . .” that results in discrimination under RCW 49.60.040(14). See *Evergreen Sch. Dist. No 114 v. Washington State Human Rights Comm’n*, 39 Wn. App 763, 777, 695 P.2d 999 (1995) (holding that RCW 49.60.215 and RCW 49.60.040(14) are to be read in harmony.) By its own terms, the statute contemplates personal liability of an employee for his or her discriminatory actions. The statute also expressly provides that an employer who operates a place of public accommodation could be liable for the employer’s own acts or the acts of an agent. However, nothing

supports strict liability for places of public accommodation for acts by non-agents.

The AG (and Legal Voice) suggest their proposed interpretation is supported by drawing a distinction between RCW 49.60.215 and discrimination in the real estate context under the WLAD, specifically referencing RCW 49.60.222. Under RCW 49.60.222, it is an unfair practice for “any **person**, whether acting for himself, herself, **or another**” to discriminate against a person in the terms, conditions or privileges of a real estate transactions. (emphasis added.) Contrary to *amici*’s argument, RCW 49.60.222 could be interpreted broadly enough to include employees of a place of public accommodation as a “person acting for another.” However, in creating the test for sexual harassment in a real estate transaction, the court in *Tafoya* did not apply a strict liability standard. Instead, it imposed a knowledge requirement before liability can attach.

In adopting the knowledge test from the sexual harassment in employment context, the court noted that liability is imputed to the employer only “when the employer either participates in the harassment or the employer knew or should have known of the harassment and failed to take remedial action.” *Tofoya*, 177 Wn. App at 228. *Tafoya* stated: “The purpose of imputing liability is to ensure that landlords investigate

complaints and take appropriate action to stop harassment.” *Id.* There is no statutory basis to distinguish *Tafoya*.

2. **Washington law does not permit strict liability of employers for their employee’s sexual misconduct in the absence of knowledge.**

Washington courts have uniformly held as a matter of law that an employee’s sexual misconduct is not within the scope of employment. *C.J.C. v. Corp. of Catholic Bishops of Yakima.*, 138 Wn.2d 669, 718-20, 985 P.2d 262 (1999); *Niece*, 131 Wn.2d at 42, 53-59 (staff member at a group home sexually assaulted a disabled woman); *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App 537, 543, 184 P.3d 646 (2008) (nursing assistant at hospital engaged in sexual activity with former psychiatric patients); *Bratton v. Calkins*, 73 Wn. App 492, 498-501, 870 P.2d 9811 (1994) (teacher engaged in a sexual relationship with a student); *Thompson v. Everett Clinic*, 71 Wn. App 548, 550-53, 860 P.2d 1054 (1993) (staff physician at clinic engaged in sexual activity with patients). Therefore, “[n]either current Washington case law nor considerations of public policy favor the imposition of **respondeat superior or strict liability** for an employee’s intentional sexual misconduct.” *C.J.C.*, 138 Wn.2d at 720 (emphasis added). Strict liability cannot attach absent some exception to the rule: and that exception is found in *Glasgow* and *Tafoya*, which require

a Plaintiff to show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action.

In a public accommodation sexual harassment case, this negligence standard would operate to reduce frivolous claims and allow places of public accommodation the opportunity to respond to a situation. To hold otherwise would leave the place of public accommodation on the hook for all of its employees' conduct regardless of when or where it occurs on the premises, and regardless of whether the business knew about it or had any opportunity to take corrective action. This would place an affirmative duty on an employer to maintain a pristine environment, which was a duty expressly rejected by the *Glasgow* court. *Glasgow*, 103 Wn.2d at 401.

The AG's suggestion that a strict liability standard incentivizes the owner of the public accommodation to take "the strongest possible affirmative measures to prevent the hiring of employees who engage in discriminatory acts" is not persuasive. AG Br. 19-10. The public policy benefit of endorsing undisclosed new litmus tests for hiring employees who might in the future commit an act of sexual harassment is fraught with its own potentially discriminatory effect. Moreover, such a test would have had no impact at all in this case since the GHC receptionist (T.T.) was a

long term employee with a clean record and no history of any harassing actions, until she unfortunately suffered a mental breakdown which led to the allegations in this case.

The “employer knowledge” element, like the “severe and pervasive” standard, has been consistently applied in every sexual harassment case arising under the WLAD; and it should be applied here. If it is, Floeting’s claim fails as a matter of law. It is undisputed that GHC’s first awareness of any issues regarding the receptionist’s inappropriate sexual comments with any patients was on August 23, 2012. GHC immediately investigated this claim, which the receptionist denied. Floeting did not bring a complaint until September 11, 2012, and the receptionist was terminated for her actions by September 25. Given her union status (which required GHC to follow guidelines for discipline of union employees) and her mental health issues, GHC took prompt action, which undisputedly forever removed her from the Northgate facility. On these facts, liability should not attach to GHC.

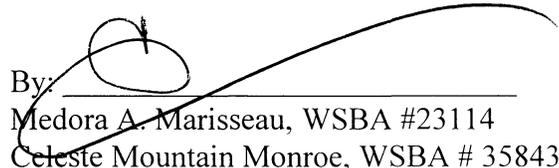
### III. CONCLUSION

For the reasons set forth herein, this Court should reject the arguments of the AG and affirm the decision of the trial court concluding that Floeting cannot, as a matter of law, establish a claim for sexual

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

Respectfully submitted this 30<sup>th</sup> day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies that on Monday, January 30, 2017, I caused to be served the foregoing document to:

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I declare under penalty of perjury under the laws of the state of Washington on Monday, January 30, 2017, at Seattle, Washington.

*Gabrielle Pimpleton*

Gabrielle Pimpleton

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 COUNTY OF KING