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No. 95205-1

SUPREME COURT
OF THE STATE OF WASHINGTON

CHRISTOPHER H. FLOETING,

Respondent,

v.

GROUP HEALTH COOPERATIVE,

Petitioner.

GROUP HEALTH COOPERATIVE'S RESPONSE TO THE AMICUS
CURIAE BRIEF OF THE ATTORNEY GENERAL (EDUCATIONAL
DIVISION) AND THE AMICUS CURIAE BRIEF OF UNIVERSITY OF
WASHINGTON, WASHINGTON STATE UNIVERSITY, CENTRAL
WASHINGTON UNIVERSITY, EASTERN WASHINGTON
UNIVERSITY, WESTERN WASHINGTON UNIVERSITY AND THE
EVERGREEN STATE COLLEGE

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I. INTRODUCTION

Respondent Group Health Cooperative (“GHC”) presented the following issues for this Court’s consideration in its Petition for Discretionary Review:

1. Whether RCW 49.60.215 makes the place of public accommodation/employer directly liable for acts of sexual harassment perpetrated by a non-supervisory employee against a patron in a place of public accommodation regardless of whether the employer: (a) knew or should have known of the harassment; and (b) took reasonably prompt and adequate corrective action as provided in *Glasgow v Georgia Pacific.*, 103 Wn.2d 401, 693 P.2d 709 (1985).

2. Whether the test for determining if the discriminatory conduct complained of causes a patron “to be treated as not welcome, accepted, desired or solicited” under RCW 49.60.040(14) includes both subjective and objective elements and consideration of whether the treatment was severe or pervasive.

In response to GHC’s petition, the Attorney General’s office filed two separate amicus briefs. The first brief is offered by the Attorney General within its “general powers” to act in “matters of public concern.” AG Brief at p. 2. The second brief is offered by the Attorney General (Educational Division) on behalf of University of Washington, Washington

State University, Central Washington University, Eastern Washington University, Western Washington University and The Evergreen State College. AG Ed. Division Brief at p. 1-2. In the interest of efficiency, Petitioner Group Health Cooperative (“GHC”) responds to both briefs (referred to herein as AG Brief and AG Ed. Div. Brief respectively) in this reply.

Notably, the conflicting briefs filed by the Attorney General starkly frame the problem created by the Court of Appeals’ decision and compel this Court to adopt the sound principles GHC presents.

II. ARGUMENT

A. The test for whether sexual based commentary or conduct directed at a patron by an employee of a place of public is actionable under the WLAD requires a showing that the commentary or conduct was sufficiently severe or pervasive and objectively unreasonable.

The Court of Appeals adopted the test in *State v. Arlene’s Flowers*, 187 Wn.2d 804, 389 P.3d 543 (2017), to determine whether a plaintiff had been subjected to sexual harassment in a place of public accommodation in violation of the Washington Law Against Discrimination (“WLAD”). Specifically, the court held that to make a prima facie case, the plaintiff must establish four elements: (1) that the plaintiff is a member of a protected class, RCW 4960.030; (2) that the defendant is a place of public accommodation, RCW 49.60.215; (3) that the defendant discriminated

against the plaintiff, whether directly or indirectly, *id.*; and (4) that the discrimination occurred “because of” the plaintiff’s status, or in other words, that the protected status was a substantial factor causing the discrimination, RCW 49.60.030. *Floeting v. Group Health Coop.*, 200 Wn. App 758, 403 P.3d 559 (2017).

As to the third element, the Court of Appeals asks, “what is it to discriminate?” *Id.* at 14. Although the court first acknowledges, correctly, that the WLAD is “not a general civility code” and that, in a place of public accommodation, “[i]t is not enough that some hasty, chance or inadvertent word or action may offend or even make one *feel* unwelcome... [as] [p]ersonal sensitivities differ greatly from one individual to another,” the Court’s analysis deteriorates from there. *Id.* at 15, citing *Evergreen Sch. Dist. No 114 v. Human Rights Comm’n*, 39 Wn. App. 763, 772-73, 695 P.2d 999 (1985).

The Court of Appeals holds that to be actionable, “the asserted discriminatory conduct must be objectively discriminatory,” but then says, “[i]n addition, the plaintiff must establish the plaintiff’s subjective perception of being discriminated against by the act of sexual harassment.” *Id.* at 16. GHC briefed its concerns with the Court of Appeals’ creation of a subjective standard at length in its Petition for Review and relies on those arguments as though set forth fully herein. However, in its discussion of its

new subjective/objective test, the court expressly rejects the “severe or pervasive” standard applied in every other context in which sexual harassment is deemed unlawful, saying it has “no place in a sexual harassment lawsuit” brought under the public accommodation statute.

Curiously, the court does not explain why it has no place, other than to say:

If a single act or event of sexual harassment in a place of public accommodation is egregious enough to meet the applicable objective standard, it is irrelevant whether it is in any other way severe. Similarly, when sexual harassment in a place of public accommodation takes the form of a series of acts or events, a case is likewise made if the sexual harassment meets the objective standard, without regard to whether it is in any other way pervasive.

Floeting, 200 Wn. App at 774-75.

This reasoning seems like an attempt to create a distinction between public accommodation jurisprudence and employment law jurisprudence; but it appears to be a distinction without a difference, and only serves to create confusion in what should be a consistent body of law governing sexual harassment claims under the WLAD.

Consider the conflicting arguments by the Attorney General’s office in their amicus briefs on this issue as a powerful example of the problem with the Court of Appeals’ new test. In the AG Brief, the Attorney General agrees with the Court of Appeals, arguing “...this Court should not create a

requirement that sexually explicit conduct be ‘pervasive’ to be unlawful in the context of a public accommodation.” AG Brief at 13. The Attorney General maintains the pervasive factor is only relevant to show whether conduct results in discrimination in an employment setting, such that it “actually alters terms or conditions of employment” so as to create “an abusive working environment.” AG Brief at p. 7. The Attorney General, like Floeting before him, maintains this makes sense because the public accommodation statute does not use the phrase “terms or conditions” as in the employment statute, but rather prohibits any act which causes any person to be “treated as not welcome, accepted, desired or solicited;” therefore, “the WLAD’s public accommodation provisions encompass more than conduct so pervasive that it affects the “terms and conditions” of the public accommodation.” AG Brief at 8 (emphasis added).

In support of this interpretation, the AG Brief cites five non-Washington cases that do not concern claims of sexual harassment, to show how “...a single interaction may violate the WLAD’s prohibition against discrimination in a public accommodation because of the often-abbreviated nature of the contact between a customer and a business.” AG Brief at p. 8-9. However, GHC is not arguing that the standard should be severe and pervasive. GHC is arguing that the standard should be severe or pervasive.

GHC further acknowledges a single instance could be sufficiently severe to cause someone to be treated as “not welcome, accepted, desired or solicited” per RCW 49.60.030(1)(b); however, whether it is unlawful must be analyzed with reference to whether the employee’s conduct rises to the level of actually or effectively depriving the patron of equal access to the facility or services. RCW 49.60.040(14). In other words, the sexual conduct/commentary at issue must actually constitute *harassment* because, again, “it is not enough that some hasty, chance or inadvertent word or action may offend or even make one *feel* unwelcome.” It must be sufficiently severe or pervasive to deny the patron their rights under the statute; and in the AG Ed. Division Brief, the Attorney General agrees.

There, the Attorney General argues, at least in the university setting, the definition of what constitutes sexual harassment “must be qualified with a standard akin to a severe or pervasive requirement or it may suppress core protected speech.” AG Ed. Division Brief at p. 7. More specifically:

This Court’s definition of what constitutes sexual harassment in places of public accommodation could have a significant impact on the Universities’ relationships with their faculty and students. If the Court fails to account for first Amendment limitations on the ability to regulate speech, it will be difficult, if not impossible, for the universities to reconcile their responsibility to prevent violations of the WLAD and the limitations the First Amendment places on their ability to regulate their employees’ and students’ speech.

In suggesting that the “adoption of a severe or pervasive, and objectively offensive, standard is one way to avoid conflict with First Amendment principles in academic settings,” the AG Ed. Division details how federal courts have consistently addressed what constitutes sexual harassment for purposes of Title VII of the Civil Right Act and Title IX of the Education Amendments of 1972. AG Ed. Division Brief at p. 6. In both cases, the inquiry is not simply whether a man or woman is treated differently than someone of the other gender in a particular environment. The focus is on whether the sexual conduct complained of rises to the level of creating a hostile environment – such that it alters terms and conditions of employment (Title VII); deprives victims of access to educational opportunities and benefits provided by a school (Title XI); and as GHC posits, denies patrons access and use of the place of public accommodation.

The conflict presented by the AG’s contradictory briefs demonstrates an important point; specifically, that application of the Court of Appeals test could lead to confusion as to what type of conduct is actionable under the WLAD and to additional requests for differing treatment for various types of places of public accommodation based on competing rights under the law. Further, any test for what constitutes sexual harassment that omits the well-reasoned and widely applied “severe or

pervasive” standard effectively relieves a plaintiff from proving he or she was actually harassed. This cannot stand.

B. There is no reasonable legal basis, or justifiable public policy argument, for imposing direct liability on employers for the sexual misconduct of their non-supervisory employees in places of public accommodation.

Echoing the reasoning of the Court of Appeals, the Attorney General (in the AG Brief) maintains that RCW 49.60.215 sets forth “a system of direct liability whereby an employer is directly responsible for its official unfair practice and the unfair practice of its agents and employees.” AG Brief at p. 15. The Attorney General further argues that “as a matter of public policy,” the imputed liability standard “...for holding employer’s liable for the acts of its employees in employment discrimination cases should not be transferred to the public accommodation.” *Id.* at 16. However, the statutory language on which the Court of Appeals and the Attorney General rely does not support the conclusion reached. Further, the public policy argument ignores the fact that a direct liability standard removes any defense to an employer, including one who adopts comprehensive anti-harassment policies, trains its employees and takes prompt remedial action to address the concerns of its patrons. Although all parties and amici agree the WLAD should be interpreted broadly enough to

prohibit sexual harassment in a place of public accommodation, to remove any defense to an employer is simply unfair.

In its opinion, the Court of Appeals asks, “Who can be liable?” Citing RCW 49.60.215(1) the court writes, “It shall be an unfair practice for any person or the person’s agent or employee to commit an act with directly or indirectly result in any distinction, restriction, or discrimination...in any place of public accommodation.” AG Brief at p 11. It then turns to the definition of “person” and notes that a person includes, “...one or more individuals...corporations;.....any owner, lessee, proprietor, manager, agent or employee... .” RCW 49.60.040(19). The court reads the phrase “any person or the person’s agent or employee” as attributing responsibility for the agent’s or employee’s discriminatory act to the employer “without mention of the doctrines of vicarious liability or respondeo superior.” AG Brief at 12. The court notes that this “does not leave the agent or employee without potential liability for their own discriminatory acts” but “[c]onsidering the goal of the statute – to eradicate discrimination in places of public accommodation - it makes sense that the legislature would not want agency principals (such as vicarious liability or respondent superior) to frustrate its goal.” Id.

The court maintains that imposing agency principals presents a risk given the nature of both sexual harassment and public accommodation as

sexual harassment is often a “solitary or fleeting event” which “escapes detection” because patrons will simply refuse to return to the establishment. *Id.* at 11-12. Therefore, “by imposing direct liability on proprietors for the actions of their employees/agents” the legislation serves its purposes of “making the proprietor liable for all acts of sexual harassment occurring on its premises – including the first.” *Id.* at 12.

GHC responded to these arguments thoroughly in its Petition for Review, noting in relevant part Washington courts uniformly have held as a matter of law that an employee’s intentional sexual misconduct is not within the scope of employment.¹ “Neither 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. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 669, 720, 985 P.2d 262 (1999). The only exception to this well-established rule is *Glasgow v. Georgia-Pacific Corp.*, 103 Wn2d 401, 693 P.2d 708 (1985) which holds that an employer is liable if the conduct is either perpetuated

¹ See *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 669, 718–20, 985 P.2d 262 (1999); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 53–59, 939 P.2d 420 (1997) (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. Valkins*, 73 Wn. App 492, 498–501, 870 P.2d 981 (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).

by a manager/supervisor or, in the case of a non-supervisory employee, if the company knew or should have known of the conduct, but failed to take specific remedial action.

The Court of Appeals admitted the cases it relied on, *Arlene's Flowers* and *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 911 P.2d 1319 (1996), involved conduct by the principals of the businesses involved, not non-supervisory employees. Thus, "there was no question but that, if the acts were wrongful, the corporations were liable." Opinion at 11. Therefore, the cases never addressed the question of how or whether to impute the non-supervisory employee's actions to the employer.

But *Glasgow* reached that issue. *Glasgow* is the law in Washington and the federal authorities on which the Supreme Court relied do not undermine its sound decision or preclude *Glasgow's* application in similar situations. Contrary to the Court of Appeals' ruling, *Glasgow* applies seamlessly here.

In its amicus brief, the Attorney General offers several cases it claims support a direct liability rule. However, once again, none of the cases address employer liability for an employee's sexual misconduct and all are unpublished non-Washington authorities.

The first case, *King v. Greyhound Lines*, 656 P.2d 349 (Or. Ct. App 1982) involved a situation where a ticket agent refused to refund the cost of

a ticket to patron and in doing so referred to the patron using a racial slur. The patron brought a claim for race discrimination under Oregon's public accommodation statute. The Court of Appeals reversed and remanded the ruling of the trial court, with instructions to enter judgment in favor of the patron and against the company. There was no discussion in the case as to whether the company knew, or should have known, or failed to take remedial efforts. However, as the court notes, Oregon, has a statute, ORS 30.680, that specifically imputes the discriminatory acts of an employee to the employer of a place of public accommodation. *King*, 656 P.2d at FN6.

In *Cf Johnston v. Apple Inc.*, No. 11 Civ 3321 (JSR), 2011 WL 4916305, two patrons brought federal, state and city discrimination claims arising from their allegation that defendants removed them from an Apple store in Manhattan because they were African American. The facts alleged that they were told to leave the store by a non-supervisory employee, and when they approached the manager, the manager required them to leave.

In an unpublished decision, the United States District Court, S.D. New York, held in relevant part that New York State "does not embrace a theory of respondent superior or strict liability" and "unambiguously separates the liability of an employee who discriminates from the liability of his employer" unless the employer "became a party to it by encouraging, condoning or approving it." *Johnston*, at p. 3. Accordingly, the court

dismissed the state discrimination claims. However, the Court held that the claims were potentially viable under the Administrative Code of the City of New York, Section 8-107, which makes an employer strictly liable for the acts of its employees. *Id.* at 5. Again, the AG has not cited this Court to a similar statute or ordinance in our state; rather, it argues that our public accommodation statute should be interpreted this way.

Finally, the Attorney General cites *Henderson v. Steak and Shake*, a case decided by the Illinois Human Rights Commission, 1999 WL 33252627 (1999). In this case, Henderson alleged that Stake and Shake discriminated against her because of her race when she was not served at one of the chain's restaurants. *Id.* at 8. The establishment's defense focused on its prompt and thorough investigation of the allegations, but the Commission refused to impose a "notification requirement onto Henderson's burden of proof in a public accommodation case." *Id.* at 10.

But, the concept of notice reflects the principal of fundamental fairness for a third party on whom liability may attach. As a threshold matter, we want to encourage businesses to give thoughtful consideration to training, policies, and processes that create an inclusive, welcoming environment. And we want to encourage patrons to come forward and report unwelcome sexual conduct by employees in places of public accommodation. Further, we want employer/proprietors to take prompt

remedial action to investigate and address those concerns but if liability for the employer/proprietor is direct without regard to notice or remedial measures, then these important proactive and reactive steps by the employer/proprietor are irrelevant.

Consider the small business owner who employs eight people at his autobody shop. He has a handbook that explains his expectations, which includes a robust policy on anti-harassment and discrimination. He conducts orientation meetings with each of the employees and reiterates his expectations. One day, he is served with a lawsuit from a female patron who claims that last week, while he was on vacation, one of his longtime male employees made several lecherous comments and gestures to her as she was attempting to ask questions about a quote for repairs. She left without leaving her car behind to be serviced. The owner was shocked as he had never observed this employee behave in this manner or had any reason to believe that he would.

Assuming for the sake of argument the comments were sufficiently severe or pervasive to create a hostile environment and effectively denied her access or use of the business, then we might agree the employee should be held liable. But, should the company be liable? In this case, the owner had no knowledge of the employee's conduct until he received the lawsuit, nor did he have any facts that would suggest the employee might behave

this way. He adopted policies and trained his staff, yet he does not have a legal defense to liability.

The response by the Court of Appeals and the Attorney General is essentially that this is the cost of doing business and this scenario should incentivize the owner to “take the strongest possible affirmative measures to prevent the hiring and retention of employees who engage in discriminatory acts.” AG Brief at 17. But, what questions could the owner have asked that would have allowed him to avoid liability for conduct that occurred years after he hired him and in the absence of any evidence that he might, someday, engage in discriminatory behavior?

GHC understands this Court’s desire to eradicate discrimination wherever it exists. GHC supports this desire and has undertaken monumental efforts to hire good people, to develop policies to govern its employees’ conduct, to train individuals to conduct themselves professionally, to conduct prompt investigations into allegations of misconduct and to take remedial action when necessary. However, if the Court of Appeals’ decision stands and places of public accommodation are not afforded any defense to liability for the unforeseen sexual misconduct of its employees, it will render all post-hiring efforts moot. This does not make for good public policy.

III. CONCLUSION

GHC respectfully requests that the Supreme Court grant its Petition for Review, imposing the “severe or pervasive” and objectively reasonable test to determine what conduct constitutes sexual harassment in a place of public accommodation, and applying the *Glasgow* imputed liability/remedial action standard to determine who may be liable for such unlawful acts.

Respectfully submitted this 12th day of June, 2018.

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I declare under penalty of perjury under the laws of the state of Washington
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