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SUPREME COURT  
OF THE STATE OF WASHINGTON

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CHRISTOPHER H. FLOETING,

Respondent,

v.

GROUP HEALTH COOPERATIVE,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER  
GROUP HEALTH COOPERATIVE

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## I. INTRODUCTION

This case presents a question under the Washington Law Against Discrimination (“WLAD”) and *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 391, 693 P.2d 708 (1985), as to whether the Court should apply differing standards in determining if, and under what circumstances, an employer per se and an employer/owner of a place of public accommodation will be found culpable for sexual harassment committed by a non-supervisory employee.

As noted in the Petition for Review (“Petition”) submitted by Petitioner Group Health Cooperative (“GHC”),<sup>1</sup> the Court of Appeals’ decision creates an anomaly among this Court’s jurisprudence governing incidents of sexual harassment in the workplace under the WLAD, creating two standards of liability for employers for the same acts of their non-supervisory employees, solely based on whether the plaintiff is another employee or a patron.

The Court of Appeals, in reversing the trial court’s summary judgment order in favor of GHC, disregarded the remedial standard for employers per se in *Glasgow*, in favor of essentially a strict liability standard for employer/proprietors. The Court of Appeals’ decision

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<sup>1</sup> Effective February 1, 2017, GHC was acquired by Kaiser Foundation Health Plan of Washington and, as of February 14, 2017, has been renamed Kaiser Foundation Health Plan of Washington.

provides no logical foundation for such a sharp distinction in the law and should be reversed.

## II. ARGUMENT

### **The *Glasgow* Standard Seamlessly Applies to Claims of Sexual Harassment Perpetrated by an Employee in Places of Public Accommodation.**

#### *1. Glasgow's Imputed Liability/Remedial Standard*

An imputed liability standard applies when an employer per se is sued under the WLAD by an employee for sexual harassment inflicted by a co-worker. In such a situation, *Glasgow* holds that imputing to an employer an employee's harassment, and thus holding the employer culpable, requires that the plaintiff/employee "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." 103 Wn.2d at 407. Under *Glasgow*, an employer is vicariously liable, i.e., liability is imputed to the employer only if this standard is met. *Id.* Here, however, the Court of Appeals imputed liability to GHC without any consideration of whether GHC was vicariously liable for its employee's alleged actions.

When the *Glasgow* standard is appropriately applied to a case brought under the WLAD for sexual harassment in places of public accommodation, RCW 49.60.215(1), adapting the language of this Court's decision in *Glasgow* to the facts of a case of sexual harassment in a place

of public accommodation demonstrates just how seamlessly *Glasgow* applies:

[T]he allegations of the (patron) were to the effect that certain acts and conduct of (an) employee[ ] constituted sexual harassment; that this harassment ... created a hostile and intimidating ... environment thereby depriving (him) of the opportunity to (patronize the business) free of sexual discrimination; and that this discrimination caused (him) severe physical, mental and emotional distress. Thus the plaintiff('s) claim essentially is that (the business) implicitly, but effectively, made (his) endurance of sexual intimidation a term or condition of (his enjoyment).

... Sexual harassment as a ... condition [of patronage] unfairly handicaps (a patron) against whom it is directed in his or her (enjoyment) and as such is a barrier to sexual equality in (places of public accommodation)....

Under the facts found by the trial court, this is ... a case wherein the (patron) seeks to hold the (owner) responsible for a hostile ... environment created by (an employee's) sexual harassment of the (patron).

*See Glasgow*, 103 Wn. 2d at 405.<sup>2</sup>

2. *The Court of Appeals' Misapplied RCW 49.60.215*

The Court of Appeals, and now Floeting, in his Answer to Petition for Review (“Answer”), rely on an errant dichotomy of the two principal sections of the WLAD at issue: RCW 49.60.180(3) — “Unfair practices of

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<sup>2</sup> Following this passage, the Court set forth the four-part test under which such harassment may or may not be imputed to the employer under the premise of vicarious liability. 103 Wn.2d at 407. *Georgia-Pacific* was found liable for its employees’ actions. Nevertheless, *Glasgow’s* imputed liability/remedial standard may exonerate employer defendants in applicable cases. *See, id.*

employers” — and RCW 49.60.215(1) — “Unfair practices of places of public resort, accommodation, assemblage, amusement.” Neither statute provides that an employer/business owner can be held directly liable for the discriminatory acts of its employees; rather, liability can only be imputed to the employer.

RCW 49.60.180(3) provides:

It is an unfair practice for any employer<sup>3</sup>:

To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability[.]

RCW 49.60.215(1) provides:

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, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, honorably discharged veteran or military status, status of a mother

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<sup>3</sup> “Employer” includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit. RCW 49.60.040(11).

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.

“Person” includes “one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.” RCW 49.60.040(19).

When it comes to deciding who can be held liable for such acts — and under what circumstances — under these statutes, the Court of Appeals asks who was harassed (an employee or a patron in a public accommodation setting), creating a substantive disparity between (a) an “employer” (or “any person acting in the interest of an employer”)<sup>4</sup> that commits an “unfair practice” under RCW 49.60.180, and (b) a “person whose “agent or employee” commits an “unfair practice” under RCW 49.60.215(1). However, both provisions speak in terms of an employer/owner’s potential, imputed, i.e., vicarious, liability for the acts of an employee.

The Court of Appeals found, absent any logical underpinning for doing so, that the *Glasgow* imputed liability/remedial standard does not

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<sup>4</sup> See RCW 49.60.040(3).

apply in cases of sexual harassment against a patron of a place of public accommodation, even when the harassment — as in *Glasgow* — is inflicted by a non-supervisory employee. In this respect, the Court of Appeals held:

The Glasgow case was brought pursuant to RCW 49.60.180, a section regulating “unfair practices of employers.” In deciding the case, our Supreme Court relied on a federal law analogue not applicable to public accommodation discrimination. And the basis for the court’s decision [in *Glasgow*] has no applicability to Floeting’s claim.

Court of Appeals Opinion (“Opinion”) at 18.

The Court of Appeals did not explain why the “federal law analogue” adopted in *Glasgow*, i.e., Title VII, is “not applicable to public accommodation discrimination,” where “[t]he WLAD is modeled after Title VII, so cases interpreting Title VII are considered persuasive authority.” *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 849, 292 P.3d 779 (2013).

Nor did the Court of Appeals explain why the test from *State v. Arlene’s Flowers, Inc.*, 187 Wn.2d 804, 389 P.3d 543 (2017) should apply. As the Court of Appeals conceded, *Arlene’s Flowers* did not involve alleged discrimination by an employee that was imputed to the employer/business owner under a vicarious liability theory. Rather, as the Court correctly noted: “In ... Arlene’s Flowers, the alleged discriminatory

acts were those of the leader[ ] of the corporation[ ].” Opinion at 11.<sup>5</sup> Therefore, a *Glasgow* imputed liability/remedial standard analysis did not apply in *Arlene’s Flowers*: “Where an owner, manager, partner or corporate officer personally participates in the harassment,” the element of imputing harassment to the employer “is met by such proof.” *Glasgow*, 103 Wn.2d at 407.

In apparent agreement, the Court of Appeals further noted, “Floeting’s case presents vastly different circumstances.” Opinion at 11. Despite such circumstances, i.e., the alleged perpetrator here was a GHC non-supervisory employee, and not the business owner, the Court opted to “follow Arlene’s Flowers,” *id.* at 20, which does not address the “vastly different circumstances” regarding discriminatory acts of an employee or imputing liability to an employer/owner under a vicarious liability theory.

This demonstrates that the Court of Appeals’ reliance on *Arlene’s Flowers* is misplaced. While Floeting agrees that the respective statutes may impute liability to the employer and the public accommodation owner for the sexual harassment of their employees, he argues that the *Arlene’s Flowers* test should also apply in determining whether an owner of a place of public accommodation is liable for a non-supervisory employee’s acts,

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<sup>5</sup> The “leader” was the owner of the business, Barronelle Stutzman. See *Arlene’s Flowers*, 187 Wn.2d at 814.

without any consideration of vicarious liability. This, even though *Arlene's Flowers* involved the actions of the owner and not those of an employee, i.e., the scenario here and in *Glasgow*.

The Court of Appeals' abandonment of *Glasgow* is premised on ensuring patrons receive the protections envisioned by the WLAD. Opinion at 8. This is unnecessary because RCW 49.60.215(1) specifically provides that any "employee" who engages in such prohibited conduct in a place of public accommodation is a "person" and is therefore liable for violation of the WLAD. RCW 49.60.040(19). There is no "one free bite" because the "person" (employee) who committed the unfair act can be directly liable for his or her own conduct. There is no need to create a new "direct liability" standard for employers to ensure "all" acts of discrimination are addressed. The premise for the Court of Appeals' departure from *Glasgow* to hold the employer automatically liable for acts of non-supervisory employees—who themselves can be directly liable under Section 215—is without basis.

The other public policy basis for the Court of Appeals determination of "direct employer" liability relies on a factual proposition which is unsubstantiated and contradicted by the record — that contacts with patrons in places of public accommodation are fleeting. The record before the court demonstrates Floeting had a 20-year history as a patient at

the GHC clinic and had known and interacted with T.T. for years before her psychological breakdown. No evidence supports the Court of Appeals' supposition even outside the confines of the instant case. It is just as likely that most patrons frequent the same places of public accommodation as part of their daily routine.

The Court of Appeals contends "direct liability" of the employer "incentivizes employers to initiate careful hiring practices and adopt effective antidiscriminatory training and work rules" to "ensur[e] that discriminatory acts do not occur." Opinion at 14. This suggests that liability is premised on the *employer's own conduct*, i.e., failing to prevent the foreseeable, wrongful conduct of its non-supervisory employees, negligent hiring or retaining of the tortfeasor employee, or other breach of a duty of care in the way it hired, trained or supervised the tortfeasor employee, which caused the harm to the plaintiff. Yet, under the Court of Appeals' "direct liability" construct, no amount of employer investment in antidiscriminatory workplace policies, training and careful hiring practices will avoid employer liability for the unforeseeable conduct of a long-term employee such as T.T. who was undergoing a mental health crisis. Although using the terminology of "direct liability," the Court of Appeals' standard is patently one of "strict liability."

Washington law does not permit strict liability of employers for an

employee’s sexual misconduct in the absence of knowledge.<sup>6</sup> The Court of Appeals rejected *Glasgow* and decades of this jurisprudence apparently because RCW 49.60.215(1), which was first enacted in 1957, did not “mention the doctrines of vicarious liability or respondeat superior.” Opinion at 12. This Court has long ruled that, “The legislature is presumed to know the law in the area in which it is legislating, and statutes will not be construed in derogation of common law absent express legislative intent to change the law.” *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008). The doctrine of *respondeat superior* in Washington dates back to at least 1901 in the case of *Doremus v. Root*, 23 Wash. 710, 715, 63 Pac. 572 (1901), in which the Court stated:

The act of an employee, even in legal intendment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of *respondeat superior* — the rule of law which holds the master responsible for

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<sup>6</sup> *C.J.C. v. Corp. of Catholic Bishops of Yakima*, 138 Wn.2d 669, 718-20, 985 P.2d 262 (1999); *Niece v. Elmview Group Home*, 131 Wn.2d at 39, 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).

the negligent act of his servant, committed while the servant is acting within the general scope of his employment and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employee, and when the employer is compelled to answer in damages therefor he can recover over against the employee.

*See also Miller v. Alaska SS. Co.*, 139 Wash. 207, 214, 246 Pac. 296 (1926).

RCW 49.60.215 in fact invokes an analysis of vicarious liability and agency law by using the term “agent or employee.” The rejection of vicarious liability/*respondeat superior* doctrines by the Court of Appeals contravenes the law.

The language in RCW 49.60.180 and RCW 49.60.215(1) with respect to harassment in the workplace and harassment in places of public accommodation, though worded differently, does not create direct liability of the employer/owner for the unforeseeable acts of non-supervisory employees or support different standards for determining an employer/owner’s liability based upon who is harmed. *Glasgow* should apply in either context.

Floeting himself, while wrestling with the obvious premise that an owner of a place of public accommodation — just like an employer per se — can be found vicariously liable for the sexual harassment of an employee, equates imputed discrimination in the workplace with imputed

discrimination in a place of public accommodation, and thereby defeats his own premise.

Citing RCW 49.60.215(1) and 49.60.040(19), Floeting states:

- “[I]n a place of public accommodation, any person, including a business, engages in an unfair practice when the person or its agent or employee discriminates against a patron.” Answer at 6.
- “If the legislature did not intend to make businesses liable for the discriminatory acts of their employees, there would have been no reason for it to include the phrase ‘or the person’s agent or employee’ in the first sentence of” RCW 49.60.215(1). *Id.*
- “Group Health ... is liable for ... the discriminatory acts of its agents and employees.” Answer at 7.

Floeting agrees that there is imputed liability to an employer for sexual harassment committed by an “agent or employee.” But like the Court of Appeals, he wholly fails to come up with a premise as to why this Court should ignore the negligence standard of *Glasgow* in the virtually identical situation involving a non-supervisory employee’s alleged harassment of a patron in a place of public accommodation.

Still, Floeting cites *Glasgow*, stating:

In *Glasgow*, the plaintiffs sought damages from their corporate employer for harm they suffered as a result of a coworker’s sexual harassment. Since the statute only addressed unfair practices by an “employer,” this Court had to decide under what circumstances a hostile work environment created by a coworker could be attributed to the employer.

Answer at 5. This is the lead-in to a vicarious liability analysis, which this Court resolved in establishing the *Glasgow* standard.

Applied here, this statement fluidly demonstrates how this matter presents the case of a plaintiff (Floeting) who, like the *Glasgow* plaintiffs:

sought damages from (his medical provider) for harm (he) suffered as a result of a[n employee's] sexual harassment. Since the statute [RCW 49.60.215(1)] ... address[es] unfair practices by an employer [owner or proprietor], this Court ha[s] to decide under what circumstances [harassment] by a[n employee] could be attributed to the employer.

This is a clear invitation to apply *Glasgow* in this case.

The employee here (T.T.) is comparable to the employee/coworker (David Long) in *Glasgow*, as are the allegations of sexual harassment. The respective employers — Georgia-Pacific and GHC — are the defendants under RCW 49.60.215(1) and RCW 49.60.180, respectively. The only difference is that GHC is sued as an owner of a place of public accommodation and Georgia-Pacific was sued as an employer.

The potentially dizzying effect of the double standard that results from applying the *Arlene's Flowers* test, rather than *Glasgow*, in cases under RCW 49.60.215(1), presents a potential legal nightmare in the making. Given this elementary analysis, it is evident that the Court of Appeals erred in failing to apply the imputed liability/remedial standard under *Glasgow*, and instead adopted a rule, fashioned from *Arlene's*

*Flowers*, that applies only in situations where the business owner is the source of illegal discrimination — as opposed to the case we have here, as in *Glasgow*, where an employee is the bad actor and any liability must be imputed to the employer under the doctrine of vicarious liability.

3. *Applying the Glasgow Standard Here Is Consistent with Public Policy Expressed in the WLAD.*

*Glasgow* is a seminal case — “This case of first impression in this state involves sexual harassment at the workplace.” 103 Wn. 2d at 402. As such, the Court cited no Washington law regarding workplace sexual harassment, relying instead on other authorities, i.e., Title VII, for which the Court of Appeals apparently criticizes the *Glasgow* Court.<sup>7</sup> At the same time, *Glasgow* enunciates public policy principles under the WLAD:

The Legislature has declared practices of discrimination because of sex to be matters of state concern. RCW 49.60.010. In furtherance of this concern, a state statute ... requires that (RCW 49.60.180(3)) “be construed liberally for the accomplishment of the purposes thereof,” RCW 49.60.020. Yet another statute provides that persons injured by such violations shall have a civil action to recover actual damages, costs and attorneys’ fees. RCW 49.60.030(2).

In support of its goal to advance “WLAD’s guarantee against discrimination in employment,” the Court of Appeals repeated the *Glasgow* Court’s reference to liberal construction of the WLAD under

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<sup>7</sup> Opinion at 18. Even so, the Court of Appeals cites Title VII in support of its unremarkable statement that sexual harassment in the workplace is a serious form of discrimination. *Id.* at 6.

RCW 49.60.020 (Opinion at 5) and cited other WLAD provisions that were in effect when *Glasgow* was decided:

- “RCW 49.60.030(1) establishes that ‘[t]he right to be free from discrimination because of ... sex ... is recognized as and declared to be a civil right.’” Opinion at 5.
- “Sexual harassment subjects a person to a ‘distinction, restriction, or discrimination’ because of that person’s sex, in contravention of RCW 49.60.215(1).” *Id.* at 6.
- “[O]ur legislature declared ‘that practices of discrimination against any of (the state’s) inhabitants ... are a matter of state concern [and] that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.’ RCW 49.60.010.” *Id.* at 9.

The Court of Appeals also cited *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 848 (2013), for its premise that: “The purpose of the statute [WLAD] is to deter and eradicate discrimination in Washington—a public policy of the highest priority.” Opinion at 9. Finally, the Court quotes *Glasgow*: “the WLAD is ‘*preventative* [sic] in nature.’” *Id.*<sup>8</sup>

And yet, despite such pronouncements, we have the decision in *Glasgow* itself and its progeny, under which an employer can be exonerated for sexual harassment committed by an employee. While, *Glasgow* states that “[s]exual harassment as a working condition unfairly

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<sup>8</sup> The italicized word in *Glasgow* is “*preventive*.” 103 Wn.2d at 408.

handicaps an employee against whom it is directed in his or her work performance and as such is a barrier to sexual equality in the workplace,” 103 Wn.2d 405 (Opinion at 6), the case, and this Court, still find employer liability only under *Glasgow*’s remedial standard. The WLAD is not an iron glove; thus, there is room here for such remedial principles as those established by the unanimous *Glasgow* Court and its eminent jurists.

If the Court of Appeals’ decision is not reversed, it conjures a scenario in which liability is not imputed to an employer if a female employee endures pervasive sexual harassment by a coworker, while that same employer — the owner of a small coffee shop — can be held directly liable for the unforeseeable acts of an employee, without any consideration of the doctrine of vicarious liability.

When it comes down to a company’s liability, it would make no sense for the Court to adopt a legal standard under which pervasive harassment of an employee is treated differently — and more liberally on behalf of an employer — than transient and/or incidental harassment of a business patron. Why should one unforeseeable offensive encounter in a fast-food restaurant versus months or years of harassment in a paper mill be treated more harshly from the owner’s standpoint? We implore the Court to answer this question — “It shall not.”

Applying the *Glasgow* standard to this case is a more straightforward application of the law, as opposed to the *Arlene's Flowers* direct (not imputed) liability test, adopted in a case involving discrimination by a business owner (rather than an employee) under RCW 49.60.215 and upon which the Court of Appeals relied.

### **III. CONCLUSION**

For the compelling reasons above, this Court should apply the remedial standard under *Glasgow* to determine when an employer is liable for the alleged sexually harassing acts of its non-supervisory employees under RCW 49.60.215(1). The Court should also adopt *Glasgow's* “severe” or “pervasive” requirement to give some meaning to the Court of Appeals’ otherwise amorphous test of when an objective person would “feel” unwelcome. The Court of Appeals decision should be reversed.

Respectfully submitted this 9<sup>th</sup> day of April, 2018.

KARR TUTTLE CAMPBELL

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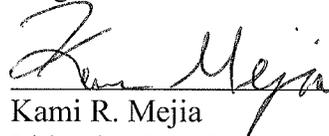
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 9<sup>th</sup> day of April, 2018, 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 April 9, 2018, at Seattle, Washington.



\_\_\_\_\_  
Kami R. Mejia  
Litigation Legal Assistant

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