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NO. 97630-9

THE SUPREME COURT
OF THE STATE OF WASHINGTON

W.H., et al.,

Plaintiffs,

vs.

OLYMPIA SCHOOL DISTRICT, et al.,

Defendants

PLAINTIFFS' OPENING BRIEF

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I. INTRODUCTION

As this Court expressly recognized in interpreting chapter 49.60 RCW, the Washington Law Against Discrimination (“WLAD”), the “‘fundamental object’ of laws banning discrimination in public accommodations is ‘to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’” *Floeting v. Grp. Health Coop.*, 192 Wn.2d 848, 855, 434 P.3d 39 (2019) (internal quotation marks omitted) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 85 S. Ct. 348, 13 L.Ed.2d 258 (1964)). Viewed through the lens of that underlying legislative objective, the questions certified by the District Court are virtually rhetorical in nature: (1) did the legislature intend to subject school districts to direct liability for employees’ discriminatory acts under WLAD’s public accommodation provisions?; and (2) did the legislature intend to include intentional sexual misconduct—including sexual abuse and assault—as sex discrimination under those provisions? To answer anything other than “yes” to both questions would catastrophically thwart the legislature’s intent, manifest in WLAD’s plain language, to vindicate and prevent these most severe deprivations of personal dignity in public accommodations such as schools.

First, this Court’s decision in *Floeting*, WLAD’s plain language, and its underlying legislative purposes make clear that public school districts, like any other employer, are directly liable for employees’ public

accommodation discrimination.

In 1957, the legislature, as was its prerogative, made the policy decision to impose direct liability on employers for public accommodation discrimination presumably with full knowledge of Washington’s common law precedent regarding employer and school district liability. That the legislature included without exception “political subdivisions of the state” such as school districts among employers subject to direct liability for such discrimination was no oversight or aberration. Its imposition of direct liability on school districts was entirely consistent with WLAD’s “legislative goal of eradicating discrimination in places of public accommodation” such as public educational institutions, *Floeting*, 192 Wn.2d at 861, as local school districts are the entities best positioned to address and eliminate discrimination by their employees within their schools at the system-wide, policymaking level. Conversely, creating by judicial fiat an exception from direct liability solely for school districts would critically undermine the legislative purpose of WLAD’s public accommodation provisions, as it would effectively immunize school districts—who, as public corporations, can *only* act through agents and employees—from *any* liability for public accommodation discrimination.

Second, WLAD’s plain language, its underlying legislative purposes, and similar anti-discrimination statutes make clear that WLAD’s public accommodation provisions encompass intentional sexual misconduct—including sexual abuse and assault—as actionable sex discrimination.

WLAD broadly defines discrimination in the public accommodation context to include mistreatment that makes a person feel “not welcome, accepted, desired, or solicited.” RCW 49.60.040(14). And this Court has held that misconduct is actionable “discrimination” when it is “objectively discriminatory,” that is, of a type, or to a degree, that a reasonable person . . . would feel discriminated against.” Suffice to say, sexual abuse and assault obviously meet either definition.

Moreover, Washington courts already recognize sexual harassment—itsself *inherently* “intentional sexual misconduct”—as actionable sex “discrimination” in the public accommodation context. And as other courts have recognized in interpreting antidiscrimination statutes, sexual assault and abuse are some of the most severe forms of sexual harassment. This higher degree of severity only heightens the necessity of prohibiting such intentional sexual misconduct as actionable under WLAD in order to protect individuals’ “full enjoyment” of the benefits of public accommodations such as public educational institutions.

Furthermore, expressly recognizing such intentional sexual misconduct as “discrimination” under WLAD’s public accommodation provisions is necessary to keep WLAD internally cohesive, as Washington precedent already has held without hesitation that a wide range of intentional sexual misconduct—including misconduct potentially constituting criminal offenses—is sex discrimination “discrimination” under WLAD’s workplace antidiscrimination provisions.

Finally, courts interpreting similar antidiscrimination statutes have

repeatedly recognized intentional sexual misconduct as a form of sex discrimination depriving students of their right to full and equal enjoyment of the benefits of public schools. Given the virtually identical rights and purposes of WLAD's public accommodation provisions, this Court should join them in this common-sense conclusion: sexual assault and abuse are sex discrimination under WLAD's public accommodation provisions.

II. CERTIFIED QUESTIONS

1. May a school district be subject to strict liability for discrimination by its employees in violation of the WLAD? **YES.**

2. If a school district may be strictly liable for its employees' discrimination under the WLAD, does "discrimination" for the purposes of this cause of action encompass intentional sexual misconduct including physical abuse and assault? **YES.**

III. STATEMENT OF THE CASE

A. Background Facts

Plaintiff W.H. is the mother of minor Plaintiff P.H. Dkt. 1 at 5-6 (¶¶ 13-14). Plaintiffs J.H. and B.M. are the father and mother of minor Plaintiff S.A. Dkt. 1 at 6 (¶¶ 15-17).

In August of 2005, Olympia School District hired Gary Shafer as a bus driver. Dkt. 74 at 3; Dkt. 34-1 at 2. Over the course of his employment with the District, Shafer sexually harassed and abused between twenty-five or thirty-five (although possibly as many as seventy-five) of the District's youngest bus passengers, including minor Plaintiffs

P.H. and S.A. Dkt. 74 at 3; Dkt. 34-2 at 76; Dkt. 34-5 at 49-50. Specifically, Shafer admitted to three or four occasions where he put his hands down P.H.'s pants and rubbed her buttocks and genitals. Dkt. 34-3 at 4 (pp. 443:21-444:13). Likewise, he admitted to pulling S.A.'s underwear to the side and looking at her genitals. Dkt. 34-5 at 50. S.A. has subsequently testified that, on multiple occasions, Shafer would play "hide and seek" with her on the bus and, after finding her, would remove her pants, fondle her vagina and buttocks, and pleasure himself while assaulting her. Dkt. 34-6 at 467-69 (pp. 20:19-26:6).

B. Procedural History

After Shafer's subsequent arrest and guilty pleas to three counts of first degree child molestation, Plaintiffs filed this lawsuit against the District and certain District employees in their individual capacities. Dkt. 1 at 6-7 (¶¶ 18-23). On February 2, 2019, Plaintiffs moved to amend their complaint to add WLAD public accommodation discrimination claims against the District based on conduct including Shafer's "sexual harassment and sexual abuse of the minor Plaintiffs" and this Court's decision in *Floeting*. Dkt. 65 at 3-5; Dkt. 75 at 32. Defendants opposed this amendment as futile, arguing that *Floeting* and WLAD's public accommodation provisions apply to "sexual harassment" but not "criminal sexual abuse" and that, under Washington common law principles of vicarious liability, employers normally are not liable for employees' intentional or criminal misconduct. Dkt. 68 at 4-6.

On April 17, applying a Fed. R. Civ. P. 12(b)(6) analysis to Defendants' futility argument, the District Court entered an order ruling that Plaintiffs had alleged cognizable public accommodation discrimination claims and granting leave to file Plaintiffs' amended complaint. Dkt. 74. On June 25, Defendants filed a motion to certify certain issues to this Court, reiterating their arguments that *Floeting* did not address whether WLAD's public accommodation provisions make "a school district vicariously or strictly liable for an employee's intentional sexual misconduct" and that, under Washington common law principles, employers are not vicariously liable for employees' intentional sexual misconduct outside the scope of employment. Dkt. 76 at 6-7.

On September 6, the District Court agreed that Plaintiffs reasonably objected to Defendants' motion as an untimely "cloaked motion for reconsideration" but nonetheless entered an order certifying the two questions currently before the Court. Dkt. 80 at 7-8, 10. However, the District Court declined to certify any question pertaining to whether the discrimination in this case was based on gender, reasoning that "whether Plaintiffs can show gender was a substantial factor in the discrimination the minor Plaintiffs remains a factual question at this point in the proceedings." *Id.* at 11.

IV. ARGUMENT

A. Standard of Review

"Certified questions from federal court are questions of law that

this court reviews de novo.” *Brady v. Autozone Stores, Inc.*, 397 P.3d 120 (2017). The Court’s review is based not in the abstract but on the certified record provided by the federal court. *Carlsen v. Glob. Client Sols., LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011).

In this case, the District Court certified two related questions regarding the District’s direct liability for employees’ gender-based discriminatory acts under WLAD. The first question essentially asks whether school districts are directly liable for employees’ violations of WLAD’s public accommodation provisions. The answer unequivocally is yes; WLAD’s public accommodation provisions impose direct liability on “any person or the person’s agent or employee,” including “political subdivisions of the state” such as local school districts, for discrimination in “public accommodations,” a term that expressly includes public educational institutions. And they do so without exception for certain types of employers—such as local school districts—and without regard to tort concepts such as vicarious liability or foreseeability.

The second question asks the Court to decide whether intentional sexual misconduct constitutes “discrimination” under WLAD’s public accommodation provisions. Again, the answer unequivocally is yes. Protecting individuals from sexual harassment and assault in schools furthers the legislative purpose of WLAD’s public accommodation provisions; is consistent with WLAD’s prohibitions against sex discrimination in the form of sexual harassment—including sexual assault and other criminal sexual acts—in the workplace; and is consistent with

similar state and federal statutes' recognition of intentional sexual misconduct as a form of sex discrimination.

B. Employers Such as School Districts Are Directly Liable for Employees' Violations of WLAD's Public Accommodation Provisions as This Court Already Held in *Floeting*

1. As political subdivisions of the state, local school districts are "persons" directly liable under RCW 49.60.215 for employees' public accommodation discrimination

Regarding the first question, WLAD's plain language makes clear that local school districts, as political subdivisions of the state, are directly liable like any other "person" under RCW 49.60.215 for employees' public accommodation discrimination.

The Court's fundamental objective in statutory interpretation is to give effect to the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, then this court gives effect to that plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). "Where statutory language is 'plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute.'" *LRS Electric Controls, Inc. v. Hamre Const., Inc.*, 153 Wn.2d 731, 738, 107 P.3d 721 (2005) (internal quotation marks omitted) (quoting *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995)). The Court discerns plain meaning not only from the provision in question but also from closely related statutes and the

underlying legislative purposes. *Murphy*, 151 Wn.2d at 242. The Court gives effect to all statutory language, considering statutory provisions in relation to each other and harmonizing them to ensure proper construction. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000).

Ultimately, the Court must assume the legislature “meant exactly what it said and apply the statute as written.” *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). As a corollary, the Court “must not add words where the legislature has chosen not to include them.” *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). And the Court cannot interpret statutes in a manner that renders portions of the statute meaningless or leads to absurd results. *G-P Gypsum Corp. v. State, Dep’t of Revenue*, 169 Wn. 2d 304, 313, 237 P.3d 256, 261 (2010); *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020, 1026 (2007). Finally, particular to WLAD, the legislature has mandated that its provisions “shall be construed liberally for the accomplishment” of its underlying purposes. RCW 49.60.020.

RCW 49.60.215, WLAD’s public accommodation antidiscrimination provision, 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 . . . in any place of public resort, accommodation, assemblage, or amusement

Emphasis added; Appendix A. In turn, RCW 49.60.040(19) defines

“[p]erson” as including, among others, “any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.” Appendix B. Under RCW 28A.315.005(2), “[l]ocal school districts are political subdivisions of the state” Appendix C.

Accordingly, the District is a “person” under RCW 4.60.215. And as the Court expressly held, RCW 4.60.215 “imposes direct liability on employers for the discriminatory conduct of their agents and employees.” *Floeting v. Grp. Health Coop.*, 192 Wn.2d 848, 856, 434 P.3d 39 (2019). Thus, RCW 4.19.215 imposes direct liability on school districts for the discriminatory conduct of their agents and employees.

2. *Floeting* already held that RCW 49.60.215 imposes direct liability for employees’ public accommodation discrimination without regard for common law tort concepts like foreseeability, scope of employment, or vicarious liability

Nonetheless, the District has argued that, notwithstanding this Court’s express holding in *Floeting*, imposing direct liability on school districts for employees’ discriminatory conduct would impermissibly conflict with Washington State common law holding that (1) employers are “not vicariously or strictly liable for their employee’s intentional sexual misconduct, where it is not within the scope of their employment,” Dkt. 76 at 7, and (2) school districts are liable for breaches of their “duty to protect their students from foreseeable dangers.” Dkt. 76 at 6-7.

But again, as this Court expressly concluded in *Floeting*:

It is an unfair practice for “any person or the person’s agent or employee” to commit a forbidden act. RCW

49.60.215(1). *This language attributes responsibility for the agent’s or employee’s discriminatory act to the “person” (employer) without mention of the doctrines of vicarious liability or respondeat superior.* In this way, the legislature chose to fight discrimination in public accommodations by making employers *directly responsible* for their agents’ and employees’ conduct.

Id. at 856 (quoting *Floeting v. Group Health Cooperative*, 200 Wn. App. 758, 770, 403 P.3d 559 (2017)) (emphases added). Indeed, the Court could not have been any clearer on this point when rejecting identical arguments in *Floeting*:

[Defendant] contends that it should not be held liable for “unforeseeable acts of an employee.” Suppl. Br. of Pet’r at 16. *But RCW 49.60.215 is not a negligence statute where foreseeability matters*; it imposes *direct liability* for discriminatory acts, *regardless of the culpability of the actor.*

* * *

[Defendant] suggests we should apply an agency or vicarious liability lens to employer liability for employee conduct under RCW 49.60.215. *This would require us to ignore both the plain language of the statute and the larger statutory scheme.*

Floeting, 192 Wn.2d at 856-57 (emphases added).

The Court clearly held in *Floeting* that WLAD imposes direct liability on employers for public accommodation discrimination “regardless of the culpability of the actor,” not liability based on common law principles of vicarious liability or negligence.¹ And as the Court

¹ The District has argued that various *negligence and vicarious liability* cases, such as *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 719, 985 P.2d 262 (1999), *as amended* (Sept. 8, 1999), and *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 929 P.2d 420 (1997), support the proposition that employers cannot be “vicariously or *strictly* liable” for criminal acts of employees unless they were within the scope of employment or foreseeable. Dkt. 76 at 7-8.

But in *Floeting* the Court necessarily rejected the District’s argument that such

cases preclude employer direct liability under RCW 4.60.215. There is no doubt on this point. In *Floeting* the employer expressly raised *C.J.C.* and *Niece* before the Court of Appeals and this Court for the same propositions advanced by the District: that “Washington law does not permit strict liability of employers for an employee’s sexual misconduct in the absence of knowledge.” Dkt. 78 at 16-17, n.6; 18; Appendix D (arguing to this Court that “[t]he rejection of vicarious liability/*respondeat superior* doctrines,” including an employer’s lack of liability “for the unforeseeable acts of non-supervisory employees,” “contravenes the law”; Dkt. 78 at 68-69; Appendix E (citing *C.J.C.* and *Niece* for the proposition that Washington law did not “favor the imposition of respondeat superior or strict liability for an employee’s intentional sexual misconduct”). Both this Court and the Court of Appeals clearly accounted for these cases and the legal principles they discuss in rejecting these same arguments reiterated by the District.

Furthermore, Plaintiffs anticipate that the District may argue that both *Niece* and *C.J.C.* rejected employers’ strict liability for the sexual misconduct of their employees. But *Niece* rejected employer strict liability under a *common law* “nondelegable duty” theory, holding that imposition of strict liability is “best left to the legislature.” *Niece*, 131 Wn.2d at 58. Likewise, *C.J.C.* merely rejected (1) a theory of a church’s vicarious liability for sexual abuse of an altar boy by a priest and (2) a theory of strict liability based on analogy to “a theory of quid pro quo sexual harassment,” a theory available under RCW 49.60.180 WLAD employment discrimination claims, holding that the priest/altar boy relationship was not analogous to that of a supervisor/employee. *C.J.C.*, 138 Wn.2d at 719; *see also Thompson v. Berta Enterprises, Inc.*, 72 Wn. App. 531, 535, 864 P.2d 983 (1994) (quid pro quo sexual harassment claims arise from RCW 49.60.180).

Entirely consistent with *Niece*’s pronouncement that imposition of strict liability is best left to the legislature, *Floeting* expressly recognized that “[i]t is the province of the legislature to establish standards of conduct and attendant rules of liability, and the legislature determined direct liability is appropriate” for public accommodation discrimination claims under RCW 49.60.215. 192 Wn.2d at 856. Likewise, consistent with *C.J.C.*’s refusal to impose strict liability for claims under (or analogous to) WLAD employment discrimination claims under RCW 49.60.180, *Floeting* recognized that WLAD’s plain language treats employment and public accommodation claims differently and imposes direct liability for the latter. *Id.* at 854-55. Accordingly, there is simply no question whether WLAD’s imposition of direct liability for violations of RCW 49.60.215 is consistent with Washington precedent.

Finally, “It is a general rule of interpretation to assume that the legislature was aware of the established common-law rules applicable to the subject matter of the statute when it was enacted.” *Ballard Square Condo. Owners Ass’n v. Dynasty Const. Co.*, 158 Wn.2d 603, 621, 146 P.3d 914 (2006). The common law rule that school districts are liable for breaches of their own duty to protect students from foreseeable harms dates back at least to 1953. *See McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 321-22, 255 P.2d 360 (1953). The common law rule that employers are not vicariously liable for employees’ intentional or criminal misconduct outside the scope of employment dates back to at least 1911. *See Linck v. Matheson*, 63 Wash. 593, 596, 116 P. 282 (1911). Accordingly, the Court must presume that when the legislature first enacted WLAD’s public accommodation discrimination provisions in 1957 to impose prohibit “any person or his agent or employee” from committing discriminatory acts—thus imposing direct liability on employers—as well as defining “person” to include “political subdivisions of the state” “places of public accommodation” to include “public . . . educational institutions,” it knew of the common law regarding school district and employer liability, yet it imposed direct liability anyway. LAWS OF 1957, ch. 37, §§ 4, 14; Appendix F.

expressly recognized, “[i]t is the province of the legislature to establish standards of conduct and attendant rules of liability, and the legislature determined direct liability is appropriate” for public accommodation discrimination claims under RCW 49.60.215. 192 Wn.2d at 856.

3. Creating *ex nihilo* an exception to direct liability under RCW 49.60.215 solely for school districts would grossly contravene WLAD’s plain language and legislative purpose of eradicating discrimination in places of public accommodation such as public educational institutions

Despite the Court’s clear, controlling holdings, however, the District has advocated for a judicially created exception for school districts from WLAD’s imposition of direct liability for public accommodation discrimination. But again, WLAD *expressly* imposes direct liability on “political subdivisions of the state” such as school districts for public accommodation discrimination by employees. RCW 49.60.040(19); 215. The Court cannot add the words “except school districts” to the statute. *Accord Cananwill*, 150 Wn.2d at 682.

This is particularly true where WLAD itself includes “any public library or educational institution” within its definition of “[a]ny place of public resort, accommodation, assemblage, or amusement.” RCW 49.60.040. Judicially creating an exception to school districts’ liability for employees’ public accommodation discrimination would irreconcilably conflict with WLAD’s plain language where the legislature *expressly* intended to combat discrimination in “public educational institutions” such as schools. Functionally, the District’s proposed exception would render

school districts liable only for their own public accommodation discrimination as an entity, as opposed to directly liable for their employees' discriminatory acts. But school districts are public corporations, RCW 28A.320.010², and as such can *only* act through their agents or employees. *State v. Sanchez*, 104 Wn. App. 976, 979, 17 P.3d 1275 (2001) (citing *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601 (1989)). Accordingly, by eliminating school districts' direct liability for employees' discriminatory conduct, the District's proposed exception would lead to the impermissibly absurd result of rendering school districts *immune* to suit under WLAD for public accommodation discrimination by removing their *only* basis for liability.

Adopting the District's proposed exception would critically undermine WLAD's "legislative goal of eradicating discrimination in places of public accommodation" such as public educational institutions by immunizing school districts from liability on a system-wide, policymaking level. *Floeting*, 192 Wn.2d at 861. And it would render the legislature's inclusion of "public educational institutions" as a public accommodation subject to WLAD's anti-discrimination provisions virtually meaningless. Accordingly, the Court must reject the District's proposed exception and instead yield to WLAD's plain language,

² RCW 28A.320.010 provides:

A school district shall constitute a body corporate and shall possess all the usual powers of a public corporation, and in that name and style may sue and be sued and transact all business necessary for maintaining school and protecting the rights of the district, and enter into such obligations as are authorized therefor by law.

underlying legislative purposes, and mandate of liberal construction, all of which inevitably lead to the conclusion that local school districts are directly liable for employees' discriminatory acts under RCW 49.60.215.

C. Intentional Sexual Misconduct is Sex Discrimination Under WLAD's Public Accommodation Provisions

Regarding the second certified question, this Court's decision in *Floeting* and the plain language and underlying legislative purposes of WLAD's public accommodation antidiscrimination provisions; Washington precedent recognizing intentional sexual misconduct as actionable sex discrimination under WLAD's workplace provisions; and other public accommodation anti-discrimination statutes similar to WLAD make clear that intentional sexual misconduct—including sexual abuse and assault—constitutes sex discrimination in places of public accommodation.

1. The plain language and underlying purposes of WLAD's public accommodation provisions already encompass objectively discriminatory misconduct such as severe sexual harassment as actionable sex discrimination

First, WLAD recognizes and declares “[t]he right to be free from discrimination because of . . . sex” as a civil right that includes “[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement.” RCW 49.60.030(1)(b); Appendix G. In turn, “WLAD’s broad definition of ‘full enjoyment’ extends beyond denial of service to include liability for mistreatment that makes a person feel ‘not welcome,

accepted, desired, or solicited.” *Floeting*, 192 Wn.2d at 855; RCW 49.60.040(14); Appendix B.³ The “‘fundamental object’ of laws banning discrimination in public accommodations is ‘to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’” *Floeting*, 192 Wn.2d at 855 (internal quotation marks omitted) (quoting *Heart of Atlanta Motel, Inc.*, 379 U.S. at 250).

Intentional sexual misconduct—including sexual abuse and assault—unquestionably constitutes mistreatment that makes a person feel unwelcome in a public accommodation such as a school, giving rise to liability under WLAD. RCW 49.60.030(1)(b); .040(14); .215. Likewise, intentional sexual misconduct such as sexual abuse and assault obviously meets the Court’s “‘objectively discriminatory’” standard for actionable discrimination because it is “‘of a type, or to a degree, that a reasonable person . . . would feel discriminated against.’” *Floeting*, 192 Wn.2d at 858 (quoting *Floeting*, 200 Wn. App. at 774-74); 859 (“Repeated, express, and outrageous sexual harassment . . . satisfies the objective standard.”).

Moreover, the Court has held that “sexual harassment is a form of sex discrimination” under WLAD’s public accommodation provisions.

³ RCW 49.60.040(14) provides:

“Full enjoyment of” includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, to be treated as not welcome, accepted, desired, or solicited.

Floeting, 192 Wn.2d at 853. Accordingly, it is evident that “intentional sexual misconduct” **must** constitute “discrimination” under these provisions; after all, sexual harassment is, by definition, intentional sexual misconduct.

The District has argued, however, that for purposes of direct liability under WLAD courts should somehow distinguish between sexual harassment and other, more severe forms of intentional sexual misconduct that are potentially subject to criminal prosecution, such as the sexual abuse and assault at issue in this case. However, no basis for such a distinction exists under WLAD’s plain language. To the contrary, as the Ninth Circuit has observed:

Rape is unquestionably among the most severe forms of sexual harassment . . . it imports a profoundly serious level of abuse into a situation that, by law, must remain free of discrimination based on sex. Being raped is, at minimum, an act of discrimination based on sex.

Little v. Windermere Relocation, Inc., 301 F.3d 958, 967-68 (9th Cir. 2002). Thus, because sexual assault is a more severe form of sexual harassment prohibited by WLAD’s public accommodation provisions, liberally construing those provisions to encompass liability for sexual abuse and assault **even moreso** furthers their “legislative goal of eradicating” sex discrimination. *Floeting*, 192 Wn.2d at 861. Likewise, applying WLAD to claims predicated on intentional sexual misconduct such as sexual abuse and assault unquestionably fulfills the “fundamental object[ive]” of public accommodation laws such as WLAD “to vindicate

the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” *Floeting*, 195 Wn.2d at 855 (quoting *Heart of Atlanta Motel, Inc.*, 379 U.S. at 250). Accordingly, both WLAD’s plain language and its underlying purposes compel

2. The Court must interpret “discrimination” under WLAD’s public accommodation provisions consistently with WLAD’s prohibitions of intentional, potentially criminal sexual misconduct as sex discrimination in the workplace

Second, Washington precedent in the WLAD workplace discrimination context confirms that intentional sexual misconduct—including potentially criminal acts—constitutes sex discrimination. Like its public accommodation provisions, WLAD also recognizes and declares “[t]he right to obtain and hold employment without *discrimination*.” RCW 49.60.030(1)(a); Appendix G. Thus, WLAD prohibits declares it is an unfair practice for any employer “[t]o discriminate against any person in compensation or in other terms or conditions of employment because of . . . sex.” RCW 49.60.180(3).

“Discrimination” in the WLAD workplace context unquestionably includes intentional sexual misconduct, including sexual touching and other acts potentially subject to criminal prosecution. In fact, one of the very first WLAD workplace sex discrimination cases, *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 402, 693 P.2d 708 (1985), involved a female employee’s claims that a male coworker had placed his hands on her hips, rubbed his genital area on her, placed his hand on her right breast, and grabbed her buttocks from behind. At the time, RCW

9A.36.040(1) (1984) defined “simple assault” as an assault not amounting to assault, in the first, second, or third degree. LAWS OF 1984, ch. 263, § 18; Appendix H. Because “assault” is not statutorily defined, Washington applies three common law definitions of assault, including “an unlawful touching with criminal intent.” *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006). Offensively touching someone’s breast without privilege or consent meets this definition and constitutes simple assault. *Stevens*, 158 Wn.2d at 311.

Despite the fact that the intentional sexual misconduct at issue was potentially a criminal offense, *Glasgow* did not hesitate to find the employer liable for workplace sex discrimination under WLAD, reasoning that “[the male co-worker’s] unwelcome sexual advances and other verbal or *physical conduct of his [sic] sexual nature* were unreasonably interfering with [the plaintiffs’] work performance and/or created an intimidating, hostile or offensive working environment” *Glasgow*, 103 Wn.2d at 407 (emphasis added).

Similarly, the intentional sexual misconduct at issue in *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 789, 98 P.3d 1264 (2004), involved a male coworker pulling his pants down and exposing himself to his female coworker, as well as threatening to sexually assault her. RCW 9A.88.010 criminalizes indecent exposure.⁴ And RCW 9A.36.041 defines

⁴ RCW 9A.88.010(1) provides:

A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm

fourth degree assault as assault not amounting to assault in the first, second, or third degree. *Stevens*, 158 Wn.2d at 311. Again, because the statute does not define “assault,” common law definitions define it as “putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.” *Id.* Like *Glasgow*, however, *Perry* did not hesitate to hold that this intentional sexual misconduct at issue, coupled with subsequent incidents of the male coworker staring at the female coworker, constituted sexual harassment. *Perry*, 123 Wn. App. at 799-800.

“When the same words are used in related statutes,” courts “must presume that the [l]egislature intended the words to have the same meaning.” *State v. Keller*, 98 Wn. App. 381, 383, 990 P.2d 423, (1999), *aff’d*, 143 Wn.2d 267, 19 P.3d 1030 (2001); *see also Medcalf v. State, Dep’t of Licensing*, 133 Wn.2d 290, 300–01, 944 P.2d 1014, 1019 (1997) (“When the same word or words are used in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning.”). Because intentional sexual misconduct—including conduct potentially constituting criminal offenses—constitutes “discrimination” under WLAD’s workplace provisions, the Court must presume that the legislature intended for such conduct to constitute “discrimination” under WLAD’s public accommodation provisions. To hold otherwise would lead to the impermissibly inconsistent, absurd result that WLAD prohibits the most severe forms of sexual harassment and discrimination in the workplace but not places of public accommodation.

3. The Court should interpret WLAD consistently with similar antidiscrimination statutes that recognize intentional sexual misconduct as sex discrimination

Furthermore, courts interpreting public accommodation and civil rights statutes similar to WLAD have expressly held that sexual assault and abuse constitute actionable sex discrimination. Washington courts routinely look to similar antidiscrimination statutes for guidance in construing WLAD's provisions. *See Glasgow*, 103 Wn.2d at 405 (citing with approval Minnesota Supreme Court's interpretation of similar "anti-sex discrimination statute"); *Floeting*, 200 Wn. App. at 765 (citing with approval Title VII and Title IX cases in holding sexual harassment constitutes sex discrimination under WLAD's public accommodation provisions).

One similar statute is Missouri's Human Rights Act ("MHRA"), which provides:

1. All persons within the jurisdiction of the State of Missouri are free and equal and shall be entitled to the ***full and equal use and enjoyment*** within this state of any place of public accommodation, as hereinafter defined, without discrimination or segregation because of race, color, religion, national origin, sex, ancestry, or disability.
2. It is an unlawful discriminatory practice for ***any person, directly or indirectly***, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the ***accommodations, advantages, facilities, services, or privileges*** made available in any place of public accommodation, as defined in section 213.010 and this section, ***or to segregate or discriminate against any such person in***

the use thereof because of race, color, religion, national origin, sex, ancestry, or disability.

Mo. Ann. Stat. § 213.065; Appendix I; *cf.* RCW 49.60.030(1)(b) (declaring right to “the full enjoyment of any of the accommodations, advantages, facilities, or privileges” of places of public accommodation); .040(14) (defining “full enjoyment” as including the right to enjoy public accommodations “without acts directly or indirectly causing persons of any particular [protected class] . . . to be treated as not welcome, desired, or solicited”); .215 (declaring it is an “unfair practice” for any person “to commit an act which directly or indirectly results in any distinction, restriction, or discrimination” on the basis of a protected class).

In interpreting the MHRA’s public accommodation provisions, Missouri courts have held that sexual assault constitutes actionable sex discrimination. In *Doe ex rel. Subia v. Kansas City, Missouri Sch. Dist.*, 372 S.W.3d 43, 46 (Mo. Ct. App. 2012), Doe, a student, alleged that he was sexually harassed and sexually assaulted by another student on multiple occasions during school hours and on school grounds. *Doe*, 372 S.W.3d at 46; Appendix J. Doe argued that this intentional sexual misconduct was sex discrimination in a public accommodation under the MHRA, giving rise to liability against his school district. *Id.*

On review, the Missouri Court of Appeals held that “a student’s sexually harassing and sexually assaulting another student has the potential to deny the aggrieved student the full and equal use and enjoyment of the advantages, facilities, services, and privileges of the

public school.” *Id.* at 52. Accordingly, it held that Section 213.065.2’s prohibition against “denying another of the benefits of a public accommodation encompasses a claim against a school district for student-on-student sexual harassment.” *Id.* at 51-52.

Like the MHRA, WLAD expressly protects the “full enjoyment” of the accommodations, advantages, facilities, or privileges” of places of public accommodation. And like the student-on-student sexual assault and harassment in *Doe*, the sexual assault and other intentional sexual misconduct by a school employee had the potential of denying Plaintiffs of the full enjoyment of these benefits of their public school. Accordingly, the intentional sexual misconduct alleged in this case constituted sex discrimination in a public accommodation.

Likewise, similar to WLAD’s prohibitions against discrimination in public accommodations, including public educational institutions, Title IX expressly provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681. As the United States Supreme Court expressly has held, “[S]exual harassment’ is ‘discrimination’ in the school context under Title IX.” *Davis Next Friend LaShonda D. v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 650, 119 S. Ct. 1661, 143 L. Ed. 2d 83 (1999). In reaching its holding, *Davis* reasoned that such intentional sexual

misconduct constituted “discrimination” because students “are not only protected from discrimination, but also specifically shielded from being ‘excluded from participation in’ or ‘denied the benefits of’ any ‘education program or activity receiving Federal financial assistance.’” 526 U.S. at 650 (quoting 20 U.S.C.A. § 1681(a)). And it further found that conduct that would support such a Title IX claim included “numerous acts of objectively offensive” touching by another student that ultimately lead to a guilty plea to criminal sexual misconduct. *Davis*, 526 U.S. at 653; *see also Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 63, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1991) (conduct giving rise to a Title IX sexual harassment claim included kissing and sexual intercourse).

Similar to Title IX’s prohibitions against exclusion from or denial of the benefits of education programs or activities, WLAD’s public accommodation provisions prohibit the denial of the “full enjoyment” of the benefits of public educational institutions. And like the intentional, even criminal sexual misconduct at issue in *Davis* and *Franklin*, the sexual abuse and assault at issue in this case deprives students such as Plaintiffs of the full enjoyment of such benefits. Accordingly, consistent with Title IX, the Court should construe WLAD’s public accommodation provisions as including intentional sexual misconduct—including sexual abuse and assault—as actionable “discrimination.”

V. CONCLUSION

As this Court already has held, the legislature exercised its prerogative to impose direct liability on employers under RCW 49.60.215 for employees' discriminatory acts in places of public accommodation. The legislature clearly and unambiguously included political subdivisions of the state, including local school districts, as employers subject to such liability. This Court should answer the first question in the affirmative, particularly where doing so is consistent with the legislative mandate to liberally construe WLAD's provisions to effectuate its underlying policy of eradicating discrimination in places of public accommodation, including public education institutions.

Likewise, this Court already has held that sexual harassment by employees is sex discrimination giving rise to employers' direct liability under RCW 49.60.215. There is no tenable basis for distinguishing between less severe forms of sexual harassment and sexual abuse and assault under WLAD. The only difference is the potentially greater degree of severity in which sexual abuse and assault interferes with individuals' full enjoyment of the benefits of public accommodations and deprives them of individual dignity, compelling with even greater force requiring liberal construction of WLAD in order to effectuate its underlying purposes. This Court also should answer the second question in the affirmative.

////

RESPECTFULLY SUBMITTED this 9th day of October 2019.

PFAU COCHRAN VERTETIS AMALA, PLLC

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CERTIFICATE OF SERVICE

Sarah Awes, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on October 9, 2019, I delivered via Email a true and correct copy of the above document, directed to:

Mr. Michael E. McFarland, Jr.
Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

Jerry J. Moberg
Jerry J. Moberg & Associates
451 Diamond Drive
Ephrata, WA 98823

DATED this 9th day of October 2019.

/s/ Sarah Awes
Sarah Awes
Legal Assistant

APPENDIX A

RCW 49.60.215**Unfair practices of places of public resort, accommodation, assemblage, amusement—Trained dog guides and service animals.**

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 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: PROVIDED, That this section shall not be construed to require structural changes, modifications, or additions to make any place accessible to a person with a disability except as otherwise required by law: PROVIDED, That behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice.

[2018 c 176 § 3; 2011 c 237 § 1; 2009 c 164 § 2; 2007 c 187 § 12; 2006 c 4 § 13; 1997 c 271 § 13; 1993 c 510 § 16. Prior: 1985 c 203 § 1; 1985 c 90 § 6; 1979 c 127 § 7; 1957 c 37 § 14.]

NOTES:

Declaration—Finding—Purpose—2018 c 176: "The legislature declares that service animals that are properly trained to assist persons with disabilities play a vital role in establishing independence for such persons. There are an increasing number of occurrences where people intentionally or mistakenly represent their pet, therapy animal, or emotional support animal to be a service animal and attempt to bring the animal into a place that it would otherwise not be allowed to enter. Federal and state laws require places of public accommodation, including food establishments, to allow an animal that is presented as a service animal into a place of public accommodation; these same places of public accommodation face a dilemma when someone enters the premises and intentionally misrepresents his or her animal as a service animal. The legislature finds that the misrepresentation of an animal as a service animal trained to perform specific work or tasks constitutes a disservice both to persons who rely on the use of legitimate service animals, as well as places of public accommodation and their patrons. The purpose of this act is to penalize the intentional misrepresentation of a service animal, which delegitimizes the genuine need for the use of service animals and makes it harder for persons with disabilities to gain unquestioned acceptance of their legitimate, properly trained, and essential service animals." [2018 c 176 § 1.]

Effective date—2018 c 176: "This act takes effect January 1, 2019." [2018 c 176 § 7.]

Severability—1993 c 510: See note following RCW 49.60.010.

Denial of civil rights: RCW 9.91.010.

APPENDIX B

RCW 49.60.040**Definitions.**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Aggrieved person" means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur.

(2) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

(3) "Commission" means the Washington state human rights commission.

(4) "Complainant" means the person who files a complaint in a real estate transaction.

(5) "Covered multifamily dwelling" means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units.

(6) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

(8) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.

(9) "Dwelling" means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(10) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

(11) "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.

(12) "Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer.

(13) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years.

(14) "Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, to be treated as not welcome, accepted, desired, or solicited.

(15) "Honorably discharged veteran or military status" means a person who is:

(a) A veteran, as defined in RCW [41.04.007](#); or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(16) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment.

(17) "Marital status" means the legal status of being married, single, separated, divorced, or widowed.

(18) "National origin" includes "ancestry."

(19) "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.

(20) "Premises" means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

(21) "Real estate transaction" includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services.

(22) "Real property" includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(23) "Respondent" means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction.

(24) "Service animal" means any dog or miniature horse, as discussed in RCW [49.60.214](#), that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work or tasks performed by the service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing nonviolent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being,

comfort, or companionship do not constitute work or tasks. This subsection does not apply to RCW **49.60.222** through **49.60.227** with respect to housing accommodations or real estate transactions.

(25) "Sex" means gender.

(26) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

[**2018 c 176 § 2**. Prior: **2009 c 187 § 3**; prior: **2007 c 317 § 2**; **2007 c 187 § 4**; **2006 c 4 § 4**; **1997 c 271 § 3**; **1995 c 259 § 2**; prior: **1993 c 510 § 4**; **1993 c 69 § 3**; prior: **1985 c 203 § 2**; **1985 c 185 § 2**; **1979 c 127 § 3**; **1973 c 141 § 4**; **1969 ex.s. c 167 § 3**; **1961 c 103 § 1**; **1957 c 37 § 4**; **1949 c 183 § 3**; Rem. Supp. 1949 § 7614-22.]

NOTES:

Declaration—Finding—Purpose—Effective date—2018 c 176: See notes following RCW **49.60.215**.

Finding—2007 c 317: "The legislature finds that the supreme court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), failed to recognize that the law against discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with disabilities act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act." [**2007 c 317 § 1**.]

Retroactive application—2007 c 317: "This act is remedial and retroactive, and applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after July 22, 2007." [**2007 c 317 § 3**.]

Effective date—1995 c 259: See note following RCW **49.60.010**.

Severability—1993 c 510: See note following RCW **49.60.010**.

Severability—1993 c 69: See note following RCW **49.60.030**.

Severability—1969 ex.s. c 167: See note following RCW **49.60.010**.

Construction—1961 c 103: "Nothing herein shall be construed to render any person or corporation liable for breach of preexisting contracts by reason of compliance by such person or corporation with this act." [**1961 c 103 § 4**.]

Severability—1957 c 37: See note following RCW **49.60.010**.

Severability—1949 c 183: See note following RCW **49.60.010**.

APPENDIX C

RCW 28A.315.005**Governance structure.**

(1) Under the constitutional framework and the laws of the state of Washington, the governance structure for the state's public common school system is comprised of the following bodies: The legislature, the governor, the superintendent of public instruction, the state board of education, the educational service district boards of directors, and local school district boards of directors. The respective policy and administrative roles of each body are determined by the state Constitution and statutes.

(2) Local school districts are political subdivisions of the state and the organization of such districts, including the powers, duties, and boundaries thereof, may be altered or abolished by laws of the state of Washington.

[**2016 c 241 § 132**. Prior: 2013 c 2 § 302 (Initiative Measure No. 1240, approved November 6, 2012); **1999 c 315 § 1**.]

NOTES:

Application of chapter 241, Laws of 2016—Effective date—2016 c 241: See RCW **28A.710.900** and **28A.710.901**.

APPENDIX D

FILED
SUPREME COURT
STATE OF WASHINGTON
4/9/2018 4:48 PM
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CLERK

No. 95205-1

SUPREME COURT
OF THE STATE OF WASHINGTON

CHRISTOPHER H. FLOETING,

Respondent,

v.

GROUP HEALTH COOPERATIVE,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER
GROUP HEALTH COOPERATIVE

Medora A. Marisseau, WSBA #23114
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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.⁶ 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

⁶ *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

APPENDIX E

No. 95205-1

No. 75057-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHRISTOPHER H. FLOETING

Appellant

v.

GROUP HEALTH COOPERATIVE

Respondent

BRIEF OF RESPONDENT

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E
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
2016 OCT 28 PM 3:10

discriminating employee is much less relevant than it is in an employment discrimination case” and where most people would be mistreated by non-supervisory employees, “a rule that only actions by supervisors are imputed to the employer would result, in most cases, in a no liability rule.” *Allen* at 20-21. In deciding that the case could proceed as a “consumer claim,” rather than a WLAD claim, Judge Pechman advocated for a general agency theory of liability, such that an employer could be held responsible for the discriminatory acts of its employees if her or she was acting within the course and scope of their employment at the time. *Id.*

Curiously, Floeting does not advocate for this general agency theory on appeal as he did below. In fact, there is no mention of what standard the court should adopt. Floeting apparently abandoned his general agency theory because Washington law is clear that where a servant steps aside from the master’s business to affect some purpose of his own, such as engaging in sexual harassment, the master is not liable. *Kuehn v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979); *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993); *Niece v. Elmview Group Home*, 131 Wn. 2d 39, 48, 939 P.2d 420 (1997).

Washington courts also hold that when an employee’s conduct involves a personal objective unrelated to the employer’s business, that

conduct is outside the scope of employment even if the employee's position provides the opportunity for his or her wrongful conduct. *Bratton v. Valkins*, 73 Wn. App 492, 498, 500-01, 870 P.2d 981 (1994) (holding that a teacher's sexual relationship with a student was outside the scope of employment even though his position as a teacher provided the opportunity for his wrongful conduct toward a student). Similarly, that the employee may appear to be acting within the scope of his or her authority does not support vicarious liability. *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 669, 719-20, 985 P.2d 262 (1999) (holding that two priests' sexual molestation of an altar boy was outside the scope of their employment even though they were acting within their authority from the victim's perspective).

Based on these rules, Washington courts uniformly have held as a matter of law that an employee's intentional sexual misconduct is not within the scope of employment. *C.J.C.*, 138 Wn.2d at 718-20; *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*, 73 Wn. App at 498-501 (teacher engaged in a sexual relationship with a student); *Thompson*, 71

Wn. App at 550-53 (staff physician at clinic engaged in sexual activity with patients). “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.*, 138 Wn.2d at 720. Under a general agency theory, Floeting’s claims must fail.

Notably, Washington courts already have set forth the standard that applies when determining whether a defendant employer could be held liable for sexual harassment perpetrated by a *non-supervisory* employee. As previously noted, *Glasgow* states:

To hold an employer responsible for the discriminatory work environment created by a plaintiff’s supervisor(s) or co-worker(s), the employee must 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. This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the workplace as to create an inference of the employer’s knowledge or constructive knowledge of it and (b) that the employer’s remedial action was not of such nature as to have been reasonably calculated to end the harassment.

See *Glasgow* at 407.

This negligence standard should apply in this case, as it does in any workplace sexual harassment case – and as it did in *Tafoya*.

If Floeting is, in fact, advocating for strict liability for places of public accommodation, this would lead Washington down the rabbit hole.

APPENDIX F

Severability—1957 c 37: See note following RCW [49.60.010](#).

Severability—1949 c 183: See note following RCW [49.60.010](#).

received under this chapter in the log patrol revolving fund.

Passed the House January 31, 1957.

Passed the Senate February 21, 1957.

Approved by the Governor March 1, 1957.

CHAPTER 37.

[H. B. 25.]

CIVIL RIGHTS—LAW AGAINST DISCRIMINATION.

AN ACT relating to civil rights, amending section 1, chapter 183, Laws of 1949 and RCW 49.60.010; amending section 12, chapter 183, Laws of 1949 and RCW 49.60.020; amending section 2, chapter 183, Laws of 1949 and RCW 49.60.030; amending section 3, chapter 183, Laws of 1949 and RCW 49.60.040; amending section 2, chapter 270, Laws of 1955 and RCW 49.60.050; amending section 6, chapter 270, Laws of 1955 and RCW 49.60.090; amending section 8, chapter 270, Laws of 1955 and RCW 49.60.120; amending section 7, chapter 183, Laws of 1949 and RCW 49.60.180 through 49.60.220; amending section 15, chapter 270, Laws of 1955 and RCW 49.60.230; amending section 16, chapter 270, Laws of 1955 and RCW 49.60.240; amending section 17, chapter 270, Laws of 1955 and RCW 49.60.250; section 9, chapter 183, Laws of 1949 and RCW 49.60.260 through 49.60.300; amending section 10, chapter 183, Laws of 1949 and RCW 49.60.310; and adding three new sections to chapter 183, Laws of 1949 and chapter 49.60 RCW.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 1, chapter 183, Laws of 1949 and RCW 49.60.010 are each amended to read as follows:

RCW 49.60.010 amended.

This chapter shall be known as the "Law Against Discrimination." It is an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of

Short title—
Purpose of
chapter.

(2) The right to the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement;

(3) The right to secure publicly-assisted housing without discrimination.

SEC. 4. Section 3, chapter 183, Laws of 1949 and RCW 49.60.040 are each amended to read as follows: RCW 49.60.040 amended.

As used in this chapter:

“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; Definitions.
“Person.”

“Employer” includes any person acting in the interest of an employer, directly, or indirectly, who has eight or more persons in his employ, and does not include any religious or sectarian organization, not organized for private profit; “Employer.”

“Employee” does not include any individual employed by his parents, spouse or child, or in the domestic service of any person; “Employee.”

“Labor organization” includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment; “Labor organization.”

“Employment agency” includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer; “Employment agency.”

“National origin” includes “ancestry”; “Natural origin.”

“Full enjoyment of” includes the right to pur- “Full enjoyment of.”

Definitions.

chase any service, commodity or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement, without acts directly or indirectly causing persons of any particular race, creed or color, to be treated as not welcome, accepted, desired or solicited;

"Any place of public resort, accommodation, assemblage or amusement."

"Any place of public resort, accommodation, assemblage or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire or reward, or where charges are made for admission, service, occupancy or use of any property or facilities, whether conducted for the entertainment, housing or lodging of transient guests, or for the benefit, use or accommodation of those seeking health, recreation or rest, or for the sale of goods, merchandise, services or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation or public purposes, or public halls, public elevators and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: *Provided*, That nothing herein contained shall be construed to include or apply to any institute, bona fide club, or place of accom-

Proviso.

RCW 49.60.200 amended.

Unfair practices of employment agencies defined.

SEC. 11. (RCW 49.60.200) It is an unfair practice for any employment agency to fail or refuse to classify properly or refer for employment, or otherwise to discriminate against, any individual because of his race, creed, color, or national origin, or to print or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, or national origin, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification: *Provided*, Nothing contained herein shall prohibit advertising in a foreign language.

Proviso.

RCW 49.60.210 amended.

Unfair to discriminate against person opposing unfair practice.

SEC. 12. (RCW 49.60.210) It is an unfair practice for any employer, employment agency, or labor union to discharge, expel, or otherwise discriminate against any person because he has opposed any practices forbidden by this chapter, or because he has filed a charge, testified, or assisted in any proceeding under this chapter.

RCW 49.60.220 amended.

Unfair practice to aid violation.

SEC. 13. (RCW 49.60.220) It is an unfair practice for any person to aid, abet, encourage, or incite the commission of any unfair practice, or to attempt to obstruct or prevent any other person from complying with the provisions of this chapter or any order issued thereunder.

New section.

SEC. 14. There is added to chapter 183, Laws of 1949 and chapter 49.60 RCW, a new section to read as follows:

Unfair practices of places of public resort, accommodation, assemblage, amusement.

It shall be an unfair practice for any person or his 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, or national origin.

SEC. 15. There is added to chapter 183, Laws of 1949 and chapter 49.60 RCW, a new section to read as follows: New section.

It shall be an unfair practice:

(1) For the owner of publicly-assisted housing to refuse to sell, rent, or lease to any person or persons such housing because of the race, creed, color, or national origin of such person or persons;

Unfair practices with respect to publicly-assisted housing.

(2) For the owner of any publicly-assisted housing to segregate, separate or discriminate against any person or persons because of the race, creed, color, or national origin of such person or persons, in the terms, conditions, or privileges of any such housing or in the furnishing of facilities or services in connection therewith;

(3) For any person to make or cause to be made any written or oral inquiry concerning the race, creed, color, or national origin of a person or group of persons seeking to purchase, rent, or lease publicly-assisted housing accommodations;

(4) For any person to print or publish or cause to be printed or published any notice or advertisement relating to the sale, rental, or leasing of any publicly-assisted housing accommodation which indicates any preference, limitation, specification, or discrimination based on race, creed, color, or national origin;

(5) For any person, bank, mortgage company or other financial institution to whom application is made for financial assistance for the acquisition, con-

APPENDIX G

RCW 49.60.030**Freedom from discrimination—Declaration of civil rights.**

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, 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 is recognized as and declared to be a civil right. This right shall include, but not be limited to:

- (a) The right to obtain and hold employment without discrimination;
- (b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;
- (c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;
- (d) The right to engage in credit transactions without discrimination;
- (e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW **48.30.300**, **48.44.220**, or **48.46.370** does not constitute an unfair practice for the purposes of this subparagraph;
- (f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, 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, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and
- (g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW **49.60.225** contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter **19.86** RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

[**2009 c 164 § 1**; **2007 c 187 § 3**; **2006 c 4 § 3**; **1997 c 271 § 2**; **1995 c 135 § 3**. Prior: **1993 c 510 § 3**; **1993 c 69 § 1**; **1984 c 32 § 2**; **1979 c 127 § 2**; **1977 ex.s. c 192 § 1**; **1974 ex.s. c 32 § 1**; **1973 1st ex.s. c 214 § 3**; **1973 c 141 § 3**; **1969 ex.s. c 167 § 2**; **1957 c 37 § 3**; **1949 c 183 § 2**; Rem. Supp. 1949 § 7614-21.]

NOTES:

Intent—1995 c 135: See note following RCW **29A.08.760**.

Severability—1993 c 510: See note following RCW **49.60.010**.

Severability—1993 c 69: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1993 c 69 § 17**.]

Severability—1969 ex.s. c 167: See note following RCW **49.60.010**.

APPENDIX H

1983
SESSION LAWS
OF THE
STATE OF WASHINGTON

3rd EXTRAORDINARY SESSION
FORTY-EIGHTH LEGISLATURE
Convened September 10, 1983. Adjourned September 10, 1983.



Published at Olympia by the Statute Law Committee pursuant to Chapter 6, Laws of 1969.

DENNIS W. COOPER
Code Reviser

in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.

NEW SECTION. Sec. 13. When a party alleging a violation of an order for protection issued under this chapter states that the party is unable to afford private counsel and asks the prosecuting attorney for the county or the attorney for the municipality in which the order was issued for assistance, the attorney shall initiate and prosecute a contempt proceeding if there is probable cause to believe that the violation occurred. In this action, the court may require the violator of the order to pay the costs incurred in bringing the action, including a reasonable attorney's fee.

NEW SECTION. Sec. 14. Upon application with notice to all parties and after a hearing, the court may modify the terms of an existing order for protection. In any situation where an order is terminated or modified before its expiration date, the clerk of the court shall forward on or before the next judicial day a true copy of the modified order or the termination order to the appropriate law enforcement agency specified in the modified or termination order. Upon receipt of the order, the law enforcement agency shall promptly enter it in the law enforcement information system.

NEW SECTION. Sec. 15. Nothing in this act may affect the title to real estate.

NEW SECTION. Sec. 16. Any proceeding under this act is in addition to other civil or criminal remedies.

NEW SECTION. Sec. 17. No peace officer may be held criminally or civilly liable for making an arrest under section 12 of this act if the police officer acts in good faith and without malice.

Sec. 18. Section 9A.36.040, chapter 260, Laws of 1975 1st ex. sess. and RCW 9A.36.040 are each amended to read as follows:

(1) Every person who shall commit an assault or an assault and battery not amounting to assault in either the first, second, or third degree shall be guilty of simple assault.

(2) Simple assault is a gross misdemeanor.

(3) Every person convicted of three offenses under this section against a family or household member as defined in RCW 10.99.020 is guilty of a class C felony.

Sec. 19. Section 1, chapter 198, Laws of 1969 ex. sess. as last amended by section 1, chapter 106, Laws of 1981 and RCW 10.31.100 are each amended to read as follows:

A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when

APPENDIX I

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Annotated Missouri Statutes
Title XII. Public Health and Welfare
Chapter 213. Human Rights (Refs & Annos)

V.A.M.S. 213.065

213.065. Discrimination in public accommodations prohibited, exceptions

Effective: August 28, 2017

[Currentness](#)

1. All persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation, as hereinafter defined, without discrimination or segregation because of race, color, religion, national origin, sex, ancestry, or disability.

2. It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, as defined in [section 213.010](#) and this section, or to segregate or discriminate against any such person in the use thereof because of race, color, religion, national origin, sex, ancestry, or disability.

3. The provisions of this section shall not apply to a private club, a place of accommodation owned by or operated on behalf of a religious corporation, association or society, or other establishment which is not in fact open to the public, unless the facilities of such establishments are made available to the customers or patrons of a place of public accommodation as defined in [section 213.010](#) and this section.

Credits

(L.1986, S.B. No. 513, § A. Amended by [L.1992, H.B. No. 1619, § A](#); [L.1998, S.B. No. 786, § A](#); [L.2017, S.B. No. 43, § A](#), eff. Aug. 28, 2017.)

[Notes of Decisions \(35\)](#)

V. A. M. S. 213.065, MO ST 213.065

Statutes are current through the end of the 2019 First Regular and First Extraordinary Sessions of the 100th General Assembly. Constitution is current through the November 6, 2018 General Election.

End of Document

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APPENDIX J



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Vejo v. Portland Public Schools](#), D.Or., September 6, 2016

372 S.W.3d 43
Missouri Court of Appeals,
Western District.

John DOE, by and Through Guardian
Ad Litem, Yvonne SUBIA, Appellant,

v.

KANSAS CITY, MISSOURI
SCHOOL DISTRICT, Respondent.

No. WD 73800.

|
April 17, 2012.

|
Application for Transfer to Supreme Court
Denied May 29, 2012.

|
Application for Transfer
Denied Aug. 14, 2012.

Synopsis

Background: Elementary school student, by and through his guardian ad litem, sued public school district, alleging that he was subjected to student-on-student sexual harassment that rose to level of sex discrimination in a public accommodation, pursuant to the Missouri Human Rights Act (MHRA). The Circuit Court, Jackson County, [Brian C. Wimes, J.](#), dismissed complaint for failure to state a cause of action. Student appealed.

Holdings: The Court of Appeals, [Lisa White Hardwick, C.J.](#), held that:

[1] student's allegations were sufficient to plead that the school was a place of public accommodation, as defined in the MHRA;

[2] MHRA prohibited sex discrimination in public accommodations;

[3] as a matter of first impression, MHRA's prohibition against indirectly denying another benefits of public accommodation encompassed student's claim against district for student-on-student sexual harassment;

[4] district could be held liable if it knew or should have known of the harassment and failed to take action; and

[5] student's allegation that he was sexually harassed was sufficient to plead that he was discriminated against in his use of the school.

Reversed and remanded.

West Headnotes (13)

[1] Appeal and Error

🔑 De novo review

Appellate review of a dismissal for failure to state a claim is de novo.

[1 Cases that cite this headnote](#)

[2] Appeal and Error

🔑 Failure to state claim, and dismissal therefor

When reviewing a dismissal for failure to state a claim, the appellate court accepts the plaintiff's allegations in the petition as true, and no attempt is made to weigh any facts alleged as to whether they are credible or persuasive.

[Cases that cite this headnote](#)

[3] Appeal and Error

🔑 Failure to state claim, and dismissal therefor

When reviewing a dismissal for failure to state a claim, the appellate court construes the plaintiff's petition liberally and accords it all reasonable inferences deducible from the facts stated; the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action or of a cause that might be adopted in that case.

[Cases that cite this headnote](#)

[4] Civil Rights

🔑 Purpose and construction in general

Provision in Missouri Human Rights Act (MHRA), mandating that all persons are entitled to the full and equal use and enjoyment of public accommodations without discrimination, was enacted in the interest of the public welfare and is conducive to the public good, and thus, provision is a remedial statute and is required to be interpreted liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case. [V.A.M.S. § 213.065](#).

[2 Cases that cite this headnote](#)

[5] Statutes

🔑 [Liberal or strict construction](#)

A “remedial statute” subject to liberal interpretation is one enacted for the protection of life and property, or which introduces some new regulation conducive to the public good.

[Cases that cite this headnote](#)

[6] Civil Rights

🔑 [Sexual harassment; sexually hostile environment](#)

Student's allegations, in action alleging student-on-student sexual harassment, that elementary school he attended was a public facility that was owned, operated, or managed by a public school district, which was a subdivision of the state and a public corporation, were sufficient to plead that the school was open to the public and was a place of public accommodation, as defined in the Missouri Human Rights Act (MHRA), even though school was not accessible by all members of the public and was subject to state law and school district's restrictions. [V.A.M.S. §§ 213.010\(15\)\(e\), 213.065\(3\)](#).

[6 Cases that cite this headnote](#)

[7] Civil Rights

🔑 [Public Accommodations](#)

Public accommodations provision in Missouri Human Rights Act (MHRA), mandating that all persons are entitled to the full and equal use and enjoyment of public accommodations

without discrimination, does not limit a claim of sex discrimination to only such discrimination as occurs in “employment, disability, or familial status as it relates to housing”; rather, provision prohibits sex discrimination in public accommodations. [V.A.M.S. § 213.010\(5\)](#).

[5 Cases that cite this headnote](#)

[8] Civil Rights

🔑 [Sexual harassment; sexually hostile environment](#)

Prohibition in Missouri Human Rights Act (MHRA) against indirectly denying another of the benefits of a public accommodation encompassed elementary school student's claim against a school district for student-on-student sexual harassment that took place during school hours on school grounds; because school had disciplinary control over its students, its alleged failure to take prompt and effective remedial action to address such sexual harassment had potential to deny aggrieved student the full and equal use and enjoyment of the advantages, facilities, services, and privileges of the public school. [V.A.M.S. § 213.065\(2\)](#).

[3 Cases that cite this headnote](#)

[9] Civil Rights

🔑 [Sexual harassment; sexually hostile environment](#)

A school district may be held liable for student-on-student sexual harassment under Missouri Human Rights Act (MHRA) where the plaintiff alleges and proves: (1) he is a member of a protected group; (2) he was subjected to unwelcome sexual harassment; (3) his gender was a contributing factor in the harassment; (4) the harassment refused, withheld from, or denied, or attempted to refuse, withhold from, or deny him any of the accommodations, advantages, facilities, services, or privileges made available in the public school, or segregated or discriminated against him in the use thereof on grounds of race, color, religion, national origin, sex, ancestry, or disability; and (5) the public school district

knew or should have known of the harassment and failed to take prompt and effective remedial action. V.A.M.S. §§ 213.010(5), 213.055(1)(1) (a).

[3 Cases that cite this headnote](#)

[10] Civil Rights

🔑 Sexual harassment; sexually hostile environment

For purposes of elementary school student's Missouri Human Rights Act (MHRA) claim of sex discrimination in public accommodations against public school district, male student's allegation that he was sexually harassed and sexually assaulted by another male student on multiple occasions in the boys' restroom in public school was sufficient to state claim that he was discriminated against, i.e., subjected to "unfair treatment based on sex," even though student did not allege that he was denied access to school, in that he was denied the full and equal use and enjoyment of the school and its services. V.A.M.S. §§ 213.010(5), 213.065(2).

[4 Cases that cite this headnote](#)

[11] Appeal and Error

🔑 Material Considered on Review

Court of Appeals would not consider children's ages and the age-appropriateness of their alleged student-on-student sexual harassment in determining whether trial court erred in dismissing elementary school student's sex discrimination claim against school district for failure to state a claim, given that children's ages were outside the pleadings, and trial court expressly stated it did not consider information outside the pleadings in dismissing student's petition.

[Cases that cite this headnote](#)

[12] Appeal and Error

🔑 Pleadings and Evidence

On appeal, the appellate court does not consider evidence outside the pleadings.

[Cases that cite this headnote](#)

[13] Appeal and Error

🔑 Sufficiency and scope of motion

Court of Appeals would not consider school district arguments that dismissal of elementary school student's sex discrimination complaint should be upheld on appeal because district was not a "person" and, therefore, was not subject to provision in Missouri Human Rights Act (MHRA) prohibiting sex discrimination, because district did not raise such argument in its motion to dismiss. V.A.M.S. § 213.065.

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

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Before Division Four: LISA WHITE HARDWICK, Chief Judge Presiding, ALOK AHUJA, Judge and DALE YOUNGS, Special Judge.

Opinion

LISA WHITE HARDWICK, Chief Judge.

John Doe, by and through his guardian ad litem, Yvonne Subia, appeals the dismissal of his petition for damages against the Kansas City, Missouri School District ("School District") for violating the Missouri Human Rights Act ("MHRA"), Chapter 213, RSMo. ¹ On appeal, Doe contends he stated a claim under the MHRA because the School District's failure to protect him from sexual harassment and sexual assault by a fellow student constituted sex discrimination that deprived him of the full, free, and equal use and enjoyment of the School District's elementary school, a public accommodation. For reasons explained herein, we reverse the circuit court's dismissal and remand the case to the circuit court.

FACTUAL AND PROCEDURAL HISTORY

Doe is a student at Swinney Elementary School, which is part of the School District. In October 2009, he filed a charge of discrimination against the School District with the Missouri Commission on Human Rights (“the Commission”). Thereafter, Doe received a Notice of Right to Sue from the Commission and filed a petition against the School District in October 2010. In his petition, Doe alleged that, beginning in May 2009, he was sexually harassed and sexually assaulted by another student on multiple occasions during school hours on school grounds. Doe asserted the perpetrator climbed under the stalls in the boys' restroom to commit the sexual harassment and sexual assaults.

Doe further alleged that school administrators, as well as the teachers and paraprofessionals responsible for supervising him and the perpetrator, had knowledge of the perpetrator's inappropriate and sexualized behavior and his aggressive tendencies. Despite knowledge of the perpetrator's sexual tendencies, school personnel permitted the perpetrator to use the restroom at the same time as other male students. Consequently, the perpetrator had the opportunity to sexually harass and sexually assault him. Doe contended that, as a result of the sexual harassment and sexual assaults, he has experienced emotional distress in the form of anxiety, fear, and depression, among other manifestations.

Doe asserted the School District's acts and omissions violated the MHRA. Specifically, he alleged the sexual harassment and sexual assaults occurred on the basis of his gender and constituted sex discrimination. He further claimed that Swinney Elementary School, as part of the School District, is a public place of accommodation, and that he was deprived of the full, free, and equal use and enjoyment of the school and its services by way of the School District's actions and inactions. Doe asserted that the school personnel were agents, servants, and employees of the School District and, therefore, that the School District was liable for their actions under the doctrine of *respondeat superior*. Doe sought compensatory and punitive damages.

The School District moved to dismiss Doe's petition. Following a hearing, the circuit court dismissed the petition on the *47 basis that Doe failed to state a cause of action under Missouri law against the School District. Doe appeals.

STANDARD OF REVIEW

[1] [2] [3] Appellate review of a dismissal for failure to state a claim is *de novo*. [Lynch v. Lynch](#), 260 S.W.3d 834, 836 (Mo. banc 2008). We accept the plaintiff's allegations in the petition as true, and “no attempt is made to weigh any facts alleged as to whether they are credible or persuasive.” [Keveney v. Mo. Military Acad.](#), 304 S.W.3d 98, 101 (Mo. banc 2010). Indeed, we construe the petition liberally and accord it “ ‘all reasonable inferences deducible from the facts stated.’ ” [Lakeridge Enters., Inc. v. Knox](#), 311 S.W.3d 268, 271 (Mo.App.2010) (citation omitted). “The petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action or of a cause that might be adopted in that case.” [Keveney](#), 304 S.W.3d at 101.

ANALYSIS

In Point I, Doe contends the circuit court erred in dismissing his petition because the MHRA prohibits student-on-student sexual harassment that rises to the level of sex discrimination in a public accommodation, and he pled sufficient facts to state such a claim under [Section 213.065](#) of the MHRA. The relevant portions of [Section 213.065](#) provide:

1. All persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation, as hereinafter defined, without discrimination or segregation on the grounds of race, color, religion, national origin, sex, ancestry, or disability.
2. It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, as defined in [section 213.010](#) and this section, or to segregate or discriminate against any such person in the use thereof on the grounds of race, color, religion, national origin, sex, ancestry, or disability.

No Missouri case has addressed whether this statute covers a claim against a public school district for sex discrimination based on student-on-student sexual harassment.

Whether [Section 213.065](#) covers such a claim is a matter of statutory interpretation. The primary goal of statutory interpretation is to ascertain the legislature's intent from the language used and give effect to that intent. *Ridinger v. Mo. Bd. of Prob. & Parole*, 189 S.W.3d 658, 664 (Mo.App.2006). We must interpret statutes consistently with the legislature's obvious purpose. *United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d 159, 167 (Mo.App.2010). In ascertaining that purpose, we do not read statutory provisions in isolation but, rather, “ ‘we construe the provisions of a legislative act together and read a questioned phrase in harmony with the entire act.’ ” *Id.* (citation omitted).

[4] [5] Additionally, in determining the legislature's intent, we must keep in mind that [Section 213.065](#) of the MHRA is a remedial statute. *Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166–67 (Mo.App.1999). “A remedial statute is one ‘enacted for the protection of life and property, or which introduce[s] some new regulation conducive to the public good.’ ” *State ex rel. Ford v. Wenskay*, 824 S.W.2d 99, 100 (Mo.App.1992) (citation omitted). As we noted in *Red Dragon*, [Section 213.065.1's](#) mandate *48—that all persons are entitled to the full and equal use and enjoyment of public accommodations within this state without discrimination—was enacted in the interest of the public welfare and is conducive to the public good. 991 S.W.2d at 167. Therefore, because [Section 213.065](#) is a remedial statute, we should interpret it “ ‘liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case.’ ” *Id.* at 166–67 (quoting *Wenskay*, 824 S.W.2d at 100).

A Public School is a Public Accommodation

[Section 213.065](#) prohibits discrimination in “any place of public accommodation.” [Section 213.010\(15\)](#) defines “places of public accommodation” as “all places or businesses offering or holding out to the general public, goods, services, privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of the general public or such public places providing food, shelter, recreation and amusement[.]”

The statute provides a non-exclusive list of the types of places, businesses, and establishments the legislature intended to include within this definition. [§ 213.010\(15\)\(a\)–\(f\)](#). Doe argues that Swinney Elementary School fits under the type of establishment described in [Section 213.010\(15\)\(e\)](#), which is “[a]ny public facility owned, operated, or managed by or

on behalf of this state or any agency or subdivision thereof, or any public corporation; and any such facility supported in whole or in part by public funds[.]” We agree.

[6] Missouri law vests title and control of school buildings in the school districts in which the property is located. [§ 177.011](#). Thus, school districts own, operate, and manage the school buildings within their districts. Although the legislature did not define the terms “subdivision” and “public corporations” in the statute, Missouri courts have long considered public school districts to be both subdivisions of this state and public corporations. See *Sch. Dist. of Kansas City v. Kansas City*, 382 S.W.2d 688, 697 (Mo. banc 1964); *Kansas City v. Sch. Dist. of Kansas City*, 356 Mo. 364, 201 S.W.2d 930, 933 (1947); *State ex inf. McKittrick v. Whittle*, 333 Mo. 705, 63 S.W.2d 100, 102 (Mo. banc 1933); and *Consol. Sch. Dist. No. 1 of Jackson Co. v. Bond*, 500 S.W.2d 18, 21 (Mo.App.1973). We presume that, when the legislature enacted [Section 213.010\(15\)\(e\)](#), it was aware that judicial opinions had interpreted the terms “subdivision” and “public corporation” to include public school districts and intended the terms to be construed in the statute consistently with those opinions. *State v. Harris*, 156 S.W.3d 817, 823 (Mo.App.2005). Moreover, public school districts are supported in part by public funds from the state. See [MO. CONST. art. IX, § 3\(b\)](#). Because Doe alleged that Swinney Elementary School is a public facility that is owned, operated, or managed by a public school district, which is a subdivision of this state and a public corporation, he sufficiently pled that Swinney Elementary School is a place of public accommodation as defined in [Section 213.010\(15\)\(e\)](#).

The School District contends, however, that public schools are specifically excluded as places of public accommodation by [Section 213.065.3](#), which states:

3. *The provisions of this section shall not apply to a private club, a place of accommodation owned by or operated on behalf of a religious corporation, association or society, or other establishment which is not in fact open to the public, unless the facilities of such establishments are made available to the customers or patrons of a place of public accommodation* *49 as defined in [section 213.010](#) and this section.

(Emphasis added.) The School District argues that an elementary school building is “not in fact open to the public” because members of the general public do not have unfettered and unlimited access to it. The School District notes that Missouri law contains limits on students' access to public schools based upon age, residency, and immunization requirements, and school districts restrict the general populace's access to school buildings to protect the safety and welfare of students. The issue, then, is whether a place of public accommodation must be accessible by *all* members of the public to be “open to the public.”

Resolution of this issue depends upon the interpretation of the word “public.” Although the MHRA does not define “public,” the Missouri Supreme Court has interpreted the term in considering whether restrictions on access to a service defeat the public character of the service. In *J.B. Vending Co., Inc. v. Dir. of Revenue*, 54 S.W.3d 183, 184–85 (Mo. banc 2001), the Court was asked to determine whether a statute imposing a sales tax on entities in which “rooms, meals or drinks are regularly served to the public,” Section 144.020.1(6), applies to vending machines and cafeterias in manufacturing plants and business facilities that are restricted-access buildings. In finding that the tax did apply, the Court based its decision, in part, on various definitions of the word “public”:

The word “public” conveys several meanings. While the word “public” can refer to the entire populace, it can also refer to “[a] particular body or section of the people; often, a clientele ...” *Webster's New Int'l Dictionary* 2005 (2d Ed.1952). It can also refer to “a group of people distinguished by common interests or characteristics.” *Webster's Third New Int'l Dictionary* 1836 (1993). “In another sense the word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few.” *Black's Law Dictionary* 1227 (6th Ed.1990).

J.B. Vending, 54 S.W.3d at 186. The Court noted these definitions are consistent with prior case law “specifically recognizing that an entity can be said to serve the public even if it serves only a subset or segment of the public and is subject to regulation on that basis.” *Id.* at 186–87 (citing *State ex rel. Anderson v. Witthaus*, 340 Mo. 1004, 102 S.W.2d 99 (Mo. banc 1937); *Voelker v. St. Louis Mercantile Library Ass'n*, 359 S.W.2d 689 (Mo.1962); and *Salvation Army v. Hoehn*, 354 Mo. 107, 188 S.W.2d 826, 830 (Mo. banc 1945)).

In finding that the taxpayer, J.B., served the “public” in spite of the limited access to its establishment, the Court stated, “J.B. holds itself out to serve those members of the public who come into its establishment, and the fact that some third party limits those who are able to reach that establishment does not mean that J.B. does not serve meals and drinks to the public. It does.” *Id.* at 187. The Court found that, to interpret the statute otherwise could result in restaurants claiming they do not sell to the public because they serve only persons with reservations, or sports arena concession stand operators asserting they do not sell to the public because they serve only those with tickets to the arena's event. *Id.* at 188. The Court stated that such an interpretation would be contrary to the legislature's intent, as it would “effectively nullify the provision for imposing a tax on the sale of meals or drinks to the public.” *Id.* at 188–89.

Similarly, in this case, we find that limiting the phrase “open to the public” in *50 Section 213.165.3 to mean accessible by *all* members of the populace would be contrary to the legislature's intent and would effectively nullify the prohibition against discrimination in public accommodations. Many of the places of public accommodation listed Section 213.010(15)(a)–(f) limit access to their facilities to a subset of the general population. Restaurants restrict minors from access to areas in which alcoholic beverages are served and exclude persons who do not comply with dress codes. Resorts, movie theaters, concert halls, and amusement parks impose age and height restrictions on patrons. Nevertheless, the legislature has expressly deemed these facilities to be “places of public accommodation.” § 213.010(15)(a), (b), (d).

The Missouri Constitution mandates the establishment and maintenance of “free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one as prescribed by law.” MO. CONST. art. IX, § 1(a). As a free public school, Swinney Elementary School holds itself out as a facility that provides such gratuitous instruction to Missouri citizens under the age of twenty-one. That access to the school is subject to state law and the School District's restrictions does not defeat the public character of the school—it still serves a subset of the public. Doe sufficiently pled that Swinney Elementary School is, in fact, open to the public and is a public accommodation under Chapter 213.

The MHRA Prohibits Sex Discrimination in Public Accommodations

Section 213.065.1 provides that all persons within the state's jurisdiction are entitled to full and equal use and enjoyment of public accommodations without discrimination. The MHRA defines “discrimination” as “any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing.” § 213.010(5). The MHRA confers upon the Commission the power “[t]o seek to eliminate and prevent discrimination because of race, color, religion, national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing.” § 213.030.1(1). Doe alleged in his petition that he was subjected to sex discrimination at Swinney Elementary School. He filed his charge of discrimination in the Commission on this basis and subsequently received his Notice of Right to Sue.

[7] The School District contends that Doe's claim necessarily fails and that the Commission was without jurisdiction to issue the Notice of Right to Sue because the MHRA's definition of “discrimination” in Sections 213.010(5) and 213.030.1(1) limits the context in which such claims of discrimination can occur. Specifically, the School District argues the portion of the definition that reads “as it relates to employment, disability, or familial status as it relates to housing” limits *all* types of discrimination—including sex discrimination—as actionable under the MHRA only if such discrimination occurs in the context of “employment, disability, or familial status as it relates to housing.”

The School District's argument misinterprets the statute. The MHRA's definition of discrimination prohibits unfair treatment on nine bases: race, color, religion, national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing. The phrase “as it relates to employment” limits only *age* discrimination claims to the employment context. Likewise, the term “disability” refers merely to a prohibited basis for discrimination and not to a context to which the other prohibited bases for discrimination are limited. Lastly, the *51 phrase “as it relates to housing” limits only *familial status* discrimination claims to the housing context. When read properly, the plain language of Section 213.010(5) does not limit a claim of sex discrimination to only such discrimination as occurs in “employment, disability, or familial status as it relates to housing.” Similarly, the plain language of Section 213.030.1(1) does not limit the Commission's jurisdiction to only such claims of sex discrimination as occur in “employment, disability, or familial status as it relates to housing.” The MHRA prohibits sex discrimination

in public accommodations. Thus, the Commission had jurisdiction over Doe's claim of sex discrimination in his public elementary school, and its Notice of Right to Sue allowing Doe to bring this action was valid.

Section 213.065 Encompasses Discrimination Based on Peer Sexual Harassment

Doe contends the plain language of the public accommodations provision prohibits sex discrimination based on student-on-student sexual harassment. Section 213.065.2 states that it is unlawful for “any person, directly or indirectly, to ... deny any other person ... any of the accommodations, advantages, facilities, services, or privileges made available in a place of public accommodation, or to ... discriminate against any such person in the use thereof on the grounds of ... sex.”

Given this language, we note that the statute prohibits a person from “directly or indirectly” denying another person any of the benefits of a public accommodation. Clearly, the statute contemplates liability for those who personally engage in the discriminatory acts that result in the denial. Because it alternatively prohibits a person from “indirectly” denying the benefits of a public accommodation, the statute also contemplates liability for a party who does not personally engage in the discriminatory acts but who is responsible for the denial of the advantages, facilities, services, or privileges of a public accommodation that results from another's discriminatory acts. In his petition, Doe asserted that the School District was liable under this indirect theory, as he claimed that the School District, by its actions and inactions in failing to protect him from the harassment and assaults, was responsible for denying him the full and equal use and enjoyment of the public school and its services.

The School District argues that Doe is attempting to hold it liable for the perpetrator's conduct and, in doing so, has failed to plead facts establishing that the District was vicariously liable for the perpetrator's conduct under the doctrine of *respondeat superior*. Doe's petition alleged that he was deprived of the full and equal use and enjoyment of the school and its services “by way of the [School District]'s actions and inactions” in failing to protect him from the perpetrator. These allegations indicate that Doe is not trying to hold the School District liable for the perpetrator's conduct but is instead trying to hold the School District liable for its own conduct—that is, its “decision to remain idle in the face of known student-on-student harassment in its schools.” *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641, 119 S.Ct.

1661, 143 L.Ed.2d 839 (1999). Because Doe is attempting to hold the School District liable for its own conduct, he did not need to plead facts establishing that the School District was vicariously liable for the perpetrator's conduct under the doctrine of *respondeat superior*.

[8] We agree with Doe that Section 213.065.2's prohibition against indirectly denying another of the benefits of a public accommodation encompasses a claim against a school district for student-on- *52 student sexual harassment. A school district exercises significant control over its students through its disciplinary policy. *Davis*, 526 U.S. at 646, 119 S.Ct. 1661. This is especially true where, as in this case, the harassment and assaults were alleged to have taken place during school hours on school grounds. Because it has such control over its students, a school district's failure to take prompt and effective remedial action to address a student's sexually harassing and sexually assaulting another student has the potential to deny the aggrieved student the full and equal use and enjoyment of the advantages, facilities, services, and privileges of the public school.

This interpretation of Section 213.065.2 is within the spirit of the public accommodations law, as it furthers the legislature's broad remedial goal of ensuring that all persons within the state's jurisdiction have full and equal use and enjoyment of any place of public accommodation without discrimination. § 213.065.1.² Moreover, it is within the spirit of the MHRA as a whole, as the Act prohibits sexual harassment in other settings, specifically, the workplace. § 213.055.1(1)(a); *Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 521 n. 8 (Mo. banc 2009) (noting that sexual harassment is a form of sex discrimination under the MHRA). The MHRA's prohibition against sexual harassment in the workplace extends to render an employer liable for sexual harassment committed by one employee against another employee. *Barekman v. City of Republic*, 232 S.W.3d 675, 679 (Mo.App.2007). Undoubtedly, the right of a student to receive an education free from sexual harassment is as important as the right of an employee to be free from such harassment in the workplace. *L.W. ex rel. L.G. v. Toms River Reg'l Schools Bd.*, 189 N.J. 381, 915 A.2d 535, 547 (2007). Thus, in light of Section 213.065's plain language and its broad remedial goal, we find that the public accommodations statute encompasses a claim against a school district for student-on-student sexual harassment in a public school.

Standard for Determining Liability for Student-on-Student Sexual Harassment

Doe contends the standard for determining whether a school district should be held liable for student-on-student sexual harassment should be the same standard as that for determining whether an employer is liable under the MHRA for the sexual harassment of one co-worker by another. An employer is liable under Section 213.055.1(1)(a) “ ‘for the sexual harassment of one co-worker by another if the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.’ ” *Barekman*, 232 S.W.3d at 679 (citation omitted). To prevail on this type of sexual harassment claim under Section 213.055.1(1)(a) of the MHRA, a plaintiff must allege and prove:

- (1) he is a member of a protected group; (2) he was subjected to unwelcome sexual harassment; (3) his gender was a contributing factor in the harassment; (4) a term, condition, or privilege of his employment was affected by the harassment; *53 and
- (5) the [employer] knew or should have known of the harassment and failed to take appropriate action.

Barekman, 232 S.W.3d at 679. Doe argues that holding a school district liable for student-on-student sexual harassment under the “knew or should have known” standard used in employment cases is consistent with Section 213.065.2's broad language prohibiting even indirect sex discrimination in public accommodations and furthers the MHRA's remedial purpose of accomplishing the greatest public good.

The Missouri School Boards Association (“the Association”), as *amicus curiae* for the School District, contends the applicable standard of liability is not the “knew or should have known” standard applied in MHRA co-worker sexual harassment cases but, rather, is the actual knowledge standard applied in actions brought under Title IX of the Education Amendments of 1972 (“Title IX”). Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. §

1681(a). In *Davis*, the United States Supreme Court addressed whether Title IX allows a private action for damages against a school board—a “funding recipient”—based upon student-on-student sexual harassment. 526 U.S. at 633, 119 S.Ct. 1661. The Court held that such an action may lie, “but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities.” *Id.*

In rejecting the lower “knew or should have known” standard, the Court explained that the asserted claim was a judicially-implied private right of action under Title IX, which was enacted pursuant to Congress's authority under the Spending Clause. *Id.* at 639–40, 119 S.Ct. 1661. As an exercise of Congress's spending power, Title IX is contractual in nature in that, in return for federal funds, funding recipients agree to comply with federally-imposed conditions. *Id.* at 640, 119 S.Ct. 1661. To allow a private damages action against funding recipients for non-compliance with those conditions, funding recipients must have “adequate notice that they could be liable for the conduct at issue.” *Id.* This is because funding recipients cannot knowingly accept the terms of Title IX's “putative contract” if they are unaware of the conditions imposed or are unable to ascertain what is expected of them. *Id.* Furthermore, as the Court noted in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 289, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998), Title IX's express system of enforcement by administrative agencies requires notice to the funding recipient and an opportunity to come into voluntary compliance. Therefore, it would be inconsistent if the judicially-implied system of enforcement, i.e., the private right of action, allowed substantial liability without regard to the funding recipient's knowledge or its corrective actions upon receiving notice. *Id.* Requiring plaintiffs in a private right of action to prove that the funding recipient had actual knowledge of the harassment and acted with deliberate indifference toward it is consistent with Title IX's express remedial scheme requiring notice and an opportunity to rectify the violation. *Id.* at 290, 118 S.Ct. 1989.

We do not have these concerns in claims asserted under the MHRA. Unlike Title IX, the MHRA creates an express cause of action for damages for sex discrimination that is not contingent upon the receipt of federal or state funds. § 213.111. While the receipt of state funds may be relevant to whether an entity is a public accommodation under Section 213.010(15), the MHRA *54 does not contain provisions like those in Title IX that require funding recipients to receive notice of discriminatory acts that may subject it to liability or that stay enforcement proceedings until an agency has

determined that voluntary compliance is unobtainable. See *Gebser*; 524 U.S. at 288, 118 S.Ct. 1989.

Nevertheless, the School District and the Association argue the “knew or should have known” standard makes sense only in the employment context due to the control employers assert over their employees—control they claim school districts do not have over their students. We disagree. As the Court noted in *Davis*, “ [t]he ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace.” *Id.* at 646, 119 S.Ct. 1661 (citation omitted). Indeed, “ ‘the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.’ ” *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)).

In asserting that Title IX's actual knowledge standard applies to claims against school districts for student-on-student sexual harassment rather than the “knew or should have known” standard used in co-worker sexual harassment claims, the School District is essentially seeking to hold aggrieved students to a more onerous standard than aggrieved employees under the MHRA. See *L.W.*, 915 A.2d at 549. Like the court in *L.W.*, we do not believe that students in the classroom are entitled to less protection from unlawful discrimination and sexual harassment than their adult counterparts in the workplace. *Id.* The standard for a public school district's liability for student-on-student sexual harassment under the MHRA should be the same as that for an employer's liability for co-worker sexual harassment under the MHRA: the school district can be held liable if it knew or should have known of the harassment and failed to take prompt and effective remedial action.

Allegations in Doe's Petition Sufficiently Stated a Claim

[9] Applying the MHRA's standard for co-worker sexual harassment claims to the public school setting, we find that a school district may be held liable for student-on-student sexual harassment under Section 213.065.2 where the plaintiff alleges and proves: (1) he is a member of a protected group; (2) he was subjected to unwelcome sexual harassment; (3) his gender was a contributing factor in the harassment; (4) the harassment refused, withheld from, or denied, or attempted to refuse, withhold from, or deny him any of the accommodations, advantages, facilities, services, or privileges made available in the public school, or segregated or discriminated against him in the use thereof on grounds of race, color, religion, national origin, sex, ancestry,

or disability; (5) the public school district knew or should have known of the harassment and failed to take prompt and effective remedial action.

The allegations in Doe's petition are sufficient to state a cause of action under this standard. In his petition, Doe alleged he was sexually harassed and sexually assaulted on multiple occasions by another male student in the boys' restroom and that this harassment occurred on the basis of his gender. Doe alleged that school administrators, as well as the teachers and paraprofessionals responsible for supervising him and the perpetrator, had knowledge of the perpetrator's inappropriate and sexualized behavior and his aggressive tendencies. Doe further alleged that, despite knowledge of the perpetrator's sexual tendencies, school personnel permitted the perpetrator to use the restroom at the *55 same time as other male students, which directly resulted in the perpetrator having the opportunity to sexually harass and sexually assault him. Doe contended that, as a result of the sexual harassment and sexual assaults, he has experienced emotional distress in the form of anxiety, fear, and depression, among other manifestations. Doe asserted that the School District's actions and inactions deprived him of the full, free, and equal use and enjoyment of the school and its services.

[10] The School District argues these allegations are insufficient to state a cause of action because Doe did not allege that he was actually denied or refused access to the school. The plain language of [Section 213.065](#), however, does not require that the victim of discrimination be denied *access* to the public accommodation. Rather, it requires only that the victim be denied “any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation” or that the victim be discriminated against in his use of the public accommodation on the grounds of race, color, religion, national origin, sex, ancestry, or disability. § 213.065.2. Doe's allegation that he was sexually harassed and sexually assaulted on multiple occasions in the boys' restroom sufficiently pled that he was discriminated against, i.e., subjected to “unfair treatment based on ... sex,” [Section 213.010\(5\)](#), in his use of the school in that he was denied the full and equal use and enjoyment of the school and its services.

The School District further argues that Doe failed to state a cause of action because young elementary school children cannot engage in conduct constituting unlawful sexual harassment as a matter of law. To support this assertion, the School District cites language from two Title IX cases, [Davis](#),

[526 U.S. at 651](#), [119 S.Ct. 1661](#), and [Gabrielle M. v. Park Forest–Chicago Heights, Il. Sch. Dist. 163](#), [315 F.3d 817](#), [821 \(7th Cir.2003\)](#). While both [Davis](#) and [Gabrielle M.](#) indicate that the ages of the children involved in a claim of student-on-student sexual harassment is a relevant consideration in determining whether there was actionable sexual harassment under Title IX, neither case holds that, as a matter of law, the conduct of young children *cannot* rise to the level of actionable harassment. See [Davis](#), [526 U.S. at 651](#), [119 S.Ct. 1661](#), and [Gabrielle M.](#), [315 F.3d at 821–22](#).

[11] [12] The School District also cites articles and studies concerning age-appropriate behavior for young children and argues that the conduct alleged in this case was “normal” for children who are the same age as the alleged perpetrator. The School District's argument is based on facts and evidence outside the petition. In his petition, Doe did not plead his age or the alleged perpetrator's age. In the hearing on the School District's motion to dismiss, the court told the parties it would not treat the motion as one for summary judgment and would not consider the children's ages. In its judgment, the court expressly stated it did not consider information outside the pleadings in dismissing Doe's petition. On appeal, we do not consider evidence outside the pleadings.³ [Thomas v. A.G. Elec., Inc.](#), [304 S.W.3d 179](#), [183 \(Mo.App.2009\)](#). Likewise, we do not weigh the credibility or persuasiveness of the allegations or address the merits of the case. *Id.* While the children's ages and the age-appropriateness of the alleged conduct will certainly be relevant in determining whether Doe proved he was subjected *56 to unwelcome sexual harassment, we do not rely on it given the procedural posture of this appeal.⁴

CONCLUSION

[13] Construing Doe's petition liberally and according it all reasonable inferences deducible from the facts stated, we find that Doe stated a cause of action under [Section 213.065.2](#) for discrimination in a public accommodation based on student-on-student sexual harassment. Therefore, we reverse the circuit court's judgment dismissing the petition and remand the case to the circuit court for further proceedings consistent with this opinion.⁵

All Concur.

All Citations

372 S.W.3d 43, 283 Ed. Law Rep. 568

Footnotes

- 1 All statutory citations are to the Revised Statutes of Missouri 2000, unless otherwise indicated.
- 2 We also note that, outside of the MHRA, the legislature has enacted [Section 160.775, RSMo Cum.Supp.2011](#), which requires every school district in the state to adopt an anti-bullying policy. Section 160.775.2 defines “bullying” as “intimidation or harassment that causes a reasonable student to fear for his or her physical safety.” This statute indicates that the legislature recognizes that harassment, a form of bullying, is a problem facing the state's educational system. Interpreting Section 213.065.2 to prohibit student-on-student sexual harassment will further promote what the legislature describes as its “assumption that all students need a safe learning environment.” § 160.775.3.
- 3 Because we cannot consider evidence outside the pleadings in reviewing the propriety of the dismissal, the School District's motion to strike documents from Doe's appendix that it alleges are outside the record is denied as moot.
- 4 Because the children's ages are outside the pleadings, we also reject the School District's related argument that, in light of the children's ages, the balance of equities militates against allowing Doe's cause of action.
- 5 In its *amicus curiae* brief, the Association raises other bases for upholding the dismissal. The Association contends that the School District is not a “person” and, therefore, is not subject to [Section 213.065](#). The Association also contends that Doe had other available remedies, such as an equal protection claim and a claim under [42 U.S.C. § 1983](#). Because the School District did not raise these arguments in its motion to dismiss, we cannot consider them as grounds for upholding the dismissal on appeal. See [Kixmiller v. Bd. of Curators of Lincoln Univ.](#), 341 S.W.3d 711, 713 (Mo.App.2011).

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