

NO. 75057-7-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CHRISTOPHER H. FLOETING,

Appellant,

v.

GROUP HEALTH COOPERATIVE,

Respondent.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL

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I. INTRODUCTION

Christopher Floeting alleges Group Health violated his civil right to be free from sex discrimination in a place of public accommodation. Specifically, Mr. Floeting alleges a Group Health employee sexually harassed him when he attended regularly scheduled medical appointments at Group Health's Northgate Medical Center. The Superior Court granted Group Health's summary judgment motion. Mr. Floeting appealed to this Court. On appeal, Group Health argues, *inter alia*, that: (1) the Washington Law Against Discrimination ("WLAD") does not prohibit sexual harassment in a public accommodation; and that (2) even if it did, the Court should apply the standard for analyzing employment harassment claims to the public accommodation context. Respondent's Br. at 16, 28.

Group Health's arguments are not supported by law or policy. The WLAD prohibits sex discrimination, including sexual harassment, in places of public accommodation. Further, Washington courts already established the appropriate standard to apply when analyzing discrimination claims in places of public accommodation. There is no reason to rely on the employment discrimination standard in this case given the statutory differences between the WLAD's public accommodation and employment provisions, and the markedly different conduct at issue in the public accommodation context.

II. IDENTITY AND INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General submits this amicus brief to urge this Court to hold that places of public accommodation may be held liable for the discriminatory or harassing conduct of their employees, including via claims for sex discrimination and sexual harassment.

The Attorney General has a strong interest in protecting the public's right to be free from unlawful discrimination. *See* RCW 49.60.010 (finding that discrimination “threatens not only the rights and proper privileges of [state] inhabitants but menaces the institutions and foundation of a free democratic state”); *see also* *City of Seattle v. McKenna*, 172 Wn.2d 551, 562, 259 P.3d 1087 (2011) (Attorney General’s “general powers and duties” include acting “on a matter of public concern”) (internal quotation marks omitted).

The Attorney General’s constitutional and statutory powers include the submission of amicus curiae briefs on matters affecting the public interest. *Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978). Because this case concerns whether a place of public accommodation can be held liable under the WLAD for the sexually harassing conduct of an employee, this case implicates individuals beyond the named plaintiff and affects the public interest.

III. ISSUES ADDRESSED BY AMICUS

Whether the WLAD prohibits sexual harassment in a place of public accommodation and, if so, whether the same legal standard that applies to all other forms of discrimination in places of public accommodation should apply to sex discrimination claims.

IV. STATEMENT OF THE CASE

On September 11, 2012, Mr. Floeting reported to Group Health that a Patient Access Representative, T.T., engaged in “inappropriate” conduct and made “sexual advances” while he attended regularly scheduled medical appointments at Group Health’s Northgate Medical Center. CP 176 ¶¶ 10-12; CP 177 ¶ 13. According to Group Health’s record of the complaint, Mr. Floeting reported that T.T. told him that she had spent the weekend locked in a bedroom with her boyfriend watching pornographic movies. CP 129; CP 131; CP 135. In his complaint, Mr. Floeting also stated that he believed T.T.’s conduct to be “sexual harassment,” that he “felt very uncomfortable,” that he “was embarrassed because others could hear [T.T.],” and that he “really want[ed] [the comments] to stop.” *Id.*

Mr. Floeting also alleges T.T. made a series of inappropriate sexual comments, some explicit in nature, in the months leading up to the incident complained of, CP 174, ¶ 6; CP 175 ¶ 7-8; CP 176 ¶ 10; CP

254:10-20, but Group Health's records do not reflect that he complained about such conduct prior to September. CP 129; CP 131; CP 135.

Mr. Floeting alleges Group Health violated his rights under the WLAD. RCW 49.60.030(1)(b) protects the right to "full enjoyment" of any place of public accommodation, including the right to purchase any service or commodity sold by any place of public accommodation "without acts directly or indirectly causing persons of [a protected class] to be treated as not welcome, accepted, desired, or solicited." *See* RCW 49.60.040(14) (defining "full enjoyment"). RCW 49.60.215 prohibits any "act which directly or indirectly results in any distinction, restriction, or discrimination" based on a person's membership in a protected class.

V. ARGUMENT

A. Sexual Harassment in a Place of Public Accommodation Violates the WLAD

Group Health argues the WLAD prohibits sexual harassment in the employment and housing contexts only. Respondent's Br. at 16-19. The State disagrees. Absent any express legislative intent to provide less protection in the context of a public accommodation, the same prohibition against sexual harassment applies.

In declaring a civil right to be free from discrimination because of sex, the Legislature created a cause of action for plaintiffs who suffer

sexual harassment. See *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 405, 693 P.2d 708 (1985) (holding sexual harassment deprived plaintiff of a workplace free of sex discrimination); *Tafoya v. Human Rights Comm'n*, 177 Wn. App. 216, 225, 311 P.3d 70 (2013) (holding sexual harassment in a real estate transaction constitutes discrimination). Because there is no question that an employer or housing provider “discriminates” on the basis of sex when an employee or tenant is harassed because of their sex, *Glasgow*, 103 Wn.2d at 405, *Tafoya*, 177 Wn. App. at 225, there should be no question that a public accommodation likewise “discriminates” on the basis of sex when a customer is harassed because of their sex. See *In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 810 (1998) (holding statutory provisions should be read in *pari materia* with related provisions to ensure a “harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes”).

Though *Glasgow* and *Tafoya* were decided in the employment and housing contexts, respectively, the right to be free from discrimination under the WLAD is not so limited. See RCW 49.60.030(1) (declaring the right to be free from discrimination “shall include, but not be limited to” the areas of employment; real estate; places of public resort, accommodation, assemblage, or amusement; credit transactions; insurance transactions; and transactions with health maintenance organizations). The WLAD has long protected the right to “full enjoyment” of any place of

public accommodation. RCW 49.60.030(1)(b); *see also Marquis v. City of Spokane*, 130 Wn.2d 97, 106, 922 P.2d 43 (1996) (observing the WLAD was amended in 1957 to include public accommodation discrimination). Under the WLAD, two separate provisions prohibit public accommodation discrimination on the basis of sex, *see* RCW 49.60.030(1)(b); RCW 49.60.215, and each provides a separate, stand-alone cause of action for public accommodation discrimination. *See e.g., Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 636, 911 P.2d 1319 (1996) (considering a claim under RCW 49.60.215); *MacLean v. First Nw. Indus. of Am., Inc.*, 96 Wn.2d 338, 343, 635 P.2d 683 (1981) (considering a claim under RCW 49.60.030(1)(b)).

The WLAD's "primary thrust" is not merely the requirement of equal access to places of public accommodation, as Group Health argues, Respondent's Br. at 22, but also "the use of their facilities on an equal footing with all others." *Evergreen Sch. Dist. No. 114 v. Wash. State Human Rights Comm'n*, 39 Wn. App. 763, 777, 695 P.2d 999 (1985). Sexual harassment prevents the use of a facility on an equal footing with all others. Whether in employment, housing, or a place of public accommodation, sexual harassment "represents an intentional assault on an individual's innermost privacy," creates a hostile or offensive environment, and "unfairly handicaps" a person based on sex. *See Glasgow*, 103 Wn.2d at 405. It is just as demeaning and degrading to

require that a man or woman “run a gauntlet of sexual abuse,” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citing *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)), in return for the privilege of being allowed to purchase goods or services at a public accommodation as it is to experience harassment at work or at home.

In sum, recognizing a claim for sexual harassment in a place of public accommodation does not, as Group Health argues, “expand” the WLAD. *Cf.* Respondent’s Br. at 18. Sexual harassment is an arbitrary barrier to sexual equality just as racial harassment is an arbitrary barrier to racial equality. *Meritor*, 477 U.S. at 67 (citations omitted). In adding sex as a protected class in 1973, *see* Laws of 1973, ch. 141, § 1, the Washington Legislature prohibited sexual harassment not only in employment and housing, but also in all places of public accommodation.

B. Sexual Harassment in a Place of Public Accommodation Should Be Analyzed Like All Other Forms of Discrimination in Places of Public Accommodation

In determining what standard the trial court should have applied to Mr. Floeting’s claim, the Court should hold that the existing standard for public accommodation discrimination based on race, national origin, and disability applies equally to discrimination based on sex.

Twenty years ago, the Supreme Court set forth the standard for establishing a prima facie case of discrimination in a place of public accommodation. In *Fell v. Spokane Transit Authority*, the Court

established that a prima facie case of disability discrimination requires the plaintiff show: (1) the plaintiff has a disability, (2) the defendant's establishment is a place of public accommodation, (3) defendant discriminated against plaintiff by providing treatment that was not comparable to the level of designated services provided to individuals without disabilities; and (4) the disability was a substantial factor causing the discrimination. 128 Wn.2d at 637. As the Supreme Court dictated, the first three elements are mixed questions of law and fact, while the fourth is strictly a question of fact. *Id.*

Courts extended *Fell's* analytical framework to cases alleging public accommodation discrimination based on other protected classes. In *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 525, 20 P.3d 447 (2001), the Court of Appeals applied *Fell's* elements and required a plaintiff alleging race or national origin discrimination in a place of public accommodation show: (1) the plaintiff is a member of a protected class, (2) the defendant's establishment is a place of public accommodation, (3) the defendant discriminated against plaintiff by not treating him in a manner comparable to the treatment it provides to persons outside that class; and (4) the protected status was a substantial factor causing discrimination.

As in *Demelash*, *Fell's* standard should extend to claims of sex discrimination, including sexual harassment, in a place of public

accommodation. Under *Fell*, a plaintiff alleging sex discrimination must show a defendant failed to treat him or her in a manner comparable to treatment it provides to persons outside the class, and that sex was a “substantial factor causing the discrimination.” 128 Wn.2d at 637. *Cf. Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995) (holding a “substantial factor” standard applies because “Washington’s disdain for discrimination would be reduced to mere rhetoric if this court were to require proof that [the protected class] was a ‘determining factor’”). *Fell*’s requirement that plaintiff show comparability of treatment and causation ensures that liability does not depend on the “subjective feelings” of the plaintiff. *Evergreen*, 39 Wn. App. at 772. While it stops short of requiring a plaintiff show defendant’s “subjective intent” to discriminate, *see Adamski-Thorpe v. Stevens Memorial Hosp.*, No. C09-1302, 2010 WL 5018141, *4 (W.D. Wash. Dec. 3, 2010), *Fell* requires “the alleged discrimination result from something the defendant has done.” 128 Wn.2d at 642, n.30.

Group Health suggests that the *Fell* standard would “relieve [plaintiffs] of proving harassment.” Respondent’s Br. at 28. This argument, however, is without merit. Washington courts frequently apply *Fell* and have no difficulty determining whether plaintiffs sufficiently proved harassment. *See, e.g. Disnute v. City of Puyallup*, No. 3:10-cv-05295-RBL, 2012 WL 1237575, at *3 (W.D. Wash. Apr. 12, 2012)

(applying *Fell* and rejecting plaintiffs' claim that police officers harassed them about their fishing license on account of race); *Dibiassi v. Starbucks Corp.*, No. CV-07-276-LRS, 2009 WL 1505379, at *21-22 (E.D. Wash. May 22, 2009), *rev'd on other grounds*, 414 F. App'x 948 (9th Cir. 2011) (applying *Fell* and finding a factual dispute as to plaintiff's claim that he was discriminated against by Starbucks baristas who falsely reported him to law enforcement because of his psychological disability); *Spry v. Peninsula Sch. Dist.*, No. 46782-8-II, 2016 WL 1329431, at *7 (Wash. Ct. App. Apr. 5, 2016) (unpublished) (applying *Fell* and rejecting pro se plaintiffs' claim that school officials discriminated against them by observing the father is African American, the family is Muslim, and African Americans are not accepted very well in Gig Harbor).

Since *Fell's* elements are straightforward, the Court need not look outside them for the standard applicable in this case. A sexual harassment claim in a public accommodation should be analyzed using the same standard that applies to any other allegation of discrimination in a place of public accommodation.

C. The Harassment Standard that Applies in the Employment and Housing Contexts Should Not Apply to a Public Accommodation

Instead of the *Fell* standard, Group Health argues that the analytical framework that applies to a sexual harassment claim in a public accommodation is the same framework that applies in the employment

context. Respondent's Br. at 28-33. In the employment context, a plaintiff must show (1) the conduct was unwelcome, (2) the conduct was because of sex, (3) the conduct affected the terms or conditions of employment, and (4) the harassment can be imputed to the employer because the employer (i) authorized, knew, or should have known of the harassment, and (ii) failed to take reasonably prompt and corrective action. *Glasgow*, 103 Wn.2d at 406. Group Health's argument is misplaced.

1. Unlike in the employment or housing contexts, RCW 49.60.030 and RCW 49.60.215 do not require discrimination that affects the "terms or conditions" of the public accommodation

Glasgow's requirement that the conduct affect "the terms or conditions of employment" stems from the specific statutory language prohibiting discrimination in employment. See RCW 49.60.180(3) (declaring it unlawful to "discriminate against any person . . . in other terms or conditions of employment" based on sex) (emphasis added). To ensure a defendant's conduct actually alters the terms or conditions of employment, *Glasgow* requires a plaintiff alleging harassment in employment show the behavior was "sufficiently severe" and "persistent" so as to create an abusive working environment. 103 Wn.2d at 406.

In contrast, the WLAD provisions prohibiting discrimination in a public accommodation makes no mention of the "terms or conditions" of a public accommodation. Instead, the public accommodation provisions

prohibit any act which “directly or indirectly” causes any person “to be treated as not welcome, accepted, desired, or solicited” based on sex, or “directly or indirectly results in any distinction, restriction, or discrimination” based on sex. RCW 49.60.030(1)(b) (providing a right to “full enjoyment”); RCW 49.60.040(14) (defining “full enjoyment”); RCW 49.60.215. On their face, the WLAD’s public accommodation provisions encompass more than conduct so pervasive that it affects the “terms and conditions” of the public accommodation. *See State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (noting “when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word”) (citations omitted).

This makes sense because the conduct at issue in a place of public accommodation is different from the daily interactions of co-workers. Though an isolated instance of sexual conduct may be insufficient to prove discrimination in an ongoing employment relationship, a single interaction may violate the WLAD’s prohibition against discrimination in a public accommodation because of the abbreviated nature of the contact between a customer and a business. *See King v. Greyhound Lines, Inc.*, 656 P.2d 349, 350-51 (Or. Ct. App. 1982) (interpreting a provision similar to the WLAD and holding bus company liable for an employee’s use of two racial slurs toward a customer). Indeed, courts often find liability for harmful and degrading conduct in the public sphere, even if the interaction

is brief. *See, e.g., Kirt v. Fashion Bug #3253, Inc.*, 479 F. Supp. 2d 938, 966 (N.D. Iowa 2007) (store clerk accused African American customer of shoplifting); *La Reine Boutique v. Mass. Comm'n Against Discrimination*, No. 08-P-621, 2009 WL 648888, at *1 (Mass. App. Ct. Mar. 16, 2009) (unpublished) (hair dresser subjected customers to “racially derogatory statements”); *Craig v. New Crystal Rest.*, No. 92-PA-40, 1995 WL 907560, *8 (Chi. Comm'n on Human Relations Oct. 18, 1995) (waitress called customer a “damn faggot”); *Miller v. Drain Experts*, No. 97-PA-29, 1998 WL 307868, at *3 (Chi. Comm'n on Human Relations Apr. 15, 1998) (customer service representative twice-called customer a “nigger” over the phone).

Given the short-lived nature of interactions between customers and store personnel, requiring a pattern of pervasive abuse would render the WLAD provision meaningless. No other jurisdiction with statutory language similar to the WLAD has imposed a “pervasiveness” requirement in the public accommodation context. *Cf. Barbot v. Yellow Cab Co.*, No. 97-SPA-0973, 2001 WL 1805186, at *2 (Mass. Comm'n Against Discrimination Nov. 27, 2001) (requiring that a plaintiff challenging a taxi cab driver’s remark that he was a “faggot” need only show he was “denied access to, restricted in the use of, or treated differently” in a place of public accommodation to prove “any distinction,

discrimination or restriction” in any place of public accommodation) (applying Mass. Gen. Laws ch. 272, § 98) (emphasis added).

Recognizing that the context of public accommodation discrimination is important, other jurisdictions have declined to apply employment discrimination standards requiring severity and pervasiveness when analyzing harassment claims in the public sphere. *See, e.g., City of Minneapolis v. Richardson*, 239 N.W.2d 197, 202, (Minn. 1976); *Fashion Bug*, 479 F. Supp. 2d at 963 (same). In *Richardson*, the Minnesota Supreme Court considered racial slurs directed at a black child by police officers and held a prima facie case of discrimination under Minnesota law requires a showing of “treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation.” 239 N.W.2d at 202. In *Fashion Bug*, the court considered a store clerk’s racially charged allegations of shoplifting and held a prima facie case of racial discrimination in a public accommodation under Iowa law required plaintiff prove she was discriminated against by “being subjected to markedly hostile conduct that a reasonable person would find objectively unreasonable under circumstances giving rise to an inference of discrimination.” 479 F. Supp. 2d at 963.

Even *Evergreen*, the case Group Health relies on most heavily for its argument, recognized that a “distinction, restriction, or discrimination” on the basis of a protected class can include one-time verbal abuse. 39

Wn. App. at 774 (citing *King*, 656 P.2d at 351, approvingly). In *Evergreen*, the court declined to impose liability based on a teacher's inadvertent remark that was not abusive nor directed at the plaintiff. 39 Wn. App. at 775. However, in so doing, the *Evergreen* court noted that, if confronted with the same facts as *King*, where an Oregon court held Greyhound liable for racial slurs its ticket agent made to an African American customer, "it would have no difficulty reaching the same result." *Id.* at 774.

Despite this body of public accommodation case law, Group Health nevertheless asks the Court to follow *Tafoya* and apply *Glasgow's* employment standard to a new context. In *Tafoya*, the Court of Appeals adapted *Glasgow's* employment standard to the housing context and required conduct be "severe" and "persistent" to be considered sexual harassment. 177 Wn. App. at 226. However, the *Tafoya* court did so only after observing that, like the employment statute, the WLAD's housing statute prohibits discrimination in the "terms, conditions, or privileges of a real estate transaction." *Id.* at 224 (citing RCW 49.60.222(1)(b)) (emphasis added).

Further, before adopting *Glasgow*, the *Tafoya* court observed the statutory similarities between the WLAD's housing discrimination provision and federal fair housing law, the significant federal authority regarding sexual harassment in housing, and the fact that *Glasgow*

mirrored federal authority in housing. 177 Wn. App. at 223 (citing RCW 49.60.222(1)(b)). This differs from the current context. Unlike the housing context, there is no federal analogue to the WLAD's prohibition against sex discrimination in a place of public accommodation. *See* 42 U.S.C. § 2000a (prohibiting discrimination based on race, color, national origin and religion only); 42 U.S.C. § 12182 (prohibiting discrimination only on the basis of disability); *see also Marquis*, 130 Wn.2d at 110-11 (“[T]here is no provision in the federal law which sets forth the equivalent of the broad language of RCW 49.60.030(1).”). And, importantly, when federal courts apply federal public accommodation statutes covering race, color, or nation origin discrimination, the test looks remarkably like *Fell*. *See, e.g., Fall v. L.A. Fitness*, 161 F. Supp. 3d 601, 606 (S.D. Ohio 2016) (requiring a plaintiff show (1) membership in a protected class, (2) attempt to make or enforce a contract for services ordinarily provided by defendant, (3) denial of the right to enter into or enjoy the benefits of the contractual relationship, and (4) treatment less favorable than similarly situated persons outside the protected class); *McCoy v. Homestead Studio Suites Hotels*, 390 F. Supp. 2d 577, 584 (S.D. Tex. 2005) (same).

Since the WLAD provision prohibiting public accommodation discrimination nowhere references “terms or conditions,” and no body of federal or state authority counsels the adoption of employment standards for sexual harassment liability in a place of public accommodation, this

Court should not create a requirement that sexually explicit conduct be “pervasive” to be unlawful in the context of a public accommodation. To establish a prima facie case, a plaintiff alleging sex discrimination need only show a comparable difference in treatment and that sex was a substantial factor causing the discrimination. *See Fell*, 128 Wn.2d at 637.

2. Unlike the employment context, RCW 49.60.215 explicitly provides for liability if a public accommodation’s “agent or employee” commits discrimination

Group Health further asks the court to impose the same employer knowledge requirement that applies in employment cases to public accommodation cases. Respondent’s Br. at 36-37 (arguing that liability should only attach if “the business knew about [the discrimination] or had an[] opportunity to take corrective action”). In the employment context, liability under the WLAD may be imputed to an employer only where the employer “authorized, knew, or should have known” of the discriminatory conduct and “failed to take reasonably prompt and adequate corrective action.” *Glasgow*, 103 Wn.2d at 407. The Court should decline Group Health’s request as there is no statutory basis for its proposed construction.

First and foremost, the statutory language prohibiting employment discrimination and public accommodation discrimination is different. *See King*, 656 P.2d at 351 n.6 (holding that employment discrimination cases “have limited precedential value” when interpreting a public

accommodation statute). Unlike the WLAD's statutory provision regarding employment, which prohibits an "employer" from discriminating based on sex, the WLAD's provision regarding a public accommodation prohibits "any person or the person's agent or *employee*" from discriminating based on sex. *Compare* RCW 49.60.180 (prohibiting employment discrimination), *with* RCW 49.60.215 (prohibiting discrimination in a public accommodation) (emphasis added).

By expressly prohibiting "employees" from committing any "act that directly or indirectly results in any distinction, restriction, or discrimination" on the basis of a protected class, RCW 49.60.215, the Legislature chose to impose liability on a place of public accommodation for its employees' harassing conduct. *See Evergreen*, 39 Wn. App. at 774 (stating it would "have no difficulty reaching the same result [as *King*]"); *King*, 656 P.2d at 350 n.3 (finding liability even though the "racial slurs were not authorized, approved or ratified by the defendant" and where the defendant was "opposed to such conduct"). *Cf. Johnston v. Apple Inc.*, No. 11 Civ. 3321(JSR), 2011 WL 4916305, at *6 (S.D.N.Y. Oct. 14, 2011) (holding New York City's provision against public accommodation discrimination did not require an employer know or condone the discrimination in order for the employer to be liable for the discriminatory conduct of its employee); *Henderson v. Steak N Shake, Inc.*, No. S-9735, 1999 WL 33252627, at *10 (Ill. Human Rights Comm'n Mar. 24, 1999)

(refusing to “graft a ‘notification’ requirement onto [the] Complainant’s burden of proof in a public accommodations case”).

Further, as a matter of public policy, the *Glasgow* standard for holding employer’s liable for the acts of its employees in employment discrimination cases should not be transferred to the public accommodation context. *See Arguello v. Conoco, Inc.*, 207 F.3d 803, 810 (5th Cir. 2000) (rejecting the workplace comparison because “in a public accommodation case . . . , a rule that only actions by supervisors are imputed to the employer would result, in most cases, in a no liability rule”). The relationship between two co-workers is different than the relationship between an employee and a member of the public. *Craig*, 1995 WL 907560, at *9. While an employee may not consider a co-worker to be an agent of the employer, an employee who harasses a customer because of the person’s membership in a protected class acts as an agent of the public accommodation. *Id. See also Callwood v. Dave & Buster’s, Inc.*, 98 F. Supp. 2d 694, 706 (D. Md. 2000) (noting in the public accommodation context, “the interactions of a highly mobile public with [sales staff] are necessarily ad hoc and transient, [and] are almost never with higher-ranking personnel of the enterprise”). Placing the burden on the public accommodation incentivizes the owner of the public accommodation to take the strongest possible affirmative measures to prevent the hiring and retention of employees who engage in

discriminatory acts. *Totem Taxi, Inc. v. N.Y. Human Rights Appeal Bd.*, 65 N.Y.2d 300, 308 (1985) (Alexander, J., concurring).

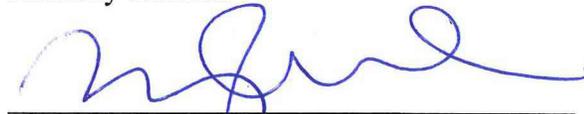
The Legislature apparently agreed with this policy: in places of public accommodation, the WLAD does not require a place of public accommodation authorize or know of its employee's discriminatory conduct before the business may be liable. In prohibiting any "employee" from discriminating in a public accommodation, the WLAD explicitly requires the public accommodation, rather than the innocent victim of discrimination, to bear the costs of its employee's discrimination.

VI. CONCLUSION

The Attorney General respectfully requests that the Court recognize that (1) the WLAD prohibits sexual harassment in a place of public accommodation, (2) the *Fell* standard that applies to race, national origin, and disability discrimination claims in a place of public accommodation is also the standard applicable to sex discrimination in a place of public accommodation.

RESPECTFULLY SUBMITTED this 12th day of December, 2016.

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CERTIFICATE OF SERVICE

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