

Washington Supreme Court Confirms Higher Standard for Harassment at a “Place of Public Accommodation”

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Under the Washington State Law Against Discrimination (“WLAD”), the statute prohibits “places of public accommodation” discriminating against individuals on the basis of sex, race, national origin, and sexual orientation. RCW 49.60.215. “Places of public accommodation” is broadly defined and includes all facilities or businesses used by or open to the public. Sexual harassment is a form of sex discrimination prohibited under the WLAD.

On January 31, 2019, the Washington Supreme Court confirmed there is a higher standard for acts of sexual harassment committed in places of public accommodation. In *Floeting v. Group Health, Inc.*, 192 Wn.2d 848, 434 P.3d 39 (Wash. Sup. Ct. 2019), the Court held that *employers are strictly liable for the actions of even non-management employees who harass customers or members of the public in places of public accommodation.*

The test for showing sexual harassment in a place of public accommodation requires that the:

1. The member of the public is a member of a protected class;
2. Employer’s establishment is a place of public accommodation;
3. Employer discriminated against the customer or member of the public when it did not treat him/her in a manner comparable to the treatment it provides to persons outside of that class; and
4. Person’s protected status was a substantial factor that caused the discrimination.

To be actionable, the Court held that the discriminatory conduct “must be of a type, or to a degree, that a reasonable person who is a member of the plaintiff’s protected class, under the same circumstances, would feel discriminated against. *This is an objective standard.*” *Id.* at 858 (emphasis in original). Under this “reasonable person” standard, it seems that a single incident could result in liability.

In contrast, employers have several opportunities to show they were not at fault in cases of employee workplace harassment under the WLAD. For example, employer can show that:

1. The conduct did not affect the terms or conditions of employment;
2. The harassment was not severe or pervasive;
3. That the employer did not authorize, know of, or have the ability to know of the harassment or, if it did,
4. The employer took reasonable prompt and corrective action.

The majority opinion stated the strict liability standard should motivate employers in public accommodations to implement quality training and supervision as well as effective procedures for reporting harassment and/or discrimination.



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In this zero-tolerance context, employers should obtain counsel to re-evaluate anti-harassment and anti-discrimination policies to highlight public accommodation issues.

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