No. 88062-0

SUPREME COURT OF THE STATE OF WASHINGTON

James Kumar, Raveer Singh, Asegedew Gefe, and Abbas Kosymov,

Petitioners

v.

GATE GOURMET, INC.,

Respondent

AMICI CURIAE BRIEF
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
AMERICAN CIVIL LIBERTIES UNION - WASHINGTON

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I. INTRODUCTION

The Plaintiffs in this case are members of various religions. They filed a class action claim alleging *inter alia* that their employer prohibited them from bringing their own food and at the same time failed to provide them meals that meet the dietary requirements of their sincerely held religious beliefs, and therefore failed to provide them with religious accommodations in violation of the Washington Law Against Discrimination ("WLAD"), RCW 49.60, *et seq*. Relying upon *Short v. Battle Ground School District*, 169 Wn. App. 188, 279 P.3d 902 (2012), the trial court ruled that the WLAD did not provide a claim for religious accommodation, and dismissed the lawsuit for failure to state a claim upon which relief can be granted. CR 12(12)(6). This Court granted direct review to determine "[w]hether an action may be brought against an employer under Washington Law Against Discrimination for failure to accommodate employees religious practices."

For the reasons stated below, this Court should reverse the trial court and overrule the Court of Appeals decision in *Battle Ground*. The Court should recognize that the WLAD established a claim for religious accommodation within the context of employment, and adopt the federal standards for proving such claims. The Court should remand for the parties to further develop the record so it can be determined whether religious accommodations are available to the plaintiffs under those standards. Amici Curiae takes no position on the ultimate resolution of the merits.

II. INTEREST OF AMICI

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of approximately 150 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life.

The American Civil Liberties Union of Washington (ACLU-WA) is a statewide, nonprofit, nonpartisan organization with over 20,000 members that is dedicated to constitutional principles of liberty and equality. The ACLU-WA has long been committed to the defense and preservation of civil liberties, including the right to be free from unlawful discrimination, whether the discrimination occurs in the workplace or in other contexts.

III. SUMMARY OF ARGUMENT

A survey reported in the *Los Angeles Times* on August 30, 2013 reveals that "[m]ore than a third of American workers say they have seen or personally experienced problems with religion not being properly accommodated in the workplace, ..." *See* Alpert, Emily: *Poll Finds Problems Accommodating Religion at Work,* L.A. Times, August 30, 2013, available at http://touch.latimes.com /#section /-1/article/p2p-77217568/. The survey found "that the most commonly reported problems included being required to work on a religious holiday or attending company events that

didn't include kosher, halal or vegetarian meals." *Id.* In addition to those issues, a substantial number of federal accommodation opinions address the manner of religious dress or appearance.[1] While the standards to be applied for a claim of religious accommodation and the application of those standards to individual cases might be fairly debatable, the public interest in recognizing the existence of the claim for religious accommodation at work is not fairly debatable.

Indeed, Congress long ago recognized and acted to protect this public interest. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of religion. 42 U.S.C. § 2000e-2(a)(1). "Religion" is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably

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[1] *E.g., EEOC v. Alamo Rent-A-Car LLC,* 432 F. Supp.2d 1006, 1016 (D. Ariz. 2006)(rejecting as "pure speculation" the employer's assertion that accommodating Plaintiff's request to wear a head covering at the rental counter might impose a cost on Alamo by opening the floodgates to others violating its uniform policy); *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984) (affirming summary judgment for employer that refused to exempt a Sikh employee from its policy that all machinists be clean-shaven based on the necessity of wearing a respirator with a gas-tight face seal to prevent exposure to toxic gases); *EEOC v. Oak-Rite Mfg. Corp.,* 2001 WL 1168156 (S.D. Ind. Aug. 27, 2001)(religious accommodation to wear modest skirts and dresses, as opposed to pants, created an undue hardship where employer required long pants in its metal-working factory for safety reasons); *Finnie v. Lee County,* 907 F. Supp.2d 750, 788 (N.D. Miss. 2012)("Title VII does not require that safety be subordinated to the religious beliefs of an employee")(citing cases). *See generally*, Aslam Sadia, *Hijab in the Workplace: Why Title VII Does Not Adequately Protect Employees from Discrimination on the Basis of Religious Dress and Appearance,* 80 UMKC L. Rev. 221 (2011-2012).

accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Under Title VII, a plaintiff generally has an obligation to establish a prima facie case. Once that is established, the burden shifts to the employer to prove that an accommodation would be an undue hardship. 42 U.S.C. § 2000e(j). "Undue hardship" is created when an accommodation "results in more than a de minimis cost to the employer." *See TWA, Inc. v. Hardison,* 432 U.S. 63, 84 (1977); *Ansonia Bd. of Edna v. Philbrook,* 479 U.S. 60, 67 (1986). Most cases decided under federal law turn on the issue of undue hardship.

The Washington legislature likewise prohibited discrimination on the basis of religion through its enactment of the WLAD. RCW 49.60.180. Although the state statute does not specifically reference religious accommodation in the workplace, it need not do so in order to require such accommodation. For example, the WLAD prohibits gender discrimination in all its forms. Although neither the statute nor the administrative regulations specifically reference sexual harassment, no one questions that sexual harassment is nevertheless prohibited by the WLAD. The statute does not specifically reference disparate impact, but no one seriously questions that disparate impact within the employment context is prohibited by the WLAD. Likewise, the WLAD prohibits religious discrimination in all its forms, including the failure to accommodate sincerely held religious beliefs.

The WLAD mandates that "[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020. The statute also explicitly incorporates "any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, ..." RCW 49.60.030(2). Religious accommodation is a "remedy" authorized by Title VII and therefore incorporated by reference in the WLAD. The right at issue in this case is the right to be free from religious discrimination at work. One remedy to prevent a violation of that right is reasonable accommodation.

Given the statute's broad remedial purpose, it is difficult to imagine that the Legislature intended to exclude religious accommodation from its coverage. Indeed, the Washington State Human Rights Commission ("HRC") has consistently recognized employment-related religious accommodation claims. *See* HRC Amicus Brief.

The failure to recognize a claim for religious accommodation under the WLAD would leave a gaping hole in the coverage made available by the statute. The WLAD explicitly recognizes that "discrimination threatens not only the rights and proper privileges of [Washington's] inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. Consistent with that recognition, this Court should rule that the WLAD provides a claim for religious accommodation within the context of employment.

This case was decided by the trial court on a motion to dismiss under CR 12(b)(6). As a consequence, the record is not developed. It is unclear to what extent, if any, the parties engaged in the interactive process to determine whether there exists a reasonable accommodation other than employer meal preparation. It is unclear, for example, whether employees could have left the security-restricted areas of the airport to eat meals brought from home, and what accommodations, if any, would be required under those circumstances. This case should be remanded with instructions to more fully develop the record.

IV. ARGUMENT

A. Title VII Recognizes a Claim for Failure to Make Reasonable Religious Accommodation at the Workplace.

Title VII prohibits as an unlawful employment practice the discrimination against an employee because of the employee's religion. 42 U.S.C. § 2000e-2(a)(1). "Religion" is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).[2] The Ninth Circuit

[2] The failure to accommodate religious beliefs is distinct from the disparate treatment on the basis of religion. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004)("A plaintiff who fails to raise a reasonable inference of disparate treatment on account of religion may nonetheless show that his employer violated its affirmative duty under Title VII to reasonably accommodate employees' religious beliefs") (citing *Trans*

employs a two-step framework to analyze claims alleging failure of religious accommodation under Title VII. *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 681 (9th Cir. 1998). Initially, a plaintiff must establish a prima facie case by demonstrating that (1) she had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) she informed her employer of the belief and conflict; and (3) the employer threatened her or subjected her to discriminatory treatment, including discharge, because of her inability to fulfill the job requirements. *Id.* (citing *Heller v. EBB Auto. Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993)).[3] If the plaintiff establishes her prima facie case, the burden shifts to the employer to show one of two things: (1) "that it initiated good faith efforts to accommodate reasonably the employee's religious practices;" or (2) "that it could not reasonably accommodate the employee without undue hardship." *Tiano,* 139 F.3d at 681.

The employer must show that it engaged in an interactive process: "Bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of

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World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977)).

[3] "An employee need only inform his employer about his religious needs for the employer to understand the conflict between the employer's expectations and the employee's religious practices." *Lawson v. Washington*, 296 F. 3d 799, 804 (9th Cir. 2002) (citing *Heller*, 8 F.3d at 1439). *See also Brown v. Polk County,* 61 F.3d 650, 654 (8th Cir.1995) (rejecting an employer's claim that an employee may not assert Title VII protections because the employee did not explicitly ask for a religious accommodation) (citing *Heller*, 8 F.3d at 1439).

the employer's business." *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 69, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986). The employer must demonstrate that it made "some initial step to reasonably accommodate the religious belief of Plaintiff or show that no reasonable accommodation was possible without undue burden." *Heller*, 8 F.3d at 1440 (internal citation omitted). This obligation requires, at a minimum, that the employer "negotiate with the employee in an effort reasonably to accommodate the employee's religious belief." *Id.* (internal citation omitted). If negotiations between employee and employer "do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so." *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996) (citing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988)). *See also Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486-87 (10th Cir. 1989)(holding that an employer who has made no efforts to accommodate the religious beliefs of an employee or applicant before taking action against him may only prevail if it shows that no accommodation could have been made without undue hardship); *Proctor v. Consolidated Freightways Corp.*, 795 F.2d 1472, 1476 (9th Cir. 1986) ("[w]hether an employer has met its statutory burden to initiate a good faith effort to accommodate an employee's beliefs is a question of fact").

"Undue hardship" is created when an accommodation "results in more

than a *de minimis* cost to the employer." *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996) (citing *Ansonia Bd. of Edna v. Philbrook*, 479 U.S. 60, 67, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986); *TWA, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977)). "A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of 'actual imposition on co-workers or disruption of the work routine.'" *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981)(quoting *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406-07 (9th Cir. 1978)).[4] The EEOC explains the

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[4] *See also Peterson v. Hewlett-Packard Co.*, 358 F. 3d 599, 607 (9th Cir. 2004) ("Complete harmony in the workplace is not an objective of Title VII. If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed"); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975)("[w]e are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted"); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989) (finding Defendant's argument that it would incur increased risk of tort liability for hiring a driver who uses peyote in religious ceremonies too speculative); *Brown v. Polk County, Iowa*, 61 F.3d 650, 655 (8th Cir. 1995)(finding that the defendants' examples of the burden they would have to bear due to the Plaintiff's spontaneous prayers and isolated references to Christian belief were insufficiently real and too hypothetical to satisfy the standard required to show undue hardship); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406-07 (9th Cir. 1978) (finding the defendant's unofficial and unscientific polls regarding employee dissatisfaction with persons who received different treatment speculative), *cert. denied*, 439 U.S. 1072 (1979); *Anderson v. General Dynamics Convair*, 589 F.2d 397, 402 (9th Cir. 1978)(stating that undue hardship requires more than proof of co-worker's unhappiness with a particular accommodation; the defendant must show an actual imposition on co-workers or disruption of the work routine); *Cook v.*

general contours of undue hardship:

> To establish undue hardship, the employer must demonstrate that the accommodation would require more than de minimis cost. Factors to be considered are "the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation." Generally, the payment of administrative costs necessary for an accommodation, such as costs associated with rearranging schedules and recording substitutions for payroll purposes or infrequent or temporary payment of premium wages (e.g., overtime rates) while a more permanent accommodation is sought, will not constitute more than de minimis cost, whereas the regular payment of premium wages or the hiring of additional employees to provide an accommodation will generally cause an undue hardship to the employer. "[T]he Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing reasonable accommodation."
>
> Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work. Whether the proposed accommodation conflicts with another law will also be considered.

EEOC Compliance Manual, Section 12-IVB2 (citations omitted).[5] It creates an undue hardship under Title VII when accommodating an employee's

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Lindsay Olive Growers, 911 F.2d 233, 241 (9th Cir. 1990)("Allowing lateral transfers or changes of job assignments constitutes a reasonable accommodation").

[5] *See* http://www.eeoc.gov/policy/docs/religion.html#_Toc203359525.

religious beliefs would require the employer to violate federal or state law. *Sutton v. Providence St. Joseph Medical Center,* 192 F.3d 826, 830-31 (9th Cir. 1999).

B. Title VII and ADA Standards for Accommodation Differ.

"Title VII's obligation to make a reasonable accommodation of religious practices should not be confused with the obligation imposed by the Americans With Disabilities Act ("ADA") to make reasonable accommodation of disabilities." Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J. 1, 6-7 (1996) (citing *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977)).

Under Title VII, an employer can satisfy this burden if the cost of the accommodation is more than *de minimis*. *TWA, Inc. v. Hardison, supra.* Under the ADA, an "undue hardship" is defined as "an action requiring significant difficulty or expense." *See* 42 U.S.C. §12111(10)(A). Determining whether an accommodation would involve undue hardship requires an examination of the nature and cost of the accommodation, the overall impact of the accommodation on the facility, the overall impact of the accommodation on the covered entity, and the type of operation of the covered entity, including the composition, structure, and functions of the

entity's workforce. *Id.* at § 12111(10)(B).[6] In stark contrast to the ADA's reasonable accommodation requirement, which has been interpreted broadly, the obligation under Title VII is "very slight." *See Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J., at 7.

C. The WLAD Recognizes a Claim for Failure to Make Reasonable Religious Accommodation.

1. *Short v. Battle Ground School District* should be overruled.

In *Short v. Battle Ground School District,* 169 Wn. App. 188, 279 P.3d 902 (2012), the plaintiff was a devout Christian who professed deeply held religious beliefs, and who reported to the superintendent of the school district. She claimed that lying would violate her religious beliefs. During a meeting with the plaintiff and another employee, the superintendent ordered that neither could discuss the substance of the meeting with anyone and in particular with an independent contractor. The superintendent stated that if the contractor inquired about the meeting, the plaintiff should make something up - lie. The plaintiff stated that she would refuse to lie. Thereafter, the superintendent allegedly harassed the plaintiff, who (after consulting with members of her church) eventually resigned. The plaintiff

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[6] Under the ADA, the issue of undue hardship requires a "fact-specific, individualized inquiry." *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999). "In the summary judgment context, a court should weigh the risks and alternatives, including possible hardships on the employer, to determine whether a genuine issue of material fact exists as to the reasonableness of the accommodation." *Id.* (citing *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 752 (9th Cir. 1998)); *see also Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997).

consulting with members of her church) eventually resigned. The plaintiff sued the District alleging religious discrimination, failure to accommodate her religious beliefs, and retaliation under the Washington Law Against Discrimination. Summary judgment was granted for the defendant and the plaintiff appealed.

In summary, the Court of Appeals ruled: "[O]ur Supreme Court, our legislature, and the Washington State Human Rights Commission (HRC) have not formally recognized . . . a [religious accommodation] claim under WLAD. *Id.* at 196. "[W]e conclude that, where government branches tasked with establishing public policies relating to WLAD have remained silent, despite sweeping changes at the federal level, we cannot judicially promulgate legislation or administrative regulations to fill this void."[7] *Id.* at 203.

The Court of Appeals erred when it concluded that the absence of legislative or administrative regulations addressing religious accommodation forecloses the claim. The failure to provide religious accommodation is only one form of religious discrimination. The WLAD prohibits discrimination

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[7] In *Battle Ground*, the plaintiff pled two separate claims: religious discrimination and failure to accommodate. The Court of Appeals, however, refused to recognize two separate claims. Instead, the Court recognized a single federal religious discrimination claim with several different theories of liability including, disparate treatment, hostile work environment, and failure to accommodate religious beliefs. 169 Wn. App. at 198. The Court concluded that although the WLAD recognized a claim for religious discrimination, it did not recognize the "failure to accommodate theory of liability." *Id.*

to religious accommodation in the statute does not foreclose its coverage by the WLAD.

2. The WLAD prohibits religious discrimination in all its forms.

The eradication of illegal discrimination is the essential purpose of WLAD. *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-10, 898 P.2d 284 (1995); *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994). Toward that end, the WLAD protects against discrimination on the basis of a variety of protected classifications, including religion. *See* RCW 49.60.030(1). The legislative purpose of Washington's law against discrimination is set forth in the statute itself:

> 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 discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability ... are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. . . . .

RCW 49.60.010. The WLAD provides that "[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020. Given the broad remedial purposes of the statute, it is

difficult to imagine that the legislature intended to exclude religious accommodation in the workplace from the statute's coverage.

The WLAD need not specifically reference religious accommodation in order for it to be protected by the statute. For example, the WLAD includes sex, race, and disability as protected classifications. Both the statute and the administrative regulations fail, however, to explicitly reference sexual, racial or disability harassment. Nor do they reference the term "hostile work environment." No one seriously doubts, however, that sexual, racial, and disability harassment is illegal under the WLAD. *See Glasgow v. Georgia-Pacific,* 103 Wn.2d 401, 693 P. 2d 708 (1985)(discussing elements for sexual harassment); *Fisher v. Tacoma Sch. Dist. No. 10,* 53 Wn. App. 591, 769 P.2d 318 (1989) (applying *Glasgow* factors to race-based harassment), *review denied,* 112 Wn.2d 1027 (1989); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P. 3d 611 (2002)("We hold that the antidiscrimination statute supports a disability based hostile work environment claim, . . ."). The WLAD and its administrative regulations do not reference disparate impact. It is nevertheless clear that disparate impact within the context of employment is illegal under Washington law. *Fahn v. Cowlitz Cy.*, 93 Wn.2d 368, 378, 610 P.2d 857 (1980)(Discrimination claims under RCW 49.60 may be brought under "disparate impact" or "disparate treatment" theories); *Shannon v. Pay'n Save Corp.*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985). Both theories may apply to the same set of facts. *Shannon*, at 732 (citing *Page v. U.S. Indus., Inc.*, 726

F.2d 1038, 1045 (5th Cir. 1984); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977)).

Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.* prohibits sex discrimination by recipients of federal education funding. Despite the lack of any specific reference to retaliation, the U.S. Supreme Court has held that retaliation is a form of discrimination prohibited by Title IX: "Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act." *Jackson v. Birmingham Bd. of Ed.*, 544 US 167, 173-74 (2005). The U.S. Supreme Court rejected the exact same reasoning relied upon by the Washington Court of Appeals in *Battle Ground*: "The Court of Appeals' conclusion that Title IX does not prohibit retaliation because the 'statute makes no mention of retaliation,' . . . , ignores the import of our repeated holdings construing 'discrimination' under Title IX broadly. Though the statute does not mention sexual harassment, we have held that sexual harassment is intentional discrimination encompassed by Title IX's private right of action." *Id.* at 174.[8]

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[8] Title VII prohibits all forms of discrimination, even though they are not all specifically referenced. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986)(Title VII does not specifically reference harassment, but the statute was designed to "strike at the entire spectrum" of discrimination, including sexual harassment).

Similarly, religious discrimination is prohibited in all its forms, and religious accommodation need not be specifically referenced by the WLAD to be protected.

3. The WLAD incorporates by reference remedies made available by Title VII.

The WLAD explicitly incorporates remedies made available under Title VII.

> 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, 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....

RCW 49.60.030(2). The right at issue in this case is the right to be free from religious discrimination. One remedy for a violation of that right is reasonable accommodation, which is a "remedy" authorized by Title VII and therefore incorporated by reference in the WLAD.

In *Blaney v. International Ass'n of Machinists,* 151 Wn.2d 203, 87 P. 3d 757 (2004), the Court relied upon RCW 49.60.030(2) to incorporate the federal remedy which allowed for an offset for federal income tax consequences. *Id.* at 214. The Court also resolved a previously recognized ambiguity in the interpretation of RCW 49.60.030(2). "We now resolve any ambiguity by holding that the 'any other appropriate remedy' clause stands on

its own as a third WLAD remedy." *Id.* As is equally applicable to finding a religious accommodation remedy, this Court explained its rationale:

> The structure of RCW 49.60.030(2) supports this reading of the statute; "any other' appropriate remedy" relates to "together with," logically providing a catchall remedy provision in addition to injunctive relief, actual damages, and cost of suit. Moreover, this reading coincides with the liberal construction WLAD requires, RCW 49.60.020, in order to effectuate its purposes of deterrence and eradication of discrimination.

Id. See also Xieng v. Peoples National Bank, 120 Wn.2d 512, 528, 844 P. 2d 389 (1993)("It is clear that RCW 49.60.030(2) would now permit an award of expert witness fees as a remedy explicitly 'authorized by ... [§ 2000e-5(k) of] the United States Civil Rights Act of 1964]', as amended by the Civil Rights Act of 1991"). Religious accommodation at the workplace is a remedy incorporated in the WLAD by reference to Title VII.

D. The Record Is Not Sufficiently Developed - Factual Questions Remain.

A plaintiff must establish a prima facie case by demonstrating that (1) she had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) she informed her employer of the belief and conflict; and (3) the employer threatened her or subjected her to discriminatory treatment, including discharge, because of her inability to fulfill the job requirements. *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 681 (9th Cir.1998).

The Plaintiffs maintain that the Defendant's failure to provide meals that conform to their religious dietary restrictions violates their right to reasonable religious accommodation. It appears uncontroversial that many religions require dietary restrictions and that those restrictions are the product of sincerely held religious beliefs. It also appears clear that the Plaintiffs have informed the Defendant of their religious beliefs and the need for accommodation.

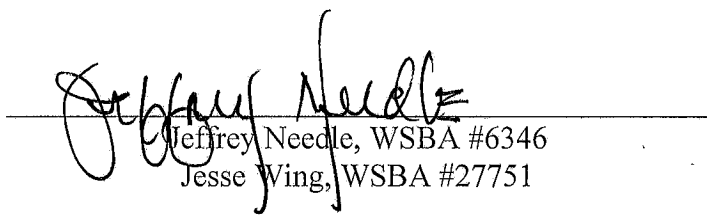
The Plaintiffs maintain that employer-prepared meals are the only reasonable accommodation because they could not bring food prepared at home to work as a result of airport security. Even if the cost of preparing those meals consistent with the dietary beliefs of a variety of religions would be more than *de minimis*, and therefore an undue hardship, other viable accommodations may exist. The record is silent, for example, about whether there is sufficient time for Plaintiffs to pass through airport security to eat meals prepared at home consistent with their religious beliefs, about whether any additional accommodation would be required for that purpose, and about the cost, if any, for such accommodation. The record is silent as to what extent the parties engaged in the interactive process. Only on a more developed record can a court determine whether a reasonable accommodation is available and whether it would create an undue hardship.

IV. CONCLUSION

The Court should rule that the WLAD recognizes a claim for failure to accommodate sincerely held religious beliefs within the context of employment. It should adopt the existing standards recognized under federal law, and remand for an opportunity to develop the record.

Respectfully submitted this 20th day of September, 2013.

WASHINGTON EMPLOYMENTS LAWYERS ASSOCIATION
AMERICAN CIVIL LIBERTIES UNION - WASHINGTON



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