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THE HONORABLE SUSAN AMINI
Department 20
Noted for Consideration: April 5, 2019 @ 10:00 a.m.
With Oral Argument

SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

ARI ROBBINS,

Plaintiff,

v.

SWEDISH HEALTH SERVICES, INC.;
SWEDISH PLASTICS AND AESTHETICS;
PROVIDENCE HEALTH AND SERVICES;
and MARY PETERS, M.D.,

Defendants.

NO. 17-2-32900-2 SEA

**PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

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& the Washington State Law Against Discrimination* (2014)3

1 **I. INTRODUCTION**

2 Plaintiff Ari Robbins filed this lawsuit after defendant Swedish Plastics and Aesthetics, a
3 department of defendant Swedish Health Services, Inc. (referred to collectively as “Swedish”),
4 canceled his gender confirmation surgery because he is transgender. When Mr. Robbins met with
5 Swedish plastic and reconstructive surgeon Dr. Mary Lee Peters on December 2, 2016, she
6 agreed to perform the chest reconstruction surgery that Mr. Robbins was medically prescribed to
7 treat his gender dysphoria. Swedish reserved a time for the surgery on March 15, 2017, a date
8 that accommodated Mr. Robbins’s law school commitments and worked with Dr. Peters’s
9 schedule. Swedish abruptly cancelled the surgery on February 21, 2017, informing Mr. Robbins
10 and his referring physician that it was returning the referral because it claimed Dr. Peters did not
11 have the necessary expertise to take on transgender patients. Mr. Robbins had to scramble to find
12 another surgeon who accepted his insurance and could perform the surgery. He ultimately had to
13 wait over five months and travel to Idaho for the surgery.

14 Swedish admits that the only reason it canceled Mr. Robbins’s surgery was because it
15 instituted temporary ban on gender confirmation surgeries, which Swedish described as a
16 “pause.” In fact, Swedish “returned the referrals” for two additional transgender individuals
17 because of the “pause.” Swedish did not return the referrals or “pause” the surgeries of any
18 patients who are not transgender. And both Dr. Peters and Swedish have confirmed that Dr. Peters
19 was qualified to perform the surgery. Mr. Robbins sued Swedish and Dr. Peters¹ for violations
20 of the Washington Law Against Discrimination (WLAD), which makes it illegal to discriminate
21 against transgender people in places of public accommodation, and the Washington Consumer
22 Protection Act (CPA). He seeks injunctive relief and an award of damages, including the travel
23 and lodging costs he incurred for the rescheduled surgery in Idaho and compensation for the
24 distress and mental anguish he experienced.

25
26 ¹ Defendant Providence Health and Services was dismissed by stipulation of the parties on
27 February 20, 2019.

1 Mr. Robbins now moves for partial summary judgment of his claims against the two
2 Swedish defendants.² The undisputed facts establish a prima facie violation of the WLAD
3 because (1) Mr. Robbins is a member of a protected class, (2) Swedish is a place of public
4 accommodation, (3) Swedish discriminated against Mr. Robbins by not treating him in a manner
5 comparable to its treatment of non-transgender people, and (4) Plaintiff's protected status as a
6 transgender man was a substantial factor in the discrimination. *See Floeting v. Group Health*
7 *Coop.*, 434 P.3d 39, 41 (Wash. 2019). In addition, violations of the WLAD constitute a per se
8 violation of the CPA, establishing several elements of the statute as a matter of law. RCW
9 49.60.030(3). There is also no genuine issue of material fact as to the remaining elements of the
10 CPA. Mr. Robbins therefore requests that the Court find that Swedish violated the WLAD and
11 the CPA and grant his motion for partial summary judgment.

12 II. RELIEF REQUESTED

13 Plaintiff requests that the Court grant partial summary judgment in his favor and find that
14 the undisputed facts establish that defendants Swedish Health Services, Inc. and its department,
15 Swedish Plastic and Aesthetics, violated the Washington Law Against Discrimination and the
16 Washington Consumer Protection Act.

17 III. EVIDENCE RELIED UPON

18 Plaintiff relies upon the Declaration of McKean Evans and attached documents, as well
19 as the files and records in this matter.

20 IV. STATEMENT OF FACTS

21 A. Swedish schedules Mr. Robbins's chest reconstruction surgery.

22 Mr. Robbins is a 31-year-old transgender man. The term transgender "covers a broad
23 range of people who experience and/or express their gender differently from what most people
24 expect. They may express themselves as the gender that does not match the sex listed on their
25 original birth certificate, or they may physically change their sex through medical treatment."
26

27 ² Plaintiff is not seeking summary judgment as to Dr. Mary Lee Peters.

1 Wash. Human Rights Comm'n, *Guide to Sexual Orientation & Gender Identity & the*
2 *Washington State Law Against Discrimination* at 2 (2014). Mr. Robbins was a law student when
3 the events relevant to this lawsuit occurred and now works for the Washington Attorney General.
4 Ex. 1 at 5:24-7:17; Ex. 2.³

5 Mr. Robbins's primary care provider, Dr. Karen Johnson at Country Doctor, referred him
6 to Swedish for chest reconstruction surgery. Ex. 3 at SWEDISH 175-179. Chest reconstruction
7 surgery is a common form of treatment for gender dysphoria, the medical diagnosis for the
8 incongruence between one's gender identity and one's sex assigned at birth. On December 2,
9 2016, Mr. Robbins met with Mary Peters, M.D., a plastic and reconstructive surgeon employed
10 by Swedish,⁴ to consult about the surgery. Ex. 5 at 15:7-16:10, 88:15-89:11; Ex. 1 at 63:10-
11 65:20; *see also* Ex. 6. During the consultation, Dr. Peters described the procedure she
12 recommended for Mr. Robbins's chest reconstruction surgery. Ex. 5 at 59:2-60:15. Dr. Peters has
13 performed more than 100 similar chest reconstruction surgeries in her career and has performed
14 approximately 30 gender confirming surgeries on transgender patients over the last 20 years,
15 including least 5 in the last two years. Ex. 7 (Answer to Interrogatory No. 4); Ex. 8 (Answer to
16 Interrogatory No. 15); Ex. 5 at 61:3-65:4, 78:20-25. Dr. Peters showed Mr. Robbins a binder of
17 examples of similar surgeries she had performed in the past. Ex. 5 at 66:19-21. Dr. Peters testified
18 that she felt competent to perform Mr. Robbins's surgery. *Id.* at 65:5-8; 166:19-21; 70:7-12; *see*
19 *also id.* at 83:2-13.

20 Swedish scheduled Mr. Robbins's surgery for March 15, 2017, by placing a hold on Dr.
21 Peters' schedule, and submitted a preauthorization form to Mr. Robbins's insurance company.
22 Ex. 9; Ex. 10 at 9:3-10:25. The March 15 surgery date was selected because Dr. Peters had time
23 on her schedule and it aligned with Mr. Robbins's short window of opportunity for his surgery.
24

25 ³ Unless otherwise noted, all exhibits are attached to the Declaration of McKean Evans.

26 ⁴ Defendant Swedish Plastics and Aesthetics is a department of defendant Swedish Health
27 Services, Inc. *See, e.g.*, Ex. 4 at 8:7-10. They are referred to collectively as "Swedish" for
purposes of this motion.

1 Ex. 10 at 20:2-11. Because Mr. Robbins’s insurance company would only preauthorize within a
2 30-day window, on February 15, 2017, Swedish re-submitted the preauthorization request to Mr.
3 Robbins’s insurance company for the March 15 surgery. Ex. 11; Ex. 10 at 31:22-33:17.

4 **B. Swedish cancels Mr. Robbins’s surgery.**

5 Three weeks before the scheduled surgery, on February 21, 2017, Swedish patient care
6 coordinator April Jackson called Mr. Robbins to cancel the surgery. Ms. Jackson left a voice mail
7 stating that Dr. Peters has “rescinded the referral meaning she’s sent it back to the primary care
8 provider for you to be referred elsewhere” because “[s]he just feels like she just does not have
9 the expertise to take on, um, the case.” Ex. 12; Ex. 13 at 120:20-121:16, 126:23-127:1; Ex. 1 at
10 92:2-93:23. Mr. Robbins promptly returned the call to obtain more information. Ex. 1 at 94:3-
11 13. Ms. Jackson told him the surgery was canceled because Dr. Peters did not have the expertise
12 to work with transgender people and mentioned certain documentation—relating to the Tanner
13 index—that was in fact not required for Mr. Robbins’s surgery. *Id.* at 94:14-96:17; *see also* Ex.
14 5 at 74:8-75:1 (explaining that the Tanner index or scale “is a system used by pediatricians to
15 determine the stages of puberty” including breast development for women).

16 Swedish also sent Country Doctor, Mr. Robbins’s primary care doctor, a fax stating, “We
17 regret to inform you after discussion with both Dr. Peters and the Plastics Manager, Dr. Peters
18 has decided she does not have the expertise to take on Transgender patients.” Ex. 14; Ex. 13 at
19 92:2-95:13, 97:10-20, 193:14-18 (“So Dr. Peters said, Just send the referrals back to the PCP and
20 tell them I don’t have the expertise to serve these transgender patients like they should be. So I
21 want them to, you know, get better suited with a provider who does.”); *see also* Ex. 3 at
22 SWEDISH 177 (“[REDACTED]”).
23 Lisa Wolfendale, the Manager of Swedish Plastics and Aesthetics, confirmed that by sending a
24 referral back to the referring provider, Swedish was informing the provider that the patient would
25 not be treated at Swedish at that time. Ex. 4 at 65:17-66:8.

1 On the same day, Swedish returned the referrals for two additional transgender patients
2 referred to Swedish by Country Doctor. Ex. 14; Ex. 15 at SWEDISH 280; Ex. 13 at 117:1-6,
3 126:23-127:5, 194:22-195:23. Swedish also told those patients that their referrals were being
4 returned because Dr. Peters did not have the expertise to treat transgender patients. Ex. 13 at
5 195:4-196:1.

6 Swedish admits that the only reason Dr. Peters did not perform Mr. Robbins's surgery
7 was a self-described "pause" that Swedish implemented for gender confirmation surgeries. Ex.
8 10 at 31:2-20. During the "pause," Swedish banned the scheduling of new gender confirmation
9 consultations or surgeries for "approximately three months" starting in February 2017. Ex. 16
10 (Supplemental Answer to Interrogatory No. 6 and No. 9); Ex. 17 (at AROB. SWEDISH. PROD
11 0389) (" [REDACTED]
12 [REDACTED]
13 [REDACTED]"); Ex. 18 (at AROB. SWEDISH. PROD 0397) (" [REDACTED]
14 [REDACTED]."); Ex. 4 at 28:2-29:7 ("The
15 surgeons let us know that they just wanted to take a three-month pause"); Ex. 19 ([REDACTED]
16 [REDACTED]). Swedish did not "pause" new
17 referrals for patients who are not transgender. Ex. 4 at 74:12-14; Ex. 5 at 125:16-126:15. While
18 the term "pause" implies a delay in receiving services, the "pause" was in reality an outright
19 denial of care for the three transgender patients, including Mr. Robbins, whose referrals were
20 returned.

21 Swedish blamed the "pause" and cancellation of Mr. Robbins's surgery on Dr. Peters,
22 [REDACTED]
23 [REDACTED]. Ex. 20 (at AROB. SWEDISH. PROD 0397) (at; *see also* Ex. 4 at 48:22-
24 23. [REDACTED]
25 [REDACTED]
26 [REDACTED] Ex. 21 (at AROB. SWEDISH. PROD 0401). [REDACTED]
27

1 [REDACTED] *Id.* (“ [REDACTED]
2 [REDACTED]
3 [REDACTED]”).

4 **C. Mr. Robbins is forced to reschedule his surgery with a surgeon in Idaho.**

5 When Swedish abruptly canceled the surgery, Mr. Robbins had to scramble to find
6 another surgeon who would accept his insurance to perform the surgery. Mr. Robbins was eager
7 to have his surgery due to the emotional distress his chest was causing him and the physical
8 harms of binding. Ex. 1 at 46:22-49:20. He also wanted to ensure his surgery occurred before his
9 supporting insurance documentation expired. Ex. 22; Ex. 1 at 53:24-54:20, 103:10-105:12. Mr.
10 Robbins ultimately consulted with Dr. Geoffrey Stiller in May 2017—driving to Idaho during
11 his law school final exams—and spent four days recovering in a hotel after Dr. Stiller performed
12 the surgery in Idaho on August 14, 2017. Ex. 1 at 121:10-122:9, 146:23-148:22; *see also* Ex. 23
13 (“Reconstructive mammoplasty is not available from Seattle-area surgeons who accept
14 Washington State Medicaid coverage. Dr. Geoffrey Stiller of Linnea Cosmetic Surgery is
15 accredited and offers this procedure.”). Mr. Robbins incurred at least \$1,225.42 in travel and
16 lodging costs that would not have been necessary if his surgery had been performed at Swedish.
17 Ex. 24.

18 Swedish’s cancellation of Mr. Robbins’s surgery also disrupted his life, causing him
19 emotional harm and humiliation. He suffered acute distress as a result of his gender dysphoria
20 and the incongruence between his chest and his gender identity, including depressive thoughts
21 and anxiety. Ex. 25 at 3-4. The delay also required Mr. Robbins to continue engaging in
22 “binding,” the process of temporarily wrapping one’s chest to flatten the breast tissue to create a
23 masculine-looking chest. Binding is painful and caused Plaintiff shortness of breath, chest pain,
24 soreness, rashes, back pain and headaches. Binding also limited Plaintiff’s enjoyment of life
25 including making it difficult for him to use public dressing rooms, exercise, swim, or travel via
26 airplane. *Id.*; Ex. 1 at 46:22-49:20.

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V. STATEMENT OF ISSUES

1. Did Swedish violate the Washington Law Against Discrimination when it canceled Mr. Robbins’s chest reconstruction surgery because he is a transgender man?

2. Did Swedish violate the Washington Consumer Protection Act when it canceled Mr. Robbins’s chest reconstruction surgery because he is a transgender man?

VI. AUTHORITY AND ARGUMENT

Summary judgment is appropriate “where the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the party bringing the motion is entitled to judgment as a matter of law.” *Christen v. Lee*, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989). A motion for summary judgment should be granted “if reasonable persons, from all of the evidence, could reach but one conclusion.” *Id.*; *see also Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 203, 668 P.2d 571 (1983) (“The rationale underlying summary procedures is to eliminate trials where only questions of law remain to be determined.”).

A. The undisputed facts establish that Swedish violated the WLAD.

The WLAD protects all people in Washington State from discrimination based on sex and sexual orientation, which includes gender and gender identity as part of the statutory definition. RCW 49.60.040(25)-(26). The WLAD is liberally construed to “eradicate discrimination, including discrimination in places of public accommodation.” *Floeting v. Group Health Coop.*, 434 P.3d 39, 41 (Wash. 2019). The Washington Supreme Court recently reaffirmed that “[d]enial or deprivation of services on the basis of one’s protected class is an affront to personal dignity” and “[t]he ‘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.’” *Id.* at 42 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964)).

1 A plaintiff establishes a prima facie case of public accommodation discrimination by
2 proving that “(1) the plaintiff is a member of a protected class, (2) the defendant’s establishment
3 is a place of public accommodation, (3) the defendant discriminated against the plaintiff when it
4 did not treat the plaintiff in a manner comparable to the treatment it provides to persons outside
5 that class, and (4) the plaintiff’s protected status was a substantial factor that caused the
6 discrimination.” *Id.* at 41. As discussed below, the undisputed facts of this case establish a prima
7 facie case of public accommodation discrimination. While Swedish has the opportunity to prove
8 there was a nondiscriminatory reason for its actions, Swedish’s admissions foreclose that
9 possibility. Mr. Robbins is therefore entitled to summary judgment of his WLAD claim against
10 Swedish.

11 1. Plaintiff is a member of a protected class.

12 As a transgender man, Mr. Robbins is a member of a protected class. The WLAD
13 prohibits discrimination on the basis of sex and sexual orientation. RCW 49.60.030(1); RCW
14 49.60.040(26). “Sexual orientation” includes “gender expression or identity,” which “means
15 having or being perceived as having a gender identity, self-image, appearance, behavior, or
16 expression, whether or not that gender identity, self-image, appearance, behavior, or expression
17 is different from that traditionally associated with the sex assigned to that person at birth.” RCW
18 49.60.040(26); *see also* RCW 49.60.040(25) (“‘Sex’ means gender.”).

19 2. Swedish is a place of public accommodation.

20 Places of public accommodation include “any place ... or use of any property or
21 facilities ... for the benefit, use, or accommodation of those seeking health ... or where medical
22 services or care is made available.” RCW 49.60.040(2). Swedish admits that it operates a place
23 for the benefit, use, or accommodation of those seeking health and where medical services or
24 care is made available. Complaint ¶¶ 73-74; Answer ¶¶ 73-74.

1 3. Swedish discriminated against Plaintiff when it did not treat him in a manner
2 comparable to the treatment it provided to persons outside his protected class.

3 The WLAD “secures the right to ‘full enjoyment’ of any place of public accommodation,
4 including the right to purchase any service or commodity sold by any place of public
5 accommodation ‘without acts directly or indirectly causing persons of [a protected class] to be
6 treated as not welcome, accepted, desired, or solicited.’” *Floeting*, 434 P.3d at 41 (alteration in
7 original) (citing RCW 49.60.040(14)). The statute also “prohibits ‘any person or the *person’s*
8 *agent or employee* [from committing] an act which directly or indirectly results in any distinction,
9 restriction, or discrimination’ based on a person’s membership in a protected class.” *Id.*
10 (alteration in original) (citing RCW 49.60.215). The WLAD “imposes direct liability on
11 employers for the discriminatory conduct of their agents and employees.” *Id.* at 42. And the
12 statute’s “broad standard focuses the liability inquiry on whether *actions* resulted in
13 discrimination, not whether the proprietor of a place of public accommodation intended to
14 discriminate.” *Id.* at 41.

15 As the *Floeting* appellate court explained, the question of whether conduct is
16 discriminatory has both a subjective and objective component. *Floeting v. Group Health Coop.*,
17 200 Wn. App. 758, 774, 404 P.3d 559 (2017), *aff’d*, 434 P.3d 39 (Wash. 2019). The plaintiff
18 must subjectively perceive that he has been discriminated against and demonstrate that “a
19 reasonable person who is a member of the plaintiff’s protected class, under the same
20 circumstances, would feel discriminated against (as described in subsections .040(14) and
21 .215(1)).” *Id.* (citing RCW 49.60.040(14) & 49.60.215(1)).

22 The undisputed evidence in this case establishes both components. Plaintiff perceived
23 that he was being discriminated against when Swedish “returned the referral” for his surgery
24 because he is transgender. Ex. 1 at 97:2-17. A reasonable transgender person would feel
25 discriminated against in the same circumstances since Swedish told Mr. Robbins that it would
26 not perform his surgery because he is transgender. Ex. 12; Ex. 13 at 92:2-95:13, 97:10-20,
27 120:20-121:16, 126:23-127:1, 193:14-18; Ex. 1 at 92:2-96:17; Ex. 14 (“We regret to inform you

1 after discussion with both Dr. Peters and the Plastics Manager, Dr. Peters has decided she does
2 not have the expertise to take on Transgender patients.”). Swedish admitted that the only reason
3 Mr. Robbins’s surgery was canceled because of the “pause” Swedish implemented for gender
4 confirmation surgeries. Ex. 10 at 13:8-19; 31:16-20. In fact, Swedish “returned the referrals” for
5 two additional transgender individuals because of the “pause.” Ex. 14; Ex. 15 at SWEDISH 280;
6 Ex. 13 at 117:1-6, 126:23-127:5. Swedish’s “pause” did not extend to patients who are not
7 transgender. Ex. 4 at 74:12-14; Ex. 5 at 125:16-126:15.

8 While Swedish has said that it returned the referrals of transgender patients and “paused”
9 gender confirmation consultations and surgeries because Dr. Peters “lacked the expertise” to
10 perform them, Dr. Peters and Swedish confirmed that Dr. Peters was in fact qualified to perform
11 chest reconstruction surgeries on transgender patients. Ex. 5 at 65:5-8, 70:7-12, 90:15-91:1; *see*
12 *also id.* at 83:2-13; Ex. 4 at 67:6-13; *see also* Ex. 26 at 46:19-49:4, 67:7-19. Dr. Peters had
13 performed more than 100 similar surgeries in her career, including gender confirming surgeries.
14 Ex.7; Ex. 8; Ex. 5 at 61:3-65:4, 78:20-25.

15 4. Plaintiff’s protected status was a substantial factor causing the discrimination.

16 Swedish’s admissions establish that Plaintiff’s protected status was a substantial factor
17 causing the discrimination. *Floating*, 434 P.3d at 41. As the Washington Supreme Court has
18 explained, “[t]he causation requirement is based on the commonsense notion that if the alleged
19 discrimination results from factors other than anything the defendant did, the defendant has not
20 violated the Law Against Discrimination.” *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 640,
21 911 P.2d 1319 (1996). Swedish admits that it canceled Mr. Robbins’s surgery because he is
22 transgender and that there was no other reason for the cancellation. Ex. 10 at 31:16-20; *see also*
23 Ex. 5 at 24:12-241:7 (there was no medical reason for canceling Mr. Robbins’s surgery); Ex. 13
24 at 124:25-125:10 (insurance preauthorization was not a factor in canceling Mr. Robbins’s
25 surgery). Swedish did not “pause” referrals or surgeries of any patients who were not transgender.
26
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1 Ex. 4 at 74:12-14; Ex. 5 at 125:16-126:15. The causation requirement, like the other elements of
2 the WLAD, is therefore established by the undisputed facts of the case.

3 **B. The undisputed facts establish that Swedish violated the Washington CPA.**

4 Swedish's conduct also constitutes a violation of the CPA. The CPA declares that "unfair
5 or deceptive acts or practices in the conduct of any trade or commerce" are unlawful. RCW
6 19.86.020. The purpose of the law is to "complement the body of federal law governing restraints
7 of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to
8 protect the public and foster fair and honest competition." RCW 19.86.920. The CPA is to be
9 "liberally construed that its beneficial purposes may be served." *Id.*

10 The elements of a CPA claim are: (1) an unfair or deceptive act or practice; (2) occurring
11 in trade or commerce; (3) a public interest impact; (4) injury to plaintiff in his or her business or
12 property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105
13 Wn.2d 778, 780, 719 P.2d 531 (1986). A violation of the WLAD is a per se violation of the CPA,
14 satisfying the first and third elements—an unfair or deceptive act or practice and public interest
15 impact. RCW 49.60.030(3) ("any unfair practice prohibited by this chapter which is committed
16 in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86
17 RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not
18 reasonable in relation to the development and preservation of business, and is an unfair or
19 deceptive act in trade or commerce"). The remaining elements of the CPA are also satisfied as a
20 matter of law.

21 1. Swedish's cancellation of Mr. Robbins's surgery was unfair.

22 Swedish's act of public accommodation discrimination is a per se unfair practice under
23 the CPA. RCW 49.60.030(3); *see also Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939,
24 952, 946 P.2d 1242 (1997).

25 Even if it was not a per se unfair practice, Swedish's conduct satisfies this element of the
26 CPA. The CPA is intended to be flexible so it may "reach unfair or deceptive conduct that
27

1 inventively evades regulation” and because “[i]t is impossible to frame definitions which
2 embrace all unfair practices.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 48-49, 204
3 P.3d 885 (2009) (citation omitted). As a general rule, courts find an act to be unfair if it “offends
4 public policy as established by statutes or the common law,” is “unethical, oppressive, or
5 unscrupulous, among other things,” or “causes or is likely to cause substantial injury to
6 consumers which is not reasonably avoidable by consumers themselves and not outweighed by
7 countervailing benefits.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 786-87, 295 P.3d 1179
8 (2013) (citations omitted). But “[g]iven that there is ‘no limit to human inventiveness,’ courts as
9 well as legislatures must be able to determine whether an act or practice is unfair or deceptive to
10 fulfill the protective purposes of the CPA.” *Panag*, 166 Wn.2d at 48 (citation omitted).

11 Swedish’s cancellation of Mr. Robbins’s surgery was unfair because it offends public
12 policy established by state and federal law. *See* RCW 49.60.030(1); RCW 49.60.040(26); *Glenn*
13 *v. Brumby*, 663 F.3d 1312, 1315-20 (11th Cir. 2011) (holding that “discrimination against a
14 transgender individual because of her gender-nonconformity is sex discrimination” violating the
15 Equal Protection Clause, and citing cases); *see also Schwenk v. Hartford*, 204 F.3d 1187, 1201-
16 02 (9th Cir. 2000) (holding, in the context of the Gender Motivated Violence Act, that
17 transgender individuals may state viable sex discrimination claims). Swedish’s conduct also
18 caused substantial injury to Mr. Robbins because he had to delay his surgery, enduring painful
19 binding of his chest, depressive thoughts and anxiety in the interim, and incurred travel and
20 lodging costs to have the surgery performed in Idaho. Ex. 25 at 3-4; Ex. 1 at 46:22-49:20; Ex.
21 24. Mr. Robbins could not have avoided these injuries—in fact, he rescheduled his surgery as
22 soon as he was able to do so—and Swedish has identified no countervailing benefits that
23 outweigh the injuries he suffered.

24 2. Swedish’s act occurred in trade or commerce.

25 Conduct occurs “in trade or commerce” when it “directly or indirectly affects the people
26 of the state of Washington.” *Panag*, 166 Wn.2d at 39; *see also* RCW 19.86.010(2) (defining trade
27

1 and commerce to include “the sale of assets or services, and any commerce directly or indirectly
2 affecting the people of the state of Washington”). This element is intentionally broad “to bring
3 within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or
4 commerce.” *Hangman Ridge*, 105 Wn.2d at 785 (citation omitted). It does not require that a
5 plaintiff be in “a consumer or other business relationship” with the defendant. *Panag*, 166 Wn.2d
6 at 43. Swedish provides its surgical services to the public and its conduct therefore occurred in
7 trade or commerce.

8 3. Swedish’s act had a public interest impact.

9 Swedish’s violation of the WLAD establishes that its act had a public interest impact.
10 RCW 49.60.030(3). This element is satisfied by the undisputed facts even if it is not established
11 per se by Swedish’s violation of the WLAD. A plaintiff may establish that a defendant’s act “is
12 injurious to the public interest because it ... (a) [i]njured other persons; (b) had the capacity to
13 injure other persons; or (c) has the capacity to injure other persons.” RCW 19.86.093(3); *see also*
14 *Rush v. Blackburn*, 190 Wn. App. 945, 967-68, 361 P.3d 217 (2015). When the act involves the
15 provision of professional services, courts consider several factors:

16 Were the alleged acts committed in the course of defendant’s business? (2) Did defendant
17 advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff,
18 indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal
19 bargaining positions?

20 *Rush*, 190 Wn. App. at 968-69. These factors “represent indicia of an effect on public
21 interest” but “not one of these factors is dispositive, nor is it necessary that all be present.” *Id.* at
22 969 (quoting *Hangman Ridge*, 105 Wn.2d at 791). Consideration of these factors supports a
23 finding of public interest impact. Swedish’s cancellation of Mr. Robbins’s surgery occurred in
24 the course of its business, Swedish offers its services to the public in general, and Swedish and
25 Mr. Robbins occupied unequal bargaining positions.

1 4. Swedish’s act injured Mr. Robbins.

2 The CPA “is a remedial statute that defines ‘injury’ liberally to include when ‘the
3 plaintiff’s property interest or money is diminished ... even if the expenses caused by the
4 statutory violation are minimal.” *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1135 (9th Cir.
5 2016) (alteration in original) (quoting *Panag*, 166 Wn.2d at 57). The Washington Supreme Court
6 has explained that “[t]he injury involved need not be great’, or even quantifiable.” *Ambach v.*
7 *French*, 167 Wn.2d 167, 171, 216 P.3d 405 (2009) (alteration in original) (quoting *Hangman*
8 *Ridge*, 167 Wn.2d at 780). Mr. Robbins incurred travel and lodging costs, totaling at least
9 \$1,225.42, that would not have been necessary if his surgery had been performed at Swedish. Ex.
10 24.

11 5. Swedish’s act caused Mr. Robbins’s injury.

12 The final element of causation is also established by undisputed evidence. “A plaintiff
13 must establish that, but for the defendant’s unfair or deceptive practice, the plaintiff would not
14 have suffered injury.” *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 278, 259 P.3d 129
15 (2011). In other words, a plaintiff “must merely show that the ‘injury complained of ... would
16 not have happened’ if not for defendant’s violative acts.” *Id.* (alteration in original) (citation
17 omitted). Mr. Robbins would not have had to reschedule his surgery in Idaho and incur travel
18 and lodging expenses if Swedish had not canceled his surgery because he is transgender.

19 **VII. CONCLUSION**

20 Plaintiff requests that the Court grant partial summary judgment in his favor and find that
21 defendants Swedish Health Services, Inc. and its department, Swedish Plastic and Aesthetics,
22 violated the Washington Law Against Discrimination and the Washington Consumer Protection
23 Act as a matter of law

24 **VIII. LCR 7(B)(5)(VI) CERTIFICATION**


25 I certify that this memorandum contains 5371 words, in compliance with the Local Civil
26 Rules.

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RESPECTFULLY SUBMITTED AND DATED this 8th day of March, 2019.

AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON FOUNDATION

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date, I caused to be served in the manner noted below, a copy of this document, on:

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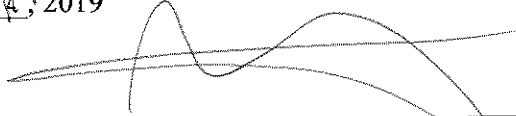
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DATED this 8th day of March, 2019



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