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Refusal to Dispense Emergency Contraception in Washington State: An Act of Conscience or Unlawful Sex Discrimination?

Dana E. Blackman

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REFUSAL TO DISPENSE EMERGENCY
CONTRACEPTION IN WASHINGTON STATE:
AN ACT OF CONSCIENCE OR UNLAWFUL
SEX DISCRIMINATION?

*Dana E. Blackman**

- I. EMERGENCY CONTRACEPTION: FUNCTION
AND IMPORTANCE • 62
 - A. *Emergency Contraception is not an Abortifacient* • 62
 - B. *Contraception is Basic Health Care for Women* • 64
- II. ACCESS TO EMERGENCY CONTRACEPTION
IS LEGALLY PROTECTED IN WASHINGTON STATE • 65
 - A. *Federal Civil Rights Protections* • 65
 - B. *The Washington Law Against Discrimination
Protects Women from Discrimination in
Places of Public Accommodation* • 68
 - 1. Refusal to Fill Prescriptions for Pregnancy
Related Drugs is Discrimination Based on Sex:
The Prima Facie Case for Sex Discrimination
in Places of Public Accommodation • 70
 - 2. Discrimination on the Basis of Membership
in a Protected Class: Discrimination Based
on the Potential to Become Pregnant
Is Discrimination Based on Sex • 72
 - 3. Places of Public Accommodation:
Pharmacies are Places of Public Accommodation • 79
 - 4. Comparability of Services: Refusal to Fill
a Lawful Prescription Alienates Women
and Fails to Provide a Comparable Level of Service • 80
 - 5. Substantial Factor: Refusal to Fill Prescriptions
for Emergency Contraception Results
in Sex Discrimination • 82
- III. ARGUMENTS OF THE DEFENDANT PHARMACIST • 84
 - A. *Plaintiff Has not Met Her Prima Facie Case
Because She has Failed to Show Discrimination
on the Basis of Sex* • 84

* J.D. Seattle University School of Law, 2006. Bachelor of Science in Biochemistry, *Magna Cum Laude*, North Carolina State University. Ms. Blackman served for two years as a human sexuality educator for a non-profit organization in Raleigh, North Carolina. She was an associate editor for *The Seattle Journal of Social Justice* and now practices in Vancouver, Washington.

B.	<i>Refusals Fall Inside Statutory Exceptions</i>	· 85
C.	<i>Freedom of Religion: Religious Beliefs Are Fundamentally Protected Rights</i>	· 86
D.	<i>Employers Must Make a Reasonable Accommodation for Religious Beliefs</i>	· 89
IV.	WASHINGTON PUBLIC POLICY PROTECTS REPRODUCTIVE FREEDOM	· 93
	CONCLUSIONS, SUGGESTIONS AND SOLUTIONS	· 95

In 1967, Mr. Jangaba Augustine Johnson entered Mr. Wheeler's barbershop seeking a haircut.¹ Mr. Wheeler, licensed barber and owner of the shop, refused service to Mr. Johnson because of his race.² At that time, Mr. Johnson lived in a culture that forced him to travel from shop to shop, or even from town to town, simply to find a barbershop or a lunch counter that would serve him.

Nearly forty years later, a woman enters her local pharmacy holding a lawful prescription for emergency contraception. Frightened and nervous, she hands the prescription to the pharmacist, only to be scolded by the person looking down his nose at her: "I will not fill this prescription. I will not help you kill your fetus." The woman is humiliated, and, even worse, is unable to get the drugs she badly needs to prevent an unwanted pregnancy. Living in an isolated area, the nearest alternative pharmacy is far away and the woman lacks transportation. Unless she is able to find a pharmacy that will fill her prescription, she will risk facing an unintended and unwanted pregnancy.³

As in the case of Jangaba Johnson, our legal system would not allow pharmacists to refuse to fill an individual's prescriptions because of the individual's race. Why, then, do we tolerate refusals to fill prescriptions that are needed to protect the health of women? Just as Mr. Johnson was refused service at a barbershop in 1967 because of his race, women across the United States are facing similar refusals of service on the basis of their sex, as they enter pharmacies in an attempt to access basic health care: emergency contraception.⁴ These incidents are not isolated, and

1. *In re Johnson*, 427 P.2d 968, 969 (Wash. 1967).

2. *In re Johnson*, 427 P.2d at 969.

3. See Josh Fiet, *The Drug War*, THE STRANGER, June 7, 2006, available at <http://www.thestranger.com/seattle/Content?oid=37399>.

4. See Marc Kaufman, *Plan B Battles Embroil States*, WASHINGTON POST, Feb. 27, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/26/AR2006022601380.html>.

they are occurring on a regular basis in the state of Washington and across the country.⁵

Refusals are being justified on the notion that pharmacists with moral or religious objections to the medication should be permitted to refuse to dispense the medication based on their beliefs.⁶ Some pharmacists object based on a belief that the drug is an abortifacient,⁷ while others simply object to dispensing all forms of contraception.⁸ Permitting pharmacists to refuse to dispense certain medications allows the religious or moral beliefs of the pharmacist to override the patient's need for basic health care.

Although the United States Food and Drug Administration (FDA) recently approved over-the-counter sales of emergency contraception, the agency does require that the drug be kept behind the counter at a licensed pharmacy and that the pharmacist or pharmacy assistant verify the woman's age prior to sale.⁹ Accordingly, women remain at the mercy of their pharmacist when they require access to emergency contraception.

Thankfully, in response to Mr. Johnson's claim of discrimination in the barbershop, the Supreme Court of Washington held that Mr. Wheeler's conduct was unlawful. Refusing to serve a patron because of his race in a barbershop, a place of public accommodation, was discriminatory and constituted an unfair practice under RCW 49.60, also known as the Washington Law Against Discrimination (WLAD).¹⁰ When the Washington legislature added sex to its public accommodation statute, it intended to protect women from the very same type of

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5. The Washington State Board of Pharmacy has received complaints from patients who have been refused prescriptions. Kyung M. Song, *Women Complain After Pharmacies Refuse Prescriptions*, SEATTLE TIMES, Aug. 1, 2006, at A5. Additionally, many women across the country have contacted their local Planned Parenthood Clinics to report such refusals. Kara Loewentheil, *Planned Parenthood Refused at the Counter* (Oct. 20, 2004) <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/birth-control-access-prevention/counter-refusal-6486.htm>.
 6. See Cara Solomon, *Druggists Want Right to Say "No" to Certain Medications*, SEATTLE TIMES, Mar. 11, 2006, at A1, available at http://seattletimes.nwsourc.com/html/localnews/2002858143_pharmacy11m.html; Rob Stein, *Pharmacists' Rights at Front of New Debate*, WASHINGTON POST, Mar. 28, 2005, A01.
 7. See Kaufman, *supra* note 4.
 8. CBSNews.com, *The Drugstore War* (Nov. 23, 2004), <http://www.cbsnews.com/stories/2004/11/23/eveningnews/main657435.shtml>.
 9. Press Release, U.S. Food & Drug Admin., *FDA Approves Over-the-Counter Access for Plan B For Women 18 and Older, Prescription Remains Required For Those 17 and Under* (Aug. 24, 2006), <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html>.
 10. *In re Johnson*, 427 P.2d 968, 973 (Wash. 1967).

discrimination faced by Mr. Johnson in 1967.¹¹ Just as Mr. Johnson was refused service because of his race, so too was the woman refused service because of her sex as she was denied access to a medicine that affects only the health of women. Additionally, because the remedial provision of the WLAD “is to be liberally construed in order to encourage private enforcement,”¹² the woman may pursue a claim against the pharmacist for sex discrimination in a place of public accommodation.

This Article will demonstrate that a pharmacist’s refusal to fill a valid prescription for emergency contraception constitutes sex discrimination and violates the WLAD. Part I explains the nature and function of emergency contraceptive pills (ECPs) as well as their role in basic health care for women and the importance of their accessibility. Part II addresses federal civil rights protections and the failure of these protections to provide relief for women facing refusals. Focusing on the WLAD, Part II also explains how state public accommodation statutes protect women from discrimination in places of public accommodation. It further sets forth the prima facie case of such a claim where a woman is refused access to emergency contraception. Part III presents arguments likely to be submitted by a pharmacist facing litigation under the WLAD. Finally, Part IV illustrates how Washington public policy supports women and the protection of reproductive freedom. The Article concludes with suggestions for judicial interpretation.

I. EMERGENCY CONTRACEPTION: FUNCTION AND IMPORTANCE

A. Emergency Contraception is not an Abortifacient

Some pharmacists have concerns that ECPs function to perform an abortion based on its mechanism of function and the erroneous belief that it is an abortifacient.¹³ A religious perspective is that pregnancy begins at the moment of fertilization, making any contraceptive which interferes with implantation a means of terminating a pregnancy and, therefore, means of obtaining an abortion.¹⁴ In contrast, under the

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11. See generally *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P.3d 655, 666–667 (Wash. 2002); *MacLean v. First Nw. Indus. of Am., Inc.*, 635 P.2d 683, 685–686 (Wash. 1981).
 12. *Wheeler v. Catholic Archdiocese of Seattle*, 829 P.2d 196, 207 (Wash. Ct. App. 1992) (citation omitted).
 13. Susan A. Cohen, *Objections, Confusion Among Pharmacists Threaten Access to Emergency Contraception*, 2 GUTTMACHER REP. ON PUB. POL’Y 1, 1–3 (June 1999).
 14. See Katherine A. White, Note, *Crisis of Conscience: Reconciling Religious Health Care Providers’ Beliefs and Patients’ Rights*, 51 STAN. L. REV. 1703, 1715 n.75 (1999)

American Medical Association's (AMA) definition, the beginning of pregnancy is the implantation of a fertilized egg in the uterus.¹⁵ ECPs do not affect pregnancy because they do not affect an implanted fertilized egg.¹⁶ The controversy exists based on whether we accept the religious view or the AMA's view of conception. Because we are discussing the dispensing of medication, it is logical that we should accept the latter view of conception. Moreover, if we fail to use accepted medical research and practice, the prospect is raised that any interest group may manipulate law and policy based on a religious agenda. Accordingly, under accepted medical science, because ECPs have no effect on implantation, emergency contraception is not an abortifacient but is just as the name implies: contraception.

It is important to clarify the nature and mechanisms of the drug that is the subject of such controversy. Emergency contraception, sold under the brand name Plan B, is a method of contraception to be used after unprotected sex, as a means of preventing pregnancy.¹⁷ A woman has a 56–89% chance of preventing an unintended pregnancy by using ECPs.¹⁸ The pills contain progestin (levonogestrel), a synthetic hormone that has safely been used to prevent pregnancy for over 35 years.¹⁹ The drug functions primarily by interfering with ovulation.²⁰ While previous studies have indicated that ECPs may prevent fertilization and implantation,²¹ a more recent study found that most often ECPs function to reduce the risk of pregnancy by inhibiting ovulation.²² Moreover, the

(quoting National Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services, 16 (Directive 36) (1995)).

15. Donald W. Herbe, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 86 (2002–03).
16. James Trussell et al., *Effectiveness of the Yuzpe Regimen of Emergency Contraception by Cycle Day of Intercourse: Implications for Mechanism of Action*, 67 CONTRACEPTION 167, 167 (2003).
17. FDA's Decision Regarding Plan B: Questions and Answers, U.S. Food & Drug Admin. (May 7, 2004), <http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm> [hereinafter FDA Questions and Answers].
18. Rachel K. Jones et al., *Contraceptive Use Among U.S. Women Having Abortions in 2000–2001*, 34 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 294, 301 (Nov.–Dec. 2002).
19. FDA Questions and Answers, *supra* note 17.
20. *Id.*
21. Prescription Drug Products; Certain Combined Oral Contraceptives for Use as Post-coital Emergency Contraception, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997).
22. Lena Marions et al., *Emergency Contraception with Mifepristone and Levonorgestrel: Mechanism of Action*, 100 OBSTETRICS & GYNECOLOGY 65, 65 (July 2002), available at <http://acogjnl.highwire.org/cgi/content/full/100/1/65>.

study suggests that levonogestrel has no effect on fertilization or implantation whatsoever.²³

Another common objection to ECPs is based on confusion with an entirely different drug, mifepristone or "the abortion pill." To clarify, emergency contraception is not the same as mifepristone, a drug used to terminate an early pregnancy up to seven weeks after the last menstrual cycle.²⁴ Mifepristone functions to block hormones necessary for an established pregnancy to continue.²⁵ In contrast, ECPs function to prevent a pregnancy from ever occurring, and, in fact, will not affect an already-established pregnancy.²⁶ As a result, ECPs by preventing unintended pregnancies, reduce the need for abortions.

A final point to emphasize is the fact that ECPs, while effective in pregnancy prevention if taken within 72 hours of unprotected intercourse, are more effective the earlier they are taken.²⁷ A refusal to provide ECPs results in a patient having to travel to another pharmacy, taking up valuable time, and such delay endangers the patient's ability to acquire her lawfully-prescribed drug in a time frame which will allow the drug to be effective. This delay is most pressing for women in rural areas who will be forced to travel to neighboring towns seeking a pharmacist to fill their much-needed, time-sensitive prescriptions.

B. Contraception is Basic Health Care for Women

For over thirty years of their lives, most women have the biological potential for pregnancy. Without contraception, the average woman is likely to become pregnant approximately twelve to fifteen times over the course of her reproductive life.²⁸ In any given year, eighty-five out of 100 sexually active women of childbearing age who are not using contraception will become pregnant.²⁹

23. *Id.* at 70.

24. U.S. Food & Drug Admin., Patient Information Sheet: Mifepristone (marketed as Mifeprex), (July 20, 2005), <http://www.fda.gov/cder/drug/InfoSheets/patient/mifepristonePIS.htm>.

25. *Id.*

26. See FDA Questions and Answers, *supra* note 17.

27. Task Force on Postovulatory Methods of Fertility Regulation, World Health Org., *Randomized Controlled Trial of Levonorgestrel Versus the Yuzpe Regimen of Combined Oral Contraceptives for Emergency Contraception*, 352 THE LANCET 428, 428-33 (1998).

28. See Luella Klein, *To Have or Not to Have a Pregnancy*, 65 OBSTETRICS & GYNECOLOGY 1, 1 (1985).

29. ROBERTA A. HATCHER ET AL., CONTRACEPTIVE TECHNOLOGY 312 (17th rev. ed. 1998).

Contraception is basic and essential health care for women. In fact, the paramount public health authority in the United States, the Centers for Disease Control (CDC), lists family planning and contraceptive care as one of the ten great public health achievements of the twentieth century³⁰ because contraception has demonstrably improved the life and health expectancy of women and children.³¹ Accordingly, it should come as no surprise that more than nine in ten women in the United States who are at risk of unintended pregnancy (women who are sexually active, able to become pregnant, and neither pregnant nor trying to become pregnant) are using a contraceptive method.³² Because it is clear that contraception is a basic health need for women, it should be equally clear that ECPs are a necessary form of contraception and are crucial to ensuring that women maintain control over their reproductive system.

II. ACCESS TO EMERGENCY CONTRACEPTION IS LEGALLY PROTECTED IN WASHINGTON STATE

A. Federal Civil Rights Protections

The laws and policies underlying our nation's prohibition against discrimination have evolved over time. The Civil Rights Act of 1964 effected a broad prohibition on discrimination in or by "public accommodations."³³ One might assume that the United States Constitution and federal civil rights laws would provide broad protections against discrimination for women.³⁴ However, while federal laws do provide some

30. Center for Disease Control, *Ten Great Public Health Achievements—United States, 1900–1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 241, 241–43 (1999), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm>.

31. Centers for Disease Control, *Achievements in Public Health, 1900–1999: Family Planning*, 48 MORBIDITY & MORTALITY WKLY. REP. 1073, 1073 (1999).

32. See J. Abma et al., *Fertility, Family Planning and Women's Health: New Data from the 1995 National Survey of Family Growth*, VITAL & HEALTH STAT., May 1997, at 49.

33. See 42 U.S.C. § 2000a(a) (2000).

34. This Article does not address whether women may be able to raise a constitutional objection to the denial of ECPs. However, such a claim would arise under the Equal Protection Clause of the Fourteenth Amendment. It is doubtful that such an action would be recognized by the courts because a pharmacist's refusal to dispense ECPs arguably is not a form of state action and therefore does not invoke Fourteenth Amendment jurisprudence. See generally Nancy Kamp, *Gender Discrimination at Private Golf Clubs*, 5 SPORTS LAW. J. 89, 92 (1998)(citing Civil Rights Cases, 109 U.S. 3 (1883)).

protection for women, those protections do not reach as far as one might think.

Over the years, the United States Congress has provided various forms of protection from discrimination. In 1964, Congress passed the Civil Rights Act prohibiting discrimination on the basis of race, color, religion, or national origin.³⁵ Unfortunately, Title II of the Act, which prohibits racial discrimination in places of public accommodation, did not include sex as a protected class and thus does not provide women with federal protection from discrimination in places of public accommodation.³⁶

Although Congress neglected the protection of women in places of public accommodation, it did eventually act to protect women from discrimination in many other areas, demonstrating a commitment to equal rights for women regardless of their unique sex-based characteristics. Congress prohibited sex discrimination in employment when it enacted Title VII of the Civil Rights Act.³⁷ It then granted women protection from discrimination in education in 1972 when it enacted Title IX.³⁸ Additionally, in 1978, Congress amended Title VII to protect women from sex discrimination in employment by defining “because of sex” and “on the basis of sex” to include pregnancy and pregnancy-

35. The Civil Rights Act provides: “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.” 42 U.S.C. 2000a(a).

36. *See id.*

37. *See* 42 U.S.C. §§ 2000e–2000e-17. Specifically, § 2000e-2 requires equal employment opportunities:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id. § 2000e-2. Ironically, sex was added as a protected class in the employment discrimination law by a southern conservative congressman in an attempt to derail the bill. *See* John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1337 (1989).

38. *See* 20 U.S.C. §§ 1681–1688 (2000). Title IX provides equal opportunity to women in education programs and activities, including sports activities. *Id.* § 1661.

related conditions.³⁹ Federal courts have interpreted this amendment, known as the Pregnancy Discrimination Act (PDA), to include protection from discrimination in employment when an employee has the “ability to become pregnant.”⁴⁰ Moreover, federal courts have found that failure to provide coverage for contraceptives in employee health plans, when those plans are otherwise comprehensive is sex discrimination.⁴¹

Despite the fact that sex remains an unprotected class in public accommodations under Title II of the Civil Rights Act, protection of women from discrimination has evolved to become a core concern of discrimination law. This is supported by the fact that forty-five states in the United States have included sex in their public accommodation statutes.⁴² Accordingly, although women who face discrimination in

39. See Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. 2000e(k) (2000)). The Act reads:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

Id.

40. See *UAW v. Johnson Controls*, 499 U.S. 187, 211 (1991).
41. See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (D. Wash. 2001); *but see In re Union Pac. R.R. Empl. Practices Litig.*, No. 06-1706, 2007 WL 763842 (8th Cir. Mar. 15, 2007) (holding that an employer health plan that specifically excluded coverage of prescription contraceptives was not discriminatory despite the fact that only women are affected by pregnancy).
42. Charles P. Charpentier, *Comments: An Unimproved Lie: Gender discrimination continues at Augusta National Golf Club*, 11 VILL. SPORTS & ENT. L.J. 111, 123 n.89 (2004) (citing ALASKA STAT. §§ 18.80.200, .80.230, .80.300 (Michie 2000); ARK. CODE ANN. §§ 16-123-101 to -108 (Michie Supp. 2003); CAL. CIV. CODE § 51 (West 1982 & Supp. 2003); COLO. REV. STAT. § 24-34-601 (2002); CONN. GEN. STAT. ANN. §§ 46a-63 to -64 (West 1995 & Supp. 2003); DEL. CODE ANN. tit. 6, §§ 4501-4516 (1999); FLA. STAT. ANN. §§ 509.092-141 (West 2002); HAW. REV. STAT. §§ 489-1 to -8 (1993 Supp. 2001); IDAHO CODE §§ 18-7301 to -7303 (Michie 1997 & Supp. 2003); 775 ILL. COMP. STAT. ANN. 5/5-103(A) (West 2001 & Supp. 2002); IND. CODE §§ 22-9-1-1 to -18, -9-1-3 (1991 & Supp. 2002); IOWA CODE ANN. §§ 216.1-.20 (West 2000 & Supp. 2003); KAN. STAT. ANN. §§ 44-1001, -1002, -1009 (2000); KY. REV. STAT. ANN. § 344.145 (Michie 1997); LA. REV. STAT. ANN. § 49:146 (West 2003); ME. REV. STAT. ANN. tit. 5, §§ 4551-4553, 4591 (West 2002 & Supp. 2002); MD. CODE ANN. art. 49B, § 5 (1957 & Supp. 2002); MASS. GEN. LAWS ANN. ch. 272, § 92A (West 2000 & Supp. 2003); MICH. COMP. LAWS §§ 37.2301-.2303 (2001 & Supp. 2003); MINN. STAT. ANN. §§ 363.01-.03 (West 1991 & Supp. 2003); MO. REV. STAT. §§ 213.010, .065 (1996 & Supp. 2003); MONT. CODE ANN. §§ 49-1-201, -2-101, -2-304 (2001); NEB. REV. STAT. §§ 20-132

pharmacies on the basis of their sex have no claim under existing federal statutes, they are likely to have an actionable claim under state law if they live in one of the forty-five states with statutory protections for women from discrimination in places of public accommodation. Although this Article uses Washington law as a model, it is important to note that the analysis set forth below is transferable among the forty-five states that have enacted similar public accommodation statutes that protect women from sex discrimination.

*B. The Washington Law Against Discrimination Protects Women
from Discrimination in Places of Public Accommodation*

The WLAD was originally enacted in 1949 as a law prohibiting discrimination in employment on the basis of race, creed, color or national origin.⁴³ In 1957, the scope of the law was expanded to protect people from discrimination in places of public resort, accommodation or amusement.⁴⁴ The law was again amended in 1973 to expand protections against discrimination in credit and insurance transactions, as well as to protect people from discrimination on the basis of sex, marital status, age and disability.⁴⁵ As currently enacted, the purpose of the WLAD is much broader, and provides far greater protections, than the Federal Civil Rights Act.⁴⁶

to -143 (1997); N.H. REV. STAT. ANN. §§ 354-A:2, -A:16--17 (1995 & Supp. 2002); N.J. STAT. ANN. §§ 10:1-3 (West 2002); N.M. STAT. ANN. §§ 28-1-2, -1-7 (Michie 2000 & Supp. 2003); N.Y. CIV. RIGHTS LAW § 40-c (McKinney 2001 & Supp. 2003); N.Y. EXEC. LAW §§ 291, 292, 296 (McKinney 2001 & Supp. 2003); N.D. CENT. CODE §§ 12.1-14-04, 14-02.4-01-4-02, 14-02.4-14, 14-02.4-16 (1997 & Supp. 2001); OHIO REV. CODE ANN. §§ 4112.01-.02 (West 2001 & Supp. 2002); OKLA. STAT. ANN. tit. 25, §§ 1401, 1402 (West 1987 & Supp. 2003); OR. REV. STAT. §§ 659A.400-409 (2001); PA. STAT. ANN. tit. 43, § 955(i) (Purdon 2002 & Supp. 2003); R.I. GEN. LAWS 11-24-1 to -3.1 (2002); S.D. CODIFIED LAWS §§ -13-1, 20-13-23 (Michie 1995 & Supp. 2003); TENN. CODE ANN. §§ 4-21-501 to -503 (1998 & Supp. 2002); UTAH CODE ANN. §§ 13-7-1 to -4 (2002); VT. STAT. ANN. tit. 9, §§ 4500-4502 (1993 & Supp. 2002); WASH. REV. CODE ANN. §§ 49.60.010, .60.030, .60.040, .60.215 (West 2002 & Supp. 2003); W. VA. CODE §§ 5-11-2 to -4, 5-11-9 (2002 & Supp. 2003); WYO. STAT. ANN. § 6-9-101 to -102 (Michie 2003)); ARIZ. REV. STAT. § 41-1442 (2002); D.C. CODE ANN. § 2-1402-31 (1977); NEV. REV. STAT. 233.010 (2005); VA. CODE ANN. § 2.2-3900 (Michie 2001); WIS. STAT. § 106.52 (2005).

43. Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 59 P.3d 655 (Wash. 2002).

44. *Fraternal Order of Eagles*, 59 P.3d at 666.

45. See WASH. REV. CODE ANN. § 49.60.010 (West 2002).

46. See *id.*, which states:

In Washington, the right to be free from discrimination extends to “full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement.”⁴⁷ First, “full enjoyment” has been defined to include the right to purchase any service or commodity without directly or indirectly causing persons of any sex to be treated as “not welcome, accepted, desired, or solicited.”⁴⁸ Second, “place of public accommodation” has been defined to include “any place, licensed or unlicensed, kept for gain, hire or reward, or . . . for the benefit, use, or accommodation of those seeking health, . . . or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services.”⁴⁹

The WLAD established the Human Rights Commission (HRC) and gives that agency “powers with respect to elimination and prevention of discrimination” in employment and in other specified areas,⁵⁰ as well as the power to investigate and rule on complaints alleging unfair practices as defined in the statute.⁵¹ The HRC also has the power to promulgate regulations in order to carry out the purposes of the statute.⁵²

Within the public accommodation context, the HRC has adopted regulations under the WLAD related to disability discrimination, but not yet to any other form of discrimination in places of public accommodation.⁵³ However, in 1999 the HRC promulgated regulations pertaining to sex discrimination in the employment context.⁵⁴ Specifically, those regulations prohibit discrimination on the basis of pregnancy and pregnancy-related conditions including the potential to become pregnant.⁵⁵

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 or the use of a trained dog guide or service animal by a disabled person 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.

47. *Id.* § 49.60.030(1)(b).

48. *Id.* § 49.60.040(9).

49. *Id.* § 49.60.040(10).

50. *Id.* §§ 49.60.050–.60.140

51. *Id.* § 49.60.120(4).

52. *Id.* § 49.60.120(3).

53. WASH. ADMIN. CODE 162-26 (2003).

54. *Id.* 162-30-010 to -020.

55. *Id.* 162-30-020 (2005).

The fact that the HRC has not promulgated any regulations related to sex discrimination in places of public accommodation does not indicate that it does not intend to protect women from discrimination in that context. More likely, the absence of regulation in that area is a result of a lack of complaints filed with the HRC. Out of a total of 1066 complaints filed, the HRC received only seventy-two complaints based on discrimination in a place of public accommodation during the 2002–2003 fiscal year.⁵⁶ Of those seventy-two complaints, 62.5% were complaints of discrimination because of race. Complaints of sex discrimination in a place of public accommodation were apparently so few that the number did not merit a mention in the Human Rights Commission Fact Sheet.⁵⁷

The HRC is not the only avenue a victim of discrimination might use to seek a remedy. The WLAD recognizes that the right to be free from discrimination is a civil right enforceable by private civil actions.⁵⁸ Indeed, Washington courts have long recognized that damage is inherent in a discriminatory act. “The act alleged in itself carries with it the elements of an assault upon the person, and in such cases the personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering, are elements of actual damages for which a compensatory award may be made.”⁵⁹ Additionally, because “the remedial provision of law against discrimination is to be liberally construed in order to encourage private enforcement,”⁶⁰ a woman who feels that she has been discriminated against could file a claim against the alleged offender under the statute.

1. Refusal to Fill Prescriptions for Pregnancy Related Drugs is Discrimination Based on Sex: The Prima Facie Case for Sex Discrimination in Places of Public Accommodation

Washington courts have developed the requirements for a prima facie case of discrimination in places of public accommodation under the WLAD as it applies in the contexts of disability and racial discrimination.⁶¹ However, as for sex discrimination claims, the two cases on point

56. Washington State Human Rights Commission Fact Sheet, July 1, 2002–June 30, 2003 (2004), <http://www.hum.wa.gov/documents/JeanFactSheet02-03.pdf>.

57. *See id.*

58. WASH. REV. CODE § 49.60.030(2) (2003).

59. *Negron v. Snoqualmie Valley Hosp.*, 936 P.2d 55, 60 (Wash. Ct. App. 1997) (citing *Anderson v. Pantages Theatre Co.*, 114 Wash. 2d, 31, 194 P. 813 (1921)).

60. *Wheeler v. Catholic Archdiocese of Seattle*, 829 P.2d 196, 197 (Wash. Ct. App. 1992).

61. *See generally* *Fell v. Spokane Transit Auth.*, 911 P.2d 1319 (Wash. 1996).

give an analysis of comparability of treatment⁶² and an analysis of what constitutes a place of a public accommodation.⁶³ While these two cases are instructive, neither sets out a clear test for analyzing sex discrimination in places of public accommodation under the WLAD.

In *Fell v. Spokane Transit Authority*, the Supreme Court of Washington faced an issue of first impression in determining whether disability discrimination had occurred.⁶⁴ In its analysis and creation of a test for disability discrimination, the court borrowed heavily from federal treatment of the disabled under the Americans with Disabilities Act (ADA)⁶⁵ and also from Washington case law within the context of employment discrimination against persons with disabilities.⁶⁶ The court crafted a four-part test to determine whether there is a prima facie case for disability discrimination in places of public accommodation: (1) plaintiff has a disability recognized under the statute; (2) the defendant's business or establishment is a place of public accommodation; (3) plaintiff was discriminated against by receiving treatment that was not comparable to the level of designated services provided to individuals without disabilities by or at the place of public accommodation; and (4) the disability was a substantial factor causing the discrimination.⁶⁷

Similarly, in *Demelash v. Ross*, the Court of Appeals of Washington noted that the necessary elements of a prima facie showing of race/national origin discrimination had not been established by Washington courts.⁶⁸ Accordingly, it examined the elements established in *Fell* for a disability-discrimination case and held that similar elements are required in the race and national origin context.⁶⁹ For claims of race/national origin discrimination in public accommodation, the elements that must be shown are: (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 the plaintiff in a manner comparable to the treatment it provides to persons outside that class; and (4) the protected status was a substantial factor causing the discrimination.⁷⁰

62. *MacLean v. First Nw. Indus. of Am., Inc.*, 635 P.2d 683, 684 (Wash. 1981).

63. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P.3d 655, 668 (Wash. 2002).

64. *Fell*, 911 P.2d at 1321.

65. *Fell*, 911 P.2d at 1324.

66. *Fell*, 911 P.2d at 1326.

67. *Fell*, 911 P.2d at 1328.

68. *Demelash v. Ross Stores, Inc.*, 20 P.3d 447, 456 (Wash. Ct. App. 2001).

69. *Demelash*, 20 P.3d at 456.

70. *Demelash*, 20 P.3d at 456.

Although the Washington courts have not set out a specific test for sex discrimination in places of public accommodation, it is logical to use an analogous test for sex discrimination in places of public accommodation for several reasons. First, the WLAD has a broad purpose to eliminate all forms of discrimination. Accordingly, absent distinguishing factors, the various protected classes should be treated similarly under the law. Second, the analysis used in *MacLean* runs parallel to the test later elucidated in *Fell* and *Demelash*, in that *MacLean* examined the absence of classification based solely on sex, the purpose of the classification, and the effects of the classification to determine whether the classification is valid.⁷¹ Accordingly, it is evident that the analysis is applicable and that it has simply not yet been utilized. Third, use of such an analogous test bolsters consistency and judicial efficiency within Washington courts.

This Article will now address each of the elements of a *prima facie* case in turn to explain how women facing pharmacist refusals to dispense emergency contraception will pursue a claim for sex discrimination in a place of public accommodation.

2. Discrimination on the Basis of Membership in a Protected Class: Discrimination Based on the Potential to Become Pregnant Is Discrimination Based on Sex

a. Utilizing Federal Employment Law in the Absence of State Precedent

There is little Washington case law on the matter of sex discrimination in places of public accommodation.⁷² As a result, there is little guidance regarding what constitutes sex discrimination absent a facially discriminatory practice of excluding women.⁷³ Where there has been an

71. See *MacLean*, 635 P.2d at 684; *Fell*, 911 P.2d at 1324; *Demelash*, 20 P.3d at 456.

72. Relevant cases include *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P.3d 655 (Wash. 2002) and *MacLean*, 635 P.2d 683 (further discussed *infra* notes 78–79, 119–125 and accompanying text. Neither case sets out criteria for establishment of a classification based on sex. However, some guidance is given in *MacLean*, where the Washington Supreme Court held that where price differentials are constructed to benefit several categories of people including women, seniors, children, and military personnel, the classification of prices is not based solely on sex. *MacLean*, 635 P.2d at 684. *But cf. Fraternal Order of Eagles*, 59 P.3d at 672 (finding sex discrimination when the club was not “distinctly private” as was required to be exempted from WLAD).

73. In *Fraternal Order of Eagles*, a club had a policy of admitting only men and specifically refused to grant admission to women. *Fraternal Order of Eagles*, 59 P.3d at 658.

absence of established state discrimination law, Washington courts have borrowed heavily from state and federal employment law.⁷⁴

Women in the state of Washington are protected from sex discrimination in the workplace by the WLAD.⁷⁵ Additionally, the Washington HRC promulgated regulations defining sex-based discrimination in the workplace to include pregnancy and the potential to become pregnant.⁷⁶ While there is no state case law interpreting this regulation, the regulation is directly analogous in its word and its purpose to the PDA.⁷⁷ Granted, the PDA prohibits discrimination on the basis of pregnancy in employment rather than in places of public accommodation. However, the PDA and the federal case law interpreting it are relevant and should be applied in the public accommodation context for several reasons.

First, despite limited case law applicable to sex discrimination in places of public accommodation, Washington's public policy prohibiting discrimination is very broad.⁷⁸ Specifically, the Washington Supreme Court has said that the WLAD "is a broad remedial statute, the purpose of which is to prevent and eradicate discrimination on the basis of race, creed, color, national origin, sex or disability in 'public accommodations.'"⁷⁹ Additionally, the court has noted that the WLAD is broader than Title VII and grants more protections than does Title VII: "Unlike our state law against discrimination, Title VII is limited to employment discrimination. Unlike our state law against discrimination, Title VII does not contain a broad statement of the right to be free of discrimination in other areas. Our state law does."⁸⁰

Because the state statute is so broad and does not limit its application to what is specifically listed, courts should feel comfortable extending the federal employment discrimination principles of the PDA to the context of public accommodation.

Secondly, when lacking relevant case law, Washington courts have often looked to state and federal employment discrimination law for

But cf. MacLean, 635 P.2d 683 (holding that price differentials do not constitute sex discrimination where such differentials benefit several categories of people).

74. *Fell v. Spokane Transit Auth.*, 911 P.2d 1319, 1327–28 (Wash. 1996); *Lewis v. Doll*, 765 P.2d 1341, 1343 (Wash. Ct. App. 1989).

75. WASH. REV. CODE § 49.60.180 (2002).

76. WASH. ADMIN. CODE 162-30-020 (2003).

77. *Compare* WASH. ADMIN. CODE 162-30-020 (2003) with 42 U.S.C. § 2000e(k) (2000).

78. *Fraternal Order of Eagles*, 59 P.3d at 667.

79. *Fraternal Order of Eagles*, 59 P.3d at 661.

80. *Marquis v. City of Spokane*, 922 P.2d 43, 50 (Wash. 1996).

guidance in public accommodation cases.⁸¹ For example, in the context of disability discrimination, Washington courts have extended employment law analysis and principles of the federal ADA to state claims of disability discrimination in places of public accommodation.⁸² Moreover, when interpreting the WLAD provisions related to disability discrimination, the Supreme Court of Washington looked specifically to the federal ADA.⁸³ Because courts have extended federal employment discrimination analysis to public accommodation law in the context of disability discrimination, courts should feel equally comfortable making the same extension in the context of sex discrimination.

Finally, while there is no federal law governing discrimination against women in places of public accommodation, there is a body of existing law based on the PDA. Moreover, Washington State has enacted regulations that mirror the PDA, making its application in the absence of law all the more appropriate. In the absence of guidance from existing case law, Washington courts should extend existing law based on the PDA to a state claim of sex discrimination in a place of public accommodation. Such an extension will maintain consistency with previous judicial reasoning. Accordingly, federal law interpreting the PDA will give the most analogous and persuasive authority.

b. Evolution of Pregnancy-Based Discrimination Analysis

Because federal law interpreting the PDA provides the most relevant and persuasive authority, it is important to understand the history and evolution of the analysis that is so appropriate today. In 1976, the U.S. Supreme Court examined the application of Title VII to pregnancy-related conditions when it decided *General Electric Co. v. Gilbert*.⁸⁴ In *Gilbert*, the Court held that an otherwise-comprehensive short-term disability policy that did not cover pregnancy-related disabilities did not discriminate on the basis of sex.⁸⁵ The majority reasoned that pregnancy discrimination does not adversely impact all women and therefore is not the same as gender discrimination.⁸⁶ Additionally, the Court reasoned that no benefits were provided to men that were not also provided to women. The fact that pregnancy disabilities were an uncov-

81. See *Fell v. Spokane Transit Auth.*, 911 P.2d 1319, 1327–28 (Wash. 1996); *Demelash v. Ross Stores, Inc.*, 20 P.3d 447, 456 (Wash. Ct. App. 2001).

82. See *Fell*, 911 P.2d at 1326.

83. *McClarty v. Totem Elec.*, 137 P.3d 844, 851 (Wash. 2006).

84. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

85. *Gilbert*, 429 U.S. at 145–46.

86. See *Gilbert*, 429 U.S. at 138–40.

ered risk unique to women did not destroy the facial disparity of the coverage.⁸⁷

The dissenting justices in *Gilbert* argued that because only women are able to become pregnant, they were being subjected to unlawful discrimination on the basis of their sex. The dissent also asserted that the proper analysis requires examination of the comprehensiveness of the coverage provided to each sex.⁸⁸ Accordingly, Justice Brennan noted that it was facially discriminatory for an employer to provide a benefits policy that “but for pregnancy, offers protection for all risks, even those that are ‘unique to’ men or heavily male dominated.”⁸⁹

In response, Congress amended Title VII to explicitly overrule *Gilbert* and to protect women from discrimination on the basis of pregnancy, childbirth, or related conditions, and thus enacted the PDA.⁹⁰ Proponents of the bill expressed the necessity of clarifying the congressional intent of Title VII and endorsed the views of the dissenting Justices in *Gilbert*.⁹¹

87. Recently, in *In re Union Pacific*, No. 06-1706, 2007 WL 763842 (8th Cir. Mar. 15, 2007), the court of appeals adopted this outdated *Gilbert* reasoning that was specifically rejected by Congress. Dismissing the fact that men are not capable of becoming pregnant, the court held that where a health plan does not cover contraception for men or for women, the plan does not discriminate on the basis of sex. *In re Union Pacific*, 2007 WL 763842, at *5. The court explained that the proper comparator is the provision of the medical benefits. *In re Union Pacific*, 2007 WL 763842, at *5. Since the plan does not cover contraceptives for men, failure to provide coverage for women does not constitute discrimination. Additionally, the court of appeals asserts that because contraceptives are only indicated prior to pregnancy, their use is gender neutral, similar to infertility treatment. *In re Union Pacific*, 2007 WL 763842, at *3. This reasoning is questionable in light of the fact that the PDA was enacted to clarify Title VII rather than to add additional rights. *See infra* note 90).

88. *See Gilbert*, 429 U.S. at 152 (Brennan, J., dissenting).

89. *Gilbert*, 429 U.S. at 160 (Brennan, J., dissenting).

90. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)).

91. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679 n.17 (1983) (citing S. Rep. No. 95-311, pp 7-8 (1977) (“the bill is merely reestablishing the law as it was understood prior to *Gilbert* by the EEOC and by the lower courts”)); H. R. Rep. No. 95-948; 123 Cong. Rec. 10581 (1977) (remarks of Rep. Hawkins) (“H. R. 5055 does not really add anything to title VII as I and, I believe, most of my colleagues in Congress when title VII was enacted in 1964 and amended in 1972, understood the prohibition against sex discrimination in employment. For, it seems only common sense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy”); *id.* at 29387 (remarks of Sen. Javits) (“this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court’s decision in *Gilbert* . . .”); *id.* at 29647; *id.* at 29655 (remarks of Sen. Javits) (“What we are doing is leaving the situation the way it was before the Supreme Court decided the *Gilbert* case last

After the passage of the PDA, the United States Supreme Court reconsidered the issue in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.⁹² In that case, the Court examined an employee health plan that provided comprehensive hospitalization benefits to both male and female employees and their dependent spouses.⁹³ The one discrepancy in benefits was a limitation on coverage for pregnancy-related hospitalization for the wives of male employees.⁹⁴ The Court acknowledged that the PDA “makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.”⁹⁵ It then held the employee benefits plan to be unlawful sex discrimination based on a two-part analysis under which the Court ultimately held that “discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.”⁹⁶ This holding was a broad interpretation of the PDA in that the Court applied the PDA to both male and female employees. Most importantly, the Court emphasized the intent of Congress to override the analysis used in *Gilbert* and to firmly establish that discrimination on the basis of pregnancy or related conditions is sex discrimination on its face.

After the U.S. Supreme Court firmly established in *Newport News* that discrimination on the basis of pregnancy is sex discrimination, it again elaborated on the application of the PDA in *UAW v. Johnson Controls*.⁹⁷ In that case, an employer’s policy prohibiting fertile female employees from working in jobs that involved exposure to lead at a level exceeding Occupational Safety and Health Administration standards was found to be facially discriminatory against women.⁹⁸ Specifically, the

year”); 124 Cong. Rec. 21436 (1978) (remarks of Rep. Sarasin (“This bill would restore the interpretation of title VII prior to that decision”). For statements expressly approving the views of the dissenting Justices that pregnancy discrimination is discrimination on the basis of sex, see Leg. Hist., at 18 (remarks of Sen. Bayh, Mar. 18, 1977, 123 Cong. Rec. 8144); 24 (remarks of Rep. Hawkins, Apr. 5, 1977, 123 Cong. Rec. 10582); 67 (remarks of Sen. Javits, Sept. 15, 1977, 123 Cong. Rec. 29387); 73 (remarks of Sen. Bayh, Sept. 16, 1977, 123 Cong. Rec. 29641); 134 (remarks of Sen. Mathias, Sept. 16, 1977, 123 Cong. Rec. 29663–29664); 168 (remarks of Rep. Sarasin, July 18, 1978, 124 Cong. Rec. 21436). See also *Discrimination on the Basis of Pregnancy*, 1977, Hearings on S. 995 before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess., 13 (1977) (statement of Sen. Bayh); *id.* at 37, 51 (statement of Assistant Attorney General for Civil Rights Drew S. Days).

92. *Newport News*, 462 U.S. at 679.

93. *Newport News*, 462 U.S. at 671–72.

94. *Newport News*, 462 U.S. at 672.

95. *Newport News*, 462 U.S. at 684.

96. *Newport News*, 462 U.S. at 684.

97. *UAW v. Johnson Controls*, 499 U.S. 187 (1991).

98. *Johnson Controls*, 499 U.S. at 211.

Court found that the policy classified its employees on the basis of their “potential for pregnancy” and that under the PDA, “such a classification must be regarded . . . in the same light as explicit sex discrimination.”⁹⁹ Moreover, the Court went on to emphasize the right of women to be free in their own personal decisions about reproduction: “Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress had mandated this choice”¹⁰⁰ Because discrimination on the basis of a person’s potential to become pregnant is facial sex discrimination, it follows that discrimination on the basis of contraceptive use is also discriminatory. Indeed, the Equal Employment Opportunity Commission (EEOC) and federal courts went on to make such findings.

In 2000, the EEOC issued a policy decision interpreting the PDA as it applies to contraceptive coverage provided in employee health benefits plans.¹⁰¹ The decision arose out of a claim of sex discrimination where an employee health plan provided coverage for a broad range of services and prescription drugs but excluded coverage for prescription contraceptives whether for contraceptive or other medical purposes.¹⁰² The EEOC concluded that exclusion of contraception from the plan violates Title VII as amended by the PDA. Central to the EEOC’s reasoning was the fact that the courts have acknowledged that the PDA prohibits discrimination on the basis of a woman’s potential for pregnancy as well as pregnancy itself.¹⁰³ The fact that it is only “women, rather than men, who have the ability to become pregnant cannot be used to penalize them in any way” led the EEOC to conclude that discrimination on the basis of a woman’s use of contraceptives is included in the prohibitions of the PDA.¹⁰⁴ Simply put, because prescription contraceptives are available only to women, treating contraceptive use differently from the use

99. *Johnson Controls*, 499 U.S. at 199.

100. *Johnson Controls*, 499 U.S. at 206; see also *Griswold v. Connecticut*, 381 U.S. 479 (1965).

101. Decision on Coverage of Contraception (U.S. Equal Employment Opportunity Comm’n Dec. 14, 2000) (Commission Decision), <http://www.eeoc.gov/policy/docs/decisions-contraception.html>.

102. *Id.*

103. *Id.* (citing *UAW v. Johnson Controls*, 499 U.S. 187, 199 (1991)).

104. *Id.* Moreover, the Commission emphasized the PDA’s explicit exception for employers from requiring coverage for abortion. *Id.* The Commission reasoned that Congress understood that contraception would be included in the protections of the act absent an explicit exemption. *Id.*

of any other prescription drug is sex discrimination on its face and is prohibited by the PDA.

In the landmark case *Erickson v. Bartell Drug Company*, a U.S. district court addressed whether an otherwise-comprehensive employee health plan failing to cover contraceptives was discriminatory on the basis of sex.¹⁰⁵ The court explained that proper analysis requires recognition of the fact that males and females have different, sex-based healthcare needs, and those needs must be met to the same extent and on the same terms.¹⁰⁶ The court found that because contraception is basic health care for women vital to their physical, emotional, economic, and social well-being, its exclusion from an otherwise comprehensive health plan constituted sex discrimination.¹⁰⁷ Following the reasoning in the *Gilbert* dissent, *Newport News*, and *Johnson Controls*, the court determined that “Title VII requires employers to recognize the difference in the sexes and provide equally comprehensive coverage” to each.¹⁰⁸

Case law has established that discrimination based on the capacity to become pregnant is sex discrimination on its face. Moreover, discrimination based on use of contraceptives constitutes such pregnancy-related sex discrimination. Accordingly, the appropriate classification of people facing discrimination in the case of a pharmacist refusing to fill prescriptions for emergency contraception is women. To be sure, it is not those who present prescriptions for contraception contrasted against those who present prescriptions for other drugs. This analysis, under which men are not granted access to any drug that women are denied, was explicitly rejected in the employment context by the passage of the PDA and then again by the Supreme Court of the United States in *Newport News*.¹⁰⁹ The appropriate analysis takes into account men’s and women’s unique sex-based characteristics and health care needs which must be met equally.

In the context of employment discrimination law, failure to provide coverage for contraceptives in an otherwise comprehensive health plan is sex discrimination. Where an employer provides coverage for a broad range of drugs and care for men, yet excludes coverage for contraception, the employer is denying women access to the basic health care need of preventing pregnancy while men maintain comprehensive pre-

105. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1266 (W.D. Wash. 2001). *But cf. In re Union Pacific R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139 (D. Neb. 2005).

106. *Erickson*, 141 F. Supp. 2d at 1271.

107. *Erickson*, 141 F. Supp. 2d at 1273.

108. *Erickson*, 141 F. Supp. 2d at 1277.

109. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983).

ventative coverage. Coverage for contraception in an employee health plan is little reassurance if women may be discriminated against when they walk into a pharmacy.

If we apply these principles to the public accommodation context, refusal to fill prescriptions for emergency contraception is clearly sex discrimination. Using a similar analysis, we see that women need emergency contraception as a function of their unique ability to become pregnant. Because only women face the serious risk of becoming pregnant, refusal to dispense ECPs and thus refusal to provide basic vital preventative care results in sex-based discrimination. That is, women are denied access to a basic health care necessity while men are granted full access to all basic health care drugs.

3. Places of Public Accommodation: Pharmacies are Places of Public Accommodation

Revised Code of Washington defines places of public accommodation and makes clear that the statute extends to places and facilities including any place for the benefit of those seeking health or the sale of goods or services.¹¹⁰ While the definition of a place of public accommodation does not include broad geographical areas where general services such as public transportation are provided, case law has established a broad range of business establishments that do fall within the reach of the statute.¹¹¹ Locations including restaurants, parks, public resorts, hospitals, and retail outlets are all established places of public accommodation.¹¹² The primary exception within the statute defining a place of public accommodation protects distinctly private clubs.¹¹³

110. WASH. REV. CODE § 49.60.040(10) (2002).

111. *Fell v. Spokane Transit Auth.*, 911 P.2d 1319 (Wash. 1996) (holding that public transportation services are not a place of public accommodation).

112. Locations that have been held to constitute places of public accommodation include restaurants (*Powell v. Utz*, 87 F. Supp. 811 (E.D. Wash. 1949)), parks and public resorts (*Davis v. Tacoma Ry. & Power Co.*, 77 P. 209 (Wash. 1904)), movie theaters (*Anderson v. Pantages Theater Co.*, 194 P. 813 (Wash. 1921)), *Randall v. Cowlitz Amusements, Inc.*, 76 P.2d 1017 (Wash. 1938)), a weight control clinic (*Browning v. Slenderella Sys. of Seattle*, 341 P.2d 859 (Wash. 1959)), and barbershops (*In re Johnson*, 427 P.2d 968 (Wash. 1967)). Additionally, places such as hospitals and retail outlets have conceded their status as places of public accommodation. *E.g.*, *Demelash v. Ross Stores, Inc.*, 20 P.3d 447 (Wash. Ct. App. 2001); *Negron v. Snoqualmie Valley Hosp.*, 936 P.2d 55 (Wash. Ct. App. 1997).

113. WASH. REV. CODE § 49.60.040(10) (2002); *see also* *Fraternal Order of Eagles, Tenuino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P.3d 655 (Wash. 2002).

Because pharmacies are open to the public, conduct commercial business, and are heavily regulated by the state, a pharmacy cannot argue with any force that it is not a place of public accommodation or that it falls within the private club exception.

4. Comparability of Services: Refusal to Fill a Lawful Prescription Alienates Women and Fails to Provide a Comparable Level of Service

The legislature designed the WLAD to prevent discrimination in a variety of fields as a means of removing barriers to equal opportunity in Washington.¹¹⁴ Accordingly, because the prohibition on discrimination stems from the constitutional requirement for equal protection, the Supreme Court of Washington has held that an essential element of discrimination in the public accommodation statute is discrimination evidenced when members of a protected class are denied comparable services.¹¹⁵

While there is little case law consistently describing what constitutes comparable services, Washington courts have examined both the actual level of services provided to patrons as well as the manner in which patrons are treated or made to feel.¹¹⁶ For example, the court in *Fell* found that fixed routes of a public transportation authority provided a comparable level of service to patrons regardless of their disability.¹¹⁷ Likewise, in the context of Title VII employment discrimination, the Supreme Court found sex-based discrimination in *Newport News* when a disparity existed between the overall comprehensiveness of the benefits offered to the male employees and the comprehensiveness of the benefits offered to the female employees.¹¹⁸

In our case, a woman wishing to have a prescription for emergency contraception filled is seeking access to a basic health care need. She goes to a pharmacy where a wide range of drugs is available with the presentation of a lawful prescription. If she presents a prescription for an antibiotic, a cholesterol medication, or a pain management drug, she will not be turned away. However, in her case, she holds a prescription that may not be filled because it is one to which the pharmacist objects.

114. *Fell*, 911 P.2d at 1325.

115. *Fell*, 911 P.2d at 1327. While the court applied this analysis in the context of disability discrimination, it noted that the comparability element has been applied to other kinds of discrimination including race and gender discrimination. *Id.* at 1328.

116. See *MacLean v. First Nw. Indus. of Am., Inc.*, 635 P.2d 683, 684–86 (Wash. 1981).

117. *Fell*, 911 P.2d at 1329–30.

118. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983); see also *supra* notes 92–96 and accompanying text.

These drugs are the only class of drugs that the pharmacist refuses to provide. Moreover, this class of drugs affects only the health and welfare of women. This refusal to provide service and care is discrimination on the basis of the patient's potential to become pregnant and thus is discrimination on the basis of sex.

When considering public accommodation claims, Washington courts have often examined whether the alleged discriminatory act made the plaintiff feel unwanted, unwelcome, or unsolicited.¹¹⁹ For example, in *MacLean*, different prices were charged to male and female patrons of a basketball game in conducting "ladies' night".¹²⁰ The Washington Supreme Court found that comparable services were provided despite the differential pricing charged to opposite sexes.¹²¹ It examined the language of the WLAD¹²² and reasoned that because the higher ticket prices for male patrons were not calculated to, nor did they cause, the patrons to feel "unwelcome, unaccepted, undesired or unsolicited," no discrimination had occurred.¹²³

The court explained that behavior that results in making a classified person feel unwelcome is precisely what characterizes discrimination in places of public accommodation.¹²⁴ It suggested that unwelcoming conduct, such as denying access as in *Anderson v. Pantages Theatre Co.*, is unacceptable.¹²⁵ In that case, a black man acquired tickets for box seats in a theater and was subsequently denied access to those seats and made to feel unwelcome in the theater.¹²⁶ The *MacLean* court indicated that conduct resulting in patrons feeling unwelcome, unaccepted or unentitled to service that other patrons receive is the very type of behavior that the statute was meant to prevent.¹²⁷

It is worth noting that courts in other jurisdictions have applied a similar analysis to examine whether patrons felt discouraged, unwelcome,

119. *E.g., MacLean*, 635 P.2d at 686.

120. *MacLean*, 635 P.2d at 684.

121. *See MacLean*, 635 P.2d at 684–85.

122. *MacLean*, 635 P.2d at 685 (citing WASH. REV. CODE § 49.60.040(9) (2002)).

123. *MacLean*, 635 P.2d at 686.

124. *MacLean*, 635 P.2d at 686. The Court of Appeals of Washington expanded on this principle in *Evergreen School District No. 144 v. Washington State Human Rights Commission*, 695 P.2d 999 (Wash. Ct. App. 1985). The court noted that while subjective feelings of the plaintiff cannot be the basis for a claim of discrimination, they are illustrative when coupled with unequal treatment. *Evergreen School District*, 695 P.2d at 1004.

125. *MacLean*, 635 P.2d at 686 (citing *Anderson v. Pantages Theatre Co.*, 194 P. 813 (Wash. 1921)).

126. *Anderson*, 194 P. at 814.

127. *See MacLean*, 635 P.2d at 686.

unacceptable or unsolicited in determining whether someone was denied full enjoyment of a place of public accommodation.¹²⁸ The opinions of these courts are consistent with the notion that a refusal of service, rather than a mere difference in prices for different sexes, would violate state public accommodation statutes.¹²⁹

A woman who is refused service at a pharmacy because of her sex-based health care needs is receiving a sub-standard level of care. While she would be served without question upon presentation of any other lawful prescription or request for over-the-counter medication, her need for medication to prevent pregnancy is treated as undeserving of professional respect. Refusal of service will necessarily result in the patron feeling unwanted and unsolicited. Furthermore, when a pharmacist looks a patient in the eye and tells the patient that he or she holds a moral objection to fulfilling her basic health need, the patient will not only feel unsolicited, but judged and condemned by the pharmacist upon whom she relies for help.

In sum, a pharmacist who refuses service to patients in need of pregnancy prevention care is not providing a comparable level of service to those patients. Moreover, the refusal will result in the patient feeling unwanted, undesired and unsolicited. Unequal treatment which, by its very nature causes a patron to feel unwelcome and unsolicited, rises to the level of behavior that is unacceptable under the WLAD.

5. Substantial Factor: Refusal to Fill Prescriptions for Emergency Contraception Results in Sex Discrimination

Finally, the Washington Supreme Court has held that the proper causation test for disability discrimination in places of public accommodation is that the alleged unfair practice was a substantial factor in producing the alleged discrimination.¹³⁰ While this element appears to

128. *See, e.g.*, *Dock Club, Inc. v. Illinois Liquor Control Comm'n*, 428 N.E.2d 735, 738 (Ill. App. Ct. 1981) (noting that if higher prices charged to male customers had been exacted for the purpose of discouraging them from patronizing the establishment, or if it had that effect, it would have denied them the equal enjoyment of the facilities in violation of the law); *Tucich v. Dearborn Indoor Racquet Club*, 309 N.W.2d 615, 619 (Mich. Ct. App. 1981) (noting that price differentials did violate the public accommodations statute where there was no statement or implication that any particular sex was not acceptable, welcome, or solicited).

129. *See also* *Magid v. Oak Park Racquet Club Assoc., Ltd.*, 269 N.W.2d 661, 663 (Mich. Ct. App. 1978) (holding that price differentials did not violate public accommodation statute absent a direct or indirect refusal, withholding, or denial of services).

130. *Fell v. Spokane Transit Auth.*, 911 P.2d 1319, 1330 (Wash. 1996) (citing *Finnessey v. Seattle Baseball Club*, 210 P. 679 (Wash. 1922) (finding that plaintiff allegedly ex-

require an examination of the intent of the defendant, the court has made clear that it does not require a showing of intent.¹³¹ Specifically, the “test for discrimination requires only that the alleged discrimination result from something the defendant has done, and not from some other cause. This is a reflection of the necessity for establishing proximate cause, and has nothing to do with the subjective intent of the defendant.”¹³²

Moreover, the Court of Appeals of Washington examined the futility of making an inquiry into intent in the presence of a discriminatory impact. Citing to *Robinson v. 12 Lofts Realty, Inc.*, the Court of Appeals of Washington explained that when a discriminatory effect is present, the courts “must be alert to recognize means that are subtle and explanations that are synthetic.”¹³³ Additionally, courts have noted that discrimination “may arise just as surely through ‘subtleties of conduct’” as through an openly-expressed refusal to serve.¹³⁴

In the case of a refusal to fill a prescription for emergency contraception, the refusal of service to all persons capable of becoming pregnant is a refusal constituting sex discrimination. Moreover, the subjective intent of the pharmacist is not at issue. Regardless of the pharmacist’s subjective intent, an overt denial of care and the creation of a barrier to care for women produces a discriminatory effect.

cluded from a ball park on the basis of race was actually excluded because he had fixed the outcome of games); *Klein v. Boeing Co.*, 847 F. Supp. 838 (W.D. Wash. 1994) (finding that employee was discharged, not because of his mental condition, but based on employer’s policy allowing for termination of employees convicted of crimes); *Chadwick v. Northwest Airlines, Inc.*, 667 P.2d 1104 (Wash. 1983) (finding that chronic absenteeism and unsatisfactory work, rather than handicap, resulted in discharge)).

131. *Fell*, 911 P.2d at 1331 n.30.

132. *Fell*, 911 P.2d at 1331 n.30.

133. *Lewis v. Doll*, 765 P.2d 1341, 1346 (Wash. Ct. App. 1989)(citing *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2nd Cir. 1979)).

134. *Negron v. Snoqualmie Valley Hosp.*, 936 P.2d 55, 60 (Wash. Ct. App. 1997) (citing *Browning v. Slenderella Sys. of Seattle*, 341 P.2d 859, 862 (Wash. 1959)), *overruled on other grounds by Nord v. Shoreline Savings Ass’n*, 805 P.2d 800, 804 (Wash. 1991).

III. ARGUMENTS OF THE DEFENDANT PHARMACIST

A. Plaintiff Has not Met Her Prima Facie Case Because She has Failed to Show Discrimination on the Basis of Sex

A defendant pharmacist is most likely to assert that a plaintiff has failed to make a prima facie case and will assert that the plaintiff has failed to show that she is a member of a protected class. Defendant pharmacist will argue that patients seeking contraception are being refused based on their choice of drugs, rather than based on their sex. Specifically, the argument would be that the relevant manner of classifying patients is women who present prescriptions for contraception or emergency contraception and women who present prescriptions for drugs that are not contraceptives. This was the analysis used in *Gilbert*, where the Court reasoned that a disability benefits plan that excluded pregnancy-related benefits was not discriminatory because the plan “covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that ‘[t]here is no risk from which men are protected and women are not.’”¹³⁵ Thus, a pharmacist might argue that women are not denied a service (provision of contraception) that is available to male patients because contraception is not made available to men either.

An analysis of the WLAD reveals that PDA analysis taking into account women’s unique, sex-based characteristics (and not requiring a similarly situated male who, by definition, lacks those characteristics) should indeed be extended to places of public accommodation. First, the WLAD makes clear in its Declaration of civil rights¹³⁶ that the right to be free from discrimination “because of” sex includes the right to full enjoyment of places of public accommodation.¹³⁷ This is significant in that the WLAD’s inclusion of the PDA phrase “because of . . . sex” evidences an intention to extend the PDA analysis beyond the employment context and into public accommodation cases.

Washington Courts should extend Title VII PDA analysis to prohibitions on discrimination in places of public accommodation for several reasons. First, WLAD is broader than the Federal Civil Rights Act in that it protects women from discrimination in places of public accom-

135. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 138 (1976) (citing *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974)).

136. WASH. REV. CODE § 49.60.030(1) (2002).

137. *Id.* § 49.69.030(1)(b).

modation, which Title II of the federal act neglects.¹³⁸ Secondly, Washington has promulgated state regulations perfectly parallel to the federal PDA, evidencing its intention to protect women from discrimination on the basis of their potential to become pregnant and its agreement with Congress that the analysis in *Gilbert* does not adequately consider the sex-based needs of women. Finally, Washington courts have consistently used federal employment law analysis in adjudicating public accommodation claims. For example, in interpreting the WLAD in the disability discrimination context, Washington courts took guidance directly from the application of Title VII employment principles to the ADA.¹³⁹ Accordingly, for judicial consistency, Washington courts should again look to Title VII for guidance in applying the public accommodation statute to sex discrimination claims. The result would take women's sex-based characteristics into account when assessing all sex discrimination claims.

B. Refusals Fall Inside Statutory Exceptions

A pharmacist facing a claim of discrimination under the public accommodations statute may attempt to raise other statutory defenses. Specifically, there are exceptions within the statute itself that permit what would otherwise constitute discriminatory behavior. First, refusal of service is permitted if it happens at a private club.¹⁴⁰ However, a pharmacist can not assert with any force that a pharmacy is not a place of public accommodation or falls within the definition of private club. Second, there is an exception under the statute that allows refusal of service when the complainant has engaged in improper conduct constituting a risk to property or other persons.¹⁴¹ Washington courts have indicated that improper conduct in places of public accommodation includes shoplifting or public sexual contact.¹⁴² While the refusing

138. See 42 U.S.C. § 2000a(a) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.").

139. *Fell v. Spokane Transit Auth.*, 911 P.2d 1319, 1326–28 (Wash. 1996).

140. WASH. REV. CODE § 49.60.040(10) (2002) ("[N]othing in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private . . ."); see also *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P.3d 655, 668 (Wash. 2002).

141. WASH. REV. CODE § 49.60.215; see also *Lewis v. Doll*, 765 P.2d 1341, 1345 (Wash. Ct. App. 1989).

142. *Lewis*, 765 P.2d at 1345.

pharmacist may suggest that use of contraception is improper conduct according to the pharmacist's religious or moral beliefs, such a fringe assertion that seeking access to a lawful prescription is improper would certainly fail.

*C. Freedom of Religion: Religious Beliefs
Are Fundamentally Protected Rights*

Once a woman has established her prima facie case under the WLAD, the burden shifts to the defendant to show a non-discriminatory reason for the discriminatory action. The burden then shifts back to the plaintiff to show that the non-discriminatory reason is a mere pretext.¹⁴³ Accordingly, once a plaintiff has met her prima facie case, the defendant pharmacist will assert "other non-discriminatory reasons" for refusing to dispense drugs that are basic health care for women.

One allegedly non-discriminatory reason that a pharmacist who refuses to fill prescriptions for emergency contraception might assert is that the refusal is based on a protected religious or moral belief. Specifically, the pharmacist will assert that a fundamental freedom of religion provides a right to refuse to dispense contraceptives. While it is true that the Washington State Constitution provides broad protection to freedom of religion, that freedom does not go unchecked.¹⁴⁴ Specifically, while citizens may exercise freedom of conscience in their beliefs, they may not exercise this belief in the form of actions such that the peace and safety of the state are endangered.¹⁴⁵

The Supreme Court of the United States held in *Cantwell v. Connecticut* that even though the freedom to believe is absolute, the freedom to act is subject to regulation for the protection of society.¹⁴⁶ The Supreme Court of Washington has held that the freedom to act can be

143. *Fell*, 911 P.2d at 1331.

144. WASH. CONST. art. I, § 11 reads:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

145. *Id.*; see *Backlund v. Bd. of Comm'rs*, 724 P.2d 981, 986 (Wash. 1986) (holding that restrictions on exercise of religious freedom may be justified by a compelling government interest); see also *infra* note 150 and accompanying text.

146. *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940).

restricted “only to prevent grave and immediate danger to interests which the State may lawfully protect.”¹⁴⁷ Additionally, “conduct motivated by religious beliefs may be subject to regulation if that conduct conflicts with the exercise of the interests of third parties.”¹⁴⁸ Finally, “[i]n the area of health and safety, governmental interests often override individual objections to regulations relating thereto.”¹⁴⁹ In sum, while religious beliefs are protected, actions based on those beliefs are not protected when those actions result in a violation of law or endangerment of the public health.

Washington courts have found a variety of governmental interests to override religious free exercise.¹⁵⁰ Specifically, the Supreme Court of Washington found that a student’s religiously-based refusal to submit to a screening for tuberculosis as a condition for admission to the University of Washington presented a clear and present, grave and immediate threat to the public health.¹⁵¹ The court explained that the State’s requirement that all students be screened for tuberculosis is necessary for protection of the public health.¹⁵² Accordingly, “infringement of the [student]’s rights is a necessary consequence of a practical attempt to

147. *Backlund*, 724 P.2d at 987 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

148. *Backlund*, 724 P.2d at 987.

149. *Backlund*, 724 P.2d at 987; *see also* *Jacobson v. Massachusetts*, 197 U.S. 11, (1905) (holding that certain mandatory vaccinations required by a state do not violate the Fourteenth Amendment); *Jehovah’s Witnesses v. King County Hosp. Unit No. 1*, 278 F. Supp. 488 (W.D. Wash. 1967) (holding that the State may require blood transfusions for children over religious objections of parents), *aff’d*, 390 U.S. 598 (1968); *State ex rel. Holcomb v. Armstrong*, 239 P.2d 545 (Wash. 1952) (holding that University of Washington requirement that students have an X-ray examination before registration to discover possible tuberculosis infections overrode religious objections thereto); *Tenn. Dep’t of Human Serv. V. Hamilton (In re Hamilton)*, 657 S.W.2d 425 (Tenn. Ct. App. 1983) (holding that the State may require a twelve-year-old girl to submit to cancer treatment over the religious objections of parents).

150. *See e.g.*, *Washington v. Meacham*, 612 P.2d 795 (Wash. 1980) (holding the State has a compelling interest in requiring blood tests for putative fathers, under the Uniform Parentage Act, although providing blood was against the complaining parties’ religious beliefs); *Holcomb*, 239 P.2d at 545–46 (holding the State has a compelling interest in a state university rule requiring an X-ray of all incoming students for tuberculosis despite beliefs of a Christian Scientist student); *Washington v. Clifford*, 787 P.2d 571, 574–75 (Wash. Ct. App. 1990) *review denied*, 792 P.2d 535 (holding the State has a compelling interest in requirement for a driver’s license despite complaining party’s assertion that his god and religious community would monitor them).

151. *Holcomb*, 239 P.2d at 548.

152. *Holcomb*, 239 P.2d at 548.

avoid danger.”¹⁵³ Meanwhile, the student’s “freedom to believe” remains absolute.¹⁵⁴

More recently, the Supreme Court of Washington found that a physician’s religiously-based refusal to comply with a rule requiring him to carry professional liability insurance was overridden by the state’s compelling interest in protecting the health and welfare of its citizens.¹⁵⁵ Moreover, the court reasoned that the physician

freely chose to enter into the profession of medicine. Those who enter into a profession as a matter of choice, necessarily face regulation as to their own conduct and their voluntarily imposed personal limitations cannot override the regulatory schemes which bind others in that activity. [His professional] practice is open to the public. He enjoys the economic benefits of his practice. . . . Therefore, with these benefits come corresponding burdens. . . .¹⁵⁶

A pharmacist’s freedom to believe that contraception is immoral is certainly a fundamental and protected right. The pharmacist’s freedom to act, however, is not so protected. Indeed, the freedom to act may be regulated and restricted to protect the public health and safety. Like the physician in *Backlund*, a pharmacist freely chooses to enter the profession of pharmacy and works in a place of public accommodation. The pharmacist thus faces the limitations of all laws, including those applicable to proper behavior in places of public accommodation that prohibit discrimination and particularly those that apply to licensed healthcare professionals.¹⁵⁷ A pharmacist may not refuse to comply with those laws on the basis that religious or moral beliefs dictate discriminatory behavior. Moreover, even if refusals are not deemed discriminatory, refusals result in a denial of health care that interferes with the health and safety of citizens of the state.

Provision of contraception, a basic element of health care for women, is crucial to public health. In the case of emergency contraception, access is essential to health and safety of patients in that the drug is most effective when taken within seventy-two hours of unprotected intercourse.¹⁵⁸ Refusal to dispense emergency contraception would result

153. *Holcomb*, 239 P.2d at 548.

154. *Holcomb*, 239 P.2d at 548.

155. *Backlund v. Bd. of Comm’rs*, 724 P.2d 981, 988 (Wash. 1986).

156. *Backlund*, 724 P.2d at 990.

157. See WASH. REV. CODE § 49.60.010 (West 2002).

158. *Holcomb*, 239 P.2d at 548 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

in unintended pregnancies and, for some women potentially life-threatening circumstances.¹⁵⁹ As many as one in every 2,800 women in developed countries, including the United States, faces risk of death resulting from pregnancy in the course of her lifetime.¹⁶⁰ Because access to contraception is crucial to the public health and safety, pharmacists' religiously-motivated refusal to dispense contraception must be prohibited.

D. Employers Must Make a Reasonable Accommodation for Religious Beliefs

Pharmacists will argue that even if there is no fundamental right to refuse based on religious beliefs, the employer pharmacy is required to make a reasonable accommodation to those beliefs or else face a charge of employment discrimination.

Title VII of the Civil Rights Act protects employees from discrimination based upon their religious beliefs.¹⁶¹ In 1972, Title VII was amended to require employers "to make reasonable accommodations, short of undue hardship, for the religious practices of employees and prospective employees."¹⁶² Generally, a plaintiff can establish a prima facie case of employment discrimination by showing that

he had a sincere religious belief that conflicted with an employment requirement, that he placed the employer on notice of the need for accommodation, or that the employer possessed enough information about his religious needs to understand that there was a need for accommodation and that the employer failed to reasonably accommodate his needs.¹⁶³

159. World Health Organization, *Maternal Mortality in 2000: Estimates developed by WHO, UNICEF, UNFPA*, at 1 (2004).

160. *Id.* at 2.

161. 42 U.S.C. § 2000e-2(a) (2000); *id.* § 2000e(b) (applying only to employers of fifteen or more employees).

162. ABIGAIL COOLEY MODJESKA, *EMPLOYMENT DISCRIMINATION LAW*, 2-127 (3rd ed. 2006) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)). "The term 'religion' includes 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 or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (2002).

163. MODJESKA, *supra* note 162, at 2-127 to -128 (citations omitted).

Additionally, plaintiff must specifically request a reasonable accommodation rather than merely asserting “an unqualified right to disobey orders that he deems inconsistent with his faith. . . .”¹⁶⁴ Furthermore, an employer may escape liability by either attempting to negotiate with the employee to reasonably accommodate the belief or by showing “that accommodation ‘could not be accomplished without undue hardship’ and that there was, therefore, no need to engage in ‘fruitless dialogue.’”¹⁶⁵

According to the EEOC, examples of reasonable accommodations include job reassignments, flexible scheduling, lateral transfers, and voluntary substitutions with other employees.¹⁶⁶ On the other hand, the employer is not required to accommodate religious beliefs to the point that it creates an “undue hardship on the conduct of the employer’s business.”¹⁶⁷ Title VII does not define “undue hardship”, so the “‘precise reach of the employer’s obligation . . . must be determined on a case-by-case basis.’”¹⁶⁸ The Supreme Court of the United States and the EEOC regulations explain that undue hardship can be demonstrated by imposition of “more than a *de minimis* cost” to the employer.¹⁶⁹ “More than *de minimis* cost” refers to not only economic and monetary cost, such as lost business or hiring additional employees, but also includes the non-economic burden imposed on the employer in conducting its business and unequal treatment of employees.¹⁷⁰

For example, in *Trans World Airlines, Inc. v. Hardison*, the Supreme Court of the United States found that where an employee’s religious beliefs prevented him from working on certain days or assignments, requiring an employer either to assign replacements or to offer premium wages for volunteer replacements would entail more than a *de minimis* cost in the form of lost efficiency or higher wages.¹⁷¹ Other examples of an undue hardship include forcing an employer to hire additional

164. *Id.* at 2-128 (citing *Reed v. Great Lakes Cos.*, 330 F.3d 931 (7th Cir. 2003)).

165. *Id.* at 2-128 to -130 (quoting *Brown v. Polk County, Iowa*, 61 F.3d 650 (3rd Cir. 1990); *Weber v. Roadway Exp., Inc.* 199 F.3d 270 (5th Cir. 2000)).

166. 29 C.F.R. § 1605.2(d)(1) (2006); *see also* Equal Employment Opportunity Commission, Religious Discrimination (Feb. 2, 2007), <http://www.eeoc.gov/types/religion.html>.

167. 42 U.S.C. § 2000e(j) (2000).

168. МОДЖЕСКА, *supra* note 162, at 2-138 (quoting *Beadle v. Hillsborough County Sheriff’s Dep’t*, 29 F.3d 589 (1994)).

169. 29 C.F.R. 1605.2(e) (2006) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

170. *Trans World Airlines*, 432 U.S. at 84; *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134–35 (1st Cir. 2004).

171. *Trans World Airlines*, 432 U.S. at 84.

staff,¹⁷² requiring other employees to assume a disproportionate amount of the workload,¹⁷³ or forcing the employer to violate the law.¹⁷⁴ Accommodating an employee who objects to a “substantial proportion of the duties of a particular position,” rather than a “minute percentage,” can also cause the employer undue hardship.¹⁷⁵

There is one case that specifically speaks to accommodating a pharmacist’s religious objection to selling prescription contraceptives. In *Noesen v. Medical Staffing Network Inc.*,¹⁷⁶ a pharmacist, Neil Noesen, refused to be involved in dispensing any form of contraceptives because of his religious beliefs. He notified his employer, who agreed to accommodate the religious belief by ensuring that an additional pharmacist would always be on duty to fill prescriptions and answer inquiries related to contraceptives.¹⁷⁷ Noesen’s employment was terminated when he refused to notify the other pharmacist on duty that a customer needed assistance with birth control.¹⁷⁸ At issue was whether the employer made a reasonable accommodation to Noesen’s religious beliefs under the Title VII.¹⁷⁹ The United States District Court for the Western District of Wisconsin granted summary judgment for the employer, reasoning that Noesen’s beliefs were accommodated by ensuring the presence of an additional pharmacist to meet patients’ needs.¹⁸⁰ However, the employer was not required to make the additional accommodation of allowing

172. *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1023 (10th Cir. 1994) (stating that the cost of hiring an additional worker can be more than a *de minimis* cost); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (hiring substitute for pharmacist who requires days for religious observance is more than a *de minimis* cost).

173. *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001) (requiring other counselors in employee assistance program to assume disproportionate workload to accommodate another counselor who refused to counsel clients on subjects conflicting with her religious beliefs was an undue hardship as a matter of law).

174. *Hover v. Florida Power & Light Co.*, No. 93-14236-CIV-RYSKAMP, 1994 U.S. Dist. LEXIS 19920 (D. Fla. Nov. 14, 1994) (requiring employer to falsify social security number for internal purposes is an undue hardship, as it is unreasonable to ask employer to intentionally violate federal regulations of the Internal Revenue Code).

175. *See Haring v. Blumenthal*, 471 F. Supp. 1172, 1180, 1184. (D.D.C. 1979) (explaining that where an employee of the IRS refused to process tax-exemption proposals for pro-choice groups, and the objection affected the processing of less than two percent of the volume of applications, the IRS should have no difficulty accommodating the employee’s religious beliefs because that small number of applications could be clearly processed without undue hardship to the IRS).

176. No. 06-C-071-S, 2006 WL 1529664, at *1 (W.D. Wis. June 1, 2006).

177. *Noesen*, 2006 WL 1529664, at *2.

178. *Noesen*, 2006 WL 1529664, at *3.

179. *Noesen*, 2006 WL 1529664, at *3.

180. *Noesen*, 2006 WL 1529664, at *4.

Noesen to completely ignore patients or leave them on hold indefinitely.¹⁸¹ It is clear from this case that customer abandonment constitutes an undue burden on the employer and thus is not considered a reasonable accommodation for religious beliefs under Title VII.

Pharmacists refusing to fill prescriptions for contraception on the basis of religious beliefs do not have an unrestricted right to decline to perform portions of their job duties. While a pharmacist may request that the employer reasonably accommodate her or his beliefs, the employer is not obligated to undergo an undue hardship. What constitutes a reasonable accommodation and an undue hardship will be different depending on the facts and circumstances at each pharmacy. For example, flexible scheduling and voluntary shift substitutions might not create an undue hardship on a very large pharmacy that regularly schedules multiple pharmacists to work at the same time. On the other hand, these measures might indeed cause an undue hardship at a small pharmacy that schedules only one pharmacist at a time.

Generally speaking, a pharmacy will not be required to hire additional staff, compel other employees to take on a disproportionate amount of the workload, compromise customer service, or violate the law.¹⁸² Accordingly, because a flat refusal to fill prescriptions for contraceptives constitutes sex discrimination in a place of public accommodation and violated the WLAD, employers are not obligated to simply allow pharmacists to refuse to fill prescriptions. Even if such refusals do not constitute sex discrimination, they certainly compromise customer service and negatively affect business such that the refusal causes an undue hardship on the employer beyond its obligation to accommodate.

In conclusion, a woman bringing a claim of sex discrimination in a place of public accommodation when she is refused basic health care will be able to proceed with her case despite the many defenses that a pharmacist will assert. First, discrimination based on the potential to become pregnant is sex discrimination on its face, as determined by Congress and the Supreme Court of the United States. This analysis should be extended to places of public accommodation in Washington as demonstrated by Washington courts' repeated willingness to extend federal employment discrimination principles to the arena of public accommodation. Second, none of the exceptions within the WLAD apply to

181. *Noesen*, 2006 WL 1529664, at *5.

182. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982); *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 500–02 (5th Cir. 2001); *Noesen*, 2006 WL 1529664, at *4.

pharmacist refusals. Third, the fundamental freedom of religion protecting the beliefs of pharmacists does not extend to allow unfettered discriminatory behavior that interferes with the public health and welfare, as refusals to dispense inevitably do. Finally, employers are required to make reasonable accommodations to pharmacists' religious beliefs provided that they do not cause more than a *de minimis* cost to the employer. The bar here is low, and while some larger employers may be willing and able to accommodate pharmacist employees, many will not be required to do so because most accommodations will create more than a *de minimis* cost to the employer. Women will prevail in claims of sex discrimination in places of public accommodation entirely consistent with Washington law and policy.

IV. WASHINGTON PUBLIC POLICY PROTECTS REPRODUCTIVE FREEDOM

Washington provides several unique protections for women and their reproductive freedom. First, Washington voters approved an amendment to the state constitution granting equal rights to women in the form of the state Equal Rights Amendment.¹⁸³ Second, the Washington State Legislature declared that every woman has a fundamental right to choose contraception, abortion, or neither.¹⁸⁴ Additionally, the legislature declared, "[T]he state shall not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services, or information."¹⁸⁵ Third, as discussed earlier, the Washington HRC has promulgated regulations prohibiting discrimination in employment based on a woman's pregnancy or potential to become pregnant.¹⁸⁶ Fourth, Washington protects women's access to reproductive health care in regulations requiring comprehensive health plans to include coverage for contraceptives.¹⁸⁷ As is clear from the extensive protections granted to women's reproductive freedom, Washington values its women and their ability to exert control over their reproductive futures. These protections

183. WASH. CONST. art. XXXI, § 1 ("Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.").

184. WASH. REV. CODE § 9.02.100 (2003) ("[I]t is the public policy of the state of Washington that: (1) Every individual has the fundamental right to choose or refuse birth control; (2) Every woman has the fundamental right to choose or refuse to have an abortion . . .").

185. *Id.* § 9.02.100(4).

186. WASH. ADMIN. CODE 162-30-020 (2005).

187. *Id.* at 284-43-822(1).

are of little benefit if access may be denied and discrimination may prevail at the pharmacy.

Washington has taken extensive measures to protect each of its citizens from wrongful discrimination. The WLAD, initially enacted as a law against employment discrimination in 1949, has repeatedly been expanded over the years to provide greater protections for the citizens of Washington State.¹⁸⁸ The Supreme Court of Washington has held that the purpose of the law is to deter and to eradicate discrimination.¹⁸⁹ Additionally, the court has also held that the law is to be construed liberally to accomplish its purposes.¹⁹⁰ In fact, the court has specifically interpreted Washington state laws more broadly than federal anti-discrimination laws because “unlike our state law against discrimination, Title VII does not contain a broad statement of the right to be free from discrimination in other areas. Our state law does.”¹⁹¹ It is clear from the language of the statute and the actions of Washington courts that the WLAD is to be interpreted as broadly as possible to achieve the purpose of deterring and eradicating all forms of discrimination.¹⁹²

It follows naturally that Washington state policy protecting women should not stop in places of public accommodation. As the Washington State Supreme Court said of the WLAD, its purpose is “to prevent and eliminate discrimination in all public settings.”¹⁹³ Women should be protected from discrimination and should be granted access to health care at pharmacies. To be sure, there are many who disagree and feel that pharmacists should have the right to turn patients away on religious grounds. However, while religious beliefs are protected, those beliefs should not be protected to the extent that they override the rights of others to seek vital health care.

188. See *Marquis v. City of Spokane*, 922 P.2d 43, 48 (Wash. 1996) (citing LAWS OF 1949, ch. 183).

189. *Mackay v. Acorn Custom Cabinetry, Inc.*, 898 P.2d 284, 287–88 (Wash. 1995).

190. *Marquis*, 922 P.2d at 49.

191. *Marquis*, 922 P.2d at 49 (quoting WASH. REV. CODE § 49.60.010).

192. See generally *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P.3d 655 (Wash. 2002); *Brown v. Scott Paper Worldwide Co.*, 20 P.3d 921 (Wash. 2001); *Martini v. Boeing Co.*, 971 P.2d 45 (Wash. 1999); *Marquis*, 922 P.2d 43; *Xieng v. Peoples Nat'l Bank of Wash.*, 844 P.2d 389 (Wash. 1993); *MacLean v. First Nw. Indus. of Am., Inc.*, 635 P.2d 683, 684–86 (Wash. 1981); *Pham v. City of Seattle*, 103 P.3d 827 (Wash. Ct. App. 2004).

193. *Fraternal Order of Eagles*, 59 P.3d at 671.

CONCLUSIONS, SUGGESTIONS AND SOLUTIONS

Contraception and emergency contraception are basic health care for women. As equal participants in society, women deserve access to basic health care equal to that of all other citizens. Religious and moral beliefs of pharmacists acting as gatekeepers should not stand in the way of basic care. Women living in a state that protects reproductive freedom to the extent that Washington does should be able to walk into a pharmacy, present a prescription for emergency contraception, and have that prescription filled without delay or disrespect. Anything short of seamless delivery of care constitutes discrimination on the basis of sex in a place of public accommodation.

As described in this Article, case law requires that prescription contraceptives receive the same level of respect as other medications. Because contraception affects only the health of women, its denial is sex discrimination on its face whether that denial occurs in the workplace or the pharmacy. With the many rights that women have fought for over the course of history, we cannot allow pharmacists to control the reproductive destiny, and thus the social and economic future, of women.

A policy allowing pharmacists to “refuse and refer,” that is, to refuse to fill and then refer the patient to another pharmacy, does not comport with the level of protection granted to women and reproductive freedom in the State of Washington. It allows pharmacists to humiliate women and then forces them to sacrifice valuable time searching the city, county, or even state, for a pharmacist that will provide health care. Moreover, considering that the nearest pharmacy may be many miles away for women living in rural areas, “refuse and refer” policies can cause the individual to be unable to have her prescription filled in a timely manner. This practice is unacceptable particularly when the crucial drug, emergency contraception, is time dependent and loses efficacy as time progresses. Simply put, a policy allowing “refuse and refer” reinforces sex discrimination and results in the disempowerment and subjugation of women.

The only defensible position that allows pharmacists to refuse to dispense emergency contraception is one that requires another pharmacist available to promptly fill the prescription on-site and ensures that patients receive care without delay, disrespect, or discrimination. No patient should ever be discriminated against by being turned away, forced to face delay, forced to travel, or forced to search for another pharmacy that is willing to provide her care. Additionally, patients

should never be exposed to the fact that a pharmacist or other staff member objects to their basic health care choices.

Employers that are able to accommodate religious objections without sacrificing the seamless delivery of care should do so. This process would require pharmacists to notify their employers of objections to filling prescriptions for emergency contraception. Those pharmacies that are able to accommodate the objections by means of scheduling or other simple means should do so. Pharmacies should also institute policies describing how patients seeking emergency contraception should be treated. These policies should prohibit the obstruction of care and require that each patient be treated with dignity and respect.

The HRC should either issue a policy statement or enact a rule clarifying the reach of the statute and protecting the reproductive health of women because courts “must give great weight to the statute’s interpretation by the agency charged with its administration”¹⁹⁴ Such clarification would strengthen protection of reproductive freedoms and allow women to successfully pursue claims of sex discrimination in places of public accommodation against pharmacists who insist on placing personal beliefs above the health and safety of women.

Notably, on April 12, 2007, the Washington State Board of Pharmacy voted unanimously to adopt two rules imposing a duty on pharmacists to fill valid prescriptions.¹⁹⁵ Pharmacists who violate the rule may be subject to disciplinary proceedings from the Board of Pharmacy.¹⁹⁶ The adoption of this rule not only bolsters Washington’s policy of protecting access to contraception, it also provides an additional remedy for women who are refused care. However, the extent to which the new rules will be used by and prove beneficial to women seeking to gain access to ECPs is something which is presently undeterminable since the rules go into effect in mid-June of the current year.¹⁹⁷

Finally, although this Article focuses on Washington law, it is important to note that forty-five states have included sex in their public accommodation statutes and thus provide protection for women in public places. Accordingly, the analysis set forth can be applied within those states as well. Plaintiffs in any of those states should examine their public accommodation statutes as well as statutes related to contraceptive

194. See *Marquis*, 922 P.2d at 50.

195. WASH. ADMIN. CODE 246-869-010, -863-095 (2007); MSNBC.com, Board: Drug-gists Can’t Refuse Prescriptions (Apr. 13, 2007), <http://www.msnbc.msn.com/id/18090057>.

196. WASH. REV. CODE § 18.64.005 (1990) (granting the Washington State Board of Pharmacy the authority to “enforce all laws placed under its jurisdiction.”).

197. MSNBC.com, *supra* note 195.

coverage and pregnancy discrimination to determine whether they may be able to successfully pursue a sex discrimination claim when a pharmacist refuses to dispense emergency contraception. §

