

1998

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Recommended Citation

Jonathan A. Moskowitz, *Permitting Employers to Violate Employees' Civil Rights: The Griffin v. Eller Exemption From Washington's Law Against Discrimination*, 7 J. L. & Pol'y (1998).

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**PERMITTING EMPLOYERS TO VIOLATE
EMPLOYEES' CIVIL RIGHTS:
THE *GRIFFIN* v. *ELLER** EXEMPTION
FROM WASHINGTON'S LAW
AGAINST DISCRIMINATION**

*Jonathan A. Moskowitz***

*The right to be free from discrimination because of race, creed, color, national origin, [and] sex . . . is recognized as and declared to be a civil right. This right shall include, but not be limited to: . . . [t]he right to obtain and hold employment without discrimination;*¹

. . . .

*[Nothing contained in the law against discrimination] shall . . . be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights.*²

. . . .

*Any person deeming himself or herself injured by any act in violation of [the law against discrimination] shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both*³

* 922 P.2d 788 (Wash. 1996).

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¹ WASH. REV. CODE ANN. § 49.60.030(1)(a) (West 1990 & Supp. 1998).

² WASH. REV. CODE ANN. § 49.60.020.

³ WASH. REV. CODE ANN. § 49.60.030(2).

INTRODUCTION

Washington state's law against discrimination confers on all its citizens an unequivocal right to be free of discrimination and to seek redress through private actions for discriminatory acts committed by their employers.⁴ However, in a decision that establishes a disturbing precedent, the Washington Supreme Court held in *Griffin v. Eller*⁵ that employers of fewer than eight employees are exempt from the ambit of the state's law against discrimination.⁶ The *Griffin* court granted employers of fewer than eight employees immunity from the remedies contained in the statute, despite the statute's explicit language conferring a right to private action to all Washington citizens who allege that their employers have discriminated against them.⁷ The *Griffin* holding resulted in a deprivation of the right of a significant percentage of employees in the state to protect against violations of their civil rights, or even seek redress for such violations, simply because they are employed by companies with fewer than eight employees.⁸

⁴ See *supra* text accompanying notes 1-3 (quoting *id.* §§ 49.60.030(1)(a), 49.60.020, 49.60.030(2), which confer an unequivocal right on every Washington citizen to be free of discrimination and to pursue a private action to protect his or her civil rights).

⁵ 922 P.2d 788 (Wash. 1996).

⁶ *Id.* at 789 (holding that "employers of fewer than eight employees are statutorily exempt from [the] remedies provided under [the law against discrimination]" and that "the exemption passes constitutional muster").

⁷ See *supra* text accompanying notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2) (West 1990 & Supp. 1998)).

⁸ *Griffin*, 922 P.2d at 792. The court stated that "[a]pproximately 75 percent of business establishments in Washington have fewer than nine employees," accounting for "about 17.5 percent of the private employee work force." *Id.* (citing U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1992: WASHINGTON, CPB 92-49 (1994)). Explaining the Washington Legislature's likely motivation for exempting a significant percentage of businesses in the state from the remedies contained in the law against discrimination, the court reasoned that the "[s]tate has a substantial interest in the well-being of small business with regard to the state economy, tax base, and opportunities for employment." *Id.* See also Ferdinand M. De Leon & Lily Eng, *Court Limits Job Sex-Bias Cases—Firms with Fewer Than 8 Workers Exempt From State Law*, SEATTLE

The Washington Supreme Court's holding in *Griffin* effectively authorizes executives and managers of companies with fewer than eight employees to discriminate arbitrarily against their employees.⁹ By holding that such employers are exempt from the remedies contained in the law against discrimination, the court insulated these employers from liability for discriminatory conduct that would otherwise be prohibited by the law against discrimination.¹⁰ The court's holding also violates the privileges and immunities clause of Washington's Constitution, which states that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."¹¹

This Comment criticizes the holding of the Washington Supreme Court in *Griffin* by illustrating its deleterious impact on the civil rights of employees in companies with fewer than eight employees. Part I analyzes the legislative history of Washington's law against discrimination. Particular analysis is focused on the scope and meaning of various provisions of the Washington statute applicable to the controversy in *Griffin*. Part II discusses the facts and procedural history of *Griffin* and the Washington Supreme Court's erroneous interpretation of the statute. Further, Part II illustrates how the *Griffin* court's holding deprives individuals employed in companies with fewer than eight employees of the defense of their civil rights pursuant to the law against discrimination. Part III discusses *Griffin*'s limiting effect on the state constitution's privileges and immunities clause, which protects the right of citizens to redress discrimination in private actions pursuant to the law against discrimination. This Comment concludes that all Washington citizens employed in companies with fewer than eight employees possess an unequivocal right to pursue private actions to protect their civil rights. Moreover, this Comment asserts that by

TIMES, Sept. 6, 1996, at B1 (stating that "[a]bout 300,000 of the state's 2.3 million workers—13 percent—work for companies with fewer than 10 employees").

⁹ *Griffin*, 922 P.2d at 789.

¹⁰ *Id.* See WASH. REV. CODE ANN. § 49.60.

¹¹ WASH. CONST. art. I, § 12.

granting immunity from the law's remedial measures to employers of fewer than eight employees, the Washington Supreme Court misinterpreted the law against discrimination, and in doing so, has established a disturbing precedent.

I. THE LEGISLATIVE HISTORY OF WASHINGTON'S ANTI-DISCRIMINATION LAW¹²

Washington's law against discrimination was enacted to prevent discrimination based on "race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical disability."¹³ Among the rights protected by statute is the right to "obtain and hold employment without discrimination."¹⁴

The statute confers a general right to redress alleged acts of discrimination by providing any person who alleges to be a victim of discriminatory acts a right to bring a private civil action to prevent further violations or recover damages.¹⁵ While the law against discrimination was enacted in 1949,¹⁶ the general right to pursue a private cause of action was not conferred on Washington citizens until 1957.¹⁷

In its 1957 amendment to the law against discrimination, the Washington Legislature conferred a general right to pursue a private action by adding to the statute the following language: "Nor

¹² WASH. REV. CODE ANN. § 49.60.

¹³ WASH. REV. CODE ANN. § 49.60.030(1) (West 1990 & Supp. 1998).

¹⁴ WASH. REV. CODE ANN. § 49.60.030(1)(a). Other rights protected in the statute include "[t]he right to the full enjoyment . . . of any place of public . . . accommodation . . . ; [t]he right to engage in real estate . . . [and] credit transactions . . . ; [t]he right to engage in insurance transactions or transactions with health maintenance organizations" and "[t]he right to engage in commerce free from any discriminatory boycotts or blacklists." *Id.* § 49.60.030(1)(b)-(f). Further, the statute states that the right to be free from discrimination "shall include, but not be limited to" the specific acts of discrimination listed in the statute. *Id.* § 49.60.030(1).

¹⁵ See *supra* text accompanying note 3 (quoting *id.* § 49.60.030(2)).

¹⁶ WASH. REV. CODE ANN. § 49.60.010 (1949 Wash. Laws, ch. 183, § 1).

¹⁷ *Griffin v. Eller*, 922 P.2d 788, 800 (Wash. 1996) (Talmadge, J., dissenting) (citing WASH. REV. CODE ANN. § 49.60.020, amended by 1957 Wash. Laws, ch. 37, § 2).

shall anything herein contained be construed to deny the right of any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights.”¹⁸ The expansive scope of the right to pursue a private action was elucidated in a 1973 amendment to the statute, which made clear that “private statutory actions to enforce the civil right to be free of discrimination in any of the areas mentioned”¹⁹ in the statute were remedies available to all individuals alleging such discrimination.²⁰

Prior to the enactment of these amendments, the only remedy afforded by the law against discrimination was the right to seek administrative relief through the state’s Human Rights Commission.²¹ Today, however, the right to seek administrative relief for claims of employment discrimination is limited to those individuals who allege that their “employers” have committed “unfair practices” pursuant to the definitions of these terms contained in the

¹⁸ *Id.* at 800 n.6 (Talmadge, J., dissenting) (citing WASH. REV. CODE ANN. § 49.60.020).

¹⁹ *Id.* at 800-01 (Talmadge, J., dissenting).

²⁰ *Id.* at 801 (citing WASH. REV. CODE ANN. § 49.60.030(2) (West 1990 & Supp. 1998)). Section 49.60.030(2) provides that:

Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys’ fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964

WASH. REV. CODE ANN. § 49.60.030(2).

²¹ *Griffin*, 922 P.2d at 799 (Talmadge, J., dissenting) (stating that “[t]he 1949 Act did not create a private right of action to redress discrimination in employment”). See WASH. REV. CODE ANN. § 49.60.010 (creating the Washington Human Rights Commission and granting it the authority to enact rules and regulations to enforce the provisions of the law against discrimination). Prior to the 1957 amendment of the law against discrimination, section 49.60.120(4) of the statute linked the jurisdiction of the Human Rights Commission to the adjudication of “complaints alleging ‘discrimination in employment.’” *Griffin*, 922 P.2d at 800 (referring to WASH. REV. CODE ANN. § 49.60.120(4)).

statute.²² “Employer” is defined by the law against discrimination as “any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.”²³ Accordingly, citizens of Washington who work in companies with fewer than eight employees are prevented from seeking relief through the Commission for employment discrimination they allege to have suffered.²⁴ It is apparent, however, that through its 1957 amendment of the law against discrimination, the Washington Legislature intended to provide all Washington citizens with the means to redress alleged violations of their civil rights through private actions, regardless of the size of the company in which they worked.²⁵

²² Section 49.60.180(1)-(3) of the statute declares that “[i]t is an unfair practice for any employer” to discriminate against any person “because of age, sex, marital status, race, creed, color, national origin or the presence of any sensory, mental, or physical disability” in decisions related to “hire,” “discharge,” “compensation” or “other terms or conditions of employment.” WASH. REV. CODE ANN. § 49.60.180(1)-(3). *See* *Glasgow v. Georgia-Pacific Corp.*, 693 P.2d 708, 711 (Wash. 1985) (holding that claims of sexual harassment are actionable under the law against discrimination). The statute further states that it is an “unfair practice” for an employer to “print, or circulate . . . any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination” based on the aforementioned factors. WASH. REV. CODE ANN. § 49.60.180(4). Pursuant to section 49.60.120(4) of the law against discrimination, Washington’s Human Rights Commission is empowered today “[t]o receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter.” WASH. REV. CODE ANN. § 49.60.120(4).

²³ WASH. REV. CODE ANN. § 49.60.040(3).

²⁴ *See supra* note 22 and accompanying text (discussing the limited jurisdiction of the Human Rights Commission to adjudicate charges of employment discrimination pursuant to the definitions of “employer” and “unfair practices” contained in the law against discrimination, pursuant to WASH. REV. CODE ANN. §§ 49.60.120(4), 49.60.180(1)-(4)); *supra* text accompanying note 23 (discussing the definition of “employer” pursuant to WASH. REV. CODE ANN. § 49.60.040(3)).

²⁵ *See Griffin*, 922 P.2d at 800 (Talmadge, J., dissenting) (stating that the Legislature’s amendment conferring a general right to pursue a private action to protect one’s civil rights coincided with the expansion of the statute’s coverage

Further evidence of the Legislature's intent to create a broad right of private action can be found in the 1957 amendment of the statutory provision defining the powers and duties of the Human Rights Commission.²⁶ The amendment narrowed the Commission's jurisdiction, which had included adjudication of charges of "discrimination in employment," by limiting its authority to adjudication of charges of "unfair practices as defined in [the law against discrimination]."²⁷ This amendment suggests that it was the Legislature's intent to narrow the Commission's enforcement authority and differentiate it from the broad right of private action conferred on Washington citizens.²⁸ Moreover, the amendment, in redefining the authority of the Human Rights Commission, illustrates that the Legislature's likely purpose was to ensure that the "definitions of unfair practices would not be used to limit the availability of private rights of action for discrimination."²⁹ With regard to the Legislature's intent in enacting the small business

to prohibit the commission of unfair practices in public housing and public accommodations). The court further stated that by amending the law against discrimination in 1957, "[t]he Legislature clearly indicated a private right of action for discrimination and administrative remedies for unfair practices were distinct" and "for the first time . . . recognized the existence of a private right of action to redress . . . discrimination." *Id.* See *supra* text accompanying note 2 (quoting WASH. REV. CODE ANN. § 49.60.020, which grants a broad right to private action); *supra* text accompanying note 1 (quoting WASH. REV. CODE ANN. § 49.60.030(1)(a), which recognizes as a civil right "[t]he right to obtain and hold employment without discrimination").

²⁶ *Griffin*, 922 P.2d at 800 (Talmadge, J., dissenting) (discussing WASH. REV. CODE ANN. 49.60.120(4) (West 1990 & Supp. 1998), *amended by* 1957 Wash. Laws, ch. 37, § 7)).

²⁷ *Id.* (Talmadge, J., dissenting) (citing WASH. REV. CODE ANN. § 49.60.120(4), which established the present authority of the Human Rights Commission "[t]o receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter," amending the authority originally conferred on the Commission to "investigate, and pass upon 'complaints alleging discrimination in employment'").

²⁸ See *supra* note 27 and accompanying text (discussing WASH. REV. CODE ANN. § 49.60.120(4) and the power conferred on the Human Rights Commission to adjudicate charges of discrimination pursuant to the definition of "unfair practices" contained in the law against discrimination).

²⁹ *Griffin*, 922 P.2d at 800 (Talmadge, J., dissenting).

exemption, the majority in *Griffin* merely noted that there was “no legislative history suggesting the purpose of the new statutory private remedy was to permit a statutory cause of action against small, otherwise exempt, employers.”³⁰

It is reasonable to conclude that through its 1957 amendments of the law against discrimination, the Washington Legislature intended to distinguish “unfair practices” from other acts of discrimination in order to delineate the limited right to seek administrative relief and the broad right to pursue private civil actions.³¹ Moreover, amending the statute in 1973 to establish a right to private action for all individuals who allege that they were discriminated against, rather than adding language conferring that right narrowly on individuals who allege themselves to be victims of “unfair practices,”³² indicates that the Legislature intended to “open the courts more generally to discrimination complaints.”³³

³⁰ *Id.* at 790.

³¹ *Id.* See *supra* note 22 and accompanying text (discussing the limited jurisdiction of the Human Rights Commission to adjudicate charges of employment discrimination pursuant to the definitions of “employer” and “unfair practices” contained in the law against discrimination, pursuant to WASH. REV. CODE ANN. §§ 49.60.120(4), 49.60.180(1)-(4)).

³² *Griffin*, 922 P.2d at 801 (Talmadge, J., dissenting).

³³ *Id.* See *supra* text accompanying note 3 (quoting the 1973 amendment of the law against discrimination, which elucidated the breadth of the Washington courts’ jurisdiction to adjudicate claims of discrimination, WASH. REV. CODE ANN. § 49.60.030(2) (West 1990 & Supp. 1998)). Further support for the contention that the statute confers a broad right to private action to redress discrimination may be found in the expansive list of civil rights protected by the statute, including the right to: “obtain and hold employment without discrimination; full enjoyment of any . . . place of public . . . accommodation; engage in credit transactions without discrimination; engage in insurance transactions or transactions with health maintenance organizations; engage in commerce free from any discriminatory boycotts or blacklists.” WASH. REV. CODE ANN. § 49.60.030(1)(a)-(f); see *Griffin*, 922 P.2d at 801 (Talmadge, J., dissenting). Moreover, by stating that the “right to be free from discrimination shall include, but not be limited to” acts listed in the statute, the Legislature left open the possibility that other acts of discrimination may be covered by the statute. WASH. REV. CODE ANN. § 49.60.030(1). If instead, the Legislature had amended the statute to grant a right to private action only to those individuals who allege themselves to be victims of “unfair practices” pursuant to the statutory definition of that term, it would have limited the ability of Washington citizens to protect

The history of the law against discrimination illustrates that the Washington Legislature intended to ensure that the right to pursue a private action to defend one's civil rights was readily available to all Washington citizens, while the availability of administrative remedies was confined to citizens employed in companies with eight or more employees.³⁴

II. THE GRIFFIN COURT'S ERRONEOUS INTERPRETATION OF THE LAW AGAINST DISCRIMINATION

A. *The Facts and Procedural History*

Appellant Sharon Griffin was hired by attorney Carson Eller, a solo practitioner, as a legal secretary on September 20, 1990.³⁵ Griffin was Eller's only full-time employee, and at no time did Eller employ eight or more individuals.³⁶ Eller terminated Griffin's employment on July 15, 1991, claiming that he could not afford to continue employing her.³⁷

Griffin claimed that Eller subjected her to repeated sexual harassment, and in doing so, created a hostile work environment.³⁸

their civil rights, because access to the courts would be confined only to the discriminatory conduct identified by the Legislature as "unfair practices." *Griffin*, 922 P.2d at 801 (Talmadge, J., dissenting).

³⁴ *Id.* (Talmadge, J., dissenting).

³⁵ *Id.* at 789.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* The Washington Supreme Court held, in *Glasgow v. Georgia-Pacific Corp.*, that in order to establish a prima facie case that an employer created a hostile work environment as a result of sexual harassment, a complainant must prove the following four elements:

(1) The harassment was unwelcome . . . in the sense that the plaintiff-employee did not solicit or incite it, and . . . regarded the conduct as undesirable or offensive.

(2) . . . [t]he gender of the plaintiff-employee [was] the motivating factor for the unlawful discrimination.

(3) The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment

. . . .

Griffin further alleged that because she objected to the sexual remarks made by Eller, Eller retaliated by terminating her employment.³⁹ Griffin also claimed that she was subjected to disparate treatment, as Eller penalized her for her protestations to his sexual remarks by denying her dental benefits and paid vacations, and assigning her duties to other employees.⁴⁰

Griffin brought suit against Eller in Superior Court, Pierce County, Washington, alleging that Eller violated the state's law against discrimination by sexually harassing her and retaliating against her for objecting to such harassment.⁴¹ Her suit also included claims that Eller violated public policy by wrongfully terminating her and failing to pay her wages,⁴² as well as claims

(4) The harassment is imputed to the employer The employee must show that the employer . . . authorized, knew, or should have known of the harassment and . . . failed to take reasonably prompt and adequate corrective action.

693 P.2d 708, 712 (Wash. 1985).

³⁹ *Griffin*, 922 P.2d at 789. In order to prove that an employer discharged an employee in retaliation for her opposition to conduct prohibited by the law against discrimination, the Washington Supreme Court has held that the employee must show that she opposed practices prohibited by the statute; "she was discharged or some other adverse employment action was taken against her; and there is a causal connection between the opposition and the discharge." *Graves v. Department of Game*, 887 P.2d 424, 427 (Wash. Ct. App. 1994) (citing *Allison v. Housing Auth.*, 799 P.2d 1195 (Wash. Ct. App. 1990), *aff'd*, 821 P.2d 34 (Wash. 1991)).

⁴⁰ *Griffin*, 922 P.2d at 789. The Washington Supreme Court held in *E-Z Loader Boat Trailers, Inc. v. Travelers Indemnity Co.* that in order to prove a claim of disparate treatment, a party must show that "an employer treated an individual employee or group of employees differently because of sex, race, age, religion or some other improper differentiation." 726 P.2d 439, 444 (Wash. 1986). The improper differentiation underlying the disparate treatment alleged by Griffin was based on her gender and her objections to Eller's sexual advances. *Griffin*, 922 P.2d at 789.

⁴¹ *Griffin*, 922 P.2d at 789. See *Glasgow*, 693 P.2d at 711 (holding that sexual harassment is "actionable under this state's Law Against Discrimination" because it "unfairly handicaps an employee against whom it is directed in his or her work performance and as such is a barrier to sexual equality in the workplace").

⁴² *Griffin*, 922 P.2d at 789.

alleging outrage and negligent infliction of emotional distress.⁴³ In response to Eller's motion for summary judgment, the trial court granted partial summary judgment, dismissing Griffin's claims for sexual harassment and retaliation filed under the state's law against discrimination.⁴⁴

⁴³ *Id.* In order to prevail on a cause of action based on outrage, the Washington Supreme Court held in *Grimsby v. Samson* that a plaintiff must prove the following elements:

First, the emotional distress must be inflicted Intentionally [sic] or recklessly; mere negligence is not enough. Second, the conduct of the defendant must be Outrageous [sic] and extreme. . . . Liability exists 'only where the conduct has been So [sic] outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'. . . . [L]iability in the tort of outrage 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities'. . . . Third, the conduct must result in Severe [sic] emotional distress to the plaintiff.

530 P.2d 291, 295 (Wash. 1975) (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)). The plaintiff in *Grimsby* sued his deceased wife's physician for outrage, alleging that the physician's negligence and recklessness caused plaintiff to suffer "severe damage" by "requir[ing him] to witness the terrifying agony and explicit pain and suffering of his [dying] wife." *Id.* at 292. Reversing the trial court's dismissal of the action and remanding for further proceedings, the *Grimsby* court held that plaintiff "had a cause of action." *Id.* at 295-96. *See also* *Rice v. Janovich*, 742 P.2d 1230, 1238 (Wash. 1987) (identifying the elements of the tort of outrage as "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress").

The Washington Supreme Court held further in *Hunsley v. Giard* that in a cause of action for the negligent infliction of emotional distress, a plaintiff must show that her "mental distress . . . [is] the reaction of a normally constituted person, absent defendant's knowledge of some peculiar characteristic or condition of plaintiff." 553 P.2d 1096, 1103 (Wash. 1976) (relying on *Rodrigues v. State*, 472 P.2d 509, 512 (Haw. 1970)). The plaintiff in *Hunsley* claimed that she was caused emotional distress when her neighbor negligently crashed her car into the plaintiff's home while plaintiff was sitting in her living room. 553 P.2d at 1097.

⁴⁴ *Griffin*, 922 P.2d at 789. For her outrage and negligent infliction of emotional distress claims, Griffin was awarded \$50,000. *Id.*

To prevail in actions based on outrage and negligent infliction of emotional distress, the burden of proof is high and may be difficult for some complainants to meet. *See supra* note 43 (discussing the elements a plaintiff must prove in

B. A Faulty Analysis of Statutory Provisions

In affirming the trial court's grant of partial summary judgment and dismissing Griffin's statutory claims for sexual harassment and

order to recover damages based on claims of outrage and negligent infliction of emotional distress). Griffin, however, was able to prevail on these claims. *Griffin*, 922 P.2d at 789. With regard to the egregious nature of the harassment she endured, Griffin asserted that:

Eller daily made offensive sexual comments to her, relating jokes about prostitutes and descriptions of different races' genitalia [O]n her birthday, Eller allegedly told her 'every woman needs to be big dicked,' and, for her birthday present, he was going to photograph her being 'big dicked' by his friend.

Id. at 794. While Griffin was able to prove the elements necessary for these tort actions due to the flagrant nature of the harassment to which she was subjected, other plaintiffs complaining of similar discriminatory conduct may not be as successful in their claims. See Ferdinand M. De Leon & Lily Eng, *Court Limits Job Sex-Bias Cases—Firms with Fewer Than 8 Workers Exempt From State Law*, SEATTLE TIMES, Sept. 6, 1996, at B1 (quoting Marilyn Endriss, Griffin's attorney, who stated that as a result of the *Griffin* court's holding, the only recourse for complainants such as Griffin would be to prove a "'claim of outrage,' which requires 'conduct so outrageous that it's beyond decency and what's acceptable in civilized society'"). Because the burden of proving these tort claims is considerably high, it follows that other plaintiffs seeking recourse for alleged civil rights violations would be required to prove that they were subjected to conduct similarly egregious to that exhibited by Griffin's employer. *Griffin*, 922 P.2d at 794. See also *supra* note 43 (discussing *Hunsley*, 553 P.2d at 436, and *Grimsby*, 530 P.2d at 295, and the elements that must be proven in order to prevail on claims of outrage and negligent infliction of emotional distress). Consequently, it is reasonable to conclude that if the discrimination alleged in other cases is not as patently egregious as that suffered by Griffin, other plaintiffs with meritorious claims may be unable to prevail in their actions based on outrage and negligent infliction of emotional distress. *Griffin*, 922 P.2d at 794. As a result, those plaintiffs who work in companies with fewer than eight employees and fail to prove the requisite elements for these tort claims would be foreclosed completely from redressing alleged violations of their civil rights, because, pursuant to the court's holding in *Griffin*, they would be barred from bringing a private action under the law against discrimination. See *Griffin*, 922 P.2d at 789 (holding that "employers of fewer than eight employees are statutorily exempt from [the] remedies provided under [the law against discrimination]").

retaliation,⁴⁵ the Washington Supreme Court misinterpreted the statutory provision defining “employer,”⁴⁶ and misconstrued the purpose of exempting companies with fewer than eight employees from the jurisdiction of the Human Rights Commission.⁴⁷ Consequently, the *Griffin* court misapplied the statute’s limiting provisions, which apply only to the jurisdiction of the Human Rights Commission, and, in doing so, impermissibly deprived an individual of the unequivocal right to pursue a private action to redress alleged discrimination.⁴⁸

Concluding that Griffin’s employer was exempt from the ambit of the law against discrimination, the court held that “no legislative history suggest[ed that] the purpose of the new statutory private remedy was to permit a statutory cause of action against small, otherwise exempt, employers.”⁴⁹ Another determinative factor for

⁴⁵ *Griffin*, 922 P.2d at 793.

⁴⁶ See *supra* note 23 and accompanying text (discussing the definition of “employer” pursuant to WASH. REV. CODE ANN. § 49.60.040(3) (West 1990 & Supp. 1998)).

⁴⁷ The Washington Administrative Code states that:

The principal purposes of exempting persons who employ less than eight from the enforcement authority of the commission are: (a) To relieve small businesses of a regulatory burden; and (b) In the interest of cost effectiveness, to confine public agency enforcement of the law to employers whose practices affect a substantial number of persons.

WASH. ADMIN. CODE § 162-16-160(2) (1997). See *Griffin*, 922 P.2d at 802 (Talmadge, J. dissenting) (stating that “the exemption only confines public agency enforcement of the law, and does not restrict the scope of the law itself”).

⁴⁸ *Griffin*, 922 P.2d at 789 (holding that “employers of fewer than eight employees are statutorily exempt from [the] remedies provided under [WASH. REV. CODE ANN. § 49.60]”). The statutory provisions that were misapplied by the *Griffin* court are those which limit the jurisdiction of the Human Rights Commission to the adjudication to those claims that allege the commission of “unfair practices” by “employers.” See *supra* note 22 and accompanying text (discussing the limited jurisdiction of the Human Rights Commission to adjudicate charges of employment discrimination pursuant to the definitions of “employer” and “unfair practices” contained in the law against discrimination, pursuant to WASH. REV. CODE ANN. §§ 49.60.120(4), 49.60.180(1)-(4); *supra* text accompanying note 23 (discussing the definition of “employer” pursuant to WASH. REV. CODE ANN. § 40.60.040(3)).

⁴⁹ *Griffin*, 922 P.2d at 790.

the *Griffin* court was its analysis of the administrative code regulation interpreting the purpose of the small business exemption.⁵⁰ The court reasoned that the term “principal purposes” in the exemption was intended to “relieve small businesses of a regulatory burden and conserve state resources.”⁵¹ Moreover, the *Griffin* court asserted that the regulation characterizing the narrow definition of “employer” functioned as an exemption from the statute’s prohibition against discriminatory conduct.⁵²

Pursuant to the law against discrimination, Washington’s Human Rights Commission is empowered to adjudicate complaints alleging unfair practices committed by employers.⁵³ The statute confines the jurisdiction of the Commission to investigating and acting on complaints of unfair practices allegedly committed by employers who meet the statute’s eight-employee threshold.⁵⁴

The statute, however, is devoid of any language that extends the eight-employee threshold governing the jurisdiction of the Human Rights Commission to prevent “[a]ny person deeming himself or herself injured”⁵⁵ by an act of discrimination from pursuing a civil action in court.⁵⁶ Thus, there is no statutory authority that justifies limiting the right of employees in companies with fewer than eight employees to pursue private actions to redress alleged acts of discrimination.

⁵⁰ *Id.* at 792 (interpreting WASH. ADMIN. CODE § 162-16-160).

⁵¹ *Id.* (referring to WASH. ADMIN. CODE § 162-16-160).

⁵² *Id.*

⁵³ WASH. REV. CODE ANN. § 49.60.120(4) (West 1990 & Supp. 1998) (establishing the power of the Human Rights Commission “[t]o receive, impartially investigate, and pass upon complaints alleging unfair practices [committed by an employer] as defined in this chapter”).

⁵⁴ *Id.* See also *supra* note 22 and accompanying text (discussing the limited jurisdiction of the Human Rights Commission to adjudicate charges of employment discrimination pursuant to the definitions of “employer” and “unfair practices” contained in the law against discrimination, pursuant to WASH. REV. CODE ANN. §§ 49.60.120(4), 49.60.180(1)-(4); *supra* text accompanying note 23 (discussing the definition of “employer” pursuant to WASH. REV. CODE ANN. § 49.60.040(3)).

⁵⁵ See *supra* note 3 (quoting WASH. REV. CODE ANN. § 49.60.030(2)).

⁵⁶ See *supra* text accompanying notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2), which confer an unequivocal right on all Washington citizens to pursue private actions to defend their civil rights).

As a result of its suspect statutory analysis, the court in *Griffin* extended the eight-employee threshold governing the jurisdiction of the state Human Rights Commission to bar all employees of companies with fewer than eight employees from pursuing private actions to redress alleged assaults on their civil rights.⁵⁷ The consequence of the *Griffin* court's holding is to grant to companies with fewer than eight employees a license to capriciously and arbitrarily discriminate against their employees because, pursuant to the powerful message conveyed in the *Griffin* holding, these employers will not be held accountable for their discriminatory conduct under the law against discrimination.⁵⁸ Undoubtedly, that is a disturbing policy to set.

C. A Frustration of Statutory Purpose

By misconstruing the limiting provisions of the law against discrimination, the court in *Griffin* frustrated the statute's express purpose as 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."⁵⁹

Yet, in *Burnside v. Simpson Paper Co.*, the Washington Supreme Court established clear objectives concerning statutory interpretation that require courts to interpret statutes "to further, not frustrate, their intended purpose."⁶⁰ In an illustration of this policy, the *Burnside* court held that the inclusion of the word "inhabitant" in the law against discrimination did not preclude Washington courts from adjudicating actions alleging age discrimination brought by individuals who were not residents of the state against companies that were Washington residents.⁶¹ In *Burnside*, the Washington Supreme Court concurred with the reasoning

⁵⁷ *Griffin v. Eller*, 922 P.2d 788, 789 (Wash. 1996).

⁵⁸ *Id.*

⁵⁹ WASH. REV. CODE ANN. § 49.60.010 (West 1990 & Supp. 1998).

⁶⁰ 864 P.2d 937, 940 (Wash. 1994) (adjudicating a wrongful termination and age discrimination claim filed by a former employee against his employer under the law against discrimination).

⁶¹ *Id.*

applied by the Court of Appeals of Washington in its disposition of the case.⁶² The Court of Appeals concluded that limiting the statute's application to "Washington inhabitants . . . would effectively allow Washington employers to discriminate freely against non-Washington inhabitants, thus undermining the fundamental purpose of the act, deterring discrimination."⁶³ Because this reasoning furthered the legislative purpose of the law against discrimination, the Washington Supreme Court affirmed the Court of Appeals' holding in *Burnside*.⁶⁴

There is no apparent reason that the policy established in *Burnside*, demonstrating the value the court placed on furthering the purpose of the law against discrimination, was not extended to *Griffin*. Although fulfillment of the statute's purpose should have been no less a priority in *Griffin* than it was in *Burnside*, it appears that the *Griffin* court was less concerned with furthering the purpose of, and the policy underlying, the law against discrimination.⁶⁵

Further, the Washington Supreme Court previously held that, in addition to interpreting statutes to "effect their purposes,"⁶⁶ statutes ought to be construed "to avoid an unlikely or strained consequence."⁶⁷ Any holding that deprives individuals of the right

⁶² *Id.* (affirming the holding of the Court of Appeals of Washington, 832 P.2d 537, 543 (Wash. 1992), which stated that "[t]here is . . . no basis consistent with the purposes of the [law against discrimination] . . . for concluding that the reference to 'inhabitants' is intended as a jurisdictional limitation on a court's power to hear cases regarding age discrimination").

⁶³ *Burnside v. Simpson Paper Co.*, 832 P. 2d 537, 543 (Wash. 1992) (referring to WASH. REV. CODE ANN. § 49.60.010).

⁶⁴ *Burnside*, 864 P.2d at 940.

⁶⁵ *Griffin v. Eller*, 922 P.2d 788, 790 (Wash. 1996) (stating that "[t]here is no legislative history suggesting the purpose of the new statutory remedy was to permit a statutory cause of action against small, otherwise exempt, employers").

⁶⁶ *State v. Mierz*, 901 P.2d 286, 296 (Wash. 1995).

⁶⁷ *Id.* In *Mierz*, the Washington Supreme Court addressed the issue of whether a citizen's possession of two coyote puppies violated the state statute criminalizing possession of "wildlife." *Id.* at 287, 296-97. See WASH. REV. CODE ANN. § 77.16.040 (West 1996) (providing that "it is unlawful to bring into this state, offer for sale, sell, possess, exchange, buy, transport, or ship wildlife"); WASH. REV. CODE ANN. § 77.08.010(16) (West 1996 & Supp. 1998) (defining wildlife as "all species of the animal kingdom whose members exist in

to protect themselves from alleged assaults on their civil rights is at odds with the law against discrimination and its purpose of protecting “the public welfare . . . of the people of this state . . . concerning civil rights.”⁶⁸ By affirming the trial court’s partial summary judgment, which extinguished Griffin’s statutory claims for sexual harassment and retaliation,⁶⁹ the Washington Supreme Court failed to accomplish the purpose of the law against discrimination. Consequently, the *Griffin* court frustrated the statute’s purpose, and its decision resulted in an impermissible “unlikely [and] strained consequence.”⁷⁰

Washington in a wild state”). The *Mierz* court reasoned that because the purpose of the statute was to “‘preserve, protect, and perpetuate wildlife,’” catching coyote puppies and keeping them as pets violated the statute. *Mierz*, 901 P.2d at 296 (citing WASH. REV. CODE ANN. § 77.12.010 (West 1996)). The court in *Mierz* rejected defendant’s argument that the statute’s use of the term “feral domestic mammals” as an exception to the definition of “wildlife” applied to the coyote puppies, since the term referred to “individual members of domestic species.” *Id.* (citing WASH. REV. CODE ANN. § 77.08.010(16)). In repudiating the defendant’s argument, the court held that “individual ‘domesticated’ members of a wild species,” such as the coyote puppies taken by the defendant, “would not be protected and could be possessed or taken with impunity” under such an interpretation of the exception, a result that would defeat the purpose of the wildlife code. *Id.* Similarly, the Washington Supreme Court in *Griffin* should have applied the same reasoning to find that employers of fewer than eight employees are not exempted from the law against discrimination. Two other decisions of the Washington Supreme Court further extend the proposition that statutes must be interpreted so as not to lead to absurd, unlikely or strained consequences. *See Whatcom County v. Bellingham*, 909 P.2d 1303, 1308 (Wash. 1996) (holding that statutes must be interpreted “so as to effectuate the legislative intent” and that the court must avoid a reading of a statute that “would result in unlikely, absurd or strained consequences”); *Timberline v. Bell Helicopter- Textron, Inc.*, 884 P.2d 920, 927 (Wash. 1994) (noting the “principle of statutory construction [which states] that a statute should be construed so as to avoid unlikely, absurd, or strained consequences”).

⁶⁸ WASH. REV. CODE ANN. § 49.60.010 (West 1990 & Supp. 1998).

⁶⁹ *Griffin*, 922 P.2d at 793.

⁷⁰ *Mierz*, 901 P.2d at 296.

*D. An Excessively Broad Interpretation of the Term
"Employer" and Selective Enforcement of Statutory
Provisions*

The *Griffin* court's erroneous holding derives from an excessively broad interpretation of, and reliance on, the statutory definition of "employer" and its misapplication of the terms limiting the jurisdiction of the Human Rights Commission.⁷¹ Affording disproportionate significance to the definition of "employer," the *Griffin* court failed to properly view the statute's limiting provisions, in relation to its enabling provisions, which grant to every aggrieved citizen a general right to pursue a private cause of action.⁷²

⁷¹ See *supra* note 22 and accompanying text (discussing the limited jurisdiction of the Human Rights Commission to adjudicate charges of employment discrimination pursuant to the definitions of "employer" and "unfair practices" contained in the law against discrimination, pursuant to WASH. REV. CODE ANN. §§ 49.60.120(4), 49.60.180(1)-(4); *supra* text accompanying note 23 (discussing the definition of "employer" pursuant to WASH. REV. CODE ANN. § 49.60.040(3)).

⁷² In support of its holding in *Griffin*, the Washington Supreme Court discussed the likely rationale of the Legislature in enacting the exemption for employers with fewer than eight employees from the law against discrimination. The court reasoned that because "the [s]tate has a substantial interest in the well-being of small business with regard to the state economy, tax base, and [employment] opportunities . . . the Legislature could well have concluded that burdening so many employers to benefit so few employees was not, on balance, of sufficient public interest to offset the burden." *Griffin*, 922 P.2d at 792. The *Griffin* court also pointed to the state's administrative code to justify its holding that employers of fewer than eight employees were exempt from the remedies contained in the law against discrimination. *Id.* The court reasoned that the "principal purposes" of the small business exemption "were to relieve small businesses of a regulatory burden and conserve state resources." *Id.* Further, the court stated that the administrative code "characterizes the definition [of employer] as an 'exemption' from the statute." *Id.* Pursuant to these conclusions reached in *Griffin*, it seems as though the court narrowly focused on the rationale of, and purposes for, these limitations without giving full effect to those statutory provisions that confer an unequivocal right on every Washington citizen to pursue a private action to protect his or her civil rights. See *supra* text accompanying notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2)).

In her appeal to the Washington Supreme Court, Griffin suggested that the court independently read the statutory provisions granting a right of civil action to those who deem themselves injured by any act in violation of the law against discrimination.⁷³ Rejecting this proposition, the *Griffin* court reasoned that the section cannot be read independently; but rather, it must be read in conjunction with the statutory provision that defines employer “narrowly and exclusively.”⁷⁴ To justify its holding that the statutory provision granting a private right of action cannot be read independently, the court erroneously stated that the right to pursue a private cause of action was not conferred on Washington citizens until the statute was amended in 1973, and that “[t]here is no legislative history suggesting the purpose of the new statutory private remedy was to permit a statutory cause of action against small, otherwise exempt, employers.”⁷⁵ The court failed, however, to point to any legislative history supporting its own proposition.⁷⁶

⁷³ *Griffin*, 922 P.2d at 789 (referring to WASH. REV. CODE ANN. § 49.60.030(2) (West 1990 & Supp. 1998)).

⁷⁴ *Id.*

⁷⁵ *Id.* at 790. The right to pursue a private action was, in fact, conferred in the law against discrimination in 1957 when the legislature amended the statute with the following language: “Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights.” WASH. REV. CODE ANN. § 49.60.020, *amended by* 1957 Wash. Laws, ch. 37, § 2. The 1973 amendment to which the court referred essentially clarified the expansive scope of the law against discrimination by providing that “private statutory actions to enforce the civil right to be free of discrimination” were remedies available to all persons who allege to be victims of discrimination. *Griffin*, 922 P.2d at 800-01 (Talmadge, J., dissenting) (referring to WASH. REV. CODE ANN. § 49.60.030(2), *amended by* 1973 Wash. Law, ch. 141).

⁷⁶ *Id.* at 790. The *Griffin* court did refer to several cases to support its conclusion that individuals employed in companies with fewer than eight employees are statutorily barred from seeking redress for employment discrimination under the law against discrimination. However, these cases do not adequately support the court’s reasoning. For example, the *Griffin* court referred to its holding in *Farnam v. CRISTA Ministries*, where it held that a religious organization was exempt from the remedies contained in law against discrimination because such organizations are not considered “employers” pursuant to the law against discrimination. *Id.* (citing *Farnam*, 807 P.2d 830 (Wash. 1991)). See WASH. REV. CODE ANN. § 49.60.040(3) (excluding from the definition of

In an apparent contradiction, the *Griffin* court engaged in the same flawed analysis it claimed to have rejected, as it narrowly focused on the limiting provisions of the statute. Specifically, the court relied on the definition of “employer,” and its limiting effect on the jurisdiction of the Human Rights Commission, to conclude that no statutory remedy was available to Griffin.⁷⁷ The court’s analysis of the law against discrimination disregarded the plain language of the statutory provisions that confer an undeniable right of recourse through private action,⁷⁸ creating a statutory

“employer” “any religious or sectarian organization not organized for private profit”). Yet this reasoning fails to justify the *Griffin* holding in light of the statutory provisions conferring an unequivocal right on all Washington citizens to pursue private actions to redress discrimination. *See supra* text accompanying notes 1-3 (quoting *id.* §§ 49.60.030(1)(a), 49.60.020, 49.60.030(2), which confer an unequivocal right on every Washington citizen to be free of discrimination and to pursue a private action to protect his or her civil rights). The Washington Supreme Court also referred to its holding in *Bennett v. Hardy*, explaining that in *Bennett*, “[w]e stated in dicta that a small employer was exempt from these statutory remedies” because an employer who employs fewer than eight individuals ‘is not within [the] statute’s definition of employer.’ *Griffin*, 922 P.2d at 790 (citing *Bennett*, 784 P.2d 1258 (Wash. 1990)). Likewise, this reference does not illuminate the court’s reasoning in *Griffin*. Further, the court unsuccessfully attempted to distinguish its holding in *Griffin*, which addressed “a statutory exemption for small employers,” from its decision in *Marquis v. City of Spokane*, which addressed the issue of “statutory silence as to independent contractors.” *Id.* (referring to 922 P.2d 43 (Wash. 1996)). *See infra* note 139 (discussing the court’s holding in *Marquis*). None of these cited cases dealt with the unequivocal right of every citizen to be free of discrimination and to seek redress for discriminatory acts that is at the heart of the *Griffin* case.

⁷⁷ *Griffin*, 922 P.2d at 789. *See supra* note 22 and accompanying text (discussing the limited jurisdiction of the Human Rights Commission to adjudicate charges of employment discrimination pursuant to the definitions of “employer” and “unfair practices” contained in the law against discrimination, pursuant to WASH. REV. CODE ANN. §§ 49.60.120(4), 49.60.180(1)-(4)); *supra* text accompanying note 23 (discussing the definition of “employer” pursuant to WASH. REV. CODE ANN. § 49.60.040(3)).

⁷⁸ *See supra* text accompanying notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2)).

exemption for Griffin's employer.⁷⁹ Consequently, Griffin was deprived of the rights conferred by the statute.

In light of the Washington Supreme Court's holding in *State v. Malone*,⁸⁰ which concerned the propriety of giving intent and purpose to all of a statute's provisions,⁸¹ the *Griffin* court erred in failing to recognize Griffin's right to pursue a private action. In *Malone*, the Washington Supreme Court reversed a decision rendered by the Spokane County Superior Court, holding that the court had a duty to "give effect to the intent and purpose of . . . legislation as expressed in [an] act as a whole."⁸² At issue in *Malone* was whether two Washington statutes were applicable to an automobile chase involving an Idaho police officer in Washington.⁸³ One of the statutes in contention deemed eluding a "pursuing police vehicle" a class C felony, while the other statute at issue defined "police officer."⁸⁴ Because neither statute contained language requiring a pursuing officer to be a Washington police officer, or indicated that the statute would not apply to police officers or vehicles from other jurisdictions, the court held

⁷⁹ *Griffin v. Eller*, 922 P.2d 788, 789 (Wash. 1996) (stating that at no time did Griffin's employer ever employ more than eight persons). See *supra* text accompanying note 23 (discussing the definition of "employer" pursuant to WASH. REV. CODE ANN. § 49.60.040(3)).

⁸⁰ 724 P.2d 364 (Wash. 1986).

⁸¹ See *id.* at 366.

⁸² *Id.*

⁸³ *Id.* The defendant in *Malone* was charged under Washington Revised Code section 46.61.024 for attempting to elude a police vehicle in a high speed chase that began in Idaho and ended in Washington. *Malone*, 724 P.2d at 365.

⁸⁴ *Id.* at 366. Washington Revised Code section 46.61.024 states that "[a]ny driver . . . who wilfully fails or refuses to immediately [stop his vehicle]" and drives in a dangerous manner endangering others' lives and property, "while attempting to elude a pursuing police vehicle" after being signaled to stop, "shall be guilty of a class C felony." WASH. REV. CODE ANN. § 46.61.024 (West 1987). The statute states further that the officer who signals the offending driver "shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle." *Id.* Section 46.04.391 defines police officer as "every officer authorized to direct or regulate traffic or make arrests for violations of traffic regulations." WASH. REV. CODE ANN. § 46.04.391 (West 1987).

that the Washington statutes applied to the Idaho police officer.⁸⁵ The court concluded that the term “police officer,” as used in the statute, included an officer whose authority to make an arrest was limited to another jurisdiction.⁸⁶ Further, the court found that “police vehicle” could also include a vehicle from another jurisdiction.⁸⁷ The *Malone* court reasoned that the statute’s language and legislative history demonstrated that it was enacted to prevent the dangers associated with high-speed police chases, regardless of the jurisdiction of the pursuing officers.⁸⁸ Consequently, the court held that the respondent’s conduct “clearly [fell] into the behavior that the Legislature intended to address when it enacted”⁸⁹ the law, and that holding otherwise would “undermine the purpose and the effectiveness of [the statute].”⁹⁰ The *Malone* court recognized that no statutory language limited the jurisdiction to enforce these laws to in-state police officers only.⁹¹ As a result, the court prudently interpreted the controlling statutes and was able to fulfill their purpose of protecting citizens from the dangers associated with high-speed chases.⁹²

Similarly, the law against discrimination does not contain language that imposes limitations on the scope of the statutory right to pursue a private action.⁹³ Instead of performing the sound statutory analysis exhibited by the *Malone* court,⁹⁴ the *Griffin* court failed to recognize that the language confining the jurisdiction of the Human Rights Commission does not limit the rights of individuals who work in companies with fewer than eight employees to pursue private actions.⁹⁵ Applying the reasoning the

⁸⁵ *Malone*, 724 P.2d at 366.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 366-67.

⁹³ See *supra* text accompanying notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2) (West 1990 & Supp. 1998)).

⁹⁴ *Malone*, 724 P.2d at 366-67.

⁹⁵ *Griffin v. Eller*, 922 P.2d 788, 789 (Wash. 1996). Washington’s law against discrimination places no limitation on the right of employees who work

Washington Supreme Court exercised in *Malone*, it is clear that the law against discrimination should be interpreted to confer on all citizens of Washington the right to pursue private actions to redress alleged acts of discrimination.⁹⁶ Further, the Washington Legislature expressly stated in the statute that the law's purpose was to safeguard the civil rights of the citizens of Washington.⁹⁷ Any interpretation of the law against discrimination that summarily denies a citizen the right to pursue a private action to defend his or her civil rights would, therefore, in the words of the *Malone* court, "undermine the purpose and the effectiveness" of the statute.⁹⁸

in companies with fewer than eight employees to pursue private actions to defend their civil rights. WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2). There are, however, limitations on the rights of employees who work in companies with fewer than eight employees to obtain administrative relief through the Human Rights Commission. See *supra* note 22 and accompanying text (discussing the limited jurisdiction of the Human Rights Commission to adjudicate charges of employment discrimination pursuant to the definitions of "employer" and "unfair practices" contained in the law against discrimination, pursuant to WASH. REV. CODE ANN. §§ 49.60.120(4), 49.60.180(1)-(4)); *supra* text accompanying note 23 (discussing the definition of "employer" pursuant to WASH. REV. CODE ANN. § 49.60.040(3)). It is these limiting provisions that the court misconstrued when it denied Griffin her right to pursue a private action. *Griffin*, 922 P.2d at 789.

⁹⁶ Pursuant to the express purpose of the law against discrimination, Washington citizens employed in companies with fewer than eight employees are entitled to pursue private actions to remedy sexual harassment and other forms of discrimination, since the purpose of the statute is to protect the public welfare of Washington citizens, and to fulfill "the provisions of the [state] Constitution . . . concerning civil rights." 724 P.2d at 366-67. See *supra* note 59 and accompanying text (discussing WASH. REV. CODE ANN. § 49.60.010). Moreover, because the provisions of the law against discrimination that grant a general right to pursue a private action do not contain language that limits in any way the exercise of that right, see *supra* notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2)), it is evident that all citizens of Washington should be entitled to pursue private actions to remedy alleged discrimination, regardless of the size of the company in which they work.

⁹⁷ See WASH. REV. CODE ANN. § 49.60.010 (stating that the law against discrimination "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").

⁹⁸ *Malone*, 724 P.2d at 366.

Several other holdings of the Washington Supreme Court illustrate that the *Griffin* court erred by failing to give intent and effect to all of the provisions of the law against discrimination, repudiating the precedent previously established in these cases. For example, in *Addleman v. Board of Prison Terms and Paroles*,⁹⁹ the court held that when interpreting a statute, “[e]ach provision must be viewed in relation to other provisions and harmonized if at all possible to insure proper construction of every provision.”¹⁰⁰ The court further stated that “[s]tatutes should not be interpreted so as to render any portion meaningless, superfluous or questionable.”¹⁰¹ The proposition that statutory provisions must

⁹⁹ 730 P.2d 1327 (Wash. 1986).

¹⁰⁰ *Id.* at 1331. In *Addleman*, the Washington Supreme Court held that the State Board of Prison Terms and Paroles (“Board”) must determine the duration of prison inmates’ terms pursuant to the requirements set forth in the state’s Sentencing Reform Act (“SRA”). *Addleman*, 730 P.2d at 1331-32 (referring to WASH. REV. CODE ANN. § 9.95.009(2) (West 1998)). The *Addleman* plaintiffs, state prison inmates, sought application of standard sentence ranges, codified in Washington’s SRA, to crimes for which they were sentenced prior to the SRA’s effective date. *Id.* at 1329. Notwithstanding that the sentencing guidelines contained in the SRA did not become effective until after plaintiffs were sentenced for their crimes, the court concluded that “rules of statutory construction mandate application of SRA standards to those sentenced prior” to the SRA’s effective date. *Id.* at 1331. The *Addleman* court held that because the SRA mandated that sentencing judges and prosecuting attorneys “shall attempt to make decisions reasonably consistent with [the sentencing ranges contained in the SRA],” those ranges should apply to plaintiffs and other inmates sentenced prior to the SRA’s effective date. *Id.* at 1332 (citing WASH. REV. CODE ANN. § 9.95.009(2)). The court reasoned that applying the SRA guidelines to the plaintiffs’ crimes “harmonized” the SRA with other provisions of the statute governing the Board’s duties and “insure[d] proper construction of every provision” of the SRA and the Board-governing statute. *Id.* at 1331 (citing *Burlington N., Inc. v. Johnston*, 572 P.2d 1085, 1088 (Wash. 1977)).

¹⁰¹ *Id.* (citing *Avlonitis v. Seattle Dist. Court*, 641 P.2d 169, 173 (Wash. 1982)). See also *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 884 P.2d 920, 925 (Wash. 1994) (citing *Pope v. University of Wash.*, 852 P.2d 1055, 1061 (Wash. 1993)) (stating that “rules of statutory construction provide that provisions in a statute are read in the context of the statute as a whole”). The court in *Timberline* further stated that “[a]ll the provisions of an act must be considered in their relation to each other and, if possible, harmoniously construed to insure proper construction of each provision.” *Id.* (citing *Publishers Forest*

be interpreted together in order to effectuate statutory purpose is further illustrated by the Washington Supreme Court's holding in *Spangenberg v. Cheney School District No. 30*, where the court stated that in order to interpret statutes properly and in accordance with the legislature's intent, "statute[s] must be read as a whole; intent is not to be determined by a single sentence . . . or phrase."¹⁰²

Prods. Co. v. State, 505 P.2d 453 (Wash. 1973)).

In *Timberline*, the court held that a manufacturer of military aircraft, which was later converted to civilian use, could not assert the statutory government contractor's defense, codified in WASH. REV. CODE ANN. § 7.72.050(2) (West 1992), as an absolute defense to a postmanufacture failure-to-warn products liability claim. *Timberline Air Serv.*, 884 P.2d at 922, 927. The government contractor's defense states that "[w]hen the injury-causing aspect of the product was, at the time of manufacture, in compliance with a specific mandatory government specification relating to design or warnings, this compliance shall be an absolute defense." WASH. REV. CODE ANN. § 7.72.050(2). The *Timberline* court reasoned that the statutory defense for government contractors provides protection only "where the government contractor is required to design a product in a certain way or to provide certain warnings, and the compliance with those specifications would otherwise expose the contractor to a product liability claim." *Timberline Air Serv.*, 884 P.2d at 926. Interpreting the contractor's defense, see WASH. REV. CODE ANN. § 7.72.050(2), in light of other provisions contained in the state's products liability statute which explain alternate theories of manufacturer liability, see WASH. REV. CODE ANN. § 7.72.030(1)(c), the court held that granting broad immunity to government contractors in failure-to-warn actions would undermine the other provisions of the statute that provide for "different theories of manufacturer liability in products liability actions." *Timberline Air Serv.*, 884 P.2d at 925.

¹⁰² 641 P.2d 163, 164 (Wash. 1982). The Washington Supreme Court held in *Spangenberg* that pursuant to a proper construction of the state's law against discrimination, the Washington Human Rights Commission was not empowered "to award compensation for humiliation and mental suffering caused by unlawful age discrimination." 641 P.2d at 169. The *Spangenberg* court held that a statute must be read as a whole and that statutory intent is not "determined by a single sentence . . . or single phrase." *Id.* at 164 (citing *State v. Fenter*, 569 P.2d 67 (Wash. 1977)). Moreover, the court concluded that the phrase contained in the statute authorizing the Commission "to take such other action" necessary to effectuate the purpose of the law against discrimination did not, on its own, confer authority on the Commission to award damages. *Id.* (referring to WASH. REV. CODE ANN. § 49.60.250). Further, the court stated that there was no express language in the statute conferring the Commission with such authority, and that the legislative history indicated that the Legislature "did not want the

The holdings of these cases indicate that by allowing the eight-employee threshold governing the jurisdiction of the Human Rights Commission to deprive the plaintiff in *Griffin* the right to pursue a private action, the Washington Supreme Court rendered meaningless the provisions of the law against discrimination that grant an unequivocal right to pursue a private action to redress alleged acts of discrimination.¹⁰³ The individual sections of a statute must be read together and interpreted as a whole in order to effectuate statutory purpose in accordance with the legislature's intent and public policy considerations. The *Griffin* court's failure to give effect to all the provisions of the law against discrimination had the effect of subjecting the plaintiff in *Griffin* to a further violation of her civil rights, as the court's holding deprived her of the unequivocal right conferred on all Washington citizens to redress in private actions acts of employment discrimination.

E. A Misinterpretation of Key Statutory Language

The *Griffin* court's failure to give effect to the statutory language granting only general jurisdiction to the Human Rights Commission further demonstrates its flawed analysis.¹⁰⁴ By explicitly conferring on the Commission only general jurisdiction to eliminate and prevent employment discrimination,¹⁰⁵ rather than exclusive purview, it appears that it was the Legislature's intent to ensure that the administrative relief available through the

[Commission] to have the power to award damages for humiliation and mental suffering for age discrimination violations." *Id.* at 166.

¹⁰³ *Griffin v. Eller*, 922 P.2d 788, 789 (Wash. 1996) (holding that individuals employed in companies with fewer than eight employees may not pursue a private action for discrimination despite the text of WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2), conferring an undeniable right on all Washington citizens to bring such actions to protect their civil rights). *See supra* text accompanying notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2)).

¹⁰⁴ *See* WASH. REV. CODE ANN. § 49.60.010 (stating that the "commission established hereunder is hereby given general jurisdiction and power" to eliminate and prevent discrimination in employment).

¹⁰⁵ *See supra* note 104 (discussing WASH. REV. CODE ANN. § 49.60.010 and its grant of "general" jurisdiction to the Human Rights Commission).

Commission was not the sole method of recourse available to individuals.¹⁰⁶ Because the Commission was not granted exclusive jurisdiction over all claims alleging discriminatory acts, the Legislature granted employees in companies with fewer than eight employees, who do not benefit from the limited jurisdiction of the Human Rights Commission, the right to pursue a private cause of action.¹⁰⁷

The court's imprudent statutory analysis is further demonstrated by its disregard of the statute's inclusion of the word "any" in defining who is entitled to the protections provided by the law against discrimination.¹⁰⁸ Generally, "any" means "every" and "all,"¹⁰⁹ which, if interpreted accurately, includes persons who

¹⁰⁶ Compare the definition of "general jurisdiction" with the definition of "exclusive jurisdiction." While the term "general jurisdiction" applies to the ability of a court or agency to adjudicate "all controversies that may be brought . . . within the legal bounds of rights and remedies," this definition does not connote exclusive jurisdiction over a particular controversy or subject area. BLACK'S LAW DICTIONARY 684 (6th ed. 1990). "Exclusive jurisdiction," conversely, is the "power which a court or other tribunal exercises over an action or over a person to the exclusion of all other courts" and "[t]hat forum in which an action must be commenced because no other forum has the jurisdiction to hear and determine the action." *Id.* at 564.

¹⁰⁷ See *supra* note 104 (discussing WASH. REV. CODE ANN. § 49.60.010 (West 1990 & Supp. 1998) and the grant of general jurisdiction to the Human Rights Commission); *supra* note 106 (discussing the definitions of "general" and "exclusive" jurisdiction).

¹⁰⁸ See *supra* text accompanying note 3 (quoting WASH. REV. CODE ANN. § 49.60.030(2)), which confers on "[a]ny person deeming himself or herself injured by any act in violation of [the law against discrimination]" the right to pursue a civil action to protect his or her civil rights); *supra* text accompanying note 2 (quoting WASH. REV. CODE ANN. § 49.60.020, which states that nothing contained in the law against discrimination "shall . . . be construed to deny the right to any person" to bring a private action to remedy or enjoin civil rights violations). See also WASH. REV. CODE ANN. § 49.60.010 (stating that "[t]he legislature hereby finds and declares that practices of discrimination against any of its inhabitants . . . threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state").

¹⁰⁹ See THE AMERICAN HERITAGE COLLEGE DICTIONARY 61 (3d ed. 1991) (defining "any" as "[o]ne, some, every, or all without specification").

work for companies with fewer than eight employees.¹¹⁰ Without explanation, the *Griffin* court rejected these statutory definitions, and in doing so, allowed the limitations applicable to the jurisdiction of the Human Rights Commission to limit the unequivocal right to private action conferred in the law against discrimination.¹¹¹

F. A Repudiation of the Statutory Mandate of Liberal Construction

Contributing to the court's erroneous holding in *Griffin* was its repudiation of the mandate of the law against discrimination stating that its anti-discrimination provisions be liberally construed in order to accomplish the law's purpose of eradicating discrimination.¹¹² The *Griffin* holding, which deprives a significant percentage of the state's citizenry the right to seek redress for alleged civil rights violations,¹¹³ demonstrates anything but the liberal construction mandated by the statute.¹¹⁴ Instead, the *Griffin* decision inexplicably evidences the very broad application of statutory exceptions to the law against discrimination that the Washington Supreme Court

¹¹⁰ *Griffin v. Eller*, 922 P.2d 788, 796 (Wash. 1996) (Talmadge, J., dissenting). See *supra* text accompanying notes 2 and 3 (discussing WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2)); *supra* note 108 (discussing WASH. REV. CODE ANN. § 49.60.010 and the statute's explicit reference to "any person" and "any . . . inhabitants" of Washington).

¹¹¹ See *Griffin*, 922 P.2d at 789 (holding that "employers of fewer than eight employees are statutorily exempt from [the] remedies provided under [the law against discrimination]").

¹¹² See WASH. REV. CODE ANN. § 49.60.020 (stating that "the provisions of this chapter shall be construed liberally for the accomplishment of the purposes [of the law against discrimination]"); *supra* note 59 and accompanying text (discussing *id.* § 49.60.010 and the purpose of the law against discrimination). See also *Burnside v. Simpson Paper Co.*, 864 P.2d 937, 940 (Wash. 1994) (stating that the underlying purpose of the law against discrimination is "to deter discrimination").

¹¹³ See *supra* note 8 (discussing the large percentage of employees in Washington who work for companies with fewer than nine or ten employees).

¹¹⁴ See *supra* note 112 (discussing the statute's mandate of liberal construction pursuant to WASH. REV. CODE ANN. § 49.60.020 (West 1990 & Supp. 1998)).

previously prohibited.¹¹⁵ Moreover, the holding demonstrated the court's disregard for its own precedent mandating liberal construction of statutory safeguards against discrimination.¹¹⁶

In *Nucleonics Alliance v. Washington Public Power Supply System*,¹¹⁷ the Washington Supreme Court held that because the purpose of the state statute governing public employees' right to representation by labor organizations was remedial in nature, the statute was "entitled to a liberal construction to effect its purpose."¹¹⁸ The issues the court addressed in *Nucleonics Alliance*

¹¹⁵ For example, in *Phillips v. City of Seattle*, the court held that statutory safeguards against discrimination "are to be liberally construed" and "exceptions narrowly confined." 766 P.2d 1099, 1102 (Wash. 1989). In *Phillips*, which involved a wrongful discharge suit brought by an employee claiming that his employer failed to accommodate his handicap, the Washington Supreme Court interpreted the definition of handicap pursuant to the law against discrimination. *Id.*

¹¹⁶ In its opinion, the *Phillips* court contrasted the emphasis of statutory interpretation in law enforcement, which is "to leave no one out," with that of affirmative action, which must "avoid including in so many persons that statistics become meaningless." *Phillips*, 766 P.2d at 1102. The court reasoned that if the narrow affirmative action definition of handicap were applied to cases involving individual claims of discrimination, as it was applied by the lower court, a large number of people would be impermissibly excluded from the protections afforded by the statute. *Id.* See also *Marquis v. City of Spokane*, 922 P.2d 43, 49 (Wash. 1996) (citing *Shoreline Community College v. Employment Sec. Dep't*, 842 P.2d 938 (Wash. 1992) (holding that "a statutory mandate of liberal construction requires that [the court] view with caution any construction that would narrow the coverage of the law")); *Nucleonics Alliance v. Washington Pub. Power Supply Sys.*, 677 P.2d 108, 110 (Wash. 1984) (stating that "[a] policy requiring liberal construction is a command that the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined").

¹¹⁷ 677 P.2d 108, 110 (Wash. 1984).

¹¹⁸ *Id.* at 110. The court held that Washington's Public Employment Relations Commission ("PERC") was required, under the state's Public Employee's Collective Bargaining Act, WASH. REV. CODE ANN. § 41.56 (West 1991), to process a collective bargaining election petition filed by the labor organization *Nucleonics* on behalf of security guards employed by the Washington Public Power Supply System. *Nucleonics Alliance*, 677 P.2d at 112. Washington's Public Employees' Collective Bargaining Act states that:

The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of

were whether the Washington Public Power Supply System (“WPPSS”), a municipal corporation and joint operating agency authorized to build and maintain power plants, was a public utility district, and whether the state’s Public Employment Relations Commission (“PERC”) had jurisdiction over “labor relations between WPPSS and its employees,”¹¹⁹ pursuant to the state’s Public Employees’ Collective Bargaining Act.¹²⁰ The respondent in *Nucleonics Alliance*, WPPSS, claimed that it was a public utility district, and therefore, was exempt from the ambit of the Collective Bargaining Act, pursuant to exceptions contained in the code governing the rights and duties of public utility districts to enter into collective bargaining with their employees.¹²¹

The *Nucleonics Alliance* court concluded that while “some of the same powers and duties that are applicable to [public utility districts]”¹²² also apply to municipal corporations and joint operating agencies, such as WPPSS, that fact “does not mandate that WPPSS be considered a [public utility district] for the purposes of an exception from [the Collective Bargaining Act].”¹²³ Reasoning that the declared purpose of the Public Employee’s Collective

public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

WASH. REV. CODE ANN. § 41.56.010.

¹¹⁹ *Nucleonics Alliance*, 677 P.2d at 110.

¹²⁰ WASH. REV. CODE ANN. § 41.56.

¹²¹ *Nucleonics Alliance*, 677 P.2d at 110, 112. See WASH. REV. CODE ANN. § 41.56.020 (stating that the Public Employees’ Collective Bargaining Act “shall apply to any county or municipal corporation, or any political subdivision of the state of Washington . . . except as otherwise provided by [Washington Revised Code sections] 54.04.170, 54.04.180”).

¹²² *Nucleonics Alliance*, 677 P.2d at 111.

¹²³ *Id.* The *Nucleonics Alliance* court stated that:

Whereas the separate [public utility districts] are subject to the exception of [section] . . . 41.56.020, municipalities [and municipal organizations] which have an express grant of authority almost identical to that of the [public utility districts] to construct, acquire and operate electric generating facilities, are not subject to such exceptions from [the Public Employees’ Bargaining Act].

Id.

Bargaining Act is the “implementation of the right of public employees to join and be represented by labor organizations,”¹²⁴ and recognizing that the Act was remedial in nature, the court concluded that the statute was “entitled to a liberal construction to effect its purpose.”¹²⁵ Rejecting the claim of exemption asserted by WPPSS, the court held that a “broad construction of the exception . . . from the covered class of municipal corporations would not effect the purpose of providing the right of public employees to join and be represented by labor organizations.”¹²⁶ Further, the *Nucleonics Alliance* court stated that “[i]n accordance with the rules of statutory construction and the remedial nature”¹²⁷ of the Act, WPPSS is not a public utility, and therefore, is “not within the jurisdictional exception [of the law].”¹²⁸

Similarly, the law against discrimination is a remedial statute that requires a liberal construction in order to effectuate its purpose of protecting all Washington citizens against violations of their civil rights.¹²⁹ The *Griffin* holding therefore repudiates Washington Supreme Court precedent mandating that remedial statutes, such as the law against discrimination, be liberally construed and their exceptions narrowly confined.

G. *The Denial of Rights Conferred by the Law Against Discrimination*

Washington’s law against discrimination undeniably provides all citizens the unequivocal right to pursue private actions to seek redress for discriminatory acts allegedly committed by their employers.¹³⁰ Moreover, a significant body of case law supports the proposition that the statute contains a general ban on

¹²⁴ *Id.* at 110.

¹²⁵ *Id.*

¹²⁶ *Id.* at 111.

¹²⁷ *Id.* at 112.

¹²⁸ *Id.* at 111.

¹²⁹ WASH. REV. CODE ANN. § 49.60.020 (West 1990 & Supp. 1998).

¹³⁰ See *supra* text accompanying notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2), which confer an unequivocal right on every Washington citizen to pursue a private action to protect his or her civil rights).

discrimination and confers on all Washington citizens an absolute right to be free of discrimination.¹³¹

On the same day it rendered its opinion in *Griffin v. Eller*, the Washington Supreme Court held in *Marquis v. City of Spokane* that definitions contained in the law against discrimination do not foreclose the general right to pursue a private cause of action.¹³² In *Marquis*, the plaintiff, an independent contractor, filed suit under the law against discrimination, alleging sexual discrimination in relation to her contract with the city of Seattle, Washington, to manage a golf course.¹³³ The trial court dismissed the *Marquis*

¹³¹ See, e.g., *Bennett v. Hardy*, 784 P.2d 1258, 1266 (Wash. 1990) (holding that allowing employees who work in companies with fewer than eight employees to pursue private actions against their employers to defend their civil rights will not undermine the purpose of exempting such employers from the jurisdiction of the Human Rights Commission); *Spangenberg v. Cheney Sch. Dist. No. 30*, 641 P.2d 163, 166 (Wash. 1982) (holding that an alleged victim of age discrimination may seek damages in a private action under the law against discrimination notwithstanding that the complainant was foreclosed from pursuing administrative remedies through the Human Rights Commission).

¹³² *Marquis v. City of Spokane*, 922 P.2d 43, 50 (Wash. 1996) (holding that definitions in the law against discrimination that function to limit its scope do not prevent citizens who allege to be victims of discrimination from pursuing private actions to protect their civil rights). Both cases were decided on September 5, 1996. See *Griffin v. Eller*, 922 P.2d 788 (Wash. 1996).

¹³³ *Marquis*, 922 P.2d at 45-46. The *Marquis* plaintiff was a professional golfer who had been hired by Seattle's Parks and Recreation Department as the golf professional at one of the three golf courses it owned. *Id.* at 45. *Marquis'* responsibilities included operation of the Downriver Golf Course, along with its "practice range, pro shop, cafe, food services and clubhouse." *Id.* at 46. At the time she negotiated her contract, *Marquis* was told that she "could expect a long career . . . and that her contract would be continually renewed so long as she performed her job." *Id.*

During her tenure as golf professional, *Marquis* learned that she was receiving less compensation than male golf professionals at the city's two other golf courses. *Id.* When she addressed the City's golf manager about the pay discrepancy, he replied by inquiring "why she was worried about it as she was married to a doctor." *Id.* In addition, she was told by a member of the City's golf committee that "[i]f you can't take the heat, get out of the kitchen." *Id.* In addition, *Marquis* claimed that "she was subjected to discriminatory treatment during the course" of her employment, including reprimands for minor violations of her contract. *Id.* *Marquis* further alleged that her male counterparts at the other municipal golf courses "were not similarly reprimanded" for comparable

plaintiff's claim, reasoning that the state's law against discrimination did "not prohibit discrimination against independent contractors."¹³⁴ The court seemingly reasoned that the rights conferred in the law against discrimination applied only to "employees," pursuant to the statutory definition of the term, and not to independent contractors.¹³⁵ The flawed reasoning applied by the trial court in *Marquis* is analogous to that exercised in *Griffin*, where the Washington Supreme Court relied on the statutory definition of "employer" to limit the right to pursue private actions to individuals who work for employers with eight or more employees.¹³⁶

Like the plaintiff in *Marquis*, who was unable to seek administrative relief from Washington's Human Rights Commission because of her status as an independent contractor,¹³⁷ Griffin was also precluded from obtaining such relief, because she was unable to allege that Eller was an employer, defined by the statute as

violations. *Id.* Finally, when the time came to renegotiate her contract, the City "refused to unconditionally renew her contract" pursuant to the "reprimands in her file." *Id.* Instead, Marquis was offered a "one-year probationary contract," which she refused. *Id.*

¹³⁴ *Id.* at 47.

¹³⁵ *Marquis*, 922 P.2d at 47.

¹³⁶ *Griffin*, 922 P.2d at 789.

¹³⁷ See *Marquis*, 922 P.2d at 51 (citing WASH. ADMIN. CODE § 162-16-170(2) (1997), a rule promulgated by the Washington Human Rights Commission, which states that "[w]hile an independent contractors [sic] does not have the protection of [seeking administrative relief from the Commission, pursuant to section 49.60.180], the contractor is protected by" the statutory provision granting a general right to private action to any person who deems himself or herself a victim of discrimination prohibited by the statute). See *supra* text accompanying note 3 (quoting WASH. REV. CODE ANN. § 49.60.030(2) (West 1990 & Supp. 1998)). The *Marquis* court stated that while the definition of "employee" contained in the law against discrimination did not specifically address independent contractors, it "presume[d] the legislature intended" the definition to distinguish "between employees and independent contractors, based primarily on the degree of control exercised by the employer/principal over the manner of doing the work involved." *Marquis*, 922 P.2d at 50 (citing *Fardig v. Reynolds*, 348 P.2d 661 (Wash. 1960)). The law against discrimination states that "[e]mployee does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person." WASH. REV. CODE ANN. § 49.60.040(4).

someone who employs eight or more persons.¹³⁸ However, in *Marquis*, the Washington Supreme Court reversed the trial court decision and held that the general right to commence a private action pursuant to the law against discrimination is enforceable regardless of the availability of administrative relief.¹³⁹ The *Marquis* court correctly recognized that the definitions contained in the law against discrimination, which function to limit the

¹³⁸ *Griffin*, 922 P.2d at 789. Pursuant to the law against discrimination, Griffin was unable to allege an unfair practice and seek administrative relief because her employer did not meet the statutory criteria of who an “employer” is, as he employed fewer than eight employees. *Id.* See *supra* text accompanying note 23 (discussing the definition of “employer” pursuant to WASH. REV. CODE ANN. § 49.60.040(3)).

¹³⁹ *Marquis*, 922 P.2d at 50 (citing WASH. REV. CODE ANN. § 49.60.030(1)) (holding that the law against discrimination “does not foreclose a cause of action to an independent contractor because, by its own terms [the statute] does not limit the actions which may be brought to those listed in the statute”). See *supra* text accompanying note 1 (quoting *id.* § 49.60.030(1) and its recognition that “[t]he right to be free of [employment] discrimination” is a “civil right”). See also *Bennett v. Hardy*, 784 P.2d 1258, 1266 (Wash. 1990) (holding that plaintiffs who sued their former employer alleging age discrimination and wrongful discharge were not precluded from pursuing private actions under the state’s unfair employment practice statute, WASH. REV. CODE ANN. § 49.44.090 (West 1990 & Supp. 1998), notwithstanding that plaintiffs were barred from seeking administrative relief from the Washington Human Rights Commission because their employer did not satisfy the definition of employer contained in the law against discrimination). While the *Bennett* court adjudicated the right of plaintiffs to sue in private actions pursuant to a statute other than the law against discrimination, the court set forth the following proposition regarding the broad availability of the right to pursue civil actions to redress alleged acts of discrimination:

The purposes announced by the Commission for exempting small businesses from regulation will in no way be interfered with by permitting private causes of action against employers whose size keeps them outside the scope of public agency regulation. Moreover, permitting private actions by individual plaintiffs can only assist the Commission in furthering the goal of preventing and eliminating employment discrimination.

Bennett, 784 P.2d at 1266.

jurisdiction of the Human Rights Commission, do not alter the unequivocal nature of the right to a private action.”¹⁴⁰

In light of the court’s holding in *Marquis*, it is clear that the plaintiff in *Griffin*, who was not entitled to seek administrative relief under the law against discrimination, was entitled to bring a private action to defend her civil rights, just as the *Marquis* plaintiff was.¹⁴¹ It is difficult to understand why the Washington Supreme Court would enunciate in *Marquis* the proposition that definitions in the law against discrimination do not foreclose the general right to pursue a private action, and simultaneously reject that same proposition in *Griffin*.¹⁴² The policy set forth in *Marquis*, demonstrating the value that the Washington Supreme Court placed on protecting a citizen’s right to defend his or her civil rights in a private action,¹⁴³ is sufficiently significant to extend to individuals such as Griffin.

Similar to its holding in *Marquis*, the Washington Supreme Court held in *Spangenberg v. Cheney School District No. 30*¹⁴⁴ that an alleged victim of discrimination was entitled to seek compensatory damages in a private action pursuant to the law against discrimination, notwithstanding her foreclosure from

¹⁴⁰ *Marquis*, 922 P.2d at 50. See also Michael Spiro, *Judicial Deference to Administrative Construction of Washington’s Law Against Discrimination: Griffin v. Eller and Marquis v. City of Spokane*, 72 WASH. L. REV. 677, 695 (1997). Spiro states that in *Marquis*, the Washington Supreme Court held that the civil rights protected by the law against discrimination were “nonexclusive,” and that the statute must be “interpreted in the manner that best fulfills the legislative purpose and intent.” *Id.* Spiro states further that “the court acknowledged that no person may be denied the right to bring a cause of action based on a ‘violation of his or her civil rights,’ and that it must ‘view with caution’ constructions that ‘narrow the coverage of the law.’” *Id.* (quoting *Marquis*, 922 P.2d at 49).

¹⁴¹ See *supra* note 139 and accompanying text (discussing the holding of the Washington Supreme Court in *Marquis*, 922 P.2d at 53).

¹⁴² Compare *Griffin*, 922 P.2d at 789 (holding that “employers of fewer than eight employees are statutorily exempt from these remedies provided under [the law against discrimination]”); with *Marquis*, 922 P.2d at 49 (holding that the definitions contained in the law against discrimination do not limit the general right to pursue a private action).

¹⁴³ See *Marquis*, 922 P.2d at 50.

¹⁴⁴ 641 P.2d 163 (Wash. 1982).

pursuing such relief through the Commission.¹⁴⁵ Interpreting the administrative code defining the practices and procedures of the Commission, the court reasoned that the law against discrimination “preserves the civil and criminal remedies of a person who has filed a complaint . . . and . . . authorizes suits directly in court, in order to free the commission to work for the remedy best designed to eliminate and prevent discrimination.”¹⁴⁶ Recognizing the public policy goals embodied in the law against discrimination, the *Spangenberg* court protected the unequivocal right of all Washington citizens to pursue a private action in defense of their civil rights.¹⁴⁷

¹⁴⁵ *Id.* at 166 (stating that plaintiff alleging age discrimination may seek redress under section 49.60.030 of the Revised Code of Washington, WASH. REV. CODE ANN. § 49.60.030 (West 1990 & Supp. 1998) “which specifically grants a civil remedy for anyone injured by an act of discrimination”). The court held that the plaintiff in *Spangenberg* was precluded from seeking damages through the Human Rights Commission for mental suffering incurred as a result of alleged age discrimination because the statute does not authorize the Commission to award damages. *Id.* at 169. *See supra* text accompanying note 3 (quoting WASH. REV. CODE ANN. § 49.60.030(2), which confers the right to pursue a civil action on “[a]ny person deeming himself or herself injured by” an act of discrimination).

¹⁴⁶ *Spangenberg*, 641 P.2d at 166 (citing WASH. REV. CODE ANN. § 49.60.020). *See supra* text accompanying note 2 (quoting WASH. REV. CODE ANN. § 49.60.020, which confers an unequivocal right on every Washington citizen to pursue a private remedy to protect his or her civil rights). *See* WASH. ADMIN. CODE § 162-08-061(2) (1997) (stating that “[t]he [Human Rights Commission’s] primary objective is to eliminate and prevent discrimination”). The administrative code provides that “[t]he commission assumes that persons who complain to it are as interested in the elimination and prevention of discrimination in general as in their individual cases” and that “[i]f a person is interested only in relief for himself or herself, he or she is advised to seek his or her remedy directly in court [pursuant to the law against discrimination].” *Id.*

The court in *Spangenberg* described the role of the Human Rights Commission “as a ‘fire department’ designated to take immediate action in the event of an emergency in the violation of civil rights, without fear of waiver of other civil or criminal remedies.” 641 P.2d at 166. Further, the *Spangenberg* court stated that “[o]n the other hand, the courts supply the long-term stability and reliability for enforcement of discrimination statutes that are violated, and for the awarding of damages.” *Id.*

¹⁴⁷ *See Spangenberg*, 641 P.2d at 169 (holding that “[a] person who has

It is difficult to reconcile the Washington Supreme Court's holding in *Spangenberg*, which placed a high value on preserving the right of individuals to protect their civil rights in private actions,¹⁴⁸ with the holding in *Griffin*. The complainants in *Griffin* and *Spangenberg* are similar in that both individuals were foreclosed from pursuing administrative relief through the Human Rights Commission.¹⁴⁹ Both individuals, as Washington citizens, also possessed the undeniable right to pursue a private action to redress alleged violations of their civil rights afforded by the law against discrimination.¹⁵⁰ Only the *Griffin* court's misinterpretation of the statutory definition of "employer," and its erroneous extension of the jurisdictional limitations of the Human Rights Commission, separate the holdings of the two cases. When the applicable provisions of the law against discrimination are interpreted together with the controlling case law, it is undeniable that *Griffin* and all other citizens of Washington, who are precluded from seeking administrative relief from the Human Rights Commission, do indeed have a right to protect their civil rights in a private action.

suffered humiliation caused by discrimination may seek relief through a civil action as provided for under [the law against discrimination]"); *supra* text accompanying notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2)).

¹⁴⁸ *Spangenberg*, 641 P.2d at 166.

¹⁴⁹ See *Griffin v. Eller*, 922 P.2d 788, 789-90 (Wash. 1996) (holding that *Griffin* was foreclosed from seeking administrative relief because her employer did not comport with the statutory definition of "employer"); *Spangenberg*, 641 P.2d at 164 (holding that the plaintiff was precluded from seeking damages through the Human Rights Commission because the statute does not authorize the Commission to award damages). See *supra* note 22 and accompanying text (discussing the limited jurisdiction of the Human Rights Commission to adjudicate charges of employment discrimination pursuant to the definitions of "employer" and "unfair practices" contained in the law against discrimination, pursuant to WASH. REV. CODE ANN. §§ 49.60.120(4), 49.60.180(1)-(4)).

¹⁵⁰ See *supra* text accompanying notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2), which confer an unequivocal right on every Washington citizen to pursue a private action to protect his or her civil rights).

H. A Disregard for the Administrative Code Created to Enforce the Law Against Discrimination

The court's erroneous holding in *Griffin* is further demonstrated by its flawed interpretation of the administrative code created to implement the law against discrimination.¹⁵¹ In rejecting *Griffin*'s argument that the small business exemption frustrates the statute's purpose,¹⁵² the Washington Supreme Court ignored key provisions in the code, stating that "[t]he standards in this section do not define who is entitled to the protection of the law against discrimination."¹⁵³

The primary purpose of the administrative code exemption limiting the Commission's enforcement authority to employers included within the statutory definition is to "relieve small businesses of a regulatory burden."¹⁵⁴ Further, "[i]n the interest of cost effectiveness," the exemption "confine[s] public agency enforcement of the law to employers whose practices affect a substantial number of persons."¹⁵⁵ This language gives no indication that the purpose of the exemption is to deprive employees of companies with fewer than eight employees of the right to pursue a private action.¹⁵⁶

The statute's exemption of companies with fewer than eight employees from the jurisdiction of the Human Rights Commission is motivated by the critical goal of reducing the state government's administrative burden by excluding from its regulatory control the

¹⁵¹ WASH. ADMIN. CODE §§ 162-16-160(1)(2) (1997) (implementing the section of the statute that defines employer as "any person . . . who employs eight or more persons" and establishes "standards for determining who is counted as employed when deciding whether a person is an employer under the quoted language").

¹⁵² *Griffin*, 922 P.2d at 792.

¹⁵³ WASH. ADMIN. CODE § 162-16-160(1).

¹⁵⁴ *Id.* § 162-16-160(2)(a). See *Griffin*, 922 P.2d at 802 (Talmadge, J., dissenting) (stating that it is the Commission's view that "the exemption only confines public agency enforcement of the law, and does not restrict the scope of the law itself").

¹⁵⁵ WASH. ADMIN. CODE § 162-16-160(2)(b).

¹⁵⁶ WASH. ADMIN. CODE § 162-16-160(2)(a), (b).

significant percentage of small businesses that operate in the state.¹⁵⁷ The exemption also furthers an important public policy objective by reducing the cost of doing business for small businesses, which, in turn, spurs economic growth and creates jobs in the state.¹⁵⁸ However, there is no justification for sacrificing the unequivocal right of all Washington citizens to protect their civil rights through private actions as a means for realizing these policies.

One of the concerns that motivated the *Griffin* court was that by allowing individuals employed by companies with fewer than eight employees to sue in private actions, the number of lawsuits filed against small businesses might significantly increase.¹⁵⁹ Pursuant to the court's reasoning, small businesses would incur significant costs as a consequence of providing a broad right to private action through the law against discrimination.

However, the *Griffin* court's concerns are unfounded in light of data compiled by two municipal human rights organizations in Washington whose jurisdiction over employment discrimination complaints is broader than that conferred on the state's Human Rights Commission by the law against discrimination. In Tacoma, the city's Human Rights Department is responsible for "[r]eceiving, investigating, and seeking the satisfactory adjustment of complaints charging unlawful practices as set forth" in the city's administrative code.¹⁶⁰ Included under the Department's jurisdiction is the adjudication of "unlawful discriminatory practices" committed by "employers," as these terms are defined by the code.¹⁶¹ The

¹⁵⁷ See *supra* note 8 (discussing the significant percentage of Washington citizens employed in small companies).

¹⁵⁸ *Griffin*, 922 P.2d at 792 (analyzing the rationale behind the small business exemption, the court explained that "the State has a substantial interest in the well-being of small business with regard to the state economy, tax base, and opportunities for employment").

¹⁵⁹ *Id.* at 791-92. The court stated that "the Legislature may well have been advancing legitimate state purposes by . . . protecting small businesses from private litigation expense." *Id.* at 791. The *Griffin* court failed, however, to support these concerns with any statistical evidence addressing the number of private actions filed against employers of fewer than eight individuals. *Id.*

¹⁶⁰ TACOMA, WASH. CODE § 1.29.030(A)(1) (1994).

¹⁶¹ *Id.* § 1.29.050.

Tacoma code defines employer as “any person [or partnership, organization or corporation] . . . acting in the interests of an employer . . . who has any person in his, her or its employ.”¹⁶² The second organization, the Seattle Office for Civil Rights, is empowered, pursuant to the city’s ordinance governing employment practices, to “investigate, and pass upon charges alleging unfair [employment] practices.”¹⁶³ Seattle’s employment law defines “employer” as “any person who has four (4) or more employees.”¹⁶⁴

Although the Tacoma Human Rights Department is authorized to adjudicate discrimination charges filed by individuals employed in companies with one or more employees,¹⁶⁵ the number of employment discrimination charges that are filed by individuals employed in companies with fewer than eight employees is negligible.¹⁶⁶ Similarly, in Seattle, where the right of employees

¹⁶² *Id.* § 1.29.040(E).

¹⁶³ SEATTLE, WASH. EMPLOYMENT PRACTICES ORDINANCE § 14.04.060(A) (1997). *See id.* § 14.04.040 (defining the unfair employment practices over which the Office has jurisdiction to adjudicate).

¹⁶⁴ *Id.* § 14.04.030(H).

¹⁶⁵ *See supra* text accompanying notes 160-162 (discussing the jurisdiction of the Department over employment discrimination claims pursuant to the code’s definition of “employer,” pursuant to TACOMA, WASH. CODE §§ 1.29.030(A)(1), 1.29.040(E), 1.29.050 (1994)).

¹⁶⁶ According to Allen Correll, Executive Director of the Tacoma Human Rights Department, out of 100 employment discrimination charges filed with the Department in any given year, it is rare to have more than “a handful” of charges of employment discrimination filed by employees in companies with fewer than eight employees. Telephone Interview with Allen Correll, Executive Director of the Tacoma Human Rights Department (Nov. 21, 1997). In 1995, less than 2% of the 113 charges alleging employment discrimination were filed by individuals employed in companies with fewer than eight employees. Letter from Judy Lampson, Administrative Secretary of the Tacoma Human Rights Department (Oct. 6, 1998) (on file with the *Journal of Law and Policy*); Telephone interview with Judy Lampson (Sept. 24, 1998). In 1996, the number of such complaints received by the Department was seven, which represents 7.3% of the 95 complaints received in total by the Department. Letter from Judy Lampson (Oct. 6, 1998); Telephone Interview with Judy Lampson (Sept. 24, 1998). Of the 93 employment discrimination complaints received by the Department in 1997, the five complaints filed by employees in companies with fewer than eight employees represent 5.3% of the total number of complaints filed. Letter from

to pursue administrative relief for alleged discrimination is also broad,¹⁶⁷ the percentage of complaints filed by employees such as Griffin, is likewise insignificant.¹⁶⁸

While these statistics apply only to the percentage of complaints seeking administrative relief, they are enlightening because they demonstrate that, notwithstanding the broad right to pursue such relief in these municipalities, the number of complaints filed by employees in companies with fewer than eight employees remains negligible. Extrapolating the data compiled by the Tacoma Human Rights Department and the Seattle Office for Civil Rights on the number of employment discrimination charges filed by employees in companies with fewer than eight employees,¹⁶⁹ it is reasonable to conclude that the number of private actions that would be filed under the law against discrimination by employees in companies with fewer than eight employees would be similarly insignificant. Consequently, permitting these employees to exercise their unequivocal right to pursue private actions to defend their civil rights is fully justified.¹⁷⁰

Judy Lampson (Oct. 6, 1998); Telephone Interview with Judy Lampson (Sept. 24, 1998). As of September 30, 1998, 63 complaints alleging employment discrimination have been filed with the Department. Letter from Judy Lampson (Oct. 6, 1998). Of those complaints, five have been filed by employees in companies with fewer than eight employees, representing less than 8% of the total complaints filed. *Id.*

¹⁶⁷ See *supra* notes 163 and 164 and accompanying text (discussing SEATTLE, WASH. EMPLOYMENT PRACTICES ORDINANCE §§ 14.04.030(H), 14.04.040, 14.04.060(A) (1997) and the jurisdiction of the city's Office for Civil Rights over employment discrimination claims pursuant to the ordinance's definition of employer).

¹⁶⁸ In 1997, one charge of employment discrimination was filed with the Seattle Office for Civil Rights by an individual employed in a company with fewer than eight employees. Letters from Mary Jane Brogan, Legal Assistant, Seattle Office for Civil Rights (Oct. 19, 1998; Oct. 30, 1998) (on file with the *Journal of Law and Policy*). Of the 90 employment discrimination complaints received by the Office from private employers in 1997, the one charge filed by an employee in a company with fewer than eight employees accounts for less than 1% of the total number of complaints filed. *Id.*

¹⁶⁹ See *supra* notes 166 and 168 and accompanying text.

¹⁷⁰ According to Allen Correll, "there is not a preponderance of cases nor any statistical facts supporting a contention that allowing employees of small

III. VIOLATIONS OF THE PRIVILEGES AND IMMUNITIES CLAUSE INHERENT IN THE *GRIFFIN* DECISION

The *Griffin* court established two separate and unequal criteria for determining who has a right to redress alleged acts of employment discrimination.¹⁷¹ In so doing, the Washington Supreme Court summarily deprived one group of citizens—those employed in companies with fewer than eight employees—of a means to defend themselves against alleged violations of their civil rights.¹⁷² At the same time, the court affirmed that citizens employed in companies with eight or more employees have a substantial means to defend against such abuses.¹⁷³

Further, the *Griffin* court provided a special privilege to owners of small businesses by exempting them from the burden of complying with the law against discrimination.¹⁷⁴ Pursuant to the court's holding, this burden has been imposed exclusively on companies with eight or more employees.¹⁷⁵ As a result of its disparate treatment of citizens employed in companies with fewer than eight employees, and its unequal treatment of their employers, the Washington Supreme Court's holding in *Griffin* violated the privileges and immunities clause of Washington's constitution.¹⁷⁶

The privileges and immunities clause of Washington's constitution prohibits any law from granting to any citizen or corporation,

companies to sue in private actions to redress alleged acts of discrimination would significantly increase the burden on state courts." Telephone Interview with Allen Correll, Executive Director of the City of Tacoma Human Rights Department (Nov. 21, 1997).

¹⁷¹ *Griffin v. Eller*, 922 P.2d 788, 791 (Wash. 1996) (holding that applying the anti-discrimination statute unequally is permissible because "the legislature may constitutionally approach the problem of employment discrimination one step at a time").

¹⁷² *Id.* at 789 (holding that "employers of fewer than eight employees are statutorily exempt from [the] remedies provided under [the law against discrimination]" and that "the exemption passes constitutional muster").

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ WASH. CONST. art. I, § 12.

except municipal corporations, “privileges or immunities which upon the same terms shall not equally belong to all citizens.”¹⁷⁷ The safeguards inherent in the privileges and immunities clause prohibit the type of disparate statutory enforcement advanced by the *Griffin* court, which held that “employers of fewer than eight employees are statutorily exempt from [the] remedies provided under [the law against discrimination].”¹⁷⁸ In light of its holdings in numerous cases adjudicating alleged violations of the state constitution’s privileges and immunities clause,¹⁷⁹ the Washington Supreme Court repudiated established precedent and eschewed the principles of stare decisis when it affirmed the trial court’s holding in *Griffin*.¹⁸⁰ This precedent established by the court enunciates

¹⁷⁷ *Id.*

¹⁷⁸ *Griffin*, 922 P.2d at 789.

¹⁷⁹ *See, e.g.*, *Adams v. Hinkle*, 322 P.2d 844, 857 (Wash. 1958) (holding that a state statute that criminalized the sale of comic books but exempted from the statute’s coverage the sale of newspapers with comic sections violated the privileges and immunities clause); *City of Seattle v. Rogers*, 106 P.2d 598, 601 (Wash. 1940) (holding that a Seattle ordinance that required all businesses that solicit charitable contributions to obtain licenses violated the privileges and immunities clause because it provided an exemption to one organization); *Sherman Clay v. Brown*, 231 P. 166, 168 (Wash. 1924) (deeming violative of the privileges and immunities clause a Seattle ordinance that exempted dealers of one type of second-hand goods from a licensing requirement that was imposed on all other dealers of second-hand goods); *State v. Robinson*, 146 P. 628, 629 (Wash. 1915) (determining that a state statute that exempted one type of food producer from a requirement to record sales while imposing that obligation on other food producers violated the privileges and immunities clause). *See* Jonathan Thompson, *The Washington Constitution’s Prohibition on Special Privileges and Immunities: Real Bite for “Equal Protection” Review of Regulatory Legislation*, 69 TEMP. L. REV. 1247, 1273-76 (1996) (discussing the aforementioned cases).

¹⁸⁰ *Griffin*, 922 P.2d at 793. For example, in *State v. Martin*, the court held that stare decisis “makes for stability and permanence . . . [and implies] that a rule once declared is and shall be the law.” 384 P.2d 833, 845 (Wash. 1963). Further, the *Martin* court stated that “[t]he very ideal of equal justice under law, and the aspiration that one man shall be treated exactly like every other man under the same circumstances depends upon [the principle of stare decisis].” *Id.* By holding that *Griffin*’s employer, and all other employers with fewer than eight employees, were exempt from the remedies provided in the law against discrimination, the *Griffin* court granted the very immunity from regulation it had prohibited in its prior holdings. *Griffin*, 922 P.2d at 789. Consequently, it is

a clear prohibition against granting regulatory immunity to certain individuals or groups while excluding others, because such immunity constitutes a violation of the privileges and immunities clause. For example, in *Adams v. Hinkle*,¹⁸¹ the Washington Supreme Court held that the Comic Book Act, a statute requiring comic book dealers to obtain a pre-publication license, was invalid under the privileges and immunities clause of Washington's constitution.¹⁸² The *Adams* court reasoned that because the statute exempted from the licensing requirement regularly published newspapers with comic sections,¹⁸³ it did not meet state constitutional muster because it "exact[ed] from dealers in comic books a prepublication license while immunizing newspapers from the same requirements in the publication and distribution of the identical materials."¹⁸⁴

In holding that the Comic Book Act was violative of the privileges and immunities clause, the *Adams* court stated that the purpose of the clause was "'to secure equality of treatment of all persons without undue favor on the one hand or hostile discrimination on the other.'"¹⁸⁵ Pursuant to the *Adams*' court analysis of

reasonable to conclude that by repudiating the precedent established in these preceding cases, the court in *Griffin* eroded some of the "stability and permanence" fostered by the principle of stare decisis. See *Martin*, 384 P.2d at 845.

¹⁸¹ 322 P.2d 844 (Wash. 1958).

¹⁸² *Id.* at 857-58. The Comic Book Act declared that comic books "are a factor in juvenile delinquency" and deemed criminal the "sale of comic books or possession thereof with intent to sell without a prior license." *Adams*, 322 P.2d at 846-47 (citing 1955 Wash. Laws, ch. 282). The statute defined comics as "drawings depicting or telling a story of a real or fanciful event or series of events" and stated that "no comic section of any regularly published daily or weekly newspaper shall be deemed to be a 'comic book' for the purposes of this act." *Id.* at 847. See Thompson, *supra* note 179, at 1275-76 (analyzing the court's holding in *Adams*, 322 P.2d at 858).

¹⁸³ *Adams*, 322 P.2d at 847 (citing 1955 Wash. Laws 282 §§ 3-4).

¹⁸⁴ *Id.* at 858.

¹⁸⁵ *Adams*, 322 P.2d at 858 (citing *Bacich v. Huse*, 59 P.2d 1101 (Wash. 1936), *overruled by* Puget Sound Gillnetters Ass'n v. Moos, 603 P.2d 819, 824 (Wash. 1979)). The *Adams* court relied on the reasoning exhibited by the court in *Bacich* to conclude that the Comic Book Act violated the privileges and immunities clause of the state constitution, because it immunized newspapers with comic sections from the licensing regulation imposed on comic book

the privileges and immunities clause, it is apparent that the Washington Supreme Court's holding in *Griffin* violates the clause.¹⁸⁶ By depriving individuals employed in companies with fewer than eight employees of the unequivocal right to private action conferred in the law against discrimination,¹⁸⁷ the *Griffin* court subjected Griffin to the "hostile discrimination" in statutory enforcement proscribed by the privileges and immunities clause.¹⁸⁸ Moreover, the *Griffin* holding granted "undue favor," in violation of the privileges and immunities clause, to individuals employed in companies with eight or more employees by preserving their right to redress employment discrimination pursuant to the law against discrimination.¹⁸⁹

Similarly, in *City of Seattle v. Rogers*,¹⁹⁰ the Washington Supreme Court held violative of the privileges and immunities clause a Seattle ordinance exempting the Seattle Community Fund, a charitable organization,¹⁹¹ from a requirement that businesses that solicit charitable contributions obtain a license in order to be compensated for money they raise.¹⁹² The court concluded that because the licensing requirement applied to every business or individual involved in charitable fundraising, the exemption of the Seattle Community Trust was based arbitrarily on the fact that the

dealers. *Id. Bacich*, on the other hand, addressed the constitutionality of a Washington law that regulated the rights of individuals and corporations in the state to fish in Puget Sound with gill nets. 59 P.2d at 1102-03. The holding of *Bacich* was overruled on the basis of the constitutionality of the state's regulation of fishermen, an issue that was not considered by the *Adams* court. *Puget Sound Gillnetters Ass'n*, 603 P.2d at 824.

¹⁸⁶ See *supra* text accompanying note 177 (discussing the purpose of the Washington constitution's privileges and immunities clause).

¹⁸⁷ See *supra* text accompanying notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2) (West 1990 & Supp. 1998)).

¹⁸⁸ See *Adams*, 322 P.2d at 858.

¹⁸⁹ See *id.*

¹⁹⁰ 106 P.2d 598 (Wash. 1940).

¹⁹¹ *Id.* at 600.

¹⁹² *Id.* at 600-01. See Thompson, *supra* note 179, at 1274 (noting the discriminatory impact of a Seattle ordinance that made it unlawful for every fundraising organization, except the Seattle Community Fund, to conduct charity campaigns where part of the proceeds of the campaign were withheld as compensation unless campaign promoters obtained a costly license).

Trust had a sympathetic mission or considerable political strength.¹⁹³ In light of the precedent established in *Rogers* and *Adams*, which clearly prohibit the enactment of any law that would result in one individual or group receiving privileges or immunities that others are deprived of, the Washington Supreme Court's holding in *Griffin* is flawed.

The *Griffin* holding deprived Griffin and all others who had the misfortune of working in companies with fewer than eight employees of the undeniable right to sue in a private action to defend their civil rights.¹⁹⁴ Yet, employees who work in larger companies retain that right.¹⁹⁵ The right of all citizens to defend their civil rights in a private action is conferred on every Washington citizen without equivocation by the law against discrimination and is protected by the privileges and immunities clause of Washington's constitution.¹⁹⁶ As a result of its disparate application of the law against discrimination, the *Griffin* court eliminated the protection of this right embodied in the privileges and immunities clause.¹⁹⁷ Consequently, individuals employed in companies with fewer than eight employees are left powerless to

¹⁹³ *Rogers*, 106 P.2d at 600. Two other holdings of the Washington Supreme Court support the proposition that exempting some businesses from a regulation while enforcing it against others implicates rights protected by the privileges and immunities clause. See *Sherman Clay v. Brown*, 231 P. 166, 168 (Wash. 1924); *State v. Robinson*, 146 P. 628, 629 (Wash. 1915). In *Sherman Clay*, the court held that a Seattle ordinance that required second-hand goods dealers to be licensed and keep records violated the privileges and immunities clause because the ordinance exempted those merchants who dealt in "stoves, furniture or total contents of any room or house." *Sherman Clay*, 231 P. at 168. In *Robinson*, the court deemed violative of the privileges and immunities clause a statute that required recording of sale of concentrated commercial foodstuffs, while exempting cereal and flour mills from the recording requirement. 146 P. at 629. See also, Thompson, *supra* note 179, at 1273-76 (discussing the aforementioned cases).

¹⁹⁴ *Griffin v. Eller*, 922 P.2d 788, 789 (Wash. 1996) (holding that "employers of fewer than eight employees are statutorily exempt from [the] remedies provided under [the law against discrimination]").

¹⁹⁵ *Id.*

¹⁹⁶ See *supra* text accompanying notes 2 and 3 (quoting WASH. REV. CODE ANN. §§ 49.60.020, 49.60.030(2)); WASH. CONST. art. I, § 12.

¹⁹⁷ *Griffin*, 922 P.2d at 789.

redress discriminatory acts pursuant to the law against discrimination, in violation of the privileges and immunities clause.

In the cases previously discussed, the Washington Supreme Court illustrated its commitment to ensuring that no business or commercial enterprise receives an unfair advantage due to legislation that provides privileges or benefits that are not granted equally to all businesses.¹⁹⁸ Considering that the rights the court protected in these cases related to unfettered competition in the business arena, a strong policy argument can be made that the significance the court attached to these important rights should have been extended to the plaintiff in *Griffin*. In fact, preventing unequal administration of the law in order to protect individual human rights, such as the right to work in an environment free from sexual harassment, is a value as significant as preventing unequal administration of the law to ensure uninhibited competition in business.¹⁹⁹

CONCLUSION

It is clear that Sharon Griffin, and all Washington citizens employed in companies with fewer than eight employees, have an unequivocal right to pursue a private action to protect their civil rights—even though they are barred statutorily from pursuing relief through the state's Human Rights Commission. Pursuant to the significant body of case law interpreting the law against discrimination, the administrative code created to implement it, and the rules of statutory interpretation mandating liberal construction of

¹⁹⁸ *Adams v. Hinkle*, 322 P.2d 844, 858 (Wash. 1958); *City of Seattle v. Rogers*, 106 P.2d 598, 600-01 (Wash. 1940); *Sherman Clay*, 231 P. at 168; *Robinson*, 146 P. at 629.

¹⁹⁹ See WASH. REV. CODE ANN. § 49.60.030(1)(a) (stating that “[t]he right to be free of discrimination . . . is recognized as and declared to be a civil right . . . [and] shall include but not be limited to: [t]he right to obtain and hold employment without discrimination”); *Glasgow v. Georgia-Pacific Corp.*, 693 P.2d 708, 711 (Wash. 1985) (holding that sexual harassment “unfairly handicaps an employee against whom it is directed in his or her work performance and as such is a barrier to sexual equality in the workplace”).

remedial laws, it is evident that the majority opinion in *Griffin* lacks merit.

The *Griffin* holding is distressing for numerous reasons. First, the decision frustrates the law's express purpose of protecting the people of the state of Washington by fulfilling "the provisions of the Constitution . . . concerning civil rights."²⁰⁰ Second, the holding in *Griffin* had the effect of perpetuating the discrimination already suffered by the plaintiff. By depriving Griffin of the right to seek redress in a private action, the court subjected her to further discrimination based purely on the size of the company in which she worked.

Third, the *Griffin* holding has far-reaching implications and potentially disturbing precedential impact. Because the law against discrimination also prohibits discrimination in employment based on "age . . . marital status, race, creed, color, national origin" and "mental, or physical disabilit[ies],"²⁰¹ it follows that individuals working in companies with fewer than eight employees alleging to have suffered discrimination based on these other factors would likewise be prohibited from protecting their civil rights in a private action.

Undoubtedly, the *Griffin* holding establishes troublesome policy, as it provides immunity from the remedies conferred in the law against discrimination to employers with fewer than eight employees. It is reasonable to conclude that the policy established in *Griffin* may result in a significant increase in the incidence of all types of discrimination suffered by individuals employed in companies with fewer than eight employees, since their employers will not be held accountable for their discriminatory conduct. Indeed, the *Griffin* decision has the potential to destroy the substantial anti-discrimination policy established in the state of Washington to protect its citizens' civil rights.

²⁰⁰ WASH. REV. CODE ANN. § 49.60.010.

²⁰¹ WASH. REV. CODE ANN. § 49.60.030(1) (West 1990 & Supp. 1998).