

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SAFECO INSURANCE COMPANY
11 OF OREGON,

Plaintiff,

v.

13 COLIN MCPARTLAND, et al.,

14 Defendants.

CASE NO. C20-1049JLR

ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

15
16 **I. INTRODUCTION**

17 Before the court is Plaintiff Safeco Insurance Company of Oregon's ("Safeco")
18 motion for summary judgment. (Mot. (Dkt. # 16); *see also* Reply (Dkt. # 22).)
19 Defendants Colin McPartland, Caitlin Dodge, and Taylor Linden oppose Safeco's
20 motion. (McPartland Resp. (Dkt. # 20); Dodge/Linden Resp. (Dkt. # 21).) The court has
21 considered Safeco's motion, all submissions filed in support of and in opposition to the
22

1 motion, the relevant portions of the record, and the applicable law. Being fully advised,¹
2 the court GRANTS Safeco’s motion for summary judgment.

3 II. BACKGROUND

4 This matter is an insurance coverage dispute involving a renters’ insurance policy
5 issued by Safeco to Mr. McPartland (the “Policy”). (*See* Compl. (Dkt. # 1) ¶ 8.) Mr.
6 McPartland has been named as a defendant in two state-court matters in which the
7 plaintiffs, Ms. Dodge and Ms. Linden, allege that Mr. McPartland sexually assaulted
8 them (the “underlying actions”). (*See id.* ¶ 9.) Safeco is defending Mr. McPartland in
9 these actions subject to a full reservation of rights. (*See id.* ¶ 22.) Safeco alleges,
10 however, that the Policy provides no coverage for the underlying actions. (*See id.*
11 ¶¶ 25-32.) It now moves for summary judgment that it has no obligation to defend or
12 indemnify Mr. McPartland for the two underlying actions. (*See generally* Mot.) Below,
13 the court recounts the factual background of the underlying actions, describes the Policy,
14 and sets forth the procedural background of Safeco’s action in this court.

15 A. Factual Background

16 Mr. McPartland served as a district manager for Abercrombie and Fitch Stores,
17 Inc. (“A&F”) during the time period at issue in this action. (*See* McPartland Decl. (Dkt.
18 # 20-1) ¶ 2.) In January 2020, Ms. Linden and Ms. Dodge, who were both employees of
19 A&F, filed separate lawsuits against Mr. McPartland in King County Superior Court.
20

21
22

¹ Safeco requests oral argument. (*See* Mot. at 1.) The court, however, finds oral
argument unnecessary to its disposition of the motion, *see* Local Rules W.D. Wash. LCR 7(b)(4).

1 1. The Dodge Action

2 Ms. Dodge filed suit against Mr. McPartland on January 23, 2020. (*See*
3 O’Halloran Decl. (Dkt. # 21-1) ¶ 3, Ex. 2 (Compl., *Dodge v. McPartland*, No. 20-2-
4 02023-1 SEA (King Cty. Super. Jan. 23, 2020) (“Dodge Compl.”).)

5 A&F hired Ms. Dodge in August 2016 as an assistant manager at A&F’s Bellis
6 Fair Shopping Mall store in Bellingham, Washington. (Dodge Compl. ¶ 5.1.) In June
7 2017, A&F hired Mr. McPartland as District Manager for the Pacific Northwest Region.
8 (*Id.* ¶ 5.2.) In this role, Mr. McPartland oversaw eleven A&F retail stores, including the
9 Bellis Fair store, and was Ms. Dodge’s superior. (*Id.*)

10 Ms. Dodge alleges that in November 2018, Mr. McPartland asked her to assist
11 with set up for the 2018 Black Friday sale at A&F’s store in downtown Seattle,
12 Washington. (*Id.* ¶ 5.3.) Ms. Dodge agreed and traveled to Seattle at Mr. McPartland’s
13 request. (*Id.*) Two evenings later, Mr. McPartland “insisted on taking Ms. Dodge out to
14 dinner ‘on the company card’ under the guise of thanking her for her work. (*Id.* ¶ 5.4.)
15 Although Mr. McPartland had “specifically told Ms. Dodge that other managers would
16 also be present at the dinner,” no other managers were present at the restaurant. (*Id.*)
17 Ms. Dodge alleges that Mr. McPartland ordered a bottle of red wine, that she drank one
18 glass of the wine, and that she could not recall anything else that happened that night.
19 (*Id.*)

20 According to Ms. Dodge, her next recollection is from the following morning,
21 “when she was awakened by Mr. McPartland inside of his apartment, completely
22 undressed.” (*Id.* ¶ 5.5.) She asserts that she was experiencing “significant pain.” (*Id.*)

1 Mr. McPartland drove Ms. Dodge to work, “asked if she remembered the night before,
2 and then told her to work harder hungover.” (*Id.*) Ms. Dodge remained at work all day
3 although she felt ill and was very confused about the night before. (*Id.*) Thereafter, Ms.
4 Dodge experienced harassment at work. (*Id.* ¶ 5.6.) She was called offensive names in
5 front of customers and was disrespected and taunted by her coworkers. (*Id.*) She asserts
6 that she “lived in constant fear of retaliation or physical injury by Mr. McPartland”
7 because “on more than one occasion[,] Mr. McPartland had gotten angry at employees
8 and threw things like chairs in anger.” (*Id.*) Ms. Dodge states that she made complaints
9 about Mr. McPartland to A&F’s Human Resources Department, but A&F’s employees
10 brushed off her concerns and did nothing to prevent or stop Mr. McPartland’s actions or
11 to protect Ms. Dodge. (*Id.* ¶¶ 5.7-5.11.)

12 Mr. McPartland denies having sexual contact with Ms. Dodge or sexually
13 assaulting her. (McPartland Decl. ¶ 5.) He states that he did not use a company card to
14 pay for their dinner; that Ms. Dodge was originally accompanied by Ezra Moore, whom
15 he knew as Ms. Dodge’s boyfriend; that Mr. Moore left the restaurant without Ms.
16 Dodge; and that Mr. McPartland took Ms. Dodge to his residence after dinner because
17 she was intoxicated. (*Id.*; *see also* Gamble Decl. (Dkt. # 18) ¶ 5, Ex. 3 (“Dodge Res.
18 Ltr.”) (recounting statements Mr. McPartland made during an interview with Safeco).)

19 Ms. Dodge asserts claims against both Mr. McPartland and A&F arising from the
20 alleged assault. (*See* Dodge Compl. ¶¶ 6.1-9.8.) Relevant to this coverage dispute, she
21 brings claims against Mr. McPartland for assault and battery (*id.* ¶¶ 6.1-6.6); intentional
22 infliction of emotional distress (*id.* ¶¶ 7.1-7.4); and negligent infliction of emotional

1 | distress (*id.* ¶¶ 8.1-8.3). She alleges that the actions of Mr. McPartland and A&F caused
2 | her “legally compensable harm including pain and suffering, loss of enjoyment of life,
3 | mental anguish, injury to reputation, humiliation, and emotional distress damages” and
4 | seeks reimbursement for “costs of medical treatment necessary to address the
5 | psychological damages caused by Mr. McPartland’s conduct.” (*Id.* ¶ 6.6; *see also id.*
6 | ¶¶ 7.4, 8.3.)

7 | 2. The Linden Action

8 | Ms. Linden filed suit against Mr. McPartland on January 29, 2020. (*See*
9 | O’Halloran Decl. ¶ 2, Ex. 1 (Compl., *Taylor L. v. McPartland*, No. 20-2-02551-8 SEA
10 | (King Cty. Super. Jan. 29, 2020) (“Linden Compl.”).)

11 | Ms. Linden began working at A&F’s Abercrombie Kids store in Tigard, Oregon,
12 | in June 2018. (*Id.* ¶ 5.1.) Mr. McPartland oversaw Ms. Linden’s store and was her
13 | superior. (*Id.* ¶ 5.2.) In September 2018, at Mr. McPartland’s request, Ms. Linden
14 | traveled to Kennewick, Washington to assist with an A&F store located there. (*Id.* ¶ 5.3.)
15 | One evening, Mr. McPartland “insisted on taking Ms. [Linden] out in Kennewick to
16 | ‘show her around.’” (*Id.* ¶ 5.5.) Ms. Linden has no recollection of how she got back to
17 | her hotel that night. (*Id.*) She remembers Mr. McPartland kissing her in the elevator.
18 | (*Id.* ¶ 5.6.) Her next recollection is of being “awakened by Mr. McPartland who was
19 | engaged in intercourse with her.” (*Id.*) She asserts that this sexual contact was unwanted
20 | and unlawful. (*See id.* ¶¶ 6.2-6.3.) At work the next day, Mr. McPartland told Ms.
21 | Linden that she could not tell anyone what had happened. (*Id.* ¶ 5.7.)
22 |

1 Mr. McPartland acknowledges that he met Ms. Linden at her hotel; that they had
2 dinner and drinks; and that he had intercourse with her that evening and the next
3 morning. (McPartland Decl. ¶ 4.) He asserts, however, that their sexual involvement
4 was consensual and denies having sexually assaulted Ms. Linden. (*Id.*)

5 Like Ms. Dodge, Ms. Linden asserts claims against both Mr. McPartland and A&F
6 arising from the alleged assault. (*See* Linden Compl. ¶¶ 6.1-9.8.²) She, too, brings
7 claims against Mr. McPartland for assault and battery (*id.* ¶¶ 6.1-6.6), intentional
8 infliction of emotional distress (*id.* ¶¶ 7.1-7.4), and negligent infliction of emotional
9 distress (*id.* ¶¶ 8.1-8.3). She alleges that Mr. McPartland caused her “legally
10 compensable harm including pain and suffering, loss of enjoyment of life, mental
11 anguish, injury to reputation, humiliation, and emotional distress damages” and seeks
12 reimbursement for “costs of medical treatment necessary to address the psychological
13 damages caused by Mr. McPartland’s conduct.” (*Id.* ¶ 6.6; *see also id.* ¶¶ 7.4, 8.3.)

14 3. The Policy

15 Safeco issued Mr. McPartland renter’s insurance policy No. OM2581622 for
16 effective dates August 5, 2018 to August 5, 2019. (*See* Gamble Decl. (Dkt. # 18) ¶ 3,
17 Ex. 1 (“Policy”).) The Policy includes both property coverage and liability coverage.
18 (*See id.*; *see also* Taggart Decl. (Dkt. # 23) ¶ 3, Ex. A.) The declaration page lists the
19

20
21 ² Ms. Dodge and Ms. Linden are represented by the same attorneys in the underlying
22 actions. (*See* Dodge Compl.; Linden Compl.) The allegations specific to each cause of action
are nearly identical in the two complaints. (*Compare* Dodge Compl. ¶¶ 6.1-9.8 *with* Linden
Compl. ¶¶ 6.1-9.8.)

1 insured as Mr. McPartland at an address in Seattle, Washington and the “residence
2 premises” as a property located in Portland, Oregon. (See Taggart Decl. Ex. A.)

3 The Policy provides the following personal liability coverage to an insured:

4 If a claim is made or suit is brought against any *insured* for damages because
5 of *bodily injury* or *property damage* caused by an *occurrence* to which this
coverage applies, we will:

- 6 1. pay up to our limit of liability for the damages for which the *insured*
7 is legally liable; and
- 8 2. provide a defense at our expense by counsel of our choice even if the
allegations are groundless, false or fraudulent. . . .

9 (Policy at SAFECO_000033 (emphasis in original).) The Policy includes the following
10 definitions:

11 2. “*Bodily injury*” means:

- 12 a. bodily harm, sickness or disease, including required care, loss
13 of services and death resulting therefrom.

14 *Bodily injury* does not include any communicable disease
transmitted by any *insured* to any other person.

15 b. personal injury:

16 (1) arising out of one or more of the following offenses:

- 17 (a) false arrest, detention or imprisonment, or
18 malicious prosecution;
- 19 (b) libel, slander or defamation of character; or
- 20 (c) invasion of privacy, wrongful eviction or
wrongful entry.

21 (2) coverage does not include:

22 * * *

- 1 (b) injury resulting from violation of:
2
3 i. criminal law; or
4 ii. local or municipal ordinance
5 committed by, or with the knowledge or consent
6 of any *insured*.
7
8 (c) injury sustained by any person as a result of an
9 offense directly or indirectly related to the
10 employment of this person by any *insured*;
11
12 (d) injury arising out of the *business* pursuits of any
13 *insured*.

14 * * *

15 3. “*Business*” includes trade, profession or occupation.

16 (*Id.* at SAFECO_000041-42 (emphasis in original).)

17 8. “*Occurrence*” means an accident, including exposure to conditions
18 which results in:

- 19 a. *bodily injury*; or
20 b. *property damage*;

21 during the policy period. Repeated or continuous exposure to the
22 same general conditions in considered to be one **occurrence**.

(*Id.* at SAFECO_000042 (emphasis in original).) In addition, the following exclusions
apply:

LIABILITY LOSSES WE DO NOT COVER

1. Coverage E – Personal Liability . . . do[es] not apply to *bodily injury*
. . .

* * *

1 b. arising out of the *business* pursuits of any *insured* or the rental
2 or holding out for rental of any part of any premises by any
3 *insured*.

4 * * *

5 i. arising out of physical or mental abuse, sexual molestation, or
6 sexual harassment.

7 (*Id.* at SAFECO_000034, SAFECO_000036 (emphasis in original).)

8 Mr. McPartland tendered Ms. Dodge’s and Ms. Linden’s lawsuits to Safeco. On
9 March 6, 2020, Safeco agreed to defend Mr. McPartland in the Linden action subject to a
10 full reservation of rights. (*See* Gamble Decl. ¶ 4, Ex. 2 (“Linden Res. Ltr”).) Safeco
11 agreed to defend Mr. McPartland in the Dodge action, also subject to a full reservation of
12 rights, on June 3, 2020. (*See* Dodge Res. Ltr.) In its reservation of rights letters, Safeco
13 explained to Mr. McPartland its position that the Policy did not cover the allegations in
14 the underlying actions. (*See* Linden Res. Ltr at 2-5; Dodge Res. Ltr at 3-8.)

15 **B. Procedural Background**

16 Safeco filed its complaint in this court on July 7, 2020. (*See* Compl.) It seeks a
17 declaratory judgment that there is no coverage available to Mr. McPartland under the
18 terms of the Policy and that Safeco has no duty to defend or indemnify Mr. McPartland in
19 the underlying actions. (*See id.* ¶ 32; *see also id.* at 6 ¶¶ A-C.) It filed the instant motion
20 for summary judgment on March 15, 2021. (*See* Mot.)

21 //

22 //

//

1 **III. ANALYSIS**

2 The court first considers whether Oregon law or Washington law applies to this
3 insurance dispute before considering the merits of Safeco’s motion for summary
4 judgment.

5 **A. Choice of Law**

6 The parties dispute whether the court should apply Oregon law or Washington law
7 to interpret the Policy. (*See* Mot. at 9-12 (asserting that Oregon law applies); McPartland
8 Resp. at 3-6 (asserting that Washington law applies); Dodge/Linden Resp. at 2-3
9 (asserting that Washington law applies and joining in Mr. McPartland’s analysis).)

10 When the laws of more than one state potentially apply, a federal court sitting in
11 diversity applies the forum state’s choice-of-law rules. *Patton v. Cox*, 276 F.3d 493, 495
12 (9th Cir. 2002). In Washington, choice-of-law disputes require a two-step inquiry. First,
13 the court must determine whether there is an actual conflict between the laws or interests
14 of Washington and the laws or interests of another state. *Seizer v. Sessions*, 940 P.2d
15 261, 265 (Wash. 1997). An actual conflict exists when the result of the issues is different
16 under the law of the two states. *Id.* If there is no actual conflict, the presumptive local
17 law applies. *Erwin v. Cotter Health Ctrs.*, 167 P.3d 1112, 1120 (Wash. 2007).

18 If the court concludes there is an actual conflict between the laws of the two states
19 on any given issue, the court must move on to the second step of the analysis, and
20 determine which jurisdiction has the “most significant relationship” to the particular
21 issue. *Seizer*, 940 P.2d at 265. Washington courts have adopted the Restatement tests for
22 determining which jurisdiction has the “most significant relationship” to the transaction

1 and the parties. *See Mulcahy v. Farmers Ins. Co. of Wash.*, 95 P.3d 313, 317-18 (Wash.
2 2004) (applying Restatement (Second) of Conflict of Laws (“Restatement”) § 188 to an
3 insurance contract dispute).

4 1. Actual Conflict

5 Here, the parties agree that an actual conflict exists between Oregon law and
6 Washington law with respect to the consideration of extrinsic evidence in determining
7 whether an insurer’s duty to defend has been triggered. (*See Mot. at 10-11; McPartland*
8 *Resp. at 5.*) The duty to defend arises under the law of both states if the insurance policy
9 conceivably covers the allegations within the four corners of the complaint. *See Expedia,*
10 *Inc. v. Steadfast Ins. Co.*, 329 P.3d 59, 65 (Wash. 2014); *West Hills Dev. Co. v. Chartis*
11 *Claims Inc.*, 385 P.3d 1053, 1055 (Or. 2016). In Washington, an insurer may also
12 consider extrinsic facts whenever the “allegations in the complaint conflict with facts
13 known to the insurer or if the allegations are ambiguous.” *Expedia, Inc.*, 329 P.3d at 65
14 (citing *Woo v. Fireman’s Fund Ins. Co.*, 164 P.3d 454, [53] (Wash. 2007)). These
15 extrinsic facts, however, “may only be used to trigger the duty to defend; the insurer may
16 not rely on such facts to deny its defense duty.” *Id.* In Oregon, by contrast, consideration
17 of extrinsic evidence is generally prohibited except to show that a putative insured “did,
18 in fact, occupy insured status and therefore was entitled to a defense.” *West Hills Dev.*
19 *Co.*, 385 P.3d at 1055-56 (citing *Fred Shearer & Sons, Inc. v. Gemini Ins. Co.*, 240 P.3d
20 67 (Or. 2010)). Because an actual conflict exists between Washington law and Oregon
21 law governing an insurer’s duty to defend, the court must consider which state bears the
22 most significant relationship to the transaction and the parties.

1 2. Most Significant Relationship

2 Washington courts follow Restatement § 188 to determine which state’s law
3 applies to insurance coverage disputes where, as here, the policy contains no choice of
4 law provision. *See Fluke Corp. v. Hartford Accident & Indem. Co.*, 34 P.3d 809, 815
5 (Wash. 2001).³ Under § 188, the “rights and duties of the parties with respect to an issue
6 in contract are determined by the local law of the state which, with respect to that issue,
7 has the most significant relationship to the transaction and the parties” Restatement
8 § 188(1). Section 188 directs the court to focus on five contacts to determine the state
9 with the most significant relationship to the transaction and the parties: “(a) the place of
10 contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d)
11 the location of the subject matter of the contract; and (e) the domicile, residence,
12 nationality, place of incorporation, and place of business of the parties.” *Id.* § 188(2).
13 “The ‘approach is not to count contacts, but rather to consider which contacts are most
14 significant and to determine where those contacts are found.’” *Baffin Land Corp. v.*
15 *Monticello Motor Inn, Inc.*, 425 P.2d 623, 628 (Wash. 1967). Indeed, the “contacts are to
16 be evaluated according to their relative importance with respect to the particular issue.”
17 *Mulcahy*, 95 P.3d at 317. The court is also mindful of the Washington Supreme Court’s

19 ³ Mr. McPartland argues that the court should apply Restatement § 145 to determine
20 which state’s laws apply to this dispute. (*See* McPartland Resp. at 4 (citing *Johnson v. Spider*
21 *Staging Corp.*, 555 P.2d 997, 1000-01 (Wash. 1976)).) Section 145, however, governs the
22 choice of laws analysis for tort claims. *See Rice v. Dow Chem. Co.*, 875 P.2d 1213, 1217 (Wash.
1994). Although the complaints in the underlying actions allege tort claims, the dispute in *this*
case centers on whether the insurance contract between Safeco and Mr. McPartland provides
coverage for those underlying actions. (*See generally* Compl.) As a result, Restatement § 188
provides the proper framework for analyzing the choice-of-law issue in this matter.

1 recognition that “the expectations of the parties to the contract may significantly tip the
2 scales in favor of one jurisdiction’s laws being applied over another’s.” *Id.* at 317-18.

3 Here, the court concludes that Oregon bears the most significant relationship to the
4 insurance contract at issue in this case. The first two factors favor Washington because
5 Mr. McPartland resides in Washington and purchased the Policy from an agent in
6 Washington. (*See* Taggart Decl. Ex. A (listing Mr. McPartland’s address in Seattle,
7 Washington, and the agent’s address in Moses Lake, Washington).) The second two
8 factors favor Oregon: because the Policy insures a residence in Portland, Oregon, the
9 place of performance and the location of the subject matter of the insurance contract are
10 both located that state. (*See id.*) The fifth factor favors neither Washington nor Oregon
11 because Mr. McPartland’s residence is in Washington and Safeco’s place of business is in
12 Oregon. (*See id.*) Although a mere count of the contacts might indicate that they are
13 evenly balanced, the court must also consider which contacts are most significant in light
14 of the issue before the court and the expectations of the parties when they entered into the
15 contract. *See Baffin Land Corp.*, 425 P.2d at 628; *Mulcahy*, 95 P.3d at 317. Here, the
16 court finds it most significant that the policy is an “Oregon Renter’s Policy” purchased to
17 insure a residence in Oregon. (*See* Gamble Decl. Ex. 1 at SAFECO_000022; Taggart
18 Decl. Ex. A.) Accordingly, the court concludes that Oregon law applies to this insurance
19 coverage dispute, and the court must look only to the four corners of the complaints in
20 the underlying actions in determining whether those complaints triggered Safeco’s duty
21 to defend. *See West Hills Dev. Co.*, 385 P.3d at 1055.

1 **B. Motion for Summary Judgment**

2 Safeco contends that the Policy does not provide liability coverage for any of the
3 claims that Ms. Dodge and Ms. Linden assert against Mr. McPartland. It argues that (1)
4 claims for assault and battery and intentional infliction of emotional distress do not
5 constitute an “occurrence” under the language of the Policy; (2) the claims for negligent
6 infliction of emotional distress do not constitute “bodily injury”; (3) all of the claims are
7 excluded by the Policy’s abuse or molestation exclusion; and (4) the negligence claims
8 are excluded by the Policy’s business pursuits exclusion. (Mot. at 2, 12-20.) Mr.
9 McPartland, Ms. Dodge, and Ms. Linden counter that Safeco owes Mr. McPartland a
10 duty to defend and indemnify in the underlying actions. (McPartland Resp. at 8-16;
11 Dodge/Linden Resp. at 3.) The court states the standard of review for motions for
12 summary judgment and then reviews the language of the Policy to determine whether it
13 provides coverage for the claims alleged in the underlying actions.

14 1. Standard for Motions for Summary Judgment

15 Summary judgment is appropriate if the evidence shows “that there is no genuine
16 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
17 Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*
18 *Cty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is “material” if it might affect the
19 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
20 factual dispute is “‘genuine’ only if there is sufficient evidence for a reasonable fact
21 finder to find for the non-moving party.” *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986,
22 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49).

1 The moving party bears the initial burden of showing there is no genuine issue of
2 material fact and that it is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323.
3 If the moving party does not bear the ultimate burden of persuasion at trial, it can show
4 the absence of a dispute of material fact in two ways: (1) by producing evidence negating
5 an essential element of the nonmoving party’s case, or (2) by showing that the
6 nonmoving party lacks evidence of an essential element of its claim or defense. *Nissan*
7 *Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving
8 party will bear the burden of persuasion at trial, it must establish a prima facie showing in
9 support of its position on that issue. *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d
10 1465, 1471 (9th Cir. 1994). That is, the moving party must present evidence that, if
11 uncontroverted at trial, would entitle it to prevail on that issue. *Id.* at 1473. If the moving
12 party meets its burden of production, the burden then shifts to the nonmoving party to
13 identify specific facts from which a fact finder could reasonably find in the nonmoving
14 party’s favor. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 252.

15 The court is “required to view the facts and draw reasonable inferences in the light
16 most favorable to the [non-moving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007).
17 The court may not weigh evidence or make credibility determinations in analyzing a
18 motion for summary judgment because these are “jury functions, not those of a judge.”
19 *Anderson*, 477 U.S. at 249-50. Nevertheless, the nonmoving party “must do more than
20 simply show that there is some metaphysical doubt as to the material facts Where
21 the record taken as a whole could not lead a rational trier of fact to find for the
22 nonmoving party, there is no genuine issue for trial.” *Scott*, 550 U.S. at 380 (internal

1 quotation marks omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
2 475 U.S. 574, 586-87 (1986)).

3 2. Analysis

4 In Oregon, an insurer has a duty to defend an action against an insured “if the
5 claim against the insured stated in the complaint could, without amendment, impose
6 liability for conduct covered by the policy.” *Bresee Homes, Inc. v. Farmers Ins. Exch.*,
7 293 P.3d 1036, 1039 (Or. 2012) (citing *Ledford v. Gutoski*, 877 P.2d 80, 82 (Or. 1994).)
8 An insurer’s duty to defend is determined under the “four-corners” rule, under which the
9 court compares the allegations in the complaint to the terms of the insurance policy. *West*
10 *Hills Dev. Co.*, 385 P.3d at 1055 (citing *Bresee Homes, Inc.*, 293 P.3d at 1039.) The
11 court looks only at the facts alleged in the complaint to determine whether they provide
12 any basis for recovery that could be covered by the policy. *Bresee Homes, Inc.*, 293 P.3d
13 at 1039. Any ambiguity concerning potential coverage must be resolved in favor of the
14 insured. *Id.* The insured has the burden to prove that the policy provides coverage, while
15 the insurer has the burden to prove an exclusion from coverage. *Fountaincourt*
16 *Homeowners’ Ass’n v. Fountaincourt Dev., LLC*, 380 P.3d 916, 927 (Or. 2016).

17 *a. Assault and Battery Claims and Intentional Infliction of Emotional*
18 *Distress Claims Arising from Sexual Assault*

19 Safeco contends that the Policy provides no coverage for Ms. Linden’s and Ms.
20 Dodge’s claims for assault and battery and for intentional infliction of emotional distress
21 arising from the alleged sexual assaults because those claims do not allege an
22 “occurrence” as defined by the Policy. (Mot. at 13-14.) The court agrees.

1 The Policy provides liability coverage for “a claim . . . or suit . . . against any
2 *insured* for damages because of *bodily injury* . . . caused by an *occurrence*.” (Policy at
3 SAFECO_000033 (emphasis in original).) The Policy defines “occurrence” as “an
4 accident, including exposure to conditions which results in . . . *bodily injury* . . . during
5 the policy period.” (*Id.* at SAFECO_000042 (emphasis in original).) The Policy does
6 not define “accident.” Oregon courts, however, define the term “accident” as used in
7 insurance policies as ““an incident or occurrence that happened by chance, without design
8 and contrary to intention and expectation.”” *St. Paul Fire & Marine Ins. Co., Inc. v.*
9 *McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1212 (Or. 1996) (quoting *Finley v.*
10 *Prudential Ins. Co.*, 388 P.2d 21, 26 (Or. 1962)) (stating that this definition “portray[s]
11 the common understanding of the term ‘accident’ by an ordinary purchaser of
12 insurance”); *see also Safeco Ins. Co. of Am. v. House*, 721 P.2d 862, 866 (Or. Ct. App.
13 1986) (defining “accident” as something “unforeseen, unexpected, unintended or the
14 like”).

15 Oregon courts have held that an allegation that an insured acted intentionally or
16 volitionally is not enough to prevent coverage under definitions of “occurrence” nearly
17 identical to the one in the Policy. *See Falkenstein’s Meat Co. v. Maryland Cas. Co.*, 754
18 P.2d 621, 623 (Or. Ct. App. 1988) (citing *Cunningham & Walsh, Inc. v. Atlantic Mut.*
19 *Ins.*, 744 P.2d 1317, 1319 (Or. Ct. App. 1987)). Rather, “[i]t must also be alleged or
20 necessarily inferred that some harm was intended by the intentional act.” *Id.*; *see also id.*
21 at 623-24 (holding an allegation of employment retaliation was not an “occurrence”—and
22 thus insurer had no duty to defend—because “the natural and intended consequence [of

1 retaliation] is to cause some type of harm to the employee”). An injurious intent is
2 “necessarily inferred” as a matter of law from allegations of intentional sexual abuse. *See*
3 *Mutual of Enumclaw v. Merrill*, 794 P.2d 818, 820 (Or. Ct. App. 1990).

4 Here, Ms. Dodge and Ms. Linden both allege that Mr. McPartland intentionally
5 and unlawfully sexually assaulted them when they were intoxicated or incapacitated.
6 (Dodge Compl. ¶¶ 5.4-5.5, 6.3; Linden Compl. ¶¶ 5.6, 6.3.) They further allege that Mr.
7 McPartland intentionally caused them emotional distress by subjecting them to “forceful
8 sexual touching and assault, or other actions taken with reckless disregard to [their]
9 emotional well-being.” (Dodge Compl. ¶ 7.3; Linden Compl. ¶ 7.3.) The court
10 concludes that the intentional sexual assault of an intoxicated or incapacitated person is
11 the type of conduct from which an intent to cause harm must necessarily be inferred as a
12 matter of law. *See Merrill*, 794 P.2d at 820. Thus, because the alleged assaults on Ms.
13 Dodge and Ms. Linden cannot be considered “accidents” under Oregon law, they are not
14 “occurrences” within the meaning of the Policy and coverage for the harms resulting
15 from them are outside the scope of the Policy’s liability coverage. (*See Policy at*
16 *SAFECO_000033, SAFECO_000042.*)

17 Mr. McPartland argues that the Policy provides coverage for the assault and
18 battery claims and intentional infliction of emotional distress claims arising from the
19 alleged assaults because he believed his sexual contact with Ms. Linden was consensual
20 and he denies having any sexual contact with Ms. Dodge. (McPartland Resp. at 9-10.)
21 He asserts that “no reasonable person in [his] position would have foreseen” that Ms.
22 Linden would later claim that he had sexually assaulted her. (*Id.* at 9.) As an initial

1 matter, under Oregon law, the court cannot consider Mr. McPartland’s defenses in
2 determining Safeco’s duty to defend because its analysis must be based solely on the
3 “four corners” of Ms. Dodge’s and Ms. Linden’s complaints—neither of which includes
4 any allegation that the sexual conduct at issue was consensual. *See West Hills Dev. Co.*,
5 385 P.3d at 1055.

6 Mr. McPartland also asserts, relying on *Fischer v. State Farm Fire & Cas. Co.*,
7 272 F. App’x 608, 608 (9th Cir. 2007), that summary judgment is unwarranted because
8 nonconsensual intercourse can constitute an “accident” covered by the Policy. (*See*
9 *McPartland Resp.* at 8-10.) In *Fischer*, the Washington Court of Appeals, reviewing the
10 jury verdict in the underlying action, had held that the jury could have found both that
11 Mr. Fischer was negligent when he engaged in intercourse with the claimant and that the
12 claimant had consented to the intercourse “under the mistaken belief that her boyfriend,
13 not Fischer, had climbed into her bed.” *Fischer*, 272 F. App’x at 608. In reviewing the
14 appeal of the subsequent coverage action, the Ninth Circuit noted that under Washington
15 law, “an intentional action may qualify as an accident unless a reasonable person in the
16 insured actor’s position would be aware of or foresee the harmful consequences of the
17 action.” *Id.* Under the “bizarre set of circumstances” presented in that case, the court
18 held that “a reasonable person . . . would not be aware of or foresee the harmful
19 consequences of intercourse with the consenting [claimant] because he would not be
20 aware of or foresee that her consent was ineffective and based on her mistaken belief that
21 she was with her boyfriend.” *Id.* at 608-09. The court concluded that because the harm to
22 the claimant was unforeseeable due to the claimant’s mistake as to Mr. Fischer’s identity,

1 it was the result of an accident and was covered by Mr. Fischer’s insurance policy. *Id.*
2 Here, by contrast, there are no allegations that either Ms. Linden or Ms. Dodge consented
3 to intercourse. Thus, even if Washington law were to apply to this case, *Fischer* does not
4 assist Mr. McPartland.⁴

5 Ms. Dodge and Ms. Linden argue that the Policy covers their assault and battery
6 claims and intentional infliction of emotional distress claims arising from the alleged
7 assaults because they allege bodily injury and it is a question of fact whether Mr.
8 McPartland’s alleged conduct was intentional or accidental. (Dodge/Linden Resp. at 3.)
9 But as discussed above, Oregon courts will necessarily infer intent to harm based on
10 allegations of sexual assault. *See Merrill*, 794 P.2d at 820. As a result, the assaults are
11 not “accidents” and thus not “occurrences” covered by the Policy. The court GRANTS
12 Safeco’s motion for summary judgment with respect to coverage for Ms. Dodge’s and
13 Ms. Linden’s assault and battery claims and intentional infliction of emotional distress
14 claims arising from the alleged assaults.

15 *b. Emotional Distress Claims Not Arising from the Alleged Assaults*

16 Next, Safeco argues that it is not required to defend and indemnify Mr. McPartland
17 for emotional distress claims that do not arise from the alleged assaults because those
18 claims do not allege “bodily injury.” (Mot. at 15-17.) As discussed above, the Policy
19

20 ⁴ Mr. McPartland also argues that the Policy provides coverage for Ms. Dodge and Ms.
21 Linden’s claims for intentional infliction of emotional distress because they allege harm from
22 “other actions taken with reckless disregard to [their] emotional well-being,” which does not
qualify as intentional conduct. (*See* McPartland Resp. at 10.) The court addresses this issue
below. *See infra* § III.B.2.b.

1 provides liability coverage for “*bodily injury* . . . caused by an *occurrence*.” (Policy at
2 SAFECO_000033 (emphasis in original).) The Policy defines “bodily injury” as:

- 3 a. bodily harm, sickness or disease, including required care, loss
4 of services and death resulting therefrom.

5 *Bodily injury* does not include any communicable disease
6 transmitted by any *insured* to any other person.

- 7 b. personal injury:

8 (1) arising out of one or more of the following offenses:

9 (a) false arrest, detention or imprisonment, or
10 malicious prosecution;

11 (b) libel, slander or defamation of character; or

12 (c) invasion of privacy, wrongful eviction or
13 wrongful entry.

14 (Policy at SAFECO_000041 (emphasis in original).) Safeco contends that no coverage
15 lies because neither Ms. Dodge nor Ms. Linden allege that they suffered “bodily harm,
16 sickness or disease” or that they were subjected to one of the three categories of offenses
17 that give rise to coverage for personal injury. (Mot. at 16-17.) Again, the court agrees.

18 With respect to intentional infliction of emotional distress not arising from sexual
19 assault, Ms. Dodge and Ms. Linden allege, in relevant part, that Mr. McPartland
20 intentionally caused them emotional distress by subjecting them to “other actions taken
21 with reckless disregard to [their] emotional well-being” and that, as a result, they suffered
22 “legally compensable emotional distress damages.” (Dodge Compl. ¶ 7.3-7.4; Linden
23 Compl. ¶ 7.3-7.4.) In their negligent infliction of emotional distress claims, they allege
24 that Mr. McPartland’s “conduct as District Manager of 11 A&F retail stores in the Pacific

1 Northwest Region, and as an agent of A&F, fell well below the standard of care required
2 for a reasonable person and resulted in negligent breach of duties” to Ms. Dodge and Ms.
3 Linden. (Dodge Compl. ¶ 8.2; Linden Compl. ¶ 8.2.) They assert that as a result of Mr.
4 McPartland’s breach of duty, they suffered “legally compensable emotional distress
5 damages.” (Dodge Compl. ¶ 8.3; Linden Compl. ¶ 8.3.) Neither Ms. Dodge nor Ms.
6 Linden allege in their emotional distress claims that they suffered “bodily harm, sickness
7 or disease,” nor do they assert that they suffered personal injury arising from the three
8 enumerated sets of offenses. (*See generally* Dodge Compl., Linden Compl.) As a result,
9 their claims are not covered under the Policy.⁵

10 Mr. McPartland argues that the Policy covers the emotional distress claims
11 because (1) Ms. Linden alleges “physical touching,” which is “bodily harm”; (2) Ms.
12 Dodge alleges that she awoke in “significant pain” after spending the night at his
13 apartment, which, again, constitutes “bodily harm”; and (3) Ms. Linden seeks defamation
14 of character damages against Mr. McPartland, which falls] within the three sets of
15 enumerated “personal injury” offenses. (*See* McPartland Resp. at 11-12 (citing Linden
16 Compl. ¶¶ 6.3, 6.6; Dodge Compl. ¶ 5.5).) These arguments are unavailing. First, Ms.
17 Linden’s “physical touching” allegation and Ms. Dodge’s allegation that she suffered
18 “significant pain” fall within their claims for assault and battery, which the court has
19 determined are not covered by the Policy. *See supra* § III.B.2.a. Second, although both

21 ⁵ As Safeco acknowledges, claims for emotional distress resulting from sexual assault
22 could constitute “bodily injury.” (*See* Mot. at 17.) Because sexual assault is not an
“occurrence,” however, the Policy does not provide coverage for such claims. *See supra*
§ III.B.2.a.

1 Ms. Dodge and Ms. Linden seek damages for injury to reputation, neither makes any
2 claim for defamation. To state a claim for defamation under Oregon law, a plaintiff must
3 allege (1) the making of a defamatory statement; (2) publication of the defamatory
4 material; and (3) a resulting special harm. *L.D. of Or., Inc., v. Am. States Ins. Co.*, 14
5 P.3d 617, 620 (Or. Ct. App. 2000). Neither Ms. Dodge nor Ms. Linden allege that Mr.
6 McPartland made or published a defamatory statement about them. (*See generally*
7 Dodge Compl., Linden Compl.) Accordingly, the court GRANTS Safeco’s motion for
8 summary judgment that it has no duty to defend or indemnify Mr. McPartland for Ms.
9 Dodge’s and Ms. Linden’s claims for emotional distress not arising from the alleged
10 sexual assaults.

11 *c. Policy Exclusions*

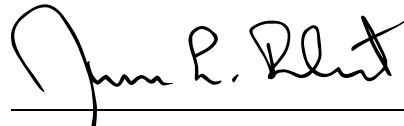
12 Finally, Safeco argues that even if Ms. Dodge’s and Ms. Linden’s claims were
13 claims for “bodily injury” resulting from an “occurrence,” their claims are nevertheless
14 barred by the Policy exclusions for bodily injury arising out of “physical or mental abuse,
15 sexual molestation, or sexual harassment” or “the business pursuits of any insured.”
16 (Mot. at 17-20 (citing Policy at SAFECO_000036, SAFECO_000034).) The court
17 agrees. Ms. Dodge’s and Ms. Linden’s claims for assault and battery and for intentional
18 infliction of emotional distress arising from the alleged sexual assaults fall squarely
19 within the exclusion for “physical or mental abuse, sexual molestation, or sexual
20 harassment.” And their allegations supporting their claims for emotional distress not
21 arising from the alleged assaults assert that the conduct occurred in connection with Mr.
22 McPartland’s employment as an A&F District Manager. (*See* Dodge Compl. ¶¶ 5.6,

1 (alleging severe harassment at work after the night at Mr. McPartland’s apartment), 8.2
2 (alleging negligent infliction of emotional distress arising from Mr. McPartland’s
3 “conduct as District Manager”); Linden Compl. ¶¶ 8.2 (same).) Accordingly, the abuse
4 and molestation exclusion and the business pursuits exclusion provide additional bases
5 for the court to conclude, as a matter of law, that Safeco has no duty to defend or
6 indemnify Mr. McPartland for the underlying actions.

7 **IV. CONCLUSION**

8 For the foregoing reasons, the court GRANTS Safeco’s motion for summary
9 judgment (Dkt. # 16).

10
11 Dated this 29th day of April, 2021.

12
13 

14 JAMES L. ROBART
15 United States District Judge
16
17
18
19
20
21
22