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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

TIMOTHY P. MERRIMAN, Appellant, Vs. WHATCOM COUNTY, Respondent.	No. 69295-0-1 RESPONSE BRIEF OF APPELLANT

TABLE OF CONTENTS

TABLE OF CASES

Clarke v. Attorney General, 133 Wn.App. 767, 775,138 P.3d 144 (2006); Page 7

Alstott v. Edwards, 116, Wn.App. 424, 432, 65 P.3d 696 (2003); Page 9

Kimbro v. Atlantic Richfield, 889 Fd.2d 869, (1989); Page 12

Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004); Page 12

I. STATUTE OF LIMITATIONS

On the statute of limitations question both the Appellant and Respondent have relied upon Antonius v. King County, 153 Wn.2d 256, 103 p.3d 729 (2005) to support their position that the applicable three-year statue limitations either does or does not restrict the consideration of acts outside of the three-year limitations period to support the various causes of action pled.

In Antonius the Court expressly adopted the reasoning of Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), for the proposition that a hostile work environment claim is not untimely if one of the acts occurs during the limitations period because if so then the claim as a whole is considered to have occurred within the limitations period. Morgan, id. at 536 U.S. 122. Under Morgan a "Court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the

statutory time period." Id. at 536 U.S. 120. The Court stated the acts must have some relationship to each other to be part of the same hostile work environment claim, and if there is no relationship or if there is an intervening act by the employer than the act can no longer be considered part of the same hostile environment claim. Id. at 536 U.S. 118.

The salient question then becomes whether any act occurred on or after September 22, 2006, which can be construed as a continuation of the actionable hostile work environment. Respectfully, the answer to this question is yes. Taking 2006 alone, the following acts occurred demonstrating a continuation of the hostile work environment practice of the Respondent.

- 1/29/06 Appellant experiences another psychological breakdown created by the hostile work environment within which he is required to work. CP 650
- 1/29/06 Margaret Rose, forwards a letter to the Respondent describing her outrage that her patient, the Appellant, is being re-traumatized by a fellow employee and "forced to be exposed to a hostile workplace when I specifically said it would be injurious to him." CP 684
- 1/30/06 Appellant submits a request for the reinstatement of the reasonable accommodation previously granted. CP 681.
- 2/10/06 Karen Goens forwards a memo to Appellant describing his desire to work with window blinds closed and/or locked as a "work style preference." CP 693

- 3/16/06 Appellant is required to start a medical leave of absence from his employment with the Respondent.

- 3/19/06 Margaret Rose, ARNP forwards Certification of Health Care Provider verifying Appellant meets the diagnostic criteria of a chronic medical condition with a probable duration of "lifetime." CP 694

- 4/09/06 Margaret Rose forwards Progressive Report from Health Care Provider to Respondent describing the Appellant being under her care for Bipolar Affective Disorder and Attention Deficit Disorder with a probable duration of "unknown." CP 698

- 4/26/06 Melissa Keeley on behalf of the Respondent forwards a letter to Appellant acknowledging receipt of the progress report from Ms. Rose and Appellant's request for an additional six weeks of leave under FMLA. CP 710

- 6/02/06 Appellant forwards a letter to Melissa Keeley requesting that his leave for "illness or injury using sick leave, vacation and personal holiday leaves" be extended by at least 12 weeks specifically referring to the 2006 Unrepresented Employees Resolution 6.9. In the alternative he requests the 89 days of unpaid disability leave be approved pursuant to the Employee Handbook section 113.2 Disability Leave. CP 712

- 8/30/06 Melissa Keeley on behalf of the Respondent forwards an e-mail to the Appellant stating her need for the Appellant to submit a request for unpaid disability leave per the employee handbook, for the remaining 21 days of his requested six-week leave. She also states she "will also need documentation from your healthcare provider to support this." The unpaid disability leave per the Employee Handbook she is referring to is section 113.2. CP 711

- 9/22/06 Appellant forwards an e-mail to various personnel employed by the Respondent describing his perception regarding the application of Disability Leave section 113.2 and the Unrepresented Resolution 6.9. He clearly informs the Respondent both that he has retained counsel to assist him as

well as his belief that Unrepresented Resolution 6.9 is the most applicable provision. Appellant clearly states, "how many times does Whatcom County need to be told that I have a chronic lifelong medical condition?" "It cannot be cured." He concludes by stating that he has already suffered health consequences as a result of the manner in which he has been treated by Whatcom County and refers the Respondent to his attorney. CP 715

- 9/27/06 Wendy Wefer-Clinton forwards a letter to the Appellant's attorney, Patricia S. Rose, describing various alternatives to resignation available to the Appellant. Virtually no mention of Unrepresented Resolution 6.9 is made in this letter. No acknowledgment of the requested accommodation necessary for the Appellant to be able to effectively work without a re-occurrence of the documented psychological impacts is mentioned. CP 617

- 10/05/06 Wendy Wefer-Clinton forwards a second letter to Appellant's attorney describing the Respondent's willingness to offer additional time for Appellant and his attorney to review the options provided. Again, no mention is made of Unrepresented Resolution 6.9 or the requested and necessary accommodation to permit the Appellant to return and work effectively in the work environment created by the Respondent. CP 620

- 2006 Melissa Keeley testifies in her deposition regarding her perception of County policy in 2006. She states the policy of the County is not to terminate an employee at the end of 89 calendar days regardless of the language of Disability Leave section 113.2. When specifically asked how someone who reads this policy would know of the existence of that unwritten policy her response is, "[h]e could have asked a question and found out about that." "I cannot read Mr. Merriman's mind and determine what information he needed to - I did my best to provide him with the information he needed to address his concerns." "[i]f I didn't address this concern here with this sentence in this policy that we don't enforce, I wish he would have asked me." CP 734-35

This chronological history shows the relationship between the events of September 2006 with the events as far back as 2004 and the subsequent psychological impact to the Appellant from the work environment within which he was forced to work. The Appellant suffered multiple psychological breakdowns from this work environment and as late as his letter of September 22, 2006, he was clearly notifying the Respondent that his health related challenges remained.

In response to Appellant's letter of September 22, 2006, the Respondent through the two letters from Ms. Wefer-Clinton continued to refuse to permit the simple, effective, and virtually cost free accommodation to be implemented. The Respondent simply and deliberately refused to address the conditions of the work environment within which the Appellant worked. Respondent also continued with the discriminatory practice of requiring the Appellant to utilize Disability Leave pursuant to section 113.2 with its compulsory termination after 89 days. This requirement continued to place significant psychological pressure on the Appellant which in turn affected his Bipolar Affective Disorder condition and effectively prevented him from returning to work in the existing hostile work environment which the Respondent refused to correct.

Pursuant to the holding in Antonius, as well as the continued bias of the Respondent as demonstrated by the testimony of Ms. Keeley and the two letters of Ms. Wefer-Clinton which all occurred subsequent to September 22, 2006, it is respectively submitted the Appellant has satisfied the requirement of showing that a related act constituting part of the same hostile work environment claim occurred within the applicable time period. The consideration of all evidence supporting these claims occurring as early as 2004 is supported by this case law. Therefore, the three-year statute of limitations does not operate to limit the consideration of facts only during the claimed four-day period from September 22 through September 26, 2006.

II. HOSTILE WORK ENVIRONMENT

In the Memorandum in Support of Respondent's Motion to Dismiss filed February 16, 2010, Counsel for the Respondent argued pursuant to the holding in Clarke v. Attorney General, 133 Wn.App. 767, 775, 138 P.3d 144 (2006), that one cannot experience a hostile work environment if one is not at work. Counsel argued a per se rule exists requiring dismissal of the case because the Appellant was not present at work when he resigned his position. In the "Summary" portion of this Memorandum Counsel in total wrote:

> The only relevant facts are that he left the workplace on March 12, 2006. He resigned on September 26, 2006. He filed his action on September 22, 2009. Since he was never actually at work at any time during the three-year statute of limitations he does not have the requisite act to allow him to argue for a hostile work environment claim. Thus his Complaint must be dismissed. CP 6.

Now, in the Responsive Memorandum the Respondent through Counsel admits, "there is no per se rule that precludes the court from considering incidents that are alleged to have occurred while the employee was not present in the work force workplace." RB 12. An inconsistent position is being argued. Now it appears that Counsel acknowledges that a per se rule does not exist.

Without question the sole basis for the ruling of Judge Krese dismissing the hostile work environment claim was that the Appellant was not actually in the work place during the limitations period. Respectfully, given that the Respondent now acknowledges the sole basis for Judge Krese's decision is not legally valid remand is the only appropriate result. As the Court stated in Antonius, "where the trial court applied the wrong legal standard to determine whether summary

judgment was appropriate, the proper course is to remand this case to the trial court." Id. at 272.

The Appellant stands on the argument made in the Brief of Appellant originally filed for the rest of the argument regarding the hostile work environment claim.

III. CONSTRUCTIVE DISCHARGE

In Alstott v. Edwards, 116, Wn.App. 424, 432, 65 P.3d 696 (2003), the Court noted that "[b]y its nature, a constructive discharge may not be the result of a single, identifiable event." The reasoning of the Court in Antonius is directly applicable to the constructive discharge cause of action.

Respondent argues, "due to the time-barred nature of his claims, sufficient admissible evidence does not exist to support a cause of action for constructive discharge with regard to the alleged discriminatory conduct that resulted in a breakdown." RB 13. As established earlier in this Brief, the evidence submitted by the Appellant in support of his constructive discharge claim pursuant to the Antonius decision is not time-barred.

Respondent argues that "it is difficult to reconcile Appellant's claims of the supposedly intolerable working conditions that prevented him from returning to work with the plan he, his attorney and his

medical provider came up at their September 22 for a meeting, at which time his provider felt he was capable of returning to work with accommodations." RB 16. This argument is a deliberate refusal to consider the facts.

On January 31, 2006, following yet another psychological breakdown resulting from the hostile work environment which occurred January 29, 2006, the Appellant again requested the reestablishment of the accommodation from the Respondent permitting him to close the blinds to his office and lock the door. CP 681. This request was refused by Karen Goens in her letter of February 10, 2006, claiming that the request for an accommodation is a "work style preference." CP 93. On March 13, 2006, the Appellant is again forced to take medical leave from work. Ultimately he is never able to return to work from this day forward.

On March 19 and April 9, 2006, Margaret Rose, ARNP, forwarded two separate reports to the Respondent pointing out the lifetime chronic medical condition from which the Appellant suffered. CP 694, 698. On March 29, 2006, Ms. Rose forwarded a letter to the Respondent describing her outrage that her client was being re-traumatized by a fellow employee in the hostile workplace which she had previously indicated would be injurious to him. CP 684. On

September 22, 2006, the Appellant forwarded an e-mail to the Respondent discussing his leave status and specifically stating, "how many times does Whatcom County need to be told that I have a chronic life lifelong medical condition?" CP 715.

Respectfully, the facts of this case demonstrate the personification of the constructive discharge cause of action. The Appellant made multiple requests to re-establish the simple, effective, and virtually cost free accommodation which the Respondent, despite the unequivocal evidence of the health-related impact to the Appellant refused to permit.

The facts establishing this cause of action are not single or unique and thereby permit the consideration of all facts involved including those which occurred prior to September 22, 2006. In September 2006 the Appellant was informed by Margaret Rose that he could only return to work successfully with this accommodation. Given that the Respondent refused to grant this accommodation he had a difficult choice to make. The choice was to return to the hostile work environment with the recognized impact to his health which by this time had required him to leave work on three separate occasions for health-related reasons, or resign. In order to protect his personal health the Appellant made the choice that any reasonable individual would do

and resigned his position. These facts establish the cause of action for constructive discharge and a summary judgment was as a matter of law, error.

IV. FAILURE TO ACCOMMODATE

Counsel for the Respondent argues, "Respondent cannot be expected or held to a standard to accommodate Appellant when he never presented the request for it." RB 19. This is both a misstatement of the law in the State of Washington as well as the facts of this case.

In Kimbro v. Atlantic Richfield, 889 Fd.2d 869, (1989), the Court made it abundantly clear that RCW 49.60.180 places an affirmative obligation upon an employer to come forward with a reasonable accommodation even in the absence of a formal request from a handicapped employee. Id. at 877. As the Appellant has already outlined for this Court on multiple occasions through his personal communications as well as those of his various medical providers, ample evidence has been presented to demonstrate the Appellant notified the Respondent of his need for an accommodation to deal with his disability. The first element of Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004), is admitted that the employee has a sensory, mental, or physical abnormality that substantially limits his ability to perform the job. No credible argument can be made that

the Respondent was not aware that the Appellant suffered from a disability requiring accommodation.

Similarly, the argument of the Respondent that the Appellant allegedly failed to "demonstrate his ability to perform the essential functions of the job during the four-day period in question" deliberately ignores the performance review of the Appellant's supervisor, Mr. Jackson, who determined the Appellant was fully "Outstanding" in virtually every category of his performance review. CP 702-08.

The Respondent was aware that the Appellant suffered from a disability which pursuant to RCW 49.60.180 required them as the employer to affirmatively accommodate this disability. The Respondent had, in fact, in 2004 fully accommodated this disability at which time the Appellant was able to be fully successful in his work while maintaining his own personal health. It was only upon the baseless allegation of masturbation by the Appellant that the Respondent withdrew the accommodation which had the direct effect of causing the Appellant to once again have a psychiatric breakdown because of the working conditions to which he was subjected. On September 22, 2006, the Appellant once again wrote a letter to the Respondent stating "how many times does Whatcom County need to be

told that I have a chronic lifelong medical condition?" "I can't be cured."

On September 26, 2006, the day the Appellant resigned his employment, the Respondent had direct knowledge that: (1) the Appellant suffered from a disability; (2), with an accommodation was fully capable of performing all of the essential functions of his job; (3) without the accommodation specifically requested by the Appellant as well as his medical providers the working environment would cause him to suffer another psychiatric breakdown; and (4) despite all of this clear evidence as well as the timely request of the Appellant to accommodate his known disability refused to do so. These are the circumstances that existed on September 26, 2006, and fully meet all of the elements of a cause of action for failure to accommodate a disability.

V. SUMMARY

Both the causes of action for a hostile work environment as well as constructive discharge are generally comprised of events which are not singular or of such uniqueness that they automatically serve as a basis for the start of the limitations period. Pursuant to the holding in Antonius as a matter of law a complaint is not untimely if any singular act related to the cause of action occurs within the limitations period.

The facts of the present matter as outlined above demonstrate that relate acts did occur subsequent to September 22, 2006, permitting a determination that as a matter of law the Appellant is not limited to consideration of the facts which occurred during a four-day window of time. This is true as to both the causes of action for hostile work environment as well as constructive discharge.

Judge Krese dismissed the hostile work environment claim based upon the singular argument of Counsel that because the Appellant was not in the work place from March 2006 through the time of his resignation on September 22, 2006, he could not have experienced a hostile work environment and no cause of action could be sustained. Now, Counsel acknowledges that no such per se rule as argued to Judge Krese exists. Given that the ruling of Judge Krese was based upon a now admitted erroneous argument of law the only appropriate recourse is to remand the hostile work environment claim.

The cause of action for constructive discharge is also not limited to a four-day window of consideration. As outlined, the Appellant was forced into a decision to attempt to return to work without an accommodation in a work environment within which he had already experienced multiple psychiatric breakdowns, or resign his

employment. As any reasonable person would do the Appellant chose his health over employment and resigned his position.

The cause of action for failure to accommodate a known disability must also be remanded. The Respondent was fully aware that the Appellant suffered from a disability and as a matter of law had an affirmative duty to accommodate this disability. The Respondent not only failed to affirmatively accommodate the known disability, they deliberately refused multiple requests by both the Appellant and his healthcare providers to institute an accommodation that was simple, effective, and virtually cost free. All of this was known to the Respondent on September 22, 2006, when the Appellant was forced to resign his employment.

RESPECTFULLY SUBMITTED this 4th day of March, 2013.

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Attorney for Appellant

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION ONE

TIMOTHY P. MERRIMAN, Appellant, and WHATCOM COUNTY, Respondent.	No.: 69295-0-1 DECLARATION OF SERVICE

I certify that on the 4th day of March, 2013, I mailed true and correct copies of Appellate Brief, by depositing the same in the United States mail, postage prepaid, to Randall Joseph Watts Attorney at Law, addressed as follows:

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Dated this 4th day of March, 2013.

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