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NO. 69295-0-1

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

TIMOTHY P. MERRIMAN,
Appellant,

v.

WHATCOM COUNTY
Respondent.

RESPONDENT'S BRIEF

David S. McEachran,
Whatcom County Prosecuting Attorney
By: RANDALL J. WATTS
Chief Civil Deputy
Attorney for Respondent
WSBA No. 6314

Whatcom County Prosecutor's Office
311 Grand Ave., Suite 201
Bellingham, WA 98225
360.676.6784

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A. Introduction

The question before this Court is whether or not an employer can be held liable when an employee requests leave, takes it, but then resigns, even though he was never denied the requested leave. The record and Appellant's statement of the case are rife with references to his impressions, beliefs, and perceptions regarding County leave provisions and the County's intentions, none of which were based in fact. (". . . it was his impression . . ."(p. 11); "Appellant came to believe that Respondent's desire . . . ." (p. 12); "it was the Appellant's perception . . ." (p. 12); "belief that it was the preference of Respondent to terminate his employment . . . ." (P. 13); "felt he had no choice . . . ." (P. 14)). However, it is undisputed that Appellant was out on leave and Respondent never refused or denied his request for an extension of that leave. By Appellant's own admission, Respondent never once indicated or even remotely implied that termination was a possibility. CP 586-588.

B. Factual Statement of the Case

Despite Appellant's repeated mischaracterizations (even going so far as to refer to his resignation as a termination on page 29 of his brief), Appellant resigned on September 26, 2006 (CP 586); based on his own

erroneous interpretation of County leave policies. Appellant claims that he was forced to resign in order to avoid being terminated for being absent without leave. CP 586-587. He further claims that Respondent's refusal to grant or offer a leave that was acceptable to him effectively left him with no choice but to resign. (Page 14 of Appellant's brief). In order to believe this premise, one must also then believe that Respondent's subsequent offers to accept a withdrawal of his resignation and invitation to continue in employed status were made in bad faith (CP 614-622), with the objective of convincing Appellant to resume employed status, only to then turn around and terminate him. He adamantly argues this position, yet admits in testimony that Respondent never once mentioned termination in any of its communications with him regarding the additional six weeks' leave he requested, nor did Respondent ever state that if Appellant didn't return to work by a certain date he would be terminated. CP 587-590.

On Friday, August 25, 2006, Appellant submitted a request for an additional six weeks of leave. The previously requested and approved leave was scheduled to end on that date (CP 572). At this point he had been away from the workplace on medical leave since March 13, 2006. CP 554. Six weeks as computed on the calendar would put his return to work date at approximately October 9, 2006. CP 587. Whatcom County Human Resources calculated his paid time off accruals to exhaust on

approximately September 22 at which point he would go into an unpaid leave status (CP 606, 610), leaving approximately ten work days of unpaid time in his requested six-week leave period. Respondent repeatedly tried to obtain some form of medical documentation from Appellant in support of his leave request on numerous occasions in the ensuing weeks. CP 599-600; 603-606. Appellant had last provided medical documentation on June 4, 2006 (CP 595), to support his prior leave request of June 2, 2006 (CP 712). (This documentation was unsolicited and immediately followed his June 2, 2006 request for leave). In all three of his communications between September 11 and 21, Appellant assured Respondent that he was seeing his provider and would get the medical documentation and provide it. CP 600, 603-606. These communications speak for themselves; Appellant never inquired as to different forms or types of leave that may be applicable to him. Margaret Rose, Appellant's provider, also testified that he never requested additional documentation from her pertaining to this particular period of leave, but that she would have provided it, had he requested it. CP 591-593. However, on September 22, Appellant, emailed Respondent arguing that "you're using the wrong leave provision; that you're supposed to be using the Unrepresented Resolution, not the Employee Handbook Section . . ." CP 588-589, 607-608. This was the first Respondent had heard of

Appellant's misperceptions and misapplication of the different types of leave available (CP 732). Appellant never inquired about the accuracy of any of his beliefs or perceptions prior to withdrawing completely from the interactive process. Appellant argues that Respondent was erroneously classifying his leave status under Section 113.2 of the Employee Handbook (CP 454) which was unacceptable to him because it effectively resulted in automatic termination after 89 days, and required medical documentation. (Appellant's brief, page 19; CP 633, 639). Respondents are at a loss as to how they could have prevented or eased Appellant's fears about the 89th day automatic termination clause he repeatedly cites to when he never inquired about it until September 22 (Friday), and, based on the leave request he had submitted, was also only requesting to use approximately ten days of unpaid leave, nowhere near the 89 days referenced in the provision. It is also difficult to reconcile this argument of a looming "termination on the 89th day" provision when Appellant supposedly was able to return to work with accommodations as of September 24, when he met with his attorney and medical provider and developed a plan for him to return to work with accommodations (CP 569, 581, 583-584), then, inexplicably resigned two days later. Appellant never responded to Respondent's subsequent repeated attempts to address this erroneous distinction and interpretation of the leave provisions, (CP 600,

609). Respondents never heard anything from Appellant or his counsel (aside from her acknowledgement of representation, CP 609) until he submitted his "forced resignation" on September 26 (Tuesday) (CP 600-601, 611).

Despite Appellant's insistence, the two leave clauses are not separate and distinct; as Ms. Keeley testified (CP 731), they "automatically consider 6.9." As Respondent has testified repeatedly and the policy speaks for itself (CP 407), leave under Section 6.9 of the 2006 Unrepresented Resolution is subject to review and approval by the Department Head and Executive. CP 306-307, 596-597. Respondent's application of Section 6.9 to this particular leave request is obvious in two of Respondent's last communications with Appellant in which Ms. Keeley specifically states that time was needed to process his request and for the Executive to review it. (CP 605 and 606).

In yet another effort to justify his resignation, Appellant, for the first time ever on page 12 of his Brief, references (and completely misrepresents) Section 114(T) of the Employee Handbook, which states as follows: "Absence from work other than an authorized leave shall be treated as leave without pay, and **may** be grounds for disciplinary action. Unauthorized absence from duty **may** result in separation from service." (emphasis added). CP 458. Despite Appellant's mischaracterization, it is

clearly not the conclusive "if/then" policy he presents it to be; it does not state that if an employee is absent without leave, then he/she will be terminated. Even though Respondent never once made mention of this clause, or the possibility that Appellant may be subject to termination if absent without leave, he drew his own mistaken assumption from his study of the Handbook: that if he was absent without leave effective September 22, he would be terminated for cause. CP 587-590. It is important to note that nowhere in his September 22 communication (CP 607), or any of his four prior communications with Respondent (CP 603-606), did he inquire as to whether or not he may be subject to termination under this clause, nor did he inquire about it or cite to it in his resignation (CP 611). Appellant's brief to this Court represents the first time he's cited to this provision as yet another reason why he was "left no choice but to resign his position."

Appellant also argues for the first time in his Brief to this Court (Appellant's brief, pages 11-12) that he was even more justified in insisting that his leave be classified under Unrep. Resolution Section 6.9 because of its connection to Section 8.1.1, which states as follows: "If an employee has a documented extended illness or injury and is unable to work or be compensated at least eighty (80) hours per calendar month, medical premiums will continue to be paid by the County . . ." (CP 408).

This particular argument appears to be yet another attempt at an after-the-fact rationalization of his allegedly forced resignation. As he states in his brief, 8.1.1 requires medical documentation; he apparently assumes that Respondent would have accepted his last medical update from June 2006 for purposes of Section 8.1.1, even though they repeatedly requested updated medical documentation for the leave extension requested on August 25. Also, because Appellant was (knowingly) compensated for 80 hours in September, his medical premiums were covered through to the end of October (Section 8.1, CP 408), over two weeks after his projected return to work date. Respondents are once again puzzled as to how or why any of these details matter if Appellant planned to return to work on or near October 9, or how he rationalizes his possible loss of medical premium coverage as of November 1 as reason to resign and in fact completely withdraw from the interactive process over a month prior to that. Appellant's communications throughout September (CP 600, 603-606) speak for themselves – he never asks about premium payment for his medical coverage; he never references this clause as additional reasoning for his desire to be placed on leave under Section 6.9 until his Brief to this Court over six years later. In his attempt to characterize Respondent's actions as a refusal to place him on leave under one specific leave provision, he fails to acknowledge the clear statements about Executive

review and what that clearly implies: Respondent was in fact applying Section 6.9 to his leave.

Respondents took all of Appellant's statements and representations at face value and expected that he was doing the same. There were no hidden agendas or attempts to set him up. Respondent never denied Appellant his requested leave. Following receipt of his resignation, Respondent encouraged Appellant to reconsider and withdraw it (CP 598, 614-620); these communications were essentially ignored. Respondent never terminated Appellant, he resigned of his own volition: "I couldn't have gotten fired, I resigned first." CP 586.

C. Issues Pertaining to Assignments of Error

1. Appellant's Issue No. 4 – "Did the applicable three-year statute of limitations operate to limit the factual evidence which can be relied upon by the Appellant in establishing his causes of action?"

Yes, under Antonius v. King County, 153 Wn.2d 256, 103 P.3d 72 (2004), National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), and Greer v. Paulson, 505 F.3d 1306 (2007), the applicable three-year statute of limitations does limit the factual evidence that Appellant may rely upon in establishing his causes of action.

Appellant resigned on September 26, 2006 and filed this action on September 22, 2009; leaving only a four-day window in which

Respondent's actions may be questioned. Appellant's argument on pages 17 and 18 of his brief supports Respondent's position – that most of his claims are time-barred and limited to only a four-day period in which he only had one communication with Respondent. Appellant fails to identify the one allegedly hostile act that the Antonius *supra,* and Morgan, *supra,* Courts found must have occurred during the limitations period (four days), and must bear some connection or relationship to the prior acts.

> "[a]s a unitary whole, the claim is not untimely if one of the acts occurs during the limitations period because the claim is brought after the practice, as a whole, occurred and within the limitations." Antonius v. King County, 153 Wn.2d 256, at 266.
>
> 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." National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), at 120.

There is nothing hostile about Respondent's one communication (CP 609) to Appellant's attorney on the afternoon of September 22 regarding Appellant's leave, nor does the communication bear any connection or relationship to whether or not Appellant was allowed to work with his door locked and blinds closed over six months prior. Respondent had no contact with Appellant for the majority of his leave, from April, 2006 until it responded to his August 25, 2006 leave request. Respondent took

virtually no action during the period within the statute of limitations, and definitely did not commit any acts that could be construed as hostile, nor is there any connection or relationship between Respondent's one benign act and any of the allegedly hostile acts that occurred over six months prior.

2. Appellant's Issue No. 1 – "Does a per se rule exist that precludes the Court from considering a hostile work environment claim when the acts complained of occurred while the claimant is not in the workplace?"

No, 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 workplace. However, the court in Greer v. Paulson, 505 F.3d 1306 (2007) upheld the criteria regarding timeliness of at least one act and its connection or relationship to other acts that were established by the Antonius and Morgan Courts.

> "Although we hold that there is no *per se* rule against considering incidents while an employee is out of the workplace, this does not mean that all incidents are automatically linked." *Id.* at 1314.

In fact, Appellant's argument completely ignores the criteria he cited in Antonius and Morgan with regard to timeliness and relationship, and the Court found that Greer's alleged facts did not satisfy them either.

> "In response to the "intervening action" proffered by the IRS, Greer has presented no evidence from which a reasonable jury could infer that her new supervisor was

> "perpetuating" or "condoning," *id.*, a racially hostile environment allegedly created by a previous supervisor in her former branch. Absent such a showing, the May 1995 denial of Greer's leave requests and the requirement that Greer return to work are too "obviously different" from the earlier alleged racial harassment incidents to form "part of the same hostile work environment" claim."
>
> Because Greer has proffered no admissible evidence of a sufficient link between the pre- and post-1994 incidents, she has failed to raise a genuine issue that she exhausted administrative remedies for this claim and thus summary judgment was appropriately granted to the Secretary. Greer v. Paulson, 505 F.3d 1306 (2007), at 1316.

Greer is also inapposite because the facts are only vaguely analogous to this case: Greer was terminated for extensive AWOL status, while Appellant herein admittedly resigned willfully (despite a misrepresentation on page 29 of his brief). In addition, the Court in Greer upheld all of the summary judgment findings for the employer, specifically regarding Greer's attempt to establish a hostile work environment claim.

3. Appellant's Issue No. 2 – "Was sufficient evidence presented to support a cause of action for constructive discharge when aggravating circumstances exist and Appellant demonstrated a pattern of discriminatory conduct resulting in his experiencing a predictable psychological breakdown?"

No, 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.

Appellant argues that whether or not working conditions were intolerable is a question of fact and is therefore not subject to summary judgment, based on the Court's findings in Haubry v. Snow 106 Wash.App. 666, 31 P.3d 1186 (2001). However, in posing this argument he conveniently ignores the second part of the Court's statement on the issue:

> "The question of whether the working conditions were intolerable is one for the trier of fact, **unless there is no competent evidence to establish a claim of constructive discharge.** The intolerable element may be shown by aggravated circumstances or a continuous pattern of discriminatory treatment. Here, contrary to the decision of the trial court and contrary to the arguments made by Dr. Snow, Haubry presented evidence supporting these elements sufficient to avoid summary judgment. There is at least a question of material fact as to whether the workplace situation into which Haubry was placed would compel a reasonable person to resign. While it may be a difficult burden for Haubry to prove that the conditions were "intolerable" at trial, the evidence is sufficient to avoid a summary judgment dismissal of the constructive discharge claim. Haubry v. Snow 106 Wash.App. 666, at 677-678. *(Emphasis added).*

Appellant's case is vastly different from Haubry, *supra.* in which the Court found that Plaintiff Haubry did present evidence sufficient to pose a question of fact as to the existence of the

intolerable working conditions and survive summary judgment. Appellant herein has no competent evidence on which to base such a claim. He bases his claim for constructive discharge on his theory that Respondent refused to allow him unpaid leave pursuant to Unrepresented Resolution 6.9 (page 28 of his Brief). The record clearly shows there was no such refusal, and in fact Unrep. Resolution 6.9 was applied to his leave request. His "theory" is simply not competent evidence and therefore this claim was ripe for dismissal on summary judgment.

Appellant also alleges that Respondent was "setting him up," (to be absent without leave) so it could then terminate him (Appellant's brief pages 12, 13 and 27). The only evidence he presents to support this theory is his own personal belief and past experience. He claims that everywhere else he had ever worked an employee was subject to termination if he/she was absent without leave and that he believed Whatcom County operated the same way, (CP 588-590), even though Whatcom County never mentioned termination or the possibility of it in any of its communications, and, following receipt of his resignation, twice offered him the opportunity to withdraw his resignation and continue his employment. Appellant's unsubstantiated assumptions and theories, based on his personal

experiences over fifteen years prior (CP 647), are clearly not competent evidence on which to base a claim for constructive discharge.

The court has held that in order for a constructive discharge to occur, the employer must deliberately make an employee's working conditions intolerable, thereby forcing the employee to resign. Crownover v. State ex rel. Dept. of Transportation, 165 Wn. App. 131, at 149, 265 P. 3d 971 (Div. 3, 2011); Bulaich vs. AT & T Information Systems, 113 Wn.2d 254, at 261; Miconi vs. Steilacoom Civil Service Commission, 44 Wash. App. 636 643, 722 P.2d 1369 (1986). First, Appellant was not subjected to any work place conditions during the period covered by the statute of limitations, secondly, 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 24 meeting, at which time his provider felt he was capable of returning to work with accommodations. CP 579, 581, 583-584. The conditions as he left them in March did not change between September 24, when they planned for him to return to work, and September 26, when he submitted his resignation; in fact he never inquired about the

persistence of the specific conditions he complains of, nor did he present his proposed plan for returning to work.

4. Appellant's Issue No. 3 – "Was sufficient evidence presented to support a cause of action for failure to accommodate his documented physical disability?"

No, sufficient admissible evidence was not presented to support this cause of action. As previously established, none of the events that occurred prior to the four days allowed under the statute have any relationship or connection to the rather benign actions that occurred during those four days, leaving only the events and interactions that occurred between September 22 and 26 for the Court to consider. These events, which are directly related to Appellant's leave request, are also the subject of the Appellant's original causes of action for failure to accommodate. CP 127. The record is clear on these matters – Respondent never denied or refused him the leave he requested, and was in fact attempting to incorporate and apply the different leave provisions that were available. Respondent attempted to clarify if Appellant was seeking an ADA accommodation by inquiring directly of his attorney in response to his September 22 communication, but never received a response. CP 609. In light of the record, Appellant's second allegation regarding Respondent's supposed unwillingness to engage in

the interactive process is simply laughable. The record clearly shows Respondent's multiple attempts to engage in the interactive process with Appellant and his attorney in order to determine whether his request for additional leave was medically necessary. CP 602-606.

In addition, Appellant's failure to demonstrate his ability to perform the essential functions of the job during the four-day period in question, followed by his resignation, which rendered him unavailable to perform the essential functions of his job, lead to a complete failure to establish at least two of the elements he cites to as required by the Court in Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004):

> (1) the employee had sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) the employee was qualified to perform the essential functions of the job in question; (3) the employee gave the employer notice of the abnormality and its accompanying substantial limitation; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality.

Appellant cannot allege that Respondent failed to accommodate him when he resigned from the position completely and never indicated he was able to return to work. Interestingly enough, on March 19, 2012, under Appellant's direct and very leading examination, his

healthcare provider, Margaret Rose, testified that on September 24, 2006, two days prior to his resignation, she met with him, his wife, and his attorney and they discussed a plan for him to return to work in which she would complete a fit-for-duty-with-accommodations form for him to provide to Respondent. She felt he was able to go back to work with accommodations. CP 581, 583-584. This plan was never executed, nor was it ever presented to Respondent; Respondent cannot be expected or held to a standard to accommodate Appellant when he never presented the request for it.

D. Conclusion

The fatal flaw in Appellant's case is that he was never terminated. He admittedly resigned his position voluntarily, based on, so he claims, his own perceptions and impressions of applicable County leave policies. Appellant went out on leave in March of 2006 and was not denied the extension of leave that he requested in August. Despite his dogged insistence, the majority of his claims are time-barred and caselaw does not support his arguments that no statutory limitations exist. Appellant has failed to present admissible evidence sufficient on

which to base his claims, therefore the summary judgments granted in this case were warranted and must be affirmed.

RESPECTFULLY submitted this 30th day of January, 2013.

RANDALL J. WATTS, WSBA #6314
Chief Civil Deputy Prosecutor

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to Rodney R. Moody, counsel of record for Appellant, addressed as follows:

Rodney R. Moody
2528 Colby Ave., Suite 302
Everett, WA 98201

1/30/13