69295-0

69295-0

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

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

TABLE OF CONTENTS

TABLE OF CASES

Real v. Food Maker, Inc., 152 Wn.2d 138, 94 P.3d 930 (2004);
Page 29

I. ASSIGNMENTS OF ERROR

Assignments of Error

1. Judge Krese erred on July 15, 2002, when she dismissed the Appellants' hostile work environment claim with prejudice based on the argument that a per se rule existed preventing a hostile work environment claim from being established when the acts complained of occurred in part while the claimant was not in the workplace and at the time of his resignation.

2. Judge Kurtz erred by dismissing the Appellant's claim for constructive discharge on summary judgment.

3. Judge Kurtz erred by dismissing the Appellant's claim for failure to accommodate his disability on summary judgment.

Issues Pertaining to Assignment of Error

1. Does a per se rule exist in Washington precluding the court's consideration of a hostile work environment claim when the acts complained of occur at a time when the claimant is not in the workplace?

2. Was sufficient evidence presented to support a cause of action for constructive discharge when aggravating circumstances exist and the Appellant demonstrated a pattern of discriminatory conduct resulting in his experiencing a predictable psychological breakdown?

3. Was sufficient evidence presented to support a cause of action for failure to accommodate the Appellants' documented physical disability?

4. Did the applicable three-year statute of limitations operate to limit the factual evidence which can be relied upon by the Appellants' establishing his causes of action?

II. STATEMENT OF THE CASE

Appellant was hired by Whatcom County on November 1, 1989, to determine eligibility for assigned counsel applicants as well as assist victims of unlawful harassment or domestic violence in obtaining protection orders. CP 647. He was a supervisor in this office and continued to provide those services throughout his employment with the Respondent. CP 647.

Two of the employees he supervised were Nicole Monica Johnston and Heather Holestine. These two individuals are sisters and worked with him in room 304 of the Whatcom County Courthouse. Initially, Appellant was assigned to office C within this office area as depicted in Exhibit 9. CP 686. During the course of his employment and supervision of these two individuals, they jointly filed a complaint against Whatcom County for reasons which were unrelated to Appellant or his supervision. CP 647.

Both individuals, Ms. Holestine in particular, began to make unsubstantiated complaints against Appellant in an attempt to undermine the credibility of his testimony in their pending lawsuit. The effect of constantly defending himself against baseless complaints as well as

simultaneously providing supervision for these two individuals while the lawsuit was ongoing proved to be debilitating to Appellant both psychologically and physically. CP.648. Appellant made the effects of this known to the Respondent both through his immediate supervisor, N.F. Jackson, and the HR Human Resources representative assigned to his office, Melissa Keeley. CP 648.

Appellant was diagnosed as experiencing stress 2° related to his work situation, anxiety, depression, Bipolar Affective Disorder, and Attention Deficit Disorder. CP 660, 664, 678. The depression, anxiety, and insomnia were diagnosed as "indefinite" conditions. CP 664. A certification of this from his healthcare provider, Dr. Craig K. Moore, was provided to the Respondents as early as 2003. CP 660, 661. Appellant experienced a psychological breakdown on March 26, 2003, related to this stressful work environment. CP 648. Appellant was able to return to work, but was then required to go on a leave of absence pursuant to the Family Medical Leave Act from November 2003 through January 4, 2004, again as a result of the stress being experienced in the work place. CP 648. Dr. Moore released Appellant to return to work with no restrictions on January 5, 2004. CP 663.

The difficulties with Ms. Johnston and Ms. Holestine continued after his return. On March 12, 2004 Dr. Moore wrote a note to Whatcom

County Human Resources stating this limitation. CP 670. On November 5, 2004, Margaret Ann Rose, ARNP, authored a report notifying the Respondent that Appellant was experiencing Bipolar Affective Disorder, Depression, and Attention Deficit Disorder. CP 678. This document clearly indicated that the probable duration of the condition was "Lifetime."

An accommodation was granted to the Appellant on November 30, 2004. As depicted in Exhibit 9, he was able to relocate his office within room 304 from office C to office A. CP 649, 671. Appellant was permitted to close and lock the interior door from this office into the waiting room and close the blinds. CP 649. This allowed him to separate his office from the remainder of room 304 and provided him with the privacy and separation from Ms. Johnston and Ms. Holestine that he needed and Ms. Rose had formally advised occur. CP 649, 648. Plaintiff was able to work successfully in this configuration from November 2004 until May 2005 when this accommodation was withdrawn. CP 649.

This accommodation was withdrawn based upon a false allegation made by Ms. Holestine and two other witnesses, who claimed that they heard sounds of Appellant masturbating in his office. CP 649. This was alleged to occur while Appellant was alone in his office with his office door that opened directly into a busy public hallway propped open. None of these

witnesses claimed to have actually seen any inappropriate behavior; the claim was that they had heard him masturbating. CP 649.

Based upon this allegation an administrative hearing panel was convened by the administration for Whatcom County. The panel heard evidence regarding this allegation and determined the complaint was groundless. CP 649. Regardless, they developed a list of conditions under which Appellant could return to employment. These conditions were: (1) the office accommodation granted in November 2004 was revoked and Appellant would be required to move back to office C; (2) all offices within room 304 were to be kept with doors and blinds open except if a client was present and requested that they be closed; (3) that he would be required to have prior approval for any computer installs, downloads or deletions; and (4) that he engage in counseling. CP 649-50. These conditions were imposed by Mr. Jackson and theAppellant returned to work. When asked about the office accommodation Mr. Jackson told Appellant "you don't look like you need it anymore." CP 650. Mr. Jackson issued a "doors and blinds" memo on May 13, 2006, when Appellant returned to work. CP 682.

Appellant attempted to return to work with these conditions. CP 650. He was only able to work two or three days per week from May 2005, when the office accommodation was withdrawn, until January 29,

2006, when Appellant suffered another psychiatric breakdown caused as a direct result of the loss of the accommodation. CP 650.

The effect of the withdrawal of this accommodation and the impact upon Appellant was alarming to his psychiatric nurse, Ms. Rose, who wrote a letter to the Respondent on March 29, 2006. CP 684. This letter expresses the outrage that Ms. Rose felt based upon the withdrawal of this accommodation with the resulting re-traumatization that occurred.

On January 30, 2006, Appellant prepared a Reasonable Accommodation Request. CP 681. Appellant was allowed to move back into office A, but because of the "doors and windows" memorandum Appellant was not permitted to lock the door or keep the blinds closed. CP 650, 693. Karen Goens, A.S. Human Resources Manager, on February 10, 2006, drafted a memorandum to Appellant and stated that the County viewed his style of working with the doors and blinds shut as a "work style preference" and directed that "all blinds must remain open except during lunch or upon customer request until such customers are gone." CP 693. Even after receipt of this memorandum Appellant continued to press the County for the simple accommodation of allowing him to keep the door locked and blinds closed which had been effective until May 2005. CP 650, Ln. 24.

On March 19, 2006, Appellant submitted another Certification of Health Care Provider prepared by Ms. Rose which indicated that Appellant met the diagnostic conditions for chronic medical condition and the probable duration of this condition was "lifetime." CP 694. Subsequent to this, Appellant requested an FMLA absence beginning March 13, 2006, and continuing for six weeks based upon Ms. Rose's determination that Patient meets the diagnostic criteria for chronic medical condition that supports her conclusion a serious health condition existed. CP 20. This was acknowledged by HR representative Melissa Keeley. CP 697. Appellant was informed by her that a second medical opinion would be necessary, and he was referred to a psychologist, Dr. Zold. Appellant was provided with a Release of Medical Information which he was not comfortable signing. CP 651. Despite his concerns and hesitation Appellant did sign the release for Dr. Zold and mailed this to him directly on March 28, 2006. CP 651. By doing so Appellant complied with the request of the Respondent to provide additional medical information.

On April 9, 2006, Appellant submitted another Progress Report from Health Care Provider prepared by Ms. Rose indicating that he was still experiencing Bipolar Affective Disorder and Attention Deficit Disorder. CP 698. At that time she stated the probable duration of his condition was "unknown." This progress report was received by the

Respondent on April 26, 2006. Within this release Ms. Rose specifically requested that Appellant be granted an additional six weeks of leave under FMLA. This was acknowledged by Ms. Keeley in her letter dated April 26, 2006. CP 710.

On Friday, June 2, 2006, Appellant wrote a letter to Mr. Jackson specifically requesting his leave for illness or injury using accrued sick leave, vacation and personal holiday leaves be extended by at least an additional 12 weeks. CP 712. He pointed out to Mr. Jackson two relevant County policies which included the 2006 Unrepresented Resolution 6.9 leave for illness as well and the Employees Handbook 113.2 disability leave provision. He requested that if leave could not be granted based upon sick or other leave including Unrepresented Resolution 6.9 leave for illness for up to 12 months that it is granted under the Employee Handbook 113.2 disability leave provision for up to 89 days. CP 712.

In August 2006, Appellant requested an additional six weeks of leave to address his health condition. He received an e-mail back from Ms. Keeley acknowledging this request and estimating that his remaining vacation accruals would end on approximately September 19th. CP 711. She stated that she would need him to submit a request for unpaid disability leave (per the Employee Handbook) for the remaining 21 days. Further, Ms. Keeley stated that she needed documentation from his

healthcare provider to support only the unpaid portion of the request, but the paid portion which was requested at the same time was approved. CP 711. On September 22, 2006, Appellant wrote to Ms. Keeley informing her that he had retained counsel to assist him with this matter. CP 714. He also pointed out to her that Employee Handbook section 113.2 did not apply to his particular circumstances. CP 714. It was his impression that the Unrepresented Resolution 6.9, which did not require additional medical information, was the applicable provision. CP 714.

Under Employee Handbook section 113.2, the leave of absence is limited to 89 days. CP 719. The very last sentence of this section states, "[f]ailure to return to work on or before the end of the leave will result in termination of employment." Appellant had reviewed this provision and realized the risk being placed under section 113.2 posed to him. Another significant difference between these two policies is that under provision 113.2, benefit premium coverage is not provided for the employee by the County during leave without pay. Unrepresented Resolution 6.9 does, pursuant to Unrepresented Resolution 8.1.1, allow for medical premiums to continue to be paid by the County for Appellant and his family for a period of up to 12 months from the date the employee is first absent on account of such illness or injury. CP 717-18. Unrepresented Resolution 8.1.1 does require documentation of an extended illness which had already

been provided to the Respondent as late as early 2006 with the information provided from Appellant's psychiatric nurse, Ms. Rose.

Appellant had expressed to Ms. Keeley directly, as early as 2004, the lack of trust which he had for the HR department. CP 666. In 2006 Appellant came to believe that the Respondent's desire was in effect to terminate his employment and hire a permanent replacement that would not experience the medical difficulties he was experiencing. CP 652.

In September 2006, Appellant was informed by Ms. Keeley that his accumulated sick leave and vacation would expire on approximately September 19th. CP 711. Ms. Keeley ultimately calculated September 22nd as the day on which his various accruals would expire. CP 653. As a result if Appellant was absent without leave effective September 22, 2006, he would be subject to termination for cause per the Employee Handbook Work Rules in Section 114(T). CP 458. If terminated from employment it was the Appellant's perception based on the Employee Handbook Section 121.0 and 121.1 that he would not have the ability to purchase COBRA coverage thereby exposing his family and himself to significant financial harm. If Appellant resigned his position however, the COBRA coverage would be available to him. CP 458.

On September 22, 2006, Appellant retained Patricia Rose as his attorney to assist him in attempting to resolve this matter. Attached to the

declaration of Wendy Wefer-Clinton, are two letters dated September 27 and October 5, 2006. CP 617-22. Appellant received these two letters. In these letters, Ms. Wefer-Clinton discusses Compassionate Leave, Non Disability Leave, Disability Leave Request and Long-Term Disability. However, no mention of Unrepresented Resolution 6.9 is made despite the fact that this had previously been pointed out to Ms. Keeley and Mr. Jackson directly by the Appellant. The Disability Leave Request per Unrepresented Resolution section 8.1.1 was discussed, but then Ms. Wefer-Clinton wrongfully stated the need to submit documentation from a healthcare provider which was previously provided. In addition Unrepresented Resolution 8.1.1 benefit provision was mislabeled as a Disability Leave Request and as such a benefit not available to Appellant until November 1, 2006, when his paid benefits ran out. In effect, the only option being presented to Appellant was to be placed under Employee Handbook section 113.2 with its 89 day limitation and subsequent mandatory termination. The second letter, dated October 5, 2006, once again completely ignores Unrepresented Resolution 6.9.

In September 2006, after months' of effort to reach an agreement regarding the status of his leave absence from employment, as well as with the knowledge and belief that it was the preference of the Respondent to terminate his employment, Appellant found himself in a position where

his various leave accruals had expired and the question of his leave status remained unresolved. He had retained counsel to assist him, but this had failed. Even the letters provided to his attorney after the effective date of his resignation still declined to offer a specific determination of his leave status. In September Appellant found himself in the situation where his work environment had deteriorated to the point that it was directly impacting his health in a negative and continuous manner. He was on an unpaid status and in effect absent from work without agreed upon leave. This is an offense for which termination with cause could be warranted. Appellant felt he had no choice but to resign his position which is what he did on September 26th.

It was not Appellant's desire to leave work with the Respondent. CP 654. It is acknowledged by Ms. Keeley that she was well aware it was Appellant's desire to return to work. CP 729. The Respondent, through Mr. Jackson, from Appellant's perspective refused to create a positive work environment in which Appellant could be successful, refused to resolve his leave status, and placed him in a position where he was absent from work on an unpaid status exposing himself to termination. CP 654-55. After resigning his position the Respondent contacted Appellant's then attorney, but still declined to resolve the leave status by applying Unrepresented Resolution 6.9. This designation required no additional

medical documentation and allowed Appellant to remain on an approved leave status for a period of approximately another 6 months while attempting to regain his health.

III. ARGUMENT

STATUTE OF LIMITATIONS

The Appellant filed this lawsuit on September 22, 2009. Succinctly, argument is made by Counsel for the Respondent that the applicable three year extension limitations bars consideration of any factual allegation occurring prior to September 22, 2006. It is noted that this argument is made while simultaneously arguing facts to support the Motion for Summary Judgment which occurred prior to this date. Based on the holding in Antonius v. King County, 153 Wn.2d 256, 270, 103 P.3d 72 (2004), this is not the law in the State of Washington.

The statute of limitations question in the analogous cause of action of a hostile work environment claim was addressed in Antonius. In Antonius the Court addressed the 2002 United States Supreme Court decision of National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). In Morgan the Supreme Court concluded that hostile work environment claims "are different in kind from discrete acts" and "[t]heir very nature involves repeated conduct." Morgan, 536 U.S. at 115. The Court stated that the "unlawful

employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to some discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts. Morgan, 536 U.S. at 115. In conclusion, the Court explained that "[a] hostile work environment claim is composed of a series of separate acts that collectively constitute "one unlawful employment practice." Morgan, Id. at 117.

Finally, the Court concluded in Antonius that Morgan provided a logical analysis for determining liability under the WLAD for a hostile work environment claim. Antonius, Supra at 270. "The rule of liberal construction and the purposes of the statutes prohibiting sex discrimination in the workplace will be served by adopting Morgan's analysis, permitting suits based on acts that individually may not be actionable but put together constitute part of a unified whole compromising a hostile work environment." Id. at 268.

The Court in Antonius recognized that while RCW 4.16.005 bases the running of statute of limitations on accrual of the cause of action; it does not contain a discovery rule. Id. at 269. Chapter 49.60 RCW does not contain discovery limitations for civil causes of action and does not define accrual for such causes. There is no statutory discovery rule of

accrual that applies to hostile work environment claims. Id.at 269. In the absence of a specific statute, the Washington Courts have defined those cases where a discovery rule of accrual will apply. Id. at 269. As the Court noted, this has not been done in a hostile work environment case and in describing this claim as "collectively... one 'unlawful employment practice.'" The Court in Antonius expressly rejected a discovery rule for triggering the running of the statute of limitations. Id. at 269. As the Court noted, a hostile work environment occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. "Such claims are based on the accumulative effect of individual acts." Antonius, Id. at 270; Morgan, 536 U.S. at 115. Therefore, the Court in Antonius accordingly declined to adopt a discovery rule for hostile work environment claims. In light of the liberal construction of the purposes of RCW 49.60.180, the Court in Antonius affirmed the Court of Appeals and adopted Morgan's analysis for liability on a hostile work environment claim. Id. at 270.

The Court in Antonius, adopted the reasoning of the Morgan decision. Antonius, Supra at 270. The Court stated "[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, Supra at 266. The Court did hold

that the acts must be "part of the same unlawful employment practice." Antonius, Supra at 266; Morgan, 536 U.S. at 122.

The Court ruled that 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." Morgan, 536 U.S. at 120; Antonius, Supra at 271. The acts must have some relationship to each other to constitute part of the same hostile work environment claim, and if there is no relation, or if "for some other reason, such as certain intervening action by the employer" the act is "no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts" as part of one hostile work environment claim. Antonius, Supra at 271.

HOSTILE WORK ENVIRONMENT

Counsel for Respondent argued pursuant to CR 12(c) and the holding in Clarke v. State of Washington Attorney General's Office, 133 Wn.App. 767, 786, 138 P.3d 144 (2009), that the Appellant's claim for a hostile work environment must be dismissed because no act complained of occurred during a period of time when the Appellant was actually in the workplace. CP 6. Following argument, Judge Krese on July 15, 2010,

dismissed the Appellant's hostile work environment claim based on this argument.

The Court in Clarke, without citing to any authority, stated "[b]ut Clarke could not have been subjected to a hostile work environment if she was not at work." Id. at 786. The facts of Clarke are clearly distinguishable from the present circumstances. In Clarke the appellant created a hostile action at work and had to be forcibly removed from the office by law enforcement. The appellant was then assigned to home and ultimately her employment was terminated without her having been reinstated.

In this case the Appellant clearly did not create any hostile work circumstance nor was he forcibly removed by law enforcement. The Appellant made his desire to return to work known to the Respondent by stating this directly to Ms. Keeley. The Appellant failed to return to work and ultimately tendered his resignation in September 2006 only after the Respondent refused to clarify his leave status while simultaneously failing to correct the demonstrated hostile work environment which directly impacted his health. For an entire month and even after receiving his resignation Respondent was trying to place him on a leave that was not acceptable to Appellant because it resulted in automatic termination after 89 days instead of Unrepresented Resolution 6.9 unpaid leave. In essence,

the Respondent created this hostile work environment which forced the Appellant to be absent from work, refused to correct the hostile work environment despite several requests to re-establish the cost free and modest accommodation, and then argues to its advantage that the fact the Appellant was not in the workplace precludes the Appellant from bringing this cause of action. The Respondent cannot be permitted to create a hostile work environment and then use the fact that the environment exists to support its argument.

In addition, the Court noted in Antonius that while federal discrimination cases are not binding, they may be persuasive and their analysis adopted with when they further the purposes and mandates of state law. Id. at 266. Federal case law has clearly rejected a per se determination that absence from the workplace precludes a hostile work environment claim. Greer v. Paulson, 505 F.3d 1306, 1313-1314 (2007). This Court stated, "[w]e join our sister circuits in rejecting a *per se* rule against considering incidents alleged to have occurred while an employee was physically absent from the workplace." Id. at 1314. (Emphasis in original) This Court addressed the Morgan decision outlined above and noted that in this case the Supreme Court recently affirmed that "the phrase 'terms, conditions, or privileges of employment' [of 42 U.S.C. §2000e-2(a)(1)] evinces a congressional intent 'to strike at the entire

spectrum of disparate treatment of men and women' in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." Greer, Supra at 1313. Given this context, the Supreme Court explained that it is appropriate to consider any timely incident, even where there is a significant time gap between that incident and prior allegations, "so long as each act is part of the whole." Morgan, Supra at 118, 114 S.Ct 367. The Court in Greer went on to note that the five courts of appeals that have considered this issue unanimously agreed that employee absence does not bar consideration of work related incidents as part of a hostile environment claim. Id. at 1314. As a result the Federal Court had rejected a per se rule that employee absence precludes a hostile work environment claim. Respectively, this Court should reject a per se rule as well.

The elements of a hostile work environment claim were not argued to or addressed by Judge Krese. Regardless, to establish a hostile work environment claim the Appellant must establish; (1) that the harassment was unwelcome; (2) that the harassment occurred because he is a member of a protected class; (3) the harassment affected the terms and conditions of his employment; and (4) was imputable to his employer. Clarke, Supra at 785.

In this case the harassment present was the refusal of the Respondent to adequately address the hostile work environment created by forcing the Appellant to continue to supervise Ms. Johnston and Ms. Holsteine while simultaneously refusing to permit him to utilize the accommodation which had proven to be effective by allowing the Appellant to lock his door and close the blinds to his office. This simple accommodation, which would cost the Respondent nothing, afforded the Appellant the privacy necessary for him to work in this environment and still supervise his subordinates. As demonstrated by the Appellant's physical health, the refusal to provide this accommodation resulted in his having two psychological breakdowns necessitating him to take significant blocks of time off from work.

The Appellants known health related issues are a disability which place him in a protected class. As stated in Clarke, the conduct constituting the harassment "must be both objectively abusive and subjectively perceived as abusive by the victim." Id. at 787. The objective abuse is manifested by his two psychological breakdowns and failing health. Subjectively, as early as 2004 the Appellant had expressed to Ms. Keeley his perception that the Respondent was refusing to work with him to address adequately his personal health needs. This perception

clearly continued throughout the remaining several year course of his employment with the Respondent.

It is respectfully submitted that even though this was not argued at the trial court level, the four elements necessary to establish a hostile work environment claim our present under the facts and circumstances in this case. The sole basis for Judge Krese's decision to dismiss the hostile work environment claim was her perception as argued that a per se rule existed precluding such an action when the facts and circumstances show that the Appellant was not physically present in the workplace after March 2006. This legal conclusion has been soundly rejected by the Federal Courts and should be rejected by this Court as well.

As outlined above, the hostile work environment was created by the conduct of the Respondent which directly affected the health of the Appellant to the point where he was forced to be absent from work. The Respondent should not then be permitted to argue that because the Appellant was absent from work this precludes him from bringing the hostile work environment claim. To do otherwise is to essentially allow the Respondent to create a hostile work environment, force the absence of the Appellant, and then argue to its advantage that because the Appellant is absent the cause of action cannot be sustained. This is an illogical conclusion which should not be permitted.

CONSTRUCTIVE DISCHARGE

A cause of action for constructive discharge has been recognized in Washington State where it is alleged that an employer has engaged in illegal discrimination or retaliation for protected conduct. Short v. Battle Ground School District, ___ Wn.App. ___, 279 P.3d 902, 912 (2012). To establish constructive discharge a party must establish: (1) that the employer deliberately made the working conditions intolerable for the claimant; (2) that a reasonable person in the claimant's position would be forced to resign; (3) that the claimant resigned solely because of the intolerable conditions; and (4) that the claimant suffered damages. Harbury v. Snow, 106 Wn.App. 666, 677, 31 P.3d 1186 (2001).

A claimant may show conditions are intolerable by demonstrating aggravating circumstances or a continuous pattern of discriminatory treatment. Id. at 677; Allstot v. Edwards, 116 Wn.App. 424, 433, 116 P.3d 696 (2003). It is important to note that; "[w]hether working conditions are intolerable is a question of fact and is not subject to summary judgment unless there is no competent evidence to establish a claim." Harbury, Supra at 677-78; Allstot, Supra at 433.

Deliberate Intolerable Working Conditions

As early as 2003, the Respondent's supervisor, Mr. Jackson, and the Respondent's HR representative, Ms. Keeley, were both fully aware

that the Appellant was incapable of working in close physical proximity to Ms. Johnston and Ms. Holestine. CP 662, 665. He was able to continue to supervise these individuals as long as he had a physical separation between their work location and his own. CP 649. In November 2004, after two psychologically related episodes in 2003 and 2004 required the Appellant to miss work as a result of his close physical interactions with these two individuals the accommodation of physically separating his office from these two individuals was granted. This accommodation was withdrawn in May 2005 based upon the self-interested allegations from Ms. Holestine that the Appellant was masturbating inside his office and viewing pornography. Both of these allegations were fully investigated by Ms. Keeley, law enforcement, and the results of their investigation reported to a full administrative hearing which determined both claims to be baseless. Despite this Mr. Jackson and the administrative hearing panel made the decision to withdraw the accommodation. This forced the Appellant back into close proximity with Ms. Holestine, Ms. Johnston having left employment with the Respondent by that time.

The claim was made that this was for the protection of the Appellant to discourage further allegations, but the clearly predictable effect was to aggravate the Appellant's Bipolar Affective Disorder with the similarly predictable resulting psychiatric impact.

The decision to withdraw this accommodation by Mr. Jackson was deliberate. The result was to create a working environment which was clearly detrimental to the Appellant's health. This in fact resulted in his being required to take medical leave on March 13, 2006, from which he was not able to return. Even after the Appellant once again began to experience physical and psychological difficulties and the Respondents received the letter from Margaret Ann Rose dated January 29, 2006, expressing her outrage; no effort was made to reestablish the requested accommodation.

His psychiatric deterioration was further exacerbated when the Respondent, through the HR Department, continued to demand medical information from the Appellant affirming the medical condition which had existed for years and was more than adequately verified. In fact, as Ms. Goens incorrectly states in her Declaration, she believes a request for disability leave requires documentation from a medical provider and because this was not provided the request was not even forwarded to the Executive. CP 620. This is incorrect because Unrepresented Resolution 6.9 does not require medical documentation.

In fact, the Respondent as clearly stated through the testimony of Ms. Kelley was acting under an unwritten policy directly contrary to the written policy available to employees. Ms. Kelly "wished" that the

Appellant would have asked her what the actual policy was. CP 735. It is not however the responsibility of the employee to ask HR about unwritten policies. The employee has every right to rely upon the written policies which is what the Appellant did.

The actions of the Respondent, through Mr. Jackson, Ms. Kelley, the HR Department and the administrative hearing panel were deliberate. These actions created a working environment which had a significant negative physical impact upon the Appellant and was discriminatory under RCW 49.60.180. Given the psychiatric reaction of the Appellant, the apparent refusal of the Respondents to accommodate his medical needs, made up documentation requirements, the repeated attempts to turn his leave into a method to terminate his employment as well as the admitted refusal on the part of the Respondent through HR to even consistently apply their own written policies, created an intolerable working environment.

Reasonable Person Resign

The Appellant developed a well-documented physical/psychiatric reaction to working in close physical proximity to Ms. Johnston and Ms. Holestine. These two individuals made numerous damaging and false allegations against the Appellant. Because of his Bipolar Affective Disorder the impact upon him was significant. The Respondents

possessed the information to predict the impact the withdrawal of this accommodation would have and deliberately chose to ignore it despite numerous requests for the Appellant to reestablish the accommodation.

Given the psychiatric reaction of the Appellant, the deliberate refusal of the Respondents to grant the simple accommodation of allowing him to lock his interior office door and close his blinds, as well as refusal to allow him unpaid leave pursuant to Unrepresented Resolution 6.9, the Appellant was left with a difficult choice. His choice was to be forced into a leave with mandatory termination when he was unable to return on the 89th day as per the clear and unequivocal language of the Resolution or being terminated for cause because he was absent from work. As a reasonable person he chose to resign his employment.

Sole Reason for Resignation/Damages

Ms. Keeley acknowledged during her deposition she was aware the Appellant desired to return to work. CP 729, line 10. Given the physical and psychological condition of the Appellant, he recognized that future re-employment would be problematic. The Appellant also experienced significant medical expenses resulting from his condition. The Appellant had no employment prospects and in fact has remained unemployed since resigning his position in 2006.

As a result of this termination, the Appellant has experienced significant damages through both the loss of income as well as the loss of health care related benefits.

The Respondent through the testimony of Ms. Kelley and Ms. Wefer-Clinton attempts to support their wrongful position by asserting as a defense the allegation that they never threatened to terminate the Appellant and even under Section 113.2 at the end of the 89 day period this is not their policy to automatically terminate employment. Instead they claim the policy is to pursue an ADA analysis. Perhaps that is true, but the Appellant had every right and in fact prudence would require him to base his course of action not upon some unwritten and unstated policy, but rather upon the unequivocal written policy stated in the Employee Handbook.

FAILURE TO ACCOMMODATE KNOWN DISABILITY

To eliminate discrimination in the workplace, state law requires employers to reasonably accommodate a disabled employee unless the accommodation would be an undue hardship on the employer. Real vs. Food Maker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004). Whether a particular accommodation imposes an undue hardship is a question of fact. Kimbro v. Atlantic Richfield, 889 F.2d 869, 877 (1989). It should be

noted that RCW 49.60.180 places an affirmative obligation upon an employer to come forward with reasonable accommodations even in the absence of a formal request from a handicapped employee. Id. at 877.

Four elements must be established for an employee to prove discrimination based on lack of accommodation: (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. Real, Supra at 145.

Appellant suffers from Bipolar Affective Disorder, depression, anxiety, stress related to his work situation and attention deficit disorder. CP 660, 661, 664, 678, 679, 680, and 690. It was reported to the Respondent that these were "lifetime" and "indefinite" conditions. The medical certification of these conditions has been provided to the Respondent consistently since 2003. Ms. Keeley acknowledged being aware these medical conditions existed and that they were exacerbated by the Appellant's direct contact with Ms. Johnston and Ms. Holestine. CP

721. She further acknowledged she knew these conditions were "indefinite." CP 723. Clearly the first element is established.

Without question the Appellant also possessed the necessary skills to perform the essential functions of this job. As recently as December 31, 2005, the Appellant received a Professional Employee Performance Review from his supervisor, Mr. Jackson, which was fully "Outstanding" in virtually every category. CP 702-08.

In 2004, when the accommodation was granted to the Appellant allowing him to lock his interior office door in Room 304 as well as close his blinds he was provided with the physical separation necessary to accommodate his disabilities and was fully successful in his employment. When this accommodation was withdrawn in May 2005 because of baseless allegations he was still able to successfully perform this job as evidenced by Exhibit 25 (CP 702-08) until the continued physical contact between himself and Ms. Johnston and Ms. Holestine resulted in his having another psychiatric breakdown.

There is no dispute as to the third element of this cause of action. The evidence clearly demonstrates through the testimony of Ms. Keeley that the Respondent was fully aware of the health situation being faced by the Appellant.

The final element requires the employee to demonstrate that the employer failed to adopt measures that were available to the employer and medically necessary to accommodate the disability. The Respondent in fact did accommodate the disability of the Appellant in 2004 when it allowed him to move from office C to office A within Room 304 and permitted him to lock the interior door of office A as well as close the blinds. When this accommodation was permitted the Appellant was able to be successful in his job, provide supervision for his subordinates, and maintain his health.

The Appellant's psychiatric nurse practioner asked that the Appellant be permitted to have an office down the hall from the common area. CP 688. Her recommendation was that this would prove to be sufficient accommodation. Simply allowing the Appellant to close the interior door without at least also closing the blinds was a wholly inadequate accommodation that failed to meet his both his request and his medically demonstrated needs.

The Appellant's difficulties began to reestablish themselves once the Respondent withdrew these accommodations. Mr. Jackson clearly had sufficient information to recognize the physical implications to the Appellant of this decision. The Appellant continued to request the accommodation be re-established, which was denied. CP 681-83.

There can be no serious argument that this accommodation created an undue hardship to the Respondent. This accommodation would have cost the Respondent nothing. From the Respondent's perspective however this accommodation did not address the perception that the resulting transparency of keeping the blinds open was necessary to prevent further allegations of inappropriate misconduct on the part of the Appellant.

In addition to the failure to provide the accommodation of the locked interior door and closed blinds in September 2006, the Respondent failed to provide the simple accommodation under Unrepresented Resolution 6.9 of permitting the Appellant to remain on unpaid leave in an employed status for up to a period of 12 months without the need to provide further medical information.

Argument is made on behalf of the Respondent that the possible accommodation of unpaid disability leave was not forwarded to the Executive because the Appellant failed to provide the requested medical information. This argument ignores Exhibit 26 to the Keeley deposition dated March 29, 2006, within which the Appellant clearly indicated to Ms. Keeley that the requested medical release for Doctor Zold was mailed directly to Dr. Zold on March 28th "to comply with your instructions." CP 709. Ms. Keeley denies knowledge of having received this release, but acknowledges that she may in fact have received it and forgotten this

because she would not have acted on it regardless. CP 727. In addition, a review of the prior certifications provided to the Respondent clearly indicates that the Appellant's Bipolar Affective Disorder and ADD are "indefinite" and "lifetime" conditions. This medical information had already been provided to the Respondent and was in its possession.

Counsel for the Respondent has stated on page 10 of the Amended Motion for Summary Judgment at line 12, "the leave Appellant refers to is not automatically granted, and is subject to review and consideration based on medical information private provided." (Declaration of Karen Goens). This is an incorrect statement of Whatcom County Unrepresented Resolution 6.9 which does not require medical information be provided. The argument of Counsel, with all due respect, simply flies in the face of the Respondent's own policies and is not supported by these policies. Unrepresented Resolution 6.9 was available, but the Respondent after wrongfully failing to follow their own policies and submit a request for leave status pursuant Resolution 113.2 to the Executive for consideration compounded the error by refusing to even consider Unrepresented Resolution 6.9 status.

In reality the Respondent simply made the decision that it was easier for them as an organization to require the Appellant to unlock his office door and keep his blinds open while knowing full well from

historical events that this would negatively impact his health, then to permit the accommodation and suffer the resulting possibility of an allegation of inappropriate conduct.

All four elements of this cause of action are fully established. As outlined in Kimbro, the Respondent as the employer had an affirmative obligation to accommodate the disability of the Appellant which it refused to do. Id. at 878. The Respondent made the decision not to accommodate the Appellant's disability as a direct result of the unsubstantiated allegations made by an individual whose bias against the Appellant was clear. It is respectfully submitted that it was legal error on the part of Judge Kurtz to dismiss this cause of action even under the undisputed facts present.

CONCLUSION

Counsel for the Respondent has argued based on dicta that a per se rule exists in the State of Washington which prevents a claimant from establishing a hostile work environment claim if the claimant is not in the workplace at the time that the acts complained of occurred. As outlined in the memorandum and based on federal case law there is no such per se rule and respectfully Judge Krese committed error by adopting this rule and dismissing the hostile work environment claim.

The elements of a hostile work environment claim are fully established when, in effect, the Respondent created a hostile work environment by forcing the Appellate to supervise two individuals with a known bias against him. This error was compounded when with full knowledge of the physical impact this job requirement would have upon the Appellant, the Respondent chose to ignore these health ramifications and refused to permit the Appellant to utilize a simple cost-effective accommodation which had proven to be effective in the past.

The Trial Court erred by dismissing on summary judgment the constructive discharge component. The Appellant is fully able to demonstrate the negative health ramifications which occurred as a result of the working environment he was forced to perform in and that any reasonable employee face with the health implications would similarly make the decision to resign employment.

Similarly, the Trial Court erred by dismissing the failure to accommodate claim when the Appellant can clearly demonstrate that he suffers from a disability, the existence of which was fully provided to the Respondent, and the Respondent failed to accommodate the health needs of the Appellant even though there was no significant burden to the Respondent.

For the reasons stated above it is respectfully submitted that error has been made on three separate occasions and the Appellants' various causes of action should be reestablished and presented at trial.

DATED this 8th day of December, 2012.

Rodney R. Moody, WSBA #17416
Attorney for Appellant