

FILED
COURT OF APPEALS

JUSTICE PH 3:01

NO. 34431-9-II

W

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

EUGENE WHITEHEAD and BOOTS L. WHITEHEAD,

Appellants,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

ROB MCKENNA
Attorney General

MARK A. ANDERSON
Assistant Attorney General
WSBA #26352
7141 Cleanwater Drive SW
P.O. Box 40126
Olympia, WA 98504-0126
(360) 586-6300

ORIGINAL

pm 10/3/06

TABLE OF CONTENTS

I. NATURE OF THE CASE.....1

II. RESTATEMENT OF THE ISSUES1

III. RESTATEMENT OF THE CASE.....2

 A. Undisputed Background Facts2

 1. Plaintiff Was Trained To Report Sexual Harassment Pursuant To Published Department Policy.....3

 2. Plaintiff Did Not Report Any Sexual Harassment Nor Ask That The Conduct Be Stopped.....4

 a. Alleged Sexual Harassment By Carol Kirk5

 b. Alleged Sexual Harassment By Alleen Witte.....7

 c. Alleged Sexual Harassment By Sherri Wilson7

 B. Procedural History Relevant To This Appeal9

IV. STANDARD OF REVIEW.....9

V. SUMMARY OF ARGUMENT.....10

VI. ARGUMENT11

 A. Appellant's Issues On Appeal Should Be Deemed Waived As His Brief Is Insufficient To Merit Judicial Consideration11

 B. A Whistleblower Retaliation Claim Should Not Be Considered For The First Time On Appeal14

 C. The National Labor Relations Act Claim Was Abandoned Below And Should Not Be Considered on Appeal.....16

D. The Sexual Harassment Hostile Work Environment Claim Fails For Want Of A Prima Facie Case.....	17
1. There Was No Actionable Sexual Harassment By Superintendent Carol Kirk.....	18
a. Ms. Kirk Did Not Subject Plaintiff To Severe And Abusive Conduct That Materially Altered The Terms Or Conditions Of His Employment.....	18
b. Superintendent Kirk's Alleged Incidents Of Sexual Harassment Were Not Motivated By Plaintiff's Gender	22
c. Alleged Harassment By Superintendent Kirk Cannot Be Imputed To The Department.....	24
d. Claims Of Sexual Harassment On Most Alleged Incidents By Superintendent Kirk Are Time- Barred.....	25
2. There Was No Actionable Sexual Harassment By Nurse Supervisor Alleen Witte.....	28
a. Ms. Witte Did Not Subject Plaintiff To Severe And Abusive Conduct That Materially Altered The Terms Or Conditions Of His Employment.....	28
b. Ms. Witte's Alleged Conduct Was Not Shown To Be Motivated By Plaintiff's Sex	29
c. Nurse Supervisor Witte's Alleged Harassment Cannot Be Imputed To The Department.....	31
3. There Was No Actionable Sexual Harassment By Nurse Sherri Wilson	32
a. Ms. Wilson's Alleged Conduct Was Not So Severe And Abusive As To Materially Alter The Terms Or Conditions Of Plaintiff's Employment	32

b. Ms. Wilson's Alleged Harassment Cannot Be Imputed To The Department.....	33
c. Claims On All Alleged Incidents By Ms. Wilson Are Time-Barred	33
VII. CONCLUSION	34

TABLE OF AUTHORITIES

Cases

<u>Adams v. Able Bldg. Supply, Inc.</u> , 114 Wn. App. 291, 57 P.3d 280 (2002).....	passim
<u>Antonius v. King County</u> , 153 Wn.2d 256, 103 P.3d 729 (2004).....	27
<u>Cowiche Canyon Conservancy v. Bosley</u> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	12
<u>Doe v. State Department of Transp.</u> , 85 Wn. App. 143, 931 P.2d 196 (1997).....	22, 24
<u>Douchette v. Bethel School Dist. No. 403</u> , 117 Wn.2d 805, 818 P.2d 1362 (1990).....	25, 26, 34
<u>Faragher v. City of Boca Raton</u> , 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)..	19, 24, 25, 28
<u>Glasgow v. Georgia Pacific Corp.</u> , 103 Wn.2d 401, 693 P.2d 708 (1985).....	18, 19, 24, 31
<u>Herried v. Pierce County Pub. Transp. Benefit Auth. Corp.</u> , 90 Wn. App. 468, 957 P.2d 767 (1998).....	24
<u>Hiatt v. Walker Chevrolet</u> , 120 Wn.2d 57, 837 P.2d 618 (1992).....	11
<u>Hill v. BCTI Income Fund-I</u> , 144 Wn.2d 172, 23 P.3d 440 (2001).....	13
<u>Holland v. City of Tacoma</u> , 90 Wn. App. 533, 954 P.2d 290 (1998).....	12
<u>Huey v. UPS, Inc.</u> , 165 F.3d 1084 (7th Cir. 1999)	13

<u>In re the Detention of Kistenmacher,</u> 134 Wn. App. 72, 138 P.3d 648 (2006).....	12
<u>Independent Towers of Washington v. Washington,</u> 350 F.3d 925 (2003).....	13
<u>Kahn v. Salerno,</u> 90 Wn. App. 110, 951 P.2d 321 (1998).....	18
<u>Keever & Assocs. v. Randall,</u> 129 Wn. App. 733, 119 P.3d 926 (2005).....	12
<u>MacDonald v. Korum Ford,</u> 80 Wn. App. 877, 912 P.2d 1052 (1996).....	passim
<u>Milligan v. Thompson,</u> 90 Wn. App. 586, 953 P.2d 112 (1998).....	26
<u>Nissho-Iwai Corp. v. Kline,</u> 845 F.2d 1300 (5th Cir. 1988).....	13
<u>NLRB v. Natural Gas Util. Dist. Of Hawkins County, Tennessee,</u> 402 U.S. 600, 91 S. Ct. 1746, 29 L. Ed. 2d 206 (1971).....	17
<u>Oliver v. Pacific Northwest Bell Telephone Co.,</u> 106 Wn.2d 675, 724 P.2d 1003 (1986).....	22
<u>Oncale v. Sundowner Offshore Services, Inc.,</u> 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).....	23, 30
<u>Piper v. Department of Labor and Indus.,</u> 120 Wn. App. 886, 86 P.3d 1231 (2004).....	9
<u>Public Utility District No. 1 v. Washington Pub. Power Supply Sys.,</u> 104 Wn.2d 353, 705 P.2d 1195 (1985).....	30
<u>Sangster v. Albertson's Inc.,</u> 99 Wn. App. 156, 991 P.2d 674 (2000).....	18, 22
<u>Speer v. Rand McNally & Co.,</u> 123 F.3d 658 (7th Cir. 1997).....	26

<u>State v. Johnson</u> , 119 Wn.2d 167, 829 P.2d 1082 (1992).....	11, 16
<u>Tyrrell v. Farmers Ins. Co. of Washington</u> , 140 Wn.2d 129, 994 P.2d 833 (2000).....	9
<u>United States v. Dunkel</u> , 927 F.2d 955 (7th Cir. 1991)	14
<u>Washington v. Boeing</u> , 105 Wn. App. 1, 19 P.3d 1041 (2000).....	passim
<u>White v. Johns-Manville Corp.</u> , 103 Wn.2d 344, 693 P.2d 687 (1985).....	26

Statutes

RCW 42.40	14
RCW 42.40.020(8), (a)	15
RCW 49.60	22, 25, 26
RCW 49.60.180(3).....	22
29 U.S.C. § 152(2) National Labor Relations Act (NLRA).....	passim
Labor Management Relations Act	17
Title VII	22

Rules

RAP 2.5(a)	15
RAP 9.12.....	15
RAP 10.3(a)(4).....	2
RAP 10.3(a)(5).....	12

I. NATURE OF THE CASE

Plaintiff/appellant is an employee of the defendant/respondent, Washington State Department of Social and Health Services (Department). Plaintiff filed a complaint in superior court in September 2000, alleging sexual harassment in a previous work assignment by three different women. He also claimed the Department had violated the National Labor Relations Act (NLRA). In January 2006, the trial court granted the Department's motion for summary judgment, and dismissed all of plaintiff's claims. Plaintiff appealed the order granting summary judgment to this Court.

II. RESTATEMENT OF THE ISSUES

1. Has plaintiff waived all of his issues on appeal by failing to assign error to some, and by failing to provide any adequate briefing or argument?

2. Should this Court refuse to consider plaintiff's claim of whistleblower retaliation when: (a) plaintiff never raised the issue in the trial court; and (b) there is no evidence in the record that plaintiff ever filed a whistleblower complaint?

3. Should this Court refuse to consider plaintiff's claim for violation of the NLRA when: (a) plaintiff abandoned that claim in the trial court; (b) he assigns no error to dismissal of the claim; (c) his brief on

appeal fails to address the issue; and (d) by its terms, the NLRA does not apply to the State as an employer?

4. Was plaintiff's sexual harassment hostile work environment claim properly dismissed when: (a) plaintiff failed to show he was subjected to severe and abusive conduct that materially altered the terms and conditions of his employment; (b) plaintiff failed to show the alleged incidents were because of his sex; (c) plaintiff failed to show the alleged harassment should be imputed to his employer because, as he admits, he did not report any of the alleged incidents; and, in any event, (d) claims on most of the alleged incidents of sexual harassment were untimely and barred by the statute of limitations?

III. RESTATEMENT OF THE CASE¹

A. Undisputed Background Facts

Plaintiff is employed as a Social Worker with the Department. During the period 1990 until 2001, he worked at the Francis Haddon Morgan Center (Center), a Department facility in Bremerton. CP at 136,

¹ The Department notes that plaintiff's "Statement of the Case" fails to comply with RAP 10.3(a)(4), in that it consists of only two pages of argumentative assertions, largely unsupported by citations to the record, and a short procedural history. See Appellant's Br. at 9-11. Moreover, the only foundation for the "facts" he asserts are from his own declaration, many of which should be disregarded because they are inadmissible. In the trial court, the Department brought a motion to strike, arguing that a number of "facts" asserted by plaintiff in his self-serving declaration were merely speculative assertions, without foundation, contrary to statements made in his deposition, or inadmissible for other reasons. CP at 261-73.

line 21; 137, lines 5-15. He now works at Rainier School, a Department facility in Buckley. CP at 235.

In his complaint, plaintiff asserted two causes of action: (1) sexual harassment hostile work environment; and (2) violation of the NLRA. CP at 3-6. The hostile work environment claim was based on alleged incidents of sexual harassment by three different women over a period of time while plaintiff worked at the Center. The NLRA claim was based on alleged retaliation for plaintiff's participation in union activities.

1. Plaintiff Was Trained To Report Sexual Harassment Pursuant To Published Department Policy

The Department has a published policy that states sexual harassment is illegal and will not be tolerated. The policy specifies that an employee subjected to unwanted sexual behavior should immediately: (1) inform the harasser that the conduct is unwelcome and must stop; (2) report the behavior to management; and (3) contact the personnel office, and/or the Office for Equal Opportunity. CP at 107; 109-11.

Plaintiff received training on the Department sexual harassment policy in 1992, including what constitutes sexual harassment. CP at 140, lines 4-6; 141, lines 5-8 and 15-19; 142, lines 16-22. He learned that if sexual harassment occurs, it should be reported. CP at 143, lines 14-16.

He learned to whom the report should be made, CP at 143, lines 23-25, and when—as soon as possible. CP at 144, lines 7-11.

Plaintiff admitted in deposition that if a person is sexually harassed, it should be reported as soon as possible. CP at 145, lines 18-24; 147, lines 15-17. He admitted that if someone was harassing him he should make it clear to the person the conduct should stop. CP at 148, lines 16-21. Plaintiff understood that if a supervisor was the harasser, the report should be made up the chain of command. CP at 146, lines 3-9.

2. Plaintiff Did Not Report Any Sexual Harassment Nor Ask That The Conduct Be Stopped

Plaintiff alleged that he was sexually harassed at the Center by Superintendent Carol Kirk, Nurse Supervisor Alleen Witte, and Nurse Sherri Wilson. CP at 149, lines 14-16, 22-23. Plaintiff did not report any of the alleged incidents of sexual harassment to Linda Rolfe, the Regional Manager responsible for the Center. CP at 108. He admitted in deposition he did not report any incidents of sexual harassment to anyone in management. CP at 168, lines 11-25. In this Court, plaintiff again admits he did not make any such reports to management. Appellant's Br. at 7; 9; 16; 19. Nor is there any evidence in the record that plaintiff ever asked any of these women to refrain from conduct he thought was offensive.

a. Alleged Sexual Harassment By Carol Kirk

Carol Kirk became Superintendent at the Center in 1992. CP at 170, lines 15-23. Shortly thereafter, plaintiff attended a meeting at which Superintendent Kirk stood to speak. While she was speaking, plaintiff alleges she stood behind him where he was seated at a table, placed her hands on his shoulders, and began to "massage" his shoulders. CP at 150, line 10; 185, line 9 to 186, line 18. Plaintiff claims the "massage" lasted "at least 15 seconds" then stopped. CP at 186, line 14.

Plaintiff alleged a second incident also occurred in 1992. He claims that while Superintendent Kirk was seated next to him in a meeting where others were present, she placed her hand on his hand or forearm and rubbed. CP at 150, lines 8-20; 187, line 19 to 188, line 1.

The third and final incident alleged by plaintiff involving Superintendent Kirk occurred in 2000. As she walked out of a room, plaintiff claims Superintendent Kirk forcefully bumped his shoulder as she walked past. CP at 150, line 25 to 151, line 14; 175, line 23 to 176, line 5; 181, lines 15-17. The contact lasted for "probably a second." CP at 181, line 19 to 182, line 25. Plaintiff admitted that Superintendent Kirk did not touch him with her hands, CP at 183, line 25 to 184, line 1, did not reach out to grab any private parts of his body, did not rub her groin area against

him, nor did she rub her breasts against his chest or "anything of that nature." CP at 183, lines 15-24.

Plaintiff did not recall Superintendent Kirk ever making sexual comments or suggestive statements to him.² CP at 174, lines 20-23; 190, lines 10-13. Plaintiff admits that Superintendent Kirk is a "touchy-feely" person and that she touched females in the same way she touched males. CP at 174, lines 4-6.

Plaintiff did not say anything to Superintendent Kirk about her touching being unwanted. CP at 151, lines 13-14; 170, lines 2-8; 176, lines 4-5; 177, lines 16-17; 178, lines 3-6. He could have reported the alleged harassment by Superintendent Kirk to somebody higher in management. CP at 169, lines 1-3. Plaintiff knew Linda Rolfe, the individual with managerial oversight of Superintendent Kirk, but he did not tell her. CP at 242 ¶ 8. Plaintiff did not say anything to anybody in management. CP at 170, lines 2-8; 178, lines 7-14. Plaintiff admitted he failed to follow the reporting protocol specified in the Department's sexual harassment policy on which he had been trained. CP at 168, line 10 to 169, line 3.

² Plaintiff stated he has a good memory and an excellent capacity to remember details, even in stressful situations. CP at 135, lines 2-14.

b. Alleged Sexual Harassment By Alleen Witte

Plaintiff alleged that the nursing supervisor, Alleen Witte, began asking him out to lunch and making sexual statements shortly after she began working at the Center. CP at 152, lines 2-23. She began working there in February 1996. CP at 190, lines 14-22. Plaintiff was unable to recall specifics of the alleged harassment by Ms. Witte, other than she stated she wanted to go to lunch, she wanted to ride in his car, and that he looked nice. CP at 152, line 11 to 155, line 14. Ms. Witte also made comments to plaintiff about two other black males she thought were attractive. CP at 139, lines 14-16. Ms. Witte made these comments to other females, as well as to plaintiff. CP at 191, line 17 to 192, line 10; 193, lines 2-8.

Plaintiff did not tell Ms. Witte he was uncomfortable with her statements or that they were unwelcome. CP at 152, line 16; 155, lines 15-20. Rather, his response was "just to ignore." CP at 154, lines 4-7, 13-17. He did not tell her to stop. CP at 156, lines 22-23; 157, lines 17-19. Plaintiff never told management he was being harassed by Ms. Witte. CP at 158, line 21 to 159, line 1; 200, line 24 to 201, line 3.

c. Alleged Sexual Harassment By Sherri Wilson

Plaintiff also alleged he was harassed by Sherri Wilson, a nurse at the Center. Although plaintiff claimed that Ms. Wilson "constantly"

harassed him, CP at 159, lines 2-10, in deposition he could only recall two such incidents. First, plaintiff claimed Ms. Wilson asked him to go to a local hotel and get a room for lunch. CP at 159, line 11 to 160, line 17. This occurred within a year after Ms. Wilson began working at the Center, CP at 160, line 24 to 161, line 5, which was in January 1996. CP at 105. Second, plaintiff alleged that he overheard Ms. Wilson talking to others about sex with her husband and about pornographic television shows. CP at 164, lines 19-25. This also allegedly occurred within a year after Ms. Wilson began working at the Center, i.e., sometime in 1996. CP at 201, lines 4-22.

As with the alleged harassment by Superintendent Kirk and Ms. Witte, plaintiff did not report the alleged harassment by Ms. Wilson. CP at 159, lines 5-10. In explaining why, plaintiff said "I didn't want to make a mountain out of a mole hill." CP at 159, lines 9-10. Rather, he just ignored it and kept his mind on his job. CP at 162, lines 5-7. He did not tell Ms. Wilson that her comments were offensive or inappropriate, nor did he tell her that she should refrain from making such comments. CP at 161, lines 9-21; 162, lines 20-21; 167, lines 3-5. He did not tell anybody in management of the alleged harassment. CP at 163, line 20; 163, line 25 to 164, line 13; 166, lines 11-17; 167, lines 6-10.

B. Procedural History Relevant To This Appeal

Plaintiff filed his complaint on September 28, 2000. Following discovery, the Department filed a motion for summary judgment. CP at 103-202; 203-04. The Department moved to strike inadmissible statements in plaintiff's declaration in opposition to summary judgment. CP at 261-73.

On January 20, 2006, after hearing oral argument on the Department's summary judgment motion, the trial court entered an order granting summary judgment and dismissed all of plaintiff's claims. CP at 289-90. In its oral ruling on the motion, the court noted that plaintiff's brief (CP at 212-34) did not argue the claimed violation of the NLRA, and the statute, as a matter of law, did not apply to the State. VRP at 17-18.

Plaintiff timely filed this appeal on February 15, 2006. CP at 291.

IV. STANDARD OF REVIEW

Review of an order granting summary judgment is de novo, with the appellate court engaging in the same inquiry under CR 56 as the trial court. Tyrrell v. Farmers Ins. Co. of Washington, 140 Wn.2d 129, 132-33, 994 P.2d 833 (2000). The trial court can be affirmed on any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. Piper v. Department of Labor and Indus., 120 Wn. App. 886, 890, 86 P.3d 1231 (2004).

V. SUMMARY OF ARGUMENT

Plaintiff's complaint alleged only two causes of action: (1) sexual harassment hostile work environment, and (2) violation of the National Labor Relations Act. Both of these claims were properly dismissed by the trial court on Defendant's motion for summary judgment. Defendant respectfully requests that this Court affirm the trial court's decision to grant summary judgment for the reasons set forth below.

Plaintiff's opening brief to this Court is insufficient to merit judicial consideration; it lacks sufficient reference to the record, and any reasoned argument. Plaintiff's issues on appeal should therefore be deemed waived.

This court should refuse to consider plaintiff's claim of whistleblower retaliation. Plaintiff never raised this issue before the trial court, and there is no evidence in the record that plaintiff ever filed a whistleblower complaint.

This court should refuse to consider plaintiff's claim for violation of the NLRA. Plaintiff abandoned that claim in the trial court. He assigns no error to the trial court's decision to dismiss that claim, and his brief to this Court provides no legal authority in support of the claim. Moreover, as a matter of law, plaintiff's claim fails because the NLRA does not apply to the State of Washington as an employer.

Plaintiff's claim of sexual harassment hostile work environment fails. First, plaintiff fails to establish a prima facie case of sexual harassment. Plaintiff fails to show: (a) that he was subjected to severe and abusive conduct that materially altered the terms and conditions of his employment; (b) that the alleged incidents were because of his sex; and (c) that the alleged harassment could be imputed to the employer. Second, most of the incidents of sexual harassment alleged by plaintiff are time-barred under the statute of limitations.

The trial court properly granted summary judgment. That decision should be affirmed.

VI. ARGUMENT

A. **Appellant's Issues On Appeal Should Be Deemed Waived As His Brief Is Insufficient To Merit Judicial Consideration**

Plaintiff's opening brief lacks relevant references to the record, and lacks any reasoned argument sufficient to merit judicial consideration. He should therefore be deemed to have waived the issues raised in this appeal.

This Court may refuse to consider an argument that is not adequate to properly decide the issue. Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 837 P.2d 618 (1992). A court should not review an issue raised in passing or unsupported by authority. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Nor should an assignment of error be considered that is

not supported by argument that includes citation to authority and reference to the record. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

This Court recently declined to consider a party's arguments that were not developed in his brief, and that were not supported with legal authority. In re the Detention of Kistenmacher, 134 Wn. App. 72, 82-83, 138 P.3d 648 (2006) (citing Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration), review denied, 136 Wn.2d 1015, 966 P.2d 1278 (1998); also citing RAP 10.3(a)(5) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant part of the record)). See also Keever & Assocs. v. Randall, 129 Wn. App. 733, 741, 119 P.3d 926 (2005) (when issue is not argued, briefed, or supported by citation to the record or authority, it is generally waived).

Here, plaintiff mentions his NLRA claim in his statement of facts, but makes no argument that dismissal of the claim was error. Moreover, his brief gives only passing treatment to the subject of sexual discrimination, with the entire "argument" being less than one page. See Appellant's Br. at 12-13. There is no reference to the record, and no legal

analysis of the facts. The same is true of his treatment of hostile work environment. See Appellant's Br. at 17-21.

Plaintiff's brief is replete with conclusory and argumentative assertions. He would leave this Court the task of culling through the record to find evidence to support his position. The only foundation for the scant "facts" he does allege is his own self-serving declaration, with its many inadmissible statements. See CP at 261-73 (motion to strike).

In responding to a summary judgment motion, it remains a plaintiff's burden to designate specific facts in the record showing there is a genuine issue for trial. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 185-86, 23 P.3d 440 (2001). On appeal, the Fifth Circuit has held that parties must designate specific facts and their location in the record. Nissho-Iwai Corp. v. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988). The Seventh Circuit has held that judges need not paw over the files without assistance from the parties. Huey v. UPS, Inc., 165 F.3d 1084, 1085 (7th Cir. 1999). The same is true in Washington appellate courts.

The Ninth Circuit has admonished that it cannot "manufacture arguments for an appellant" and will not consider claims that are not actually argued in appellant's opening brief. Independent Towers of Washington v. Washington, 350 F.3d 925, 929 (2003). In Independent Towers, beyond conclusory assertions in appellant's brief, there was little

if any analysis to assist the court. Id. Expressing its displeasure with the brief, the court said "[j]udges are not like pigs, hunting for truffles buried in briefs." Id. (citing United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991)). The Ninth Circuit considered appellant's brief to be akin to the "spaghetti approach" to litigation, noting that appellant "heaved the entire contents of a pot against the wall in hopes that something would stick." Id. The court declined to "sort through the noodles" by conducting its own search to find support for appellant's claims. Id. at 929-30.

Our adversarial system relies on advocates to inform the discussion of issues before the court. This Court should not assist plaintiff in advocating his case, where his brief provides no basis to give judicial consideration to the issues ostensibly raised on this appeal. The summary judgment of dismissal should be affirmed outright.

B. A Whistleblower Retaliation Claim Should Not Be Considered For The First Time On Appeal

This Court should refuse to consider plaintiff's claim of whistleblower retaliation. In his opening brief, plaintiff asserts for the first time that he was retaliated against because he was a whistleblower under RCW 42.40. Appellant's Br. at 13-16. He did not raise an issue of whistleblower retaliation in the trial court, see CP at 3-6 (Complaint), and there is no evidence in the record that plaintiff even was a whistleblower.

"The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. Since plaintiff never raised the issue of whistleblower retaliation in the trial court, this Court should decline to consider the issue.

Even if plaintiff had raised a whistleblower retaliation claim below, the claim would fail because there is no evidence in the record that he was a whistleblower. The term "whistleblower" is statutorily defined as "an employee who in good faith reports alleged improper governmental action to the auditor" RCW 42.40.020(8) (emphasis added). The term "whistleblower" also includes an employee who is believed to have reported alleged governmental misconduct to the auditor even if, in fact, the employee has not done so. RCW 42.40.020(8)(a). Here, plaintiff provides no factual support for any assertion that he ever filed a whistleblower complaint with the state auditor, or that it was believed he filed such a complaint, or that he was retaliated against because he was thus a "whistleblower" under the statute.

The whistleblower retaliation claim before this Court is patently frivolous, and should not even be considered.

C. The National Labor Relations Act Claim Was Abandoned Below And Should Not Be Considered on Appeal

Plaintiff abandoned his claim for violation of the NLRA before the trial court. This Court should refuse to revisit the issue.

In opposing summary judgment, plaintiff offered no authority or argument in support of his NLRA claim. See CP at 212-34 (memorandum opposing summary judgment). In oral argument, he again failed to offer any reason why his NLRA claim should survive summary judgment. VRP at 9-13. In its oral ruling, the trial court noted plaintiff's failure to address the NLRA claim. VRP at 18.

In this Court, plaintiff assigns no error to dismissal of the NLRA claim. Appellant's Br. at 7-8. Plaintiff's opening brief mentions the claim, Appellant's Br. at 9, but offers no argument as to why dismissal of the claim might have been improper.

Because plaintiff abandoned his NLRA claim before the trial court, did not assign error to dismissal of the claim, and did not provide this Court with any argument or legal authority in support of the claim, the NLRA claim should not be considered on appeal. A court will not review an issue unsupported by authority. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

Even if this Court were to consider plaintiff's claim for violation of the NLRA, that claim fails as a matter of law. The NLRA does not apply to the State of Washington as an employer. Section 2(2) of the NLRA, as amended by the Labor Management Relations Act, provides that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . ." 29 U.S.C. § 152(2). The United States Supreme Court and the National Labor Relations Board have long recognized that state governments are exempted from the NLRA. See, e.g., NLRB v. Natural Gas Util. Dist. Of Hawkins County, Tennessee, 402 U.S. 600, 604-05, 91 S. Ct. 1746, 29 L. Ed. 2d 206 (1971).

Plaintiff's employer, the Department of Social and Health Services, is an agency of the State of Washington. As such, it is not subject to claims brought under the NLRA. This Court should affirm the trial court's dismissal of plaintiff's claim for violation of the NLRA.

D. The Sexual Harassment Hostile Work Environment Claim Fails For Want Of A Prima Facie Case

To establish a sexual harassment hostile work environment claim, an employee must demonstrate:

- (1) offensive and unwelcome conduct;

(2) that was serious enough to affect the terms or conditions of employment;

(3) that occurred because of the victim's sex; and

(4) that can be imputed to the employer.

Glasgow v. Georgia Pacific Corp., 103 Wn.2d 401, 407, 693 P.2d 708 (1985); Adams v. Able Bldg. Supply, Inc., 114 Wn. App. 291, 57 P.3d 280 (2002). A failure to provide competent evidence of any one of the mandatory elements of a prima facie case is fatal to a plaintiff on summary judgment in a workplace discrimination suit. Sangster v. Albertson's Inc., 99 Wn. App. 156, 160, 991 P.2d 674 (2000). Sexual harassment in the form of a hostile work environment is a form of sex discrimination. Kahn v. Salerno, 90 Wn. App. 110, 117, 951 P.2d 321 (1998).

1. There Was No Actionable Sexual Harassment By Superintendent Carol Kirk

Plaintiff's assertions regarding Superintendent Kirk do not satisfy the second, third, or fourth elements of a prima facie case of sexual harassment hostile work environment.

a. Ms. Kirk Did Not Subject Plaintiff To Severe And Abusive Conduct That Materially Altered The Terms Or Conditions Of His Employment

To be actionable, harassment must be so pervasive that it alters the conditions of employment and creates an abusive working environment, based on the totality of the circumstances. Glasgow,

103 Wn.2d at 406-07. Casual, isolated, or trivial manifestations of a discriminatory, harassing, or hostile environment do not affect the terms or conditions of employment to a degree sufficient to violate the law. Id. The alleged conduct must be: (1) frequent; (2) severe; (3) humiliating or physically threatening (not simply offensive); and, it must (4) unreasonably interfere with the employee's work performance. Washington v. Boeing, 105 Wn. App. 1, 10-11, 19 P.3d 1041 (2000). In other words, the alleged conduct must be extreme - embarrassment and anguish are not actionable. Adams, 114 Wn. App. at 297-98. The laws against discrimination, including harassment, are not codes of "general civility." Id.; Faragher v. City of Boca Raton, 524 U.S. 775, 786-89, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). Moreover, a plaintiff must prove the work environment was abusive from both an objective and subjective standpoint; not only must the employee perceive the atmosphere as abusive, but a reasonable person would also have to perceive it as such. MacDonald v. Korum Ford, 80 Wn. App. 877, 885, 912 P.2d 1052 (1996).

Washington cases provide ample illustration of the nature of conduct that is not sufficiently serious to affect the terms and conditions of employment. In Washington, plaintiff alleged she was subjected to a hostile work environment because of sex and race. Her male co-workers

and supervisors called her "dear," "sweet pea," and even "brillo-head." After she objected to a "pin up" calendar, others teased that she might file a complaint, and a male co-worker refused to assist her. 105 Wn. App. at 10-11. The trial court granted summary judgment for the employer, and the Court of Appeals affirmed. The court held the described events did not unreasonably interfere with plaintiff's work performance and were not sufficiently pervasive and workplace-altering to be actionable harassment. Id. at 9-13.

In MacDonald, this Court provided a further illustration of the nature of conduct that is not legally sufficient to affect the terms and conditions of employment. In that case, the female plaintiff alleged that a male manager had a habit of coming up behind her and placing his hand on her back, that the manager positioned himself in the office hallway so plaintiff would have to brush up against him when she passed, and he stated that "with [her] tits [she] should be able to . . . sell anything or everyone." 80 Wn. App. at 886. The manager commented on the size of plaintiff's breasts and stroked his fly while speaking to her. Id. Plaintiff claimed that another manager grabbed and kissed her, and then fired her for rebuffing him. Id. at 886, 888. In analyzing the managers' conduct, this Court held that, although inappropriate, the behavior was "mild in comparison" to acts of harassment that courts have found to create a

hostile environment. Id. at 887. In fact, this Court held that the trial court properly sanctioned the plaintiff's attorney for continuing to pursue the hostile environment claim. Id. at 888.

Here, the alleged harassment by Superintendent Kirk was not even remotely serious enough to affect the terms or conditions of plaintiff's employment. Plaintiff complains of only three incidents involving Superintendent Kirk: (1) in 1992, she "massaged" his shoulders for about fifteen seconds at a meeting where others were present; (2) on another occasion in 1992, she touched his hand in a meeting while others were present; and (3) in 2000, she bumped into him while exiting a room. Superintendent Kirk never made any sexual comments or suggestive statements to plaintiff. CP at 190, lines 10-13.

The incidents alleged by plaintiff are not sufficiently frequent or severe to constitute actionable harassment. Thus, plaintiff fails to meet the threshold requirement of a hostile work environment claim. Washington, 105 Wn. App. at 10-11. While he may have been uncomfortable with the incidents involving Superintendent Kirk, her alleged conduct was not extreme. As held in Adams, 114 Wn. App. at 297-98, embarrassment is not actionable. Plaintiff cannot establish that a reasonable person would consider the behavior of Superintendent Kirk to be abusive, as required by MacDonald, 80 Wn. App. at 885.

b. Superintendent Kirk's Alleged Incidents Of Sexual Harassment Were Not Motivated By Plaintiff's Gender

Sexual harassment occurs "because of sex" for purposes of RCW 49.60.180(3) if the sex of the person subjected to harassment motivated the harassing conduct. Doe v. State Department of Transp., 85 Wn. App. 143, 148, 931 P.2d 196 (1997). The statute does not proscribe all behavior which uses gender or sex as a weapon, but only behavior that occurs "because of" the sex of the individual toward whom it is directed. Id. at 149. The burden is on the plaintiff to produce competent evidence that his sex was the motivating factor for the harassing conduct. Id. To prove that conduct was directed toward a plaintiff because of his gender, he must prove that he would not have been singled out and caused to suffer the harassment had he been female. Sangster, 99 Wn. App. at 161 (citing Doe, 85 Wn. App. at 148).

Because RCW 49.60 substantially parallels Title VII, federal cases interpreting Title VII are persuasive authority for the construction of RCW 49.60. Oliver v. Pacific Northwest Bell Telephone Co., 106 Wn.2d 675, 678, 724 P.2d 1003 (1986). The United States Supreme Court has noted that Title VII does not prohibit all verbal or physical harassment in the workplace; rather, it is directed only at discrimination that occurs

"because of sex." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).

Boorish, rude, obnoxious, and even threatening conduct in the workplace is not actionable unless it is motivated by plaintiff's protected status. Adams, 114 Wn. App. 291. The dispositive question is whether plaintiff would have been subjected to harassment if he had been a woman. Id. at 298. It is insufficient to show that the employee suffered embarrassment, humiliation, or mental anguish from non-discriminatory harassment. Id.

Here, the alleged incidents had nothing to do with plaintiff's gender. Plaintiff admitted that Superintendent Kirk never made suggestive statements to him. CP at 190, lines 10-13. He also admitted that Superintendent Kirk is a "touchy-feely" person and that he had observed her touch others in public meetings. CP at 173, line 16 to 174, line 6. Significantly, plaintiff also admitted that Superintendent Kirk touched females in the same way she touched other males. CP at 174, lines 4-6.

Each of the incidents occurred in a room where others were present. Plaintiff admitted that, when he had meetings in Superintendent Kirk's office, she never came out from behind her desk and touched him. CP at 189, line 7 to 190, line 1. Plaintiff failed to produce any competent evidence that his gender was the motivating factor for the allegedly

harassing conduct, as required by Doe, 85 Wn. App. at 149. Indeed, given plaintiff's admission that Superintendent Kirk touched females in the same way she touched other males, plaintiff cannot prove that his sex was the motivating factor for any of her alleged conduct.

c. Alleged Harassment By Superintendent Kirk Cannot Be Imputed To The Department

Discrimination may be imputed to the employer only if the employer: (a) authorized, knew, or should have known of the harassment; and (b) failed to take reasonably prompt and adequate corrective action. Herried v. Pierce County Pub. Transp. Benefit Auth. Corp., 90 Wn. App. 468, 474, 957 P.2d 767 (1998) (quoting Glasgow, 103 Wn.2d at 407). This may be shown by proving: (a) complaints were made to the employer through higher managerial or supervisory personnel, or such pervasiveness of sexual harassment at the work place as to create an inference of the employer's knowledge or constructive knowledge of it; and (b) the employer's remedial action was not reasonably calculated to end the harassment. Glasgow, 103 Wn.2d at 407.

Moreover, in cases where a manager is alleged to have participated in harassment, an employer with a published sexual harassment policy and complaint procedure has an affirmative defense if the employee fails to use that complaint process. Faragher, 524 U.S. 775. The defense is

comprised of two elements: (1) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of employer provided preventative or corrective opportunities, or otherwise avoid harm. Id.

Here, it is undisputed the Department had a published sexual harassment policy. CP at 109-11. It is also undisputed the Department provided plaintiff with training on that policy, e.g., CP at 140, lines 4-6, plaintiff knew he was expected to report any sexual harassment, e.g., CP at 143, lines 14-16, and he understood that if a supervisor committed the harassment, the report should be made up the chain of command. CP at 146, lines 3-9. Yet, plaintiff did not report Superintendent Kirk's alleged sexual harassment to anyone in management, CP at 108; 168, lines 11-14, 23-25; 178, lines 7-14, although he admitted that he could have done so. CP at 169, lines 1-3. Because of plaintiff's unjustified failure to take advantage of the protections offered to him by failing to report any of the claimed harassment, liability should not be imputed to the Department.

d. Claims Of Sexual Harassment On Most Alleged Incidents By Superintendent Kirk Are Time-Barred

The statute of limitations for discrimination actions based on RCW 49.60 is three years. Douchette v. Bethel School Dist. No. 403, 117 Wn.2d 805, 809-10, 818 P.2d 1362 (1990); Milligan v. Thompson,

90 Wn. App. 586, 591, 953 P.2d 112 (1998). An action based on a tort or personal injury, including discrimination, accrues when the alleged tortious act occurs. White v. Johns-Manville Corp., 103 Wn.2d 344, 348, 693 P.2d 687 (1985). Under RCW 49.60, the limitations period begins to run when a discriminatory act occurs, not when alleged consequences manifest themselves. Douchette, 117 Wn.2d at 809-10.

A plaintiff generally must assert his rights and commence suit within the applicable limitations period, which begins to run when a plaintiff becomes aware of conduct that should have alerted plaintiff to assert his rights. Milligan, 90 Wn. App. at 592-93. A plaintiff aware that he has been harmed by wrongful treatment "may not sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one." Speer v. Rand McNally & Co., 123 F.3d 658, 664 (7th Cir. 1997).

Two of the three incidents of alleged sexual harassment by Carol Kirk occurred shortly after she became Superintendent in 1992. CP at 150, lines 3-23; 170, line 21 to 171, line 1; 171, lines 12-14 and 22-24; 172, lines 4-9. However, plaintiff did not file suit until eight years later in September 2000. CP at 3. Those claims against Superintendent Kirk are time-barred and were properly dismissed.

Plaintiff attempts to overcome avoid the statute of limitations by asserting the continuing violation doctrine. Appellant's Br. at 20. However, the continuing violation doctrine has been rejected by our Supreme Court. Antonius v. King County, 153 Wn.2d 256, 103 P.3d 729 (2004). There the Court held that the determinative factor is whether the acts about which a plaintiff complains are part of the same actionable hostile work environment practice, and that the acts must have some relationship to each other to constitute part of the same hostile work environment claim. Id. at 271. Absent this showing, there can be no recovery for acts that occurred outside the statute of limitations. Id.

Here, the two incidents occurring in 1992 were discrete events. The single alleged incident in 2000 is so dissimilar and so far removed in time from the alleged events of 1992 that it cannot properly be considered as part of one continuous hostile work environment spanning the period from 1992 until 2000. The only incident alleged by plaintiff within the limitations period involving Superintendent Kirk is the alleged bump as she walked out of a room. That one "incident" is insufficiently connected to any alleged touching in 1992 to allow the three incidents to be considered together as one continuous hostile work environment.

2. There Was No Actionable Sexual Harassment By Nurse Supervisor Alleen Witte

Plaintiff's assertions regarding Nurse Supervisor Alleen Witte do not satisfy the second, third, or fourth elements of a prima facie case of sexual harassment hostile work environment.

a. Ms. Witte Did Not Subject Plaintiff To Severe And Abusive Conduct That Materially Altered The Terms Or Conditions Of His Employment

Plaintiff cannot establish that the alleged harassment by Nurse Supervisor Alleen Witte was serious enough to affect the terms or conditions of his employment. As noted above, harassing conduct must be extreme in order to alter the terms or conditions of employment. Adams, 114 Wn. App. at 297-98; Faragher, 524 U.S. at 786-89.

Here, plaintiff alleges Ms. Witte said she wanted to go to lunch with him, she wanted to ride in his car, and she said he looked nice. CP at 152, line 11 to 155, line 14. Plaintiff also alleges she made comments about two other black males she thought were attractive. CP at 191, lines 14-16. There are no allegations of inappropriate touching by Ms. Witte. This conduct was not sufficiently severe, humiliating, or threatening to show a hostile work environment. See Washington, 105 Wn. App. at 10-11; MacDonald, 80 Wn. App. at 887.

Plaintiff was reluctant to say he was even embarrassed by the actions of Ms. Witte. CP at 198, lines 8-13. While he may have been uncomfortable with her alleged statements, none of her behavior was extreme. As the court held in Adams, conduct must be extreme; embarrassment and anguish are not actionable. 114 Wn. App. at 297-98.

Plaintiff was able to "keep his mind on his job." CP at 156, lines 19-21. His response to Ms. Witte's alleged harassment was just to ignore her behavior. CP at 154, line 5; 197, lines 22-25. Plaintiff made no effort to avoid Ms. Witte, CP at 198, line 23 to 199, line 22, and when business needs required, he was able to interact with her. CP at 199, lines 19-22.

The allegations against Ms. Witte are far less compelling than even those found insufficient in Washington and MacDonald. Summary judgment dismissing the claim of sexual harassment hostile work environment based on Ms. Witte's conduct should be affirmed.

b. Ms. Witte's Alleged Conduct Was Not Shown To Be Motivated By Plaintiff's Sex

The dispositive question regarding the "because of sex" element is whether plaintiff would have been subjected to the harassment if he had been a woman. Adams, 114 Wn. App. at 298. "We have never held that workplace harassment . . . is automatically discrimination because of sex

merely because the words used have sexual content or connotations." Oncale, 523 U.S. at 80.

Plaintiff admits Ms. Witte asked other people, both males and females, to go places with her, just as she asked him to go to lunch. CP at 194, lines 9-14. Plaintiff admits he took other coworkers, both male and female, for rides in his sports car. CP 195, line 5 to 196, line 9. And he admits Ms. Witte made statements to others, including females, about her attraction to black men, and complimented the way they dressed and looked. CP at 191, line 17 to 192, line 10; 193, lines 2-8.

Other than his own conclusory and conjectural assertions, plaintiff offered no evidence to show Ms. Witte's statements were motivated by his gender. He seems to suggest her words were tinged with a connotation he found to be offensive or sexual. On the other hand, plaintiff also characterized Ms. Witte's comments as complimentary. CP at 197, lines 3-4. In any event, sexual content or connotation alone does not establish discrimination. Oncale, 523 U.S. at 80. Plaintiff's pure conjecture that Ms. Witte discriminated against him "because of his sex" was not sufficient to avoid summary judgment. See Public Utility District No. 1 v. Washington Pub. Power Supply Sys., 104 Wn.2d 353, 360-61, 705 P.2d 1195 (1985) (a party may not avoid summary judgment with conjecture).

**c. Nurse Supervisor Witte's Alleged Harassment
Cannot Be Imputed To The Department**

As a nursing supervisor, Ms. Witte held no supervisory authority over plaintiff, a social worker; she was merely a coworker. Her alleged harassment of plaintiff cannot be imputed to the Department without first showing that her conduct was so pervasive and of such character as to create an inference of actual or constructive knowledge of sexual harassment on her part, or that plaintiff complained through managerial or supervisory personnel. Glasgow, 103 Wn.2d at 407.

As demonstrated in the argument above, Ms. Witte's conduct falls far short of anything that might give rise to the Department's actual or constructive knowledge of sexual harassment on her part. And plaintiff admitted in deposition that he never complained to anybody in management about being harassed by Ms. Witte.

Q. Did you at any point in time during your employment with the Frances Haddon Morgan Center ever indicate to anybody in management for the Frances Haddon Morgan Center or the Department of Social and Health Services, that you were being harassed by Alleen Witte?

A. No.

CP at 158, line 21 to 159, line 1.

Plaintiff failed to make a prima facie case of sexual harassment hostile work environment based on the alleged conduct of Ms. Witte. Summary judgment in favor of the Department should be affirmed.

3. There Was No Actionable Sexual Harassment By Nurse Sherri Wilson

Plaintiff did not establish a prima face case of sexual harassment by nurse Sherri Wilson. He recalls only two specific incidents of alleged harassment by Ms. Wilson. He claims that sometime in 1996 she asked him to go to a local hotel and get a room for lunch. CP at 159, line 11 to 160, line 17. Also in 1996, he claims he overheard her talking to others about pornographic television shows and about sex with her husband. CP at 164, lines 19-25; 201, lines 20-22.

a. Ms. Wilson's Alleged Conduct Was Not So Severe And Abusive As To Materially Alter The Terms Or Conditions Of Plaintiff's Employment

Neither alleged incident involving Ms. Wilson materially altered the terms or conditions of plaintiff's employment. In an interview with Superintendent Kirk on June 25, 1998, plaintiff admitted that "Sherri [Wilson] has never been offensive towards me." CP at 274-76. He admitted "she's never done anything harassing towards me." CP at 274-76. Ms. Kirk asked "No jokes? Comments? Remarks? Behavior? Suggestions? Suggestive moves?" Plaintiff answered, "No, Sherri's always been pleasant to work with." CP at 274-76.

Moreover, plaintiff admitted he didn't report what he now calls sexual harassment by Ms. Wilson because he "didn't want to make a mountain out of a mole hill." CP at 164, lines 19-25; 201, lines 20-22. He was able to "ignore it" and "turn it off." CP at 164, lines 17-18. Her statements went "in one ear and out the other." CP at 159, lines 7-10.

While plaintiff argues that the sexual harassment by Ms. Wilson was "constant" he has failed to establish a prima face case of sexual harassment hostile work environment by showing any material affect on the terms or conditions of his employment occasioned by her conduct.

b. Ms. Wilson's Alleged Harassment Cannot Be Imputed To The Department

Ms. Wilson's alleged harassment cannot be imputed to the Department. As a nurse, she was a coworker, with no supervisory authority over plaintiff. He did not tell anyone in management about her alleged sexual harassment. CP at 163, line 20; 166, lines 11-17.

Plaintiff failed to make a prima facie case of sexual harassment by Ms. Wilson. Summary judgment dismissing the hostile work environment claim based on her alleged conduct should be affirmed.

c. Claims On All Alleged Incidents By Ms. Wilson Are Time-Barred

The only two incidents involving Ms. Wilson allegedly occurred sometime in 1996. However, plaintiff did not commence this action until

September 2000, CP at 1-6, after the three year statute of limitations had run. See Douchette, 117 Wn.2d at 809-10. Even if not for failure to make a prima facie case, dismissal of the hostile work environment claim based on her alleged misconduct should be affirmed as time-barred.

VII. CONCLUSION

This Court should affirm the summary judgment dismissing all of plaintiff's claims below. The whistleblower retaliation claim, raised for the first time on appeal, should be disregarded.

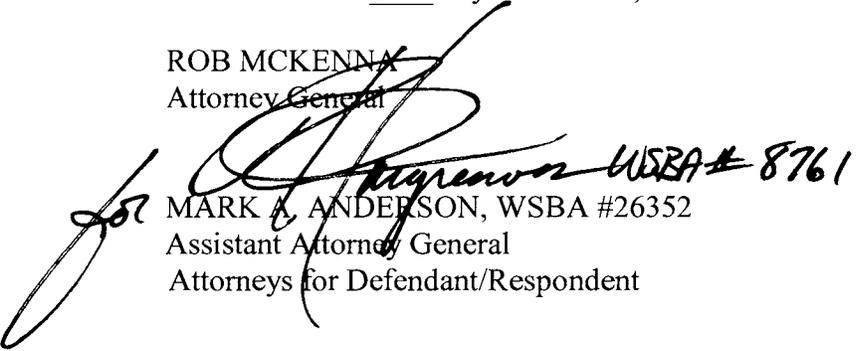
Dismissal of plaintiff's claim for violation of the National Labor Relations Act was proper as a matter of law, as by its terms the statute does not apply to the State of Washington as an employer. Moreover, plaintiff abandoned that claim below when he provided no authority or argument as to why that claim should survive summary judgment, just as he has failed to assign error to its dismissal and failed to provide authority or argument in support of the claim before this Court.

The trial court properly granted summary judgment on plaintiff's claim of sexual harassment hostile work environment. The factual assertions made by plaintiff (many of which were conclusory, argumentative, or otherwise inadmissible) failed to establish a prima facie case of sexual harassment. Moreover, many of the incidents alleged by plaintiff were time-barred under the statute of limitations.

The defendant/respondent Department of Social and Health Services, for all of the reasons argued above, respectfully asks this Court to affirm the trial court's order granting summary judgment.

RESPECTFULLY SUBMITTED this 31st day of October, 2006.

ROB MCKENNA
Attorney General

for  *USBA # 8761*
MARK A. ANDERSON, WSBA #26352
Assistant Attorney General
Attorneys for Defendant/Respondent

FILED
COURT OF APPEALS

06 NOV -1 PM 3:02

NO. 34431-9-II

STATE OF WASHINGTON

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

EUGENE WHITEHEAD and
BOOTS L. WHITEHEAD,

Appellants,

v.

DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

PROOF OF SERVICE

I, Lisa Shannon, certify that on October 31, 2006, the original and one copy of the **Brief of Respondent** was filed by placing it in the U.S. Mail, postage prepaid, to the Washington State Court of Appeals, Div. II.

On this same day, a copy of the **Brief of Respondent** was served on counsel of record, by placing it in the United States Mail, postage prepaid, and addressed as follows:

LAW OFFICE OF HORTON SMITH, P.S.
3010 FIRST AVENUE
SEATTLE, WA 98121

I certify under the penalty of perjury, according to the laws of the state of Washington, that the foregoing is true and correct.

DATED this 31st day of October, 2006.



LISA SHANNON, Legal Assistant