

NO. 42431-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ALEXIS S. SANTOS,

Appellant,

v.

THE WASHINGTON STATE OFFICE OF THE INSURANCE
COMMISSIONER, THE STATE OF WASHINGTON,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Alexis Santos worked for the Office of the Insurance Commissioner (OIC) as an actuary. While he was employed at OIC, Santos used a state computer and the state computer network to access pornography on the internet. Santos' state computer contained thousands of hits on pornographic websites. Santos also used his state computer to send pictures of his own genitalia and to solicit sexual activity with strangers over the internet. State-owned property such as a computer may not be used for the private benefit or gain of a state employee. RCW 42.52.160. When OIC discovered that Santos violated the State Ethics Act by using state property for his personal pleasure, OIC discharged Santos.

Santos did not dispute that he frequently abused state resources while he was supposed to be working. After his discharge, Santos sued OIC claiming that OIC failed to accommodate a disability and discriminated against him. OIC presented evidence that Santos was discharged for gross misconduct, a legitimate nondiscriminatory reason. The trial court granted summary judgment in favor of OIC. Santos appeals.

II. ASSIGNMENTS OF ERROR

Respondents assert no error below. The trial court should be affirmed in all respects.

III. STATEMENT OF THE CASE

On June 1, 2001, OIC hired Alexis Santos to the position of Actuary Associate at a salary of \$7,354 per month. CP at 100. In 2002, OIC disciplined Santos for neglect of duty, gross misconduct, and ethical violations. CP at 102-03. Santos appealed and the Personnel Appeals Board upheld the discipline. CP at 109-17.

In February 2004, Santos asked OIC to provide him with a “pop-up filter” for his OIC laptop computer.¹ CP at 62. At the time, Santos said he needed the filter to prevent “pop-ups” from interrupting his work. CP at 62. OIC denied the request because the agency network prevents pop-ups and the agency does not customize each computer at the request of an employee. CP at 62. No other OIC employee made a similar request. CP at 62. On February 20, 2004, OIC sent Santos an email denying the request for a pop-up filter. CP at 119. OIC had no idea that

¹Pop-ups are small windows that open automatically on your screen. Most often, they display advertising, which can be from legitimate businesses, but also might be scams or dangerous software. OIC computers use the Windows operating system with Internet Explorer as the default web search tool. Explorer has a “pop-up blocker” which can be easily activated by the user. CP at 62.

Santos was using his work computer to visit sexually explicit websites. Santos did not request an accommodation for a disability. CP at 62.

In August 2005, Santos filed complaints with the State Human Rights Commission and Equal Employment Opportunity Commission (EEOC) claiming that he was a “44 year old Filipino . . . denied promotion due to age, Asian race, and national origin.” CP at 121-22.² OIC and Santos mediated and settled the dispute. CP at 50. Consistent with the settlement, OIC approved a reallocation for Santos and one other employee from Associate Actuary to Actuary and made the reallocation retroactive to November 14, 2005. CP at 129. OIC then reallocated the position for both employees to Actuary 3, effective January 1, 2006. CP at 134-35. As an Actuary 3, Santos’ salary increased to \$9,127 per month. CP at 50-51.

Santos was on a prolonged medical leave of absence beginning August 16, 2005 (CP at 51), and Santos told OIC that he needed leave because of major depression and hypertension. CP at 141. On February 27, 2006, Deputy Commissioner Mike Watson wrote Santos asking him to provide a request for reasonable accommodation including: 1) a return to work plan, 2) a physician’s clearance to return to work, 3) the specific reasonable accommodations he was seeking, and 4) a

²Santos did not complain to the EEOC that he had a disability or required any accommodation.

completed signed Reasonable Accommodation Request Form and medical release. OIC enclosed the forms. The agreement between Santos and OIC said he would be reclassified at the higher salary when he returned to work and “if his request for a reasonable accommodation to gradually reenter the workplace is granted.” CP at 129. OIC expected Santos to request an accommodation to permit him to “gradually” return to the workplace. CP at 127-28. Santos did not respond to this request. CP at 51-52.

On April 7, 2006, OIC Human Resources Manager Patty McGuire wrote to Santos asking for a response to Watson’s February letter by April 18, and telling Santos that without it OIC would initiate a disability separation in accordance with the collective bargaining agreement. CP at 143. That same day (April 7) Santos emailed McGuire and said “my physician has authorized me to go back to work the week of April 17, 2006.” The email says: “The accommodation I am requesting is to telecommute at least four days a week.” CP at 145. The accommodation form indicates that Santos has a “mental disability” that requires accommodation namely, “major depression, panic attacks, anxiety.” CP at 147. Santos did not request a computer filter nor did he indicate that he had any uncontrolled compulsive behavior. Santos also faxed a short note from his psychiatrist, Alan Javel, M.D., in which Dr.

Javel released Santos to work and recommended a single accommodation of telecommuting “4 out of the 5 days per week.” CP at 149.

OIC responded by letter on April 13, telling Santos that before he could return to work OIC had to have “better understanding of your medical status, any medical restrictions you may have, and your ability to perform the essential functions of your position with or without reasonable accommodations.” CP at 152.

On April 24, 2006, Beverly Burdette, the new Human Resources Manager, wrote Dr. Javel asking him specific questions about Santos’ ability to perform the essential functions of his job. CP at 154-55. The essential functions of the job included the following: to function independently, interact appropriately with others, follow instructions, interact effectively in group situations, maintain professional workplace conduct, and accept supervisory authority. The form clearly indicated that “*illegal use of state property*” is prohibited and an employee who cannot “adhere to OIC policies and procedures” is not qualified to perform essential functions. (Emphasis added.) CP at 156-57.

On May 5, Dr. Javel wrote back to Burdette stating: “If Mr. Santos needs to interact with peers and clients . . . I suggest he resume work at the workplace 2 days per week . . . he will be reevaluated by me in a month to see how well this plan is working out.” CP at 162. OIC agreed to this

accommodation and notified Santos on May 15 that he could return to work on May 17. CP at 164.

On May 17, Santos returned to work. While Santos was on leave, OIC employees donated 96 hours of leave so that he could be paid while he was not working. CP at 36.

On June 30, 2006, Dr. Javel wrote: “Mr. Santos may resume full time duties *with no restrictions* as of July 10, 2006. I also recommend that he have an internet filter for his laptop *when he is travelling, to minimize distractions and minimize anxiety.*” (Emphasis added.) CP at 166. The complaint admits that this is the first time any medical professional made any request for an accommodation other than the gradual return to work. CP at 13, 36-37. Dr. Javel did not explain a medical need for this “internet filter,” or why Santos only needed the filter “when he is travelling” and not at any other time. CP at 36-37.

Burdette tried to reach Dr. Javel to clarify the request but Dr. Javel did not respond. CP at 37. Burdette and Santos met on July 14 to discuss the accommodation request. At no time, did Santos tell Burdette or anyone else at OIC that he wanted an internet filter to keep him from visiting sexually explicit websites. Santos told Burdette he needed the filter because when he travelled it was easier to use the hotel internet

service provider than to use the state CITRIX service.³ CP at 37. On July 17 Burdette met again with Santos and OIC agreed to install a filter. CP at 37. At this meeting Santos acknowledged that this satisfied his request for an accommodation. CP at 37, 169.

Tom Fleener and Lyle Bowe are information technology specialists at OIC. CP at 44. On July 20, 2006, shortly after 4:15 p.m., Fleener and Bowe were in Fleener's cubicle discussing work. One screen in the cubicle displayed the network monitoring tool known as "Etherpeek." Etherpeek watches network use and web traffic on agency computers logged onto the agency network. CP at 45. They noticed that an agency computer was being used at that moment to browse the internet and they noticed URL⁴ names as that computer visited web addresses. CP at 45. Fleener noticed several URL names that he believed were associated with adult-only content.⁵ They adjusted the filter property on the packet trace⁶ to focus on the computer generating the suspicious traffic. They watched the screen as a computer somewhere in the agency accessed an email account under the name of "blueballs4bj@hotmail.com." Fleener checked

³A computer user who wants to access the agency server remotely must first access the internet through an internet service provider, then access the server via "CITRIX."

⁴"URL" means "uniform resource locator." CP at 45.

⁵They watched as the unidentified computer in the agency went to sites such as "www.gay.com," "www.manhunt.com," and "www.men4sexnow.com."

⁶A "packet trace" is a time-stamped sequence of packets captured on a network. CP at 45.

the internet protocol address associated with the computer against the agency domain service table to determine which computer in the agency was generating the offending traffic. Fleener determined the computer was assigned to Alexis Santos. CP at 45. Fleener captured files as they were being monitored by the packet trace. It appeared that the user was constantly clearing temporary files as they watched. Fleener and Bowe notified IT supervisor Mike Shea, who in turn notified HR Manager Burdette, and Deputy for Operations Stacy Warick. CP at 45. Warick called Deputy Commissioner Jim Odiorne just after 5:00 p.m. and reported that Santos' computer was actively visiting pornographic websites. CP at 55.⁷ Odiorne went to Fleener's cubicle where he, Fleener, Bowe, and Shea all observed the activity as it occurred. CP at 55. These hits to adult content sites would normally be blocked by the network filter, but the filter was temporarily disabled that day. CP at 46.

Odiorne and Burdette decided that Santos should be sent home immediately. CP at 55. Odiorne went to Santos' office on the first floor and found that the door was locked and no one responded to his knock on the door. Odiorne returned to the second floor. Fleener told Odiorne that Santos logged off the network at 5:13 p.m. CP at 55-56. Odiorne obtained a master key, went to Santos' office and found Santos gone and

⁷ Odiorne saw Santos in the hall outside his office at about 5:00 p.m. CP at 55.

the computer still in the office. CP at 56. Odiorne and Shea removed the computer and secured it in a locked cabinet that only Shea could access. Approximately one hour elapsed from the time Fleener first observed the suspicious hits to the time Shea took possession of the computer. CP at 46.

Odiorne notified Santos that he was on home assignment and should not report to work until further notice. CP at 56. Odiorne directed Fleener to disable Santos' remote access to the agency network and disabled Santos' key card denying him access to the building. OIC officially notified Santos by letter on Friday, July 21, that he was not to return to work. CP at 171. Santos never returned to work.

OIC hired computer forensic analyst Jesse Regalado to examine the computer. CP at 68. Regalado owns Digital Forensics, LLC and is qualified to examine the contents of a computer hard drive. CP at 57-58. OIC asked Regalado to determine whether the computer contained evidence that Santos used the computer for an improper use prohibited by state law or agency policy. CP at 69. Regalado's report is Ex. 21; CP at 173-82.⁸

Regalado searched the computer for files containing sexually explicit content, including images. Photo images of nude or partially nude

⁸Sexually explicit images have been redacted from the report. CP at 48.

persons were located on the “Alexiss” profile in the “temp” file.⁹ That folder contained 4,684 image files of human genitals, faces, torsos, and nude or partially nude persons. CP at 59. Many images were “deleted” but remained on the hard drive, indicating that Santos tried to delete them before they were discovered. CP at 59. Regalado found the source of the images was a variety of websites including “dudsnude.com,” “men4sexnow.com,” “members.hotandhung.com,” “bigmuscles.com,” “members.thegaypersonals.com,” “squirt.org,” and “exercisefriends.com.” Santos visited sexually explicit websites from at least early 2004 to July 20, 2006. CP at 178.

Santos used the state-owned computer to “chat” by instant messaging with other internet users over “Yahoo.com.” CP at 59. Santos’ Yahoo aliases included “gymbuddy96” and “santos98516.” These messages are sexually explicit and express the intent to meet at specific locations and times for sex. CP at 59. Santos used the computer to communicate by email with potential sex partners. CP at 59. Sexually explicit email messages were recovered from the Outlook Express directory of the “Alexiss” profile. Santos’ email account names include: “blueballs4bj@hotmail.com” and “saints777@comcast.net,” both of

⁹The “temp” files are folders created by the Windows operating system and contain internet history, web pages, and files accessed from the internet. CP at 59.

which are assigned to user “Alexiss.”¹⁰ The sender was arranging meetings for sex. CP at 60. The emails contain sexually explicit images. Santos admits that he visited adult-oriented websites, and viewed and sent sexually explicit photos from his state computer.¹¹

Santos was scheduled to travel to Chicago on state business on July 26-27. Santos used his state computer and “hotmail” account to arrange a meeting with a stranger for sex while he was in Chicago on state business. CP at 69. Santos did not travel to Chicago on state business because he was placed on home assignment on July 20, and was directed not to conduct any state business at all.

After he was sent home and even though he was barred from the OIC building, Santos tried to get into the building on a Saturday by asking another employee to let him in during non-business hours. CP at 42. The following Saturday, Santos sent an email to Burdette accusing OIC of “confiscating my laptop.” CP at 194.¹² Knowing that he would soon be disciplined, Santos filed an EEOC complaint on September 1, 2006, claiming failure to accommodate a disability and retaliation. CP at 197. EEOC found no violation. CP at 199.

¹⁰ Santos admits that he used these aliases to access email accounts. CP at 187.

¹¹ Jobson Decl., Ex. 22; CP at 186.

¹² Apparently, Santos suffered from the delusion that the computer belonged to him and not the state.

On September 13, OIC sent Santos a pre-disciplinary hearing notice describing the charges against him in detail. CP at 202. The hearing was set for September 25 at the OIC. Santos did not appear for the hearing but a union representative, Ms. Burke, attended as did Ms. Burdette. CP at 70. Burke gave Watson a copy of the email from Mike Shea dated February 20, 2004, in which Shea told Santos that OIC had denied the request for a “pop-up” filter. CP at 119.

When Santos asked for a pop-up filter in 2004 he did not tell OIC he was “disabled,” nor did he ask for a “reasonable accommodation,” nor did he express a medical need or reason for the filter. CP at 62. Even if OIC gave Santos a “pop-up” filter, this would not have prevented him from using his state computer to access pornography or use an email account to arrange for sex. CP at 62. Blocking “pop-ups” does not limit the ability of the user to access illicit or graphic sexual web content. If Santos wanted a “pop-up” filter he could have used the blocker that comes with Internet Explorer and can easily be activated by the user. CP at 62. Before July 20 OIC did not know that Santos was using his work computer to visit sexually explicit websites. CP at 62.

OIC Deputy Watson terminated Santos on October 3, 2006, because he violated the agency ethics policy, the internet usage policy, and the electronic mail policy. CP at 211, 214. On October 30, 2006, the

EEOC issued a dismissal and notice of rights for the first complaint. CP at 124.

IV. ARGUMENT

A. Standard Of Review

On review of an order granting summary judgment, the appellate court engages in the same inquiry as the trial court under the rule governing when summary judgment is warranted. *Ducote v. State Dep't Soc. & Health Servs.*, 167 Wn.2d 697, 701, 222 P.3d 785 (2009). The appellate court may affirm the trial court's ruling on any alternative ground that the record adequately supports. *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153, *review denied*, 166 Wn.2d 1003 (2008).

B. Burden Shifting In Employment Discrimination

The standard for dispositive motions in employment cases is stated in *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001). Washington courts follow the evidentiary burden-shifting protocol established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).¹³ In the typical case, where there is no direct evidence of discrimination or retaliation, the employee must satisfy the first intermediate burden by producing the facts necessary to support a

¹³*Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81, 23 P.3d 440 (2001).

prima facie case.¹⁴ Opinions or conclusory facts are not enough.¹⁵ Unless a prima facie case is set forth, the employer is entitled to prompt judgment as a matter of law.¹⁶

Only if the plaintiff can establish a prima facie case does the burden of production shift to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment decision.¹⁷ Once such a reason is identified, the burden of production shifts back to the employee to show that the proffered reason is pretext.¹⁸ "If the plaintiff proves incapable of doing so, the defendant becomes entitled to judgment as a matter of law."¹⁹

When an employee produces some evidence of pretext, other factors may still warrant judgment as a matter of law.²⁰ If an employee presents some evidence of pretext, the court must still consider whether additional factors undermine the employee's competing inference of discrimination, justifying dismissal as a matter of law.²¹ Those factors include:

¹⁴*Hill*, 144 Wn.2d at 180-81.

¹⁵*Chen v. State*, 86 Wn. App. 183, 191, 937 P.2d 612, *review denied*, 133 Wn.2d 1020, 948 P.2d 38 (1997).

¹⁶*Hill*, 144 Wn.2d at 181.

¹⁷*Hill*, 144 Wn.2d at 181-82.

¹⁸*McDonnell Douglas v. Green*, 411 U.S. 792.

¹⁹*Hill*, 144 Wn.2d at 182.

²⁰*Hill*, 144 Wn.2d at 182-87, following *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

²¹*Hill*, 144 Wn.2d at 186, citing *Reeves*, 530 U.S. at 148-49.

- The strength of the employee's prima facie case;
- The probative value of the proof that the employer's explanation is false; and
- Any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.²²

Washington courts will dismiss the case where an employee's evidence of pretext is weak:

[W]hen the “record conclusively revealed some other, non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted evidence that no discrimination had occurred,” summary judgment is proper.²³

C. OIC Terminated Santos For Neglect Of Duty And Blatant Abuse Of State Resources. It Is Undisputed That Santos Used The State Computer Network To View Pornography And To Solicit Sex Partners.

No state employee may use state owned-property for his own private benefit or gain. RCW 42.52.160. “Personal benefit or gain may include a use solely for personal convenience, or a use to avoid a personal expense.” WAC 292-110-010(1). State ethics law explicitly prohibits “any private use of any state property that has been removed from state facilities or other official duty stations, even if there is no cost to the state.” WAC 292-110-010(6)(f). Santos admits that while he was off-site he used his state computer to view and collect sexually explicit material.

²²*Id.* (bullets added).

²³*Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418 (2002), quoting *Reeves*, 530 U.S. at 148 (internal quotations omitted); *Hill*, 144 Wn.2d at 184-85.

CP at 186. Santos admitted that “on many occasions, [he] was unable to control his behavior and viewed internet content and/or sent personal emails without distinguishing between his personal and state issued computer.” CP at 186. An employee may not make any use whatsoever that is “prohibited by federal or state law or rule, or a state agency policy.” WAC 292-110-010(6)(e). OIC policy prohibits any internet use that is not consistent with WAC 292-110-010. CP at 219.

Santos admits he violated the state ethics law cited here. CP at 186. The state has authority to discipline employees who improperly use state resources in violation of RCW 42.52.160.²⁴

In addition to breaking the law and regulations above, Mr. Santos neglected his duty and misused his time while at work to engage in a personal prurient pursuit. Watson fired Santos for this egregious conduct. CP at 211-14.

D. Disability Law Does Not Require An Employer To Accommodate The Illegal Conduct Of An Employee Or Affirmatively Prevent Him From Engaging In Illegal Conduct

The complaint alleged that OIC “terminated Mr. Santos’ employment based upon the pre-textual basis that he viewed internet sites which were personal in nature,” and that the OIC terminated Santos “because of his disabilities and/or his requests for reasonable

²⁴ *Rahman v. State*, 170 Wn.2d 810, 824, 246 P.3d 182 (2011).

accommodation.” Santos alleges this violates Washington’s Law Against Discrimination (WLAD) (RCW 49.60). CP at 16.

The employer is not required to accommodate if a “particular disability prevents the proper performance of the particular worker.” RCW 49.60.180(1).

To establish a prima facie case of failure to reasonably accommodate a disability . . . a plaintiff must show that: (1) the employee has had a sensory, mental or physical abnormality that substantially limited his 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 limitations, and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality.

Davis v. Microsoft, Corp., 149 Wn.2d 521, 532, 70 P.3d 126 (2003).

Santos cannot prove any of these elements.

1. Santos Is Not Disabled

[A] plaintiff bringing suit under the WLAD establishes that he has a disability if he (1) has a physical or mental impairment that substantially limits one or more of his major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment.

McClarty v. Totem Elec., 157 Wn.2d 214, 228, 137 P.3d 844 (2006).²⁵

²⁵“To provide for a single definition of “disability” that can be applied consistently throughout the WLAD, we adopt the definition of “disability” as set forth in the federal Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213. *McClarty*, 157 Wn.2d at 220. Thus the state law definition is taken verbatim from the ADA, 42. U.S.C. § 12102.

[An] impairment that is substantially limiting impairs a person's ability to perform tasks that are central to a person's everyday activities, thus are "major life activities." *Toyota Motor Mfg., Ky. Inc. v. Williams*, 534 U.S. 184, 195, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002). The United States Supreme Court has held that substantially limited means "[u]nable to perform a major life activity that the average person in the general population can perform" *id.* at 195, 122 S. Ct. 681 (quoting 29 C.F.R. § 1630.2(j) (2001)) and defined major life activities as "those activities that are of central importance to daily life."

Id. at 229.

Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

42 U.S.C. § 12102(2)(A).

This definition "ensures that scarce judicial resources are available to those most in need of the WLAD's protections, rather than persons with receding hairlines," and avoids "trivialize[ing] the discrimination suffered by persons with disabilities." *Microsoft*, 149 Wn.2d at 230.²⁶

Mr. Santos did not have a "disability" as that term was defined at the time. He could perform all of the "tasks that are central to a person's

²⁶In April 2007, the Legislature adopted a different definition of "disability" under the WLAD. SSB 5340, 60th Leg., Reg. Session (Wash. 2007) codified at RCW 49.60.040(25)(a). The change in the definition is retroactive "and applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after the effective date of this act." Laws of 2007, Ch.317, § 3. "The effect of this provision was to carefully carve out a window of time during which claims would still be controlled by the definition of 'disability' we announced in *McClarty*." *Hale v. Wellpinit School Dist.*, 49, 165 Wn.2d 494, 502, 198 P.3d 1021 (2009).

everyday activities,” all of those activities that “are of central importance to daily life.” The fact that he could not control his prurient obsession while he was at work did not make him “disabled.” Santos’ claim that he was disabled, “trivializes the discrimination suffered by persons with disabilities.” *McClarty*, 157 Wn.2d at 230.

2. Santos Could Not Perform The Essential Functions Of His Job

“[A]n ‘essential function’ is a job duty that is fundamental, basic, necessary, and indispensable to filling a particular position.” *Microsoft*, 149 Wn.2d at 533. “Washington law does not require an employer to eliminate the job duty.” *Id.* at 534. “[A]n employer may discharge a handicapped employee who is unable to perform an essential function of the job, without attempting to accommodate that deficiency.” *Id.* at 534.

On April 24, OIC sent a questionnaire to Dr. Javel describing Santos’ “essential job functions.” These include: the ability to function independently, interact appropriately with others, follow instructions, interact effectively in group situations, maintain professional workplace conduct, and accept supervisory authority. The form clearly indicates that “illegal use of state property” is prohibited and an employee who cannot “adhere to OIC policies and procedures” is not qualified to perform

essential functions. CP at 35. Neither Santos nor Dr. Javel responded to this request. CP at 37.

OIC learned on July 20, 2006, that Santos could do none of these things. An employee who cannot control his impulse to view pornography while at work cannot perform the essential functions of his job. He cannot be trusted to work independently, to interact appropriately with others, to follow instructions, to maintain professional conduct, or to adhere to employer policy that prohibits the illegal use of state property. Therefore, the employer is not required to accommodate the deficiency.

3. Santos Did Not Request A Disability Accommodation Until June 30. That “Accommodation” Would Have Made No Difference Nor Did Santos Explain Why It Was “Medically Necessary”

For purposes of the WLAD an employee has the duty to advise the employer of his disability and attending limitations. *Davis v. Microsoft Corp.*, 109 Wn. App. 884, 37 P.3d 333, *aff'd*, 149 Wn.2d 521 (2003). Santos never notified the OIC that he had any impairment related to computer use nor did he provide any evidence that an accommodation was “medically necessary.” CP at 36-37.

In 2004, he requested a “pop-up” filter. He did not inform OIC that he was disabled or needed it to accommodate any sensory, physical, or mental abnormality. CP at 62. He said he wanted it to prevent the

“distraction” of “pop-ups” appearing on his screen. CP at 62. The agency had no duty to install a pop-up filter because it was not a request for an “accommodation.”

On April 7, 2006, Santos requested one accommodation. Dr. Javel asked if Santos could return to work by telecommuting four out of five days per week. CP at 149. The parties compromised and Santos agreed to work on site two days per week and gradually increase his schedule of work at the office. CP at 36. Thus, OIC provided this accommodation.

On June 30, 2006, Dr. Javel wrote: “Mr. Santos may resume full time duties *with no restrictions* as of July 10, 2006. I also recommend that he have an internet filter for his laptop *when he is travelling, to minimize distractions and minimize anxiety.*” (Emphasis added.) CP at 36, 166. Dr. Javel did not provide any explanation as to why this “filter” was medically necessary, nor did he explain why it was only needed when Santos was travelling and not at other times. When OIC discovered the abuse, OIC was still attempting to learn the nature of Santos’ claimed “disability.” Santos never provided any medical explanation to support his request for specialized software.

Even if OIC had provided a “pop-up” or internet filter, that would not have prevented Santos from abusing his state computer. CP at 62.

Santos was the master and parent of his state computer and he could disable or avoid the filter if he chose to.

Finally, even assuming that Santos was entitled to reasonable accommodation, which he was not, OIC offered to provide the two accommodations he requested. First, on May 15, OIC agreed to a gradual return to work. CP at 164. Second, OIC agreed to provide an internet filter to Santos. CP at 168-69.

Santos argues that “OIC failed to adequately participate in an interactive process.” Appellant’s Brief (Appellant’s Br.) at 30. This argument is not supported by the record. The record shows that OIC made numerous inquiries to obtain information about the nature of the accommodation. CP at 35-37. It was Santos and his doctor who concealed the nature of Santos’ disability because they knew that if OIC discovered that Santos made indiscriminate use of the computer and the network for his own sexual gratification, he would be terminated.²⁷

E. OIC Did Not Discriminate Based On Race Or National Origin

The complaint alleged race and national origin discrimination in violation of the WLAD. CP at 17. It is an unfair labor practice to discharge or discriminate against an employee because of race or national

²⁷ Santos has admitted that his conduct was not caused by a “disability,” but was caused by the fact that he did not discriminate between his work computer and his own personal computer. CP at 186. He used his state-owned computer as if it were his own making no distinction between them.

origin. RCW 49.60.180(2) and (3). In order to make a prima facie case of race or origin discrimination plaintiff must demonstrate that: 1) he is in a protected class, 2) he was treated less favorably than a similarly-situated, non-protected employee, and 3) he and comparator were doing substantially the same work. *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 98 P.3d 1222 (2004).

OIC fired Santos because Santos blatantly violated state ethics law and misused his state-owned computer for his own sexual gratification. CP at 66, 211-14. This is a legitimate, non-discriminatory reason for the termination. OIC did not consider Santos' race or national origin when OIC fired Santos. CP at 66. OIC would have made the same decision no matter what the race or national origin of the employee. CP at 66.

Under *Hill*, Santos must provide admissible evidence that the reason given for firing Santos is a pretext. Santos cannot establish "pretext" without evidence that OIC's articulated reasons for its decision is "unworthy of belief." *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004), *review denied*, 154 Wn.2d 1007 (2005). Santos did not show that OIC's articulated reason: (1) had no basis in fact; (2) was not really a motivating factor for the decision; or (3) was not the motivating factor in employment decisions for other employees in the same circumstances. *Id.* Because he did not, his discrimination claim fails.

OIC did not discriminate against Santos in compensation or in other terms or conditions of employment because of his race or national origin. The complaint alleged that OIC demoted Santos in 2001(CP at 8) but Santos was never demoted. CP at 71. The complaint alleges that OIC failed to promote Santos because of race or national origin. This is false. CP at 71. The complaint alleges more trivial claims (that OIC did not permit Santos to travel in January 2003, and did not recognize his anniversary date at the office because of discrimination). These claims are false. CP at 71.²⁸

Mr. Santos claimed that he worked in a hostile work environment and was persecuted by “white male managers.” The incidents that Mr. Santos complained about in his declaration occurred from 2001 to 2004. The statute of limitations for a hostile work environment claim is three years.²⁹ Incidents that occurred between five and eight years before the action was filed are time-barred. The only incident that occurred within the statute of limitations was the October 3, 2006, discharge. The discharge was supported by a legitimate, non-discriminatory reason. Therefore, even assuming that Santos’ allegations are true, there were no discriminatory acts that are remotely within the statute of limitations.

²⁹ *Antonius v. King County*, 153 Wn.2d 256, 262, 103 P.3d 729 (2004)

OIC disputed Santos' allegations that he experienced hostility based on national origin. The record shows Santos was never demoted. CP at 578-79, 555-59. Watson denied that he ever disparaged Santos or any other employee. CP at 577-78. McNaughton disputed that he told Santos he had to be "white" to be promoted. CP at 558. Since these two disputed remarks must be viewed in the light most favorable to Santos, the trial court assumed that they occurred. Nevertheless, they do not create a "hostile work environment" because they are not "sufficiently pervasive so as to alter the conditions of employment."³⁰

F. Retaliation Was No Factor In OIC's Decision to Discharge Santos. For Several Years Santos Violated The Law, Agency Policy, And The Public Trust

It is unlawful for an employer to discharge a person "because he or she has opposed any practices forbidden by this chapter, or [...] filed a charge, testified, or assisted in any proceeding under this chapter." RCW 49.60.210(1). A discharge will support an award of damages when (1) the employee engaged in a statutorily protected activity, (2) an adverse employment action was taken, and (3) the statutorily protected activity was a substantial factor in the employer's adverse employment decision.³¹ The plaintiff must prove that retaliatory motive was a "substantial factor"

³⁰ *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985); *Fisher v. Tacoma School Dist.*, 10, 53 Wn. App. 591, 595, 769 P.2d 318, 320, *review denied*, 112 Wn.2d 1027 (1989).

³¹ *Campbell v. State*, 129 Wn. App. 10, 118 P.3d 888 (2005).

in the challenged decision.³² If the plaintiff can meet this burden, the burden shifts to the employer to produce admissible evidence that the discharge was based on a legitimate reason rather than retaliation.³³ If the employer meets this burden, the employee must produce evidence that the proffered reason for the discharge is a pretext for a retaliatory discharge. Pretext may be shown through evidence that (1) the proffered reason has no basis in fact; (2) the proffered reasons, though based in fact, were not the motivating factor in the discharge; or (3) the proffered reasons are insufficient to warrant a discharge.³⁴ If the employee fails to meet this burden, the employer is entitled to dismissal as a matter of law.³⁵

Santos does not dispute that from 2004 until 2006 he used his state computer and the state computer network for the illegal purpose of sexual gratification. When OIC discovered this abuse, OIC discharged Santos. Santos' claim that the discharge was retaliatory is not supported by the record.

OIC concedes that Santos engaged in protected activity when he filed an EEOC complaint on August 12, 2005. The complaint alleged that Santos was not promoted due to his age, race and national origin. This

³² *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 60 P.3d 106 (2002); *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 205 P.3d 145 (2009).

³³ *Id.*

³⁴ *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 128 P.3d 633 (2006); *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 619 (2002).

³⁵ *Renz v. Spokane Eye Clinic*, 114 Wn. App. at 619.

complaint was resolved by the parties and Mr. Santos was promoted to Actuary 3 effective January 1, 2006. He returned to work on May 17, 2006. OIC discovered Santos' illegal and illicit use of the state computer and network on July 20, 2006, and immediately placed him on home assignment pending an investigation.

Santos filed the second EEOC complaint over a month after he was placed on home assignment alleging failure to accommodate and retaliation. OIC immediately pursued an impartial third party forensic examination of Santos' computer. When the examination report corroborated Santos illegal computer activity, OIC gave Santos the opportunity to respond at a pre-termination *Loudermill* hearing. CP at 208. Santos never disputed that he engaged in illegal use of the state computer and network to view pornography and solicit sex partners.

Santos' two OIC complaints were not a factor in the decision to discharge him. Chief Deputy Commissioner Mike Watson fired Santos because Santos "used a state-issued work computer to send and receive inappropriate, unauthorized email, including sexually explicit email, and using the same computer to access the internet for inappropriate purposes including the exchange of sexually explicit information and picture for personal, non-work related activities in violation of agency policy." CP at 66. In addition, "Santos abandoned his state duties for extensive periods

of paid work time to engage in personal business and illicit activity unacceptable in the workplace.” CP at 66.

The burden then shifted to Santos to prove that this reason was a pretext. Mr. Santos did not dispute that this reason is “based in fact,” i.e. that he engaged in this prohibited conduct. As stated by Mr. Watson, the prohibited conduct was the motivating factor for the discharge. CP at 66. OIC had discretion to discharge Santos for this type of conduct. RCW 41.06.150; WAC 357-40-010.³⁶ Watson also considered Santos’ prior disciplinary history.³⁷ Santos’ egregious and abusive conduct over several years time warranted his immediate discharge. Therefore, Santos provided no evidence that the reason was a “pretext.”

G. The Negligent Infliction Claim Was Properly Dismissed

Claims for negligent infliction of emotional distress do not generally stand on their own as a separate cause of action in the employment context. Absent a statutory or public policy mandate, employers do not owe employees a duty to use reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes. *Snyder v. Medical Service Corp. of E. Wash.*, 144 Wn.2d 233, 244, 35 P.3d 1158 (2001), citing *Bishop v. State*, 77 Wn. App.

³⁶ An appointing authority may dismiss, suspend without pay, demote, or reduce the base salary of a permanent employee under his/her jurisdiction for just cause. WAC 357-40-010.

³⁷ CP at 66.

228, 234-35, 889 P.2d 959 (1995). *See also, Johnson v. Dep't Soc. & Health Servs.*, 80 Wn. App. 212, 230-31, 907 P.2d 1223 (1996). Washington courts also do not recognize a separate claim for negligent infliction of emotional distress when the only factual basis for emotional distress is a discrimination claim. *Robel v. Roundup Corp.*, 103 Wn. App. 75, 91, 10 P.3d 1104 (2000) *reversed on other grounds* 148 Wn.2d 35, 59 P.3d 611 (2002). In *Bishop*, as here, the plaintiff filed a lawsuit based on workplace conflict alleging that she suffered emotional distress as a result of being treated unfairly. The trial court allowed the emotional distress claim to be presented to a jury, separate from any discrimination claim, and the jury entered a verdict in plaintiff's favor. The court of appeals reversed and dismissed the damage award holding that, absent a statutory or public duty mandate, employers owe no duty to avoid inflicting distress on employees. *Bishop v. State*, 77 Wn. App. 228, 234-35, 889 P.2d 959 (1995).

Santos has not alleged any emotional distress arising from facts different than those which support his statutory discrimination claim. The facts giving rise to the negligent infliction claim and the statutory discrimination claims are the same facts. Therefore, the negligent infliction claim was dismissed. *Robel*, 103 Wn. App. at 91; *see also*,

Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 865, 991 P.2d 1182 (2000).

H. The Trial Court Properly Considered the Nature of Santos' Abuse of the State-Owned Property and the State Computer Network

Santos moved to strike evidence supporting OIC's motion for summary judgment on the ground that the evidence was irrelevant. CP at 545-54. The trial court denied the motion. CP at 622-23. The trial court considered the nature of the conduct for which Santos was discharged. This court should do the same. "An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted." *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Santos argues that the trial court should not have considered "the adult content of the websites he visited or the messages he sent." Appellant's Br. at 49. This court will consider "only evidence and issues called to the attention of the trial court." RAP 9.12. OIC presented evidence of the nature of Santos misconduct because it is the most relevant and probative evidence of the reason for the discharge.

No matter what standard of review is applied, this evidence is relevant to the issue presented; i.e. was the decision to terminate made for

a legitimate, non-discriminatory reason. The trial court determined that the evidence was relevant and not “substantially outweighed by the danger of unfair prejudice” (ER 403) and therefore denied Santos’ motion to strike it. Because the evidence was called to the attention of the trial court it is part of the record and this court considers it. RAP 9.12

V. CONCLUSION

Respondent respectfully requests that the trial court order granting summary judgment be affirmed.

RESPECTFULLY SUBMITTED this 1 day of June, 2012.

ROBERT M. McKENNA

A handwritten signature in black ink, appearing to read "MARK C. JOBSON", written over a horizontal line.

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Assistant Attorney General
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PROOF OF SERVICE

I certify that I caused service of a copy of this document on all parties or their counsel of record on the date below as follows:

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Hand delivered by _____

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

DATED this 15th day of June, 2012, at Tumwater, Washington.


DEBBIE BATES