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STATE OF WASHINGTON

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SUPREME COURT
OF THE STATE OF WASHINGTON

No. 65364-4-I

COURT OF APPEALS – DIVISION I
OF THE STATE OF WASHINGTON

DEBRA LOEFFELHOLZ,

Appellant/Plaintiff,

v.

UNIVERSITY OF WASHINGTON, AND JAMES LUKEHART AND JANE DOE LUKEHART, AND THE MARITAL COMMUNITY COMPRISED THEREOF,

Respondent/Defendant

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APPELLANT'S OPPOSITION TO PETITION FOR REVIEW

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I. INTRODUCTION

This Court should deny review. The Respondents University of Washington and James Lukehart have failed to cogently argue the applicable standards for review of the well-reasoned Court of Appeals decision, 162 Wn. App. 360, 253 P.3d 483 (2011) (App. A to Respondent's Petition) ("Opinion"). The Petition sets forth no reasons why this decision, which is narrowly confined to the particular facts of this case, is in conflict with any decision of any of the Courts of Appeals or the Supreme Court. There is no argument that review is necessary to create a rule of constitutional dimension or presents an issue of substantial public interest. See RAP 13.4(b)(1) (3) and (4).

In fact, given the unique set of facts present in this case, it is highly unlikely that any similar case would ever arise. The fundamental ruling, that Washington's Law Against Discrimination ("WLAD"), RCW 49.60.180(3) is not to be applied retroactively, was in favor of the Respondent and against the Appellant. The Court also ruled that the statute of limitations has not run on this claim because Lukehart's "angry man" statement was a sufficient "trigger" for a hostile work environment claim which occurred within the limitations period. These rulings are not challenged herein, although Petitioner contends the Act should be applied retroactively.

It is long standing law in this state that a hostile work environment, as alleged and proven here, constitutes "one unlawful employment

practice" under the WLAD. See Opinion at 4-6 citing *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2004). The Court of Appeals correctly rejected the Respondent's effort to subvert this iron clad principle by disassembling such "one unlawful employment practice" into a series of "discrete component acts." *Antonius* held that "Moreover, the nature of the hostile work environment claim strongly indicates that **it should not be parsed into component parts** for statute of limitations purposes." 153 Wn.2d at 268 (2004). The same rationale applies here because it is the very nature of the claim (i.e., "one that cannot be said to occur on any particular day;", Id. at p. 264) that prohibits parsing, disassembling or disaggregating the claim into component parts.

Respondent claims that even if a single discrete act of discrimination occurred after the effective date of WLAD, such act could not form the basis of liability, because other discrete acts comprising the hostile work environment took place prior to the effective date of the Act. Only by overturning *Antonius,* i.e., by holding that a hostile work environment claim can be parsed into discrete component parts would such a result obtain. This no court should do and Respondents wisely do not seek review in order to overturn this central holding of *Antonius*. Because the Opinion cited and is in complete accord with *Antonius*, the provisions of RAP 13.4(b)(1) are not met.

The second basis of the Petition, that the Court of Appeals Erred in holding that the "angry man" comment presented a genuine issue of

material fact as to whether it constituted a component part of the hostile work environment claim, presents no issue worthy of this Court's review.

II. STATEMENT OF THE CASE.

For the purposes of resolving both issues raised in the Petition, the facts stated in the Court of Appeals Opinion (See Opinion pp. 364-365) should be taken as true. Although genuine issues of material fact exist as to the exact date of Mr. Lukehart's "angry man" comment, the Court assumed that Appellant could prove that such comment occurred (a) within the three year statute of limitations (i.e., after May 13, 2006) and (b) after the June 7, 2006 effective date of the amendment to WLAD adding "sexual orientation" as a basis of illegal discrimination. There is a very strong factual basis for the Court of Appeal's finding that there is a genuine issue of material fact as to whether the angry man comment was part and parcel of Lukehart's creation of a hostile work environment.

In addition to those facts stated in the Opinion the record below established that. Cheney prepared two written summaries of the complaints against Lukehart, which he used to interview him, make his findings and come to his decision to demote and reassign Lukehart. These two documents are attached as Exs. D and E to the Withey Declaration (CP 206-210) and were shown to and testified about by both Lukehart and Cheney in their depositions. These two documents establish beyond any doubt that the UW investigators uncovered serious, ongoing, threatening, intimidating, manipulative, hostile and inappropriate behavior by Lukehart

toward the Plaintiff and her co-workers which covered the entire time he was allowed to supervise her from 2003 through 2007. These "findings" (in Cheney's words, see Ex. E, CP 210) are supported by detailed "bullet points" and by two pages of specific "comments reported" See Ex. D (CP 206-208) which, in turn, were taken from the interviews conducted by UW's Human Resources personnel with Plaintiff and others. Cheney created a "meeting outline" for his meeting with Lukehart which is Ex. E to the Withey Decl. (CP 210). It states "The findings of the investigation include significant issues associated with how you operate as a senior manager." (Emphasis added.) In Ex. D (CP 206) there are four categories of Lukehart's misconduct noted:

(1) Management Style, including "[Lukehart getting] "angry when chain of command broken", "engenders personal indebtedness", "power building", and "management by espionage."

(2) Manipulative, including "pulling strings to get things to go a certain way, including sharing interview questions about candidates", "soliciting personal information to obtain advantage", "deliver favors to build obligations".

(3) Intimidation in the workplace, including "fear mongering, references to use of gun and killing people", "references to 'getting' people", "threats of jobs being in jeopardy", position vulnerability, "use strategy to discredit people", "displays personal animus" and

(4) Inappropriate sharing of personal information, including "shock and awe" messages, "enemies list" and "derogatory comments about other staff." Id. (Emphasis added.)

In his meeting with Lukehart, Cheney also discussed his "violating the integrity of the recruitment process". See Ex. E (CP 210). He stated to Lukehart that his "manner of management is problematic", and is "deeply embedded, with no apparent recognition by [him]". He states that the "recruitment process in M&A [Management and Acquisitions] has been a 'hotbed' of criticism and dissatisfaction" and that Cheney "[c]annot allow a manager to destroy the credibility of the M&A recruitment process." He further states that he "[c]annot allow Jim to continue in the role of a Senior Manager given these serious issues." See Ex. E (CP 210).

Based upon this pattern of hostility and intimidation, it became clear to Plaintiff that her treatment by Lukehart affected her work conditions, her job prospects and lead to her difficulties in advancement. The offensive and homophobic comments documented in the investigation were clearly the result of discrimination directed towards her as the result of her sexual orientation. It became clear to her that she, in particular, was singled out for being a lesbian and that Lukehart wanted to have her fired. Plaintiff testified that Lukehart "had told me he had taken anger management classes and that he had a very volatile temper." See Ex. A at p. 57 (CP 186). She informed UW Central Services management manager Anne Guthrie that she had observed his temper on several occasions. Id.

Plaintiff testified that Lukehart made it clear that he could affect and interfere with the selection process. Id. at pp. 77 and 86 (CP 187, 190). He specifically told her that he wanted another employee to obtain a position Plaintiff had applied for and the other employee did in fact obtain that position. Id. at pp. 78-79 (CP 188, 189). Lukehart refused to consider a reclassification of her position. Id. at p. 104. She was denied training opportunities three years in a row by Lukehart. Id. at p. 127 (CP 68). For three years she did not receive any performance evaluations although everyone else received such evaluations. Id. at p. 160 (CP 198). When first hired, Plaintiff was told by Lukehart to work as much overtime as needed to keep up with the job requirement. Subsequently, after denying her any more overtime, she was told by Lukehart that she might have to pay the University back for the overtime wages. On a number of occasions, she asked Lukehart for higher level duty for helping to instruct the employees that were filling in for Lukehart's old position, but was turned down by Lukehart. Id. at pp. 122-126 (CP 192-196). After Lukehart found out that she was a lesbian, Plaintiff lost her permission to have flex time. Id. at p. 205 (CP 199).

The facts therefore support the inference that Mr. Lukehart's statement that he would be a "very angry man" when he returned from Iraq (and would presumably resume his role as Appellant's supervisor) was part or the cumulative effect of the hostile work environment and was directed to Appellant, particularly where:

(a) the UW's own investigation found that Lukehart used "intimidation" and "harassment" of employees, based upon its findings that Lukehart engaged in "fear mongering", "intimidation", referred to the use of a "gun and killing people," referred to "getting people," threatened "job security," used "shock and awe" messages, and created an "enemies list." See EOR 205-208 (quoting from Cheney's notes describing Lukehart's conduct.).

(b) Loeffelholz testified that Lukehart told her that "he had taken anger management classes and that he has a very volatile temper" and she had reported this fact to UW Central Services manager Anne Guthrie. (EOR 186); and

(c) the trial court found "... I think there is sufficient allegations for a hostile work environment." (Page 50 of App. C in the UW's Brief-Hearing on Summary Judgment.).

III. LEGAL ARGUMENT

A. The Court Should Not Accept Review Because the Opinion Cites and Follows *Antonius* and Conflicts with No Other Appellate Decision.

Appellant starts with the basic proposition that this case is in many ways factually *sui generis*. Respondents cite no other case where a statement which comprised an act which contributed to the creation of a hostile work environment occurred after the effective date of the WLAD but other acts occurred prior to that date. In fact, Respondents cite no

authority for the proposition that, in such circumstance, an act which fell within the protection of the recently amended law is not actionable.

Tellingly, the Respondents do not raise any argument that the Court of Appeals erred in its ruling that the statute of limitations has not run. The underlying doctrinal basis of such ruling is contained in this language of the opinion:

> "In *Antonius v. King County*, our Supreme Court adopted the United States Supreme Court's analysis in *National Railroad Passenger Corp. v. Morgan* to determine whether an employer is liable for hostile work environment conduct that occurred more than three years before the plaintiff filed suit. In *Morgan*, the Court concluded that hostile work environment claims, by their very nature, involve repeated conduct. The Court stated that the
>
> > **"unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years** and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts."
>
> A hostile work environment claim is, therefore, composed of a series of separate acts that collectively constitute one unlawful employment practice. Accordingly, provided that an act contributing to the claim occurs within the filing period, a court may consider the entire time period of the hostile environment for purposes of determining liability."

162 Wn. App. at p. 366 (footnotes omitted) (emphasis added).

Respondents do not ask this Court to overturn this holding in *Antonius*. The Court of Appeals' analysis of the very nature of a hostile work environment case is that it "cannot be said to occur on a particular day." Id. Yet this is precisely what the Respondents are asking this Court

to do: take review and reverse the Court of Appeals by holding that the hostile work environment created by the Respondents, if any, occurred on only one day: the day of Lukehart's "angry man" comment to Loeffelholz and other employees.

Such a result would not only conflict with *Antonius'* definition of a hostile work environment case, it would be completely unjust. It would effectively immunize a discriminatory actor from any liability even if he or she engaged in an act contrary to the provisions of WLAD. Such a result is clearly contrary to the remedial purposes of the Act and legislative intent that it be liberally construed. See RCW 49.60.010; *Marquis v. City of Spokane*, 130 Wn. 2d 97. 108, 922 P.2d 43 (1996).

Respondents suggest that the Opinion's result applies the WLAD "retroactively." This is simply untrue. The Opinion applies that Act prospectively to insure that acts which contribute to the creation of a hostile work environment which take place after the effective date of the Act are actionable, even if conduct which preceded that effective date is also taken into consideration in determining whether a hostile work environment was created. Therefore the cases cited on p. 11 of the Petition are completely inapposite because they stand for the unremarkable proposition that past conduct cannot be retroactively made criminal by the subsequent passage of a law outlawing it. A more appropriate factual circumstance would be whether a person would be charged with the crime of conspiracy where one overt act of the

conspiracy was committed prior to the passage of a criminal section but another overt act occurred after the law was amended. There is little doubt that a charge of conspiracy would lie in such circumstances. *State v. Dent,* 123 Wn.2d 467, 869 P.2d 392 (1994) (holding that the commission of an overt act in one county vests venue in that County even if other acts occurred elsewhere). Here the Court of Appeals Opinion conflicted with no other opinion of any appellate Court in the state which had comparable facts.

B. The Opinion Properly Held that A Genuine Issue of Material Fact Exists Which Precludes Summary Judgment on the Hostile Work Environment Claim.

It is axiomatic that such factual issues must be resolved by the jury, lest the Appellants' inviolate right to a jury trial, and the concomitant right to have all factual issues resolved by it, not a judge, be abridged. See *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989).

The legal test of whether such an act or statement was "part of the same actionable hostile work environment practice" is not high: it is whether this act "contribut[ed] to the claim." See *Antonius*, 153 Wn.2d at 264 (quoting *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, at 117, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)).

Rather the trial court, and the Respondents, have had to perform mental gymnastics to claim that this threatening and hostile comment was totally unrelated to any other hostile actions and comments by Lukehart.

In short, they wrenched this key comment out of the entire context of the hostile work environment that Lukehart created toward Debra Loeffelholz.

The Respondents' dismissive comment that such a clearly intimidating comment was directed at others, not Debra Loeffelholz, and didn't refer to her sexual orientation, are arguments for the jury, not a trial court ruling on summary adjudication or this Court on Petition for Review. They had the burden of establishing there are no genuine issues of material fact, not the Appellant. They failed to do so.

First, it is important to underscore that the trial court found that the hostile work environment claim was properly alleged and refused to grant summary judgment for Respondents on this claim. (See RP 50 of App. C in the UW's Brief-Hearing on Summary Judgment) ("I would certainly, frankly, disagree with the University's argument that if there wasn't a statue of limitations argument, and we were looking at this, I think there is sufficient allegations for a hostile work environment. But my problem is with the statute of limitations.") (emphasis added). The Appellant is therefore entitled to the inference that the Respondents created a hostile work environment over the years when Lukehart supervised Appellant. The only question is whether the statement Lukehart made in the last week before leaving contributed to that environment or not. That is not a hard question to answer. But the trial court answered it wrong. More importantly it is for the jury to answer, not the trial court, and not even this Court. The Opinion got it right.

The proof that Lukehart's "very angry man" statement was part and parcel of the hostile work environment claim is supplied by the very findings of the University's own HR investigation cited above. Just because Lukehart's statement didn't add to his statement "...because I hate lesbians" or "...you lesbian you" is not dispositive of whether the display of hostility, aggression, meanness, and threats was part of his three year plus campaign waged against Ms. Loeffelholz on account of her sexual orientation. Lukehart may have had different reasons for creating hostility toward Ms. Loeffelholz than he did at Siad Rastegar or other co-workers. His reasons were clearly stated the very first time he interacted with Debra whom he perceived as a lesbian: "Don't flaunt it." But the Respondents have cited no legal authority, and none exists, for the proposition that there is a legal requirement that a particular comment must mention the reason why the comments were made or itself display the discriminatory animus that produced it. Such could not be the law. The law looks at the cumulative effects of conduct not isolated or discrete acts alone. See *Antonius and Morgan, supra.* .

The fact he made this "very angry" comment when other co-workers were present is also not dispositive because it is an argument the Respondents can make to the jury. The presence of other people when a comment was made certainly cannot mean, as a matter of law, that Debra was not an intended target of this comment. The jury could certainly infer that he included Debra Loeffelholz in the category of people he was going

to be even more angry at when he returned. Furthermore the Appellant is entitled to the inference and the jury is entitled to determine that Lukehart's prior statement "don't flaunt being gay" and related comments about Debra being a lesbian, were all related to the many times he used hostile, threatening or intimidating actions toward her, leading her to fear his retaliation if she told anyone about it (See CP 184-185).

IV. CONCLUSION

For all the foregoing reasons the Petition should be denied. Respondents have not met the requirements of RAP 13.

RESPECTFULLY SUBMITTED this 14th day of October, 2011.

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DECLARATION OF SERVICE

I, Tricia Russell, declare as follows: on October 14, 2011, I caused to be served upon Respondents, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

APPELLANT'S OPENING BRIEF

Howard Mark Goodfriend Edwards Sieh Smith & Goodfriend, PS 1109 First Ave., Suite 500 Seattle, WA 98101-2988	_x_ via WA Legal Messenger ___ via Facsimile ___ via E-mail ___ via US Mail
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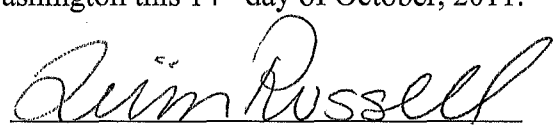
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 14th day of October, 2011.



Tricia Russell