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No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 65364-4-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FILED
SEP 29 2011
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STATE OF WASHINGTON

DEBRA LOEFFELHOLZ,
Appellant,
v.

UNIVERSITY OF WASHINGTON and
JAMES LUKEHART and JANE DOE LUKEHART,
and the marital community comprised thereof,
Respondents.

PETITION FOR REVIEW

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A. Introduction.

Effective June 7, 2006, the Legislature amended Washington's Law Against Discrimination ("WLAD") to, for the first time, make it unlawful for an employer "[t]o discriminate against any person in compensation or in other terms or conditions of employment because of . . . sexual orientation." Laws of 2006, ch. 4, § 10, *codified at* RCW 49.60.180(3). While stating that the 2006 amendment could only operate "prospectively," the Court of Appeals nonetheless held that a jury could award an employee damages for conduct constituting sexual orientation discrimination that had occurred before the statute was amended if it found that a single act contributing to a hostile work environment occurred after the effective date of the new law. The Court of Appeals' published decision incorrectly applies this Court's settled jurisprudence barring retroactive application of a law imposing a new liability, and allows the recovery of damages for conduct that was not unlawful when it occurred. The employer, the University of Washington and its employee, James Lukehart, seek review.

B. Identity Of Petitioners.

The petitioners are the University of Washington and James Lukehart, respondents in the Court of Appeals and defendants in

superior court.

C. Court Of Appeals Decision.

The Court of Appeals' published decision reversed the superior court's dismissal of respondent Debra Loeffelholz's 2009 lawsuit alleging discrimination on the basis of sexual orientation. *Loeffelholz v. Univ. of Washington*, 162 Wn. App. 360, 253 P.3d 483 (2011). (App. A) The Court of Appeals denied a timely motion for reconsideration on August 17, 2011. (App. B)

D. Issues Presented For Review.

1. May an employee recover damages for sexual orientation discrimination caused by conduct that occurred before the Legislature made it unlawful to discriminate on the basis of sexual orientation?

2. Is a departing manager's comment to a group of co-employees, upon his deployment for military service, that he will return from Iraq an "angry man," sufficiently related to his previous comments regarding the plaintiff's sexual orientation to be considered part of the same hostile work environment that plaintiff alleged existed more than three years before she filed her lawsuit?

E. Statement of the Case.

Respondent Debra Loeffelholz became the Program Coordinator in petitioner University of Washington's asbestos office for Facilities Services in 2003. (CP 21) Loeffelholz reported to petitioner James Lukehart who was the Asbestos Coordinator. (CP 22) In December 2003, Lukehart became the Central Services Manager for Facilities Services and assumed additional supervisory duties. (CP 89-90)

Loeffelholz alleged that shortly after she began working under Lukehart in November 2003, Lukehart asked her whether she was gay, and that when she answered affirmatively, told Loeffelholz "not to flaunt it." (CP 72, 197) Loeffelholz alleged that between 2003 and April 2006 Lukehart denied her higher level duty opportunities, denied her training opportunities, took away her flexible schedule, restricted her use of overtime, and failed to give her an evaluation. (CP 39-40, 72)

Lukehart served as Loeffelholz's supervisor until early 2006, when she was placed under the supervision of Tony Mussio, who assumed responsibility for meeting with Loeffelholz on a weekly basis. (CP 23-24) Several months later, Lukehart, who is a Lieutenant Colonel in the Army Reserves, learned that he would be

deployed to Iraq on June 25, 2006. Loeffelholz alleged that shortly before his departure to Iraq, Lukehart "held a meeting to let everybody know that he was going to Iraq, and toward the end of that meeting, he said, 'I am going to come back a very angry man.'" (CP 342)

After Lukehart's deployment, several employees whom he had supervised, including Loeffelholz, complained about Lukehart's management. (CP 440-42) Following an investigation that concluded upon his return from Iraq in August 2007, the University reassigned Lukehart and required that he attend management training sessions. (CP 100-01, 441, 451-52) Lukehart has had no contact with Loeffelholz since June 23, 2006, his last day of work before being deployed. (CP 25, 451-52)

Discrimination on the basis of sexual orientation was not prohibited in Washington until the 2006 Legislature amended RCW 49.60.180(3) to include sexual orientation as a protected class under the Law Against Discrimination. The amendment became effective on June 7, 2006. Laws of 2006, ch. 4, § 10, *codified at* RCW 49.60.180(3). Loeffelholz filed this lawsuit against the University of Washington and Lukehart (collectively, "the University") on May 13, 2009. Relying on the events occurring

between 2003 and shortly before Lukehart deployed in June 2006, Loeffelholz alleged that she had been subjected to a hostile work environment on the basis of her sexual orientation under the 2006 amendment to the WLAD. (CP 5-12)

The University moved for summary judgment on the ground that Loeffelholz failed to allege any act that contributed to a hostile work environment within three years of her May 2009 lawsuit. It also argued that all alleged conduct predating the June 2006 amendment to the WLAD was not unlawful as a matter of law because the amendment prohibiting discrimination on the basis of sexual orientation was prospective and did not apply retroactively. King County Superior Court Judge Regina Cahan granted the motion and dismissed Loeffelholz's lawsuit. (CP 421-23)

The Court of Appeals reversed in a published decision. (App. A) The court first held that a hostile work environment based upon sexual orientation constitutes "one unlawful employment practice" under the WLAD, and that Loeffelholz raised a triable issue of fact by alleging that the hostile work environment continued within the three year statute of limitations period. (Opinion at 4-6, *citing Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2004)) The Court of Appeals held that Lukehart's

comment to a group of workers, made on the eve of his deployment to Iraq in June 2006, that he was going to come back from Iraq “a very angry man,” was “sufficient to constitute a discriminatory act for purposes of Loeffelholz’s hostile work environment claim,” thus authorizing a jury to “consider the entire time period of the hostile environment for purposes of determining liability.” (Opinion at 5-6)

However, the Court of Appeals also held that the 2006 amendment to the WLAD prohibiting discrimination based on sexual orientation “applies prospectively only” because the amendment created a new right of action proscribing conduct that was not previously unlawful. (Opinion at 7-8) The court nonetheless held that “the amendment can properly be applied to [Loeffelholz’s] claim,” without violating the bar against retroactively imposing liability for past conduct, if the jury found that Lukehart’s “angry man” comment occurred after the amendment’s effective date:

If it is determined that Lukehart made the comment that he would return from Iraq a very angry man . . . prior to the effective date of the amendment, then Loeffelholz cannot maintain her hostile work environment claim because applying the amendment to her claim would constitute a retroactive application of the amendment. If, however, it is determined that Lukehart made the comment after the effective date of the amendment, then the amendment can properly be applied to her claim, because such application would be prospective.

(Opinion at 8)

The Court of Appeals denied reconsideration. (Appendix B)

The University seeks review.

F. Argument Why Review Should Be Granted.

1. The Court Of Appeals Erred In Allowing The University To Be Held Liable For Conduct That Was Not Unlawful When It Occurred Improperly Applying The 2006 Amendment To The WLAD Retroactively.

The Court of Appeals held that the Legislature's amendment prohibiting discrimination on the basis of sexual orientation applies prospectively only from its June 7, 2006 effective date, yet authorized an award of damages for conduct that was not unlawful at the time it occurred. The court's decision fails to distinguish between conduct that was always unlawful and remains actionable because it continues within three years of filing suit, and conduct that was never unlawful and thus cannot be actionable as a matter of law. This Court should accept review because the Court of Appeals decision conflicts with this Court's decisions prohibiting retroactive imposition of new liabilities, a rule of constitutional dimension, and presents an issue of substantial public interest. RAP 13.4(b)(1), (3) and (4).

The Court of Appeals correctly held that the amendment to RCW 49.60.180(3) must apply prospectively, based on the Legislature's intent to "expand" the law against discrimination to include sexual orientation, and to provide a new right of action where none previously existed. (Opinion at 7, citing Final B. Rep. on Engrossed Substitute H.B. 2661, at 2, 59th Leg., Reg. Sess. (2006), and *Johnston v. Beneficial Mgmt. Corp. of America*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975) (Consumer Protection Act could not be applied to make unlawful allegedly deceptive acts occurring prior to the CPA's effective date)). However, the Court of Appeals in fact authorized the retroactive application of the amendment to the WLAD by allowing Loeffelholz to establish the existence of an actionable hostile work environment based on conduct was not illegal at the time it occurred.

The Court of Appeals failed to recognize that retroactive application of an amendment to an anti-discrimination law presents a different issue than whether liability may be imposed for unlawful conduct that predates the statute of limitations. See *Johnston*, 85 Wn.2d at 644 (because CPA "did not apply retroactively . . . , we need not consider the question whether, in any event, the statutes of limitations would have run upon the claim.") The statute of limita-

tions bars liability for unlawful conduct because of the passage of time. By contrast, the prohibition against retroactive legislation bars liability for conduct that was *not* unlawful when it occurred.

This Court has held that a plaintiff suing under the WLAD may recover for conduct predating the statute of limitations period that is “part of the same *unlawful* employment practice” if at least one act contributing to the alleged hostile work environment occurs within three years of filing suit. ***Antonius***, 153 Wn.2d at 265-66, quoting ***National R.R. Passenger Corp. v. Morgan***, 536 U.S. 101, 122, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (emphasis added). In ***Antonius***, the plaintiff sued in 2000, alleging that she was subjected to a hostile work environment as a jail guard beginning in 1983, and continuing through 2000. The ***Antonius*** Court viewed the plaintiff’s hostile work environment allegations as a “series of separate acts that collectively constitute one unlawful employment practice.” 153 Wn.2d at 2664, quoting ***Morgan***, 536 U.S. at 117 (internal quotations omitted). The Court held that the plaintiff could sue for conduct occurring more than three years before she brought suit if she could show one act occurring within the limitations period and that it had “some relationship” to the acts occurring before the limitations period. 153 Wn.2d at 271.

In relying on **Antonius's** statute of limitations analysis, the Court of Appeals failed to note the critical distinction, compelled by this Court's settled retroactivity precedent, between unlawful conduct and conduct that only becomes unlawful upon the enactment of new legislation. The gender-based hostile work environment at issue in **Antonius** was illegal when Antonius began her employment with King County in 1983. By contrast, the discrimination on the basis of sexual orientation alleged by Loeffelholz was *not* unlawful until June 7, 2006, when the Legislature's amendment to the WLAD became law. The Court of Appeals' published decision conflicts with this Court's precedent and fundamental constitutional principles limiting the Legislature's ability to retroactively impose new liability based on conduct predating the effective date of legislation. RAP 13.4(b)(1), (3).

The Court of Appeals held that a jury could find that Lukehart's "angry man" comment made the "unlawful employment practice" of maintaining a hostile work environment on the basis of sexual preference actionable, if it occurred both within the limitations period (after May 13, 2006), and after the effective date of the 2006 amendment to RCW 49.60.180(3) (June 7, 2006). (Opinion at 5, 8) But even if Lukehart made his angry man

comment after the effective date of the June 7, 2006 amendment to the WLAD, and even if it is found to be part of “a series of separate acts that collectively constitute one unlawful employment practice,” (Opinion at 5), all of the other “separate acts” that occurred before June 7, 2006 were *lawful* when committed.

By definition, imposing liability, be it civil or criminal, for past conduct that was not unlawful until proscribed by a new law constitutes retroactive, rather than prospective, application of that law. See ***Hammack v. Monroe St. Lumber Co.***, 54 Wn.2d 224, 229, 339 P.2d 684 (1959) (“Upon principle, every statute, which . . . creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.”) (*quoting Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.); *In re Hinton*, 152 Wn.2d 853, 861, 100 P.3d 801 (2004) (applying statute to “impose[] punishment for an act that was not punishable when committed” constitutes retroactive application of statute).

This prohibition against the retroactive imposition of a new liability is of constitutional origin. The due process clauses of the 5th and 14th Amendment and Art. I, § 3 of the Washington

constitution, bar the imposition of liability for conduct that occurs before that conduct has been proscribed by the Legislature. U.S. Const. Amends. V & XIV, § 1; Wash. Const. Art. I, § 23. Due process mandates that a defendant have fair notice of proscribed conduct before liability may accrue. See **City of Seattle v. Klein**, 161 Wn.2d 554, 567, 166 P.3d 1149 (2007) (“Due process requires notice of proscribed conduct so that there is a fair warning of potential penalties from a chosen course of action.”); **State v. Edwards**, 104 Wn.2d 63, 72, 701 P.2d 508 (1985) (“There is no dispute the amendment changed the legal consequence of an act which was completed before its effective date. Such an enactment violates the state and federal constitutional prohibitions against ex post facto legislation.”); see also **Landgraf v. USI Film Products**, 511 U.S. 244, 265, 114 S. Ct. 1483, 1497, 128 L. Ed. 2d 229 (1994) (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly”).

Both the federal and state ex post facto clauses, by their terms, preclude the passage of any statute that retroactively creates or increases criminal punishment. U.S. Const. Art. I, § 10, cl. 1 (“[n]o State shall . . . pass any . . . ex post facto Law.”); Wash.

Const. Art. I, § 23 (“No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.”). This Court should accept review because the Court of Appeals ignored these principles here. RAP 13.4(b)(3).

The federal courts have noted the important distinction between imposing liability for conduct occurring outside the limitations period that was always unlawful, and retroactively imposing liability for conduct that was not unlawful when it occurred:

Nor does the fact that defendants’ discriminatory conduct continued beyond the ADA’s effective date affect the retroactivity analysis. . . . The issue is different where, for example, a defendant engages in a ‘continuing course of conduct’ that extends back beyond the applicable statute of limitations. In such a situation, the defendant may be held liable for acts that occurred outside the statutory period, because the conduct was *always* unlawful.

Bishop v. Okidata, Inc., 864 F.Supp. 416, 421 n.2 (D.N.J. 1994) (ADA plaintiff may not recover damages for discriminatory acts that occurred before statute’s effective date). In ***Miller v. CBC Companies, Inc.***, 908 F.Supp. 1054 (D.N.H. 1995), the district court similarly held that a discrimination plaintiff could not recover under the ADA for conduct that “was *lawful* when committed,” even if that conduct continued past the amendment’s effective date. 908

F. Supp. at 1063-64 (“compensating plaintiff for her pre-Act injuries would amount to a ‘retroactive’ application of the ADA, notwithstanding the continuing nature of defendants’ conduct.”). See also *Mills v. Amoco Performance Products, Inc.*, 872 F.Supp. 975, 985 & n.10 (S.D.Ga. 1994) (plaintiff alleging sexual harassment may recover compensatory and punitive damages only for conduct post-dating Civil Rights Act of 1991, and not “for any pre-enactment conduct that constitutes actionable sexual harassment.”).

These decisions rely on established federal precedent holding that a law imposing liability for discrimination can apply only prospectively to those acts that occur after the law’s effective date, even if the plaintiff alleges that those acts are part of a pattern of discrimination that originated before the law took effect. In *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), African-American employees of a state agency alleged pay disparities from their white counterparts, asserting a claim under Title VII of the Civil Rights Act of 1964, which was made applicable to public employees by the Equal Employment Opportunity Act of 1972, effective on March 24, 1972. The Court unanimously held that the employees’ recovery must be based on discriminatory conduct occurring after, but not before, the effective

date of the Act, even though the pattern of pay disparity predated 1972. 478 U.S. at 395 (“recovery may not be permitted for pre-1972 acts of discrimination”). See also *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 354-55 (4th Cir. 1994) (affirming district court’s instruction to jury not to award damages under Title VII for conduct that occurred prior to the effective date of the Civil Rights Act of 1991). While Washington courts have not expressly addressed the prospective application of an amendment to a statutory cause of action to conduct that straddles the law’s effective date, the analysis of the federal courts is consistent with and compelled by this Court’s retroactivity cases.¹ See, e.g., *Johnston*, 85 Wn.2d at 641-44.

In her hostile work environment claim, Loeffelholz seeks damages for conduct that, with one exception,² predates the effective date of the WLAD amendments and that was not unlawful when it occurred. For instance, Loeffelholz claimed that Lukehart

¹ The federal cases are also persuasive because Washington courts frequently look to federal case law for guidance in interpreting the WLAD. See, e.g., *Antonius*, 153 Wn.2d at 266 (listing cases); *Oliver v. Pacific Northwest Bell Telephone Co., Inc.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986) (“RCW 49.60 is patterned after Title 7 of the Civil Rights Act of 1964 Consequently, decisions interpreting the federal act are persuasive authority for the construction of RCW 49.60.”).

² The University seeks review of the Court of Appeals’ holding that Lukehart’s “angry man” comment is actionable as sexual orientation discrimination in Part F.2, below.

denied her higher level duty, took away her flexible schedules, and that she “was denied training opportunities three years in a row by Lukehart.” (App. Br. at 11-12; CP 68, 71, 196) She also alleged that Lukehart told her not to “flaunt” her sexual preference. (CP 197) Each of these, and all the other, discriminatory acts alleged by Loeffelholz, with the exception of the “angry man” comment, indisputably occurred in 2003, 2004, 2005, or at the latest, April 2006, well before the Legislature made it unlawful to discriminate based upon sexual orientation. (CP 67-74, 196-97) This Court should accept review and hold that the University can only be liable for *unlawful* discrimination, occurring on or after June 7, 2006.

2. The Court of Appeals Erred In Holding That A Reasonable Juror Could Find That Lukehart’s “Angry Man” Comment, Made To A Large Group, Was Motivated By Loeffelholz’s Sexual Orientation Or Directed Toward Her Personally As Part of A Hostile Work Environment.

Apart from authorizing the retroactive imposition of liability for conduct that was not proscribed when it occurred, the Court of Appeals decision falters on another, more threshold level. No reasonable trier of fact could find that Lukehart’s “angry man” comment – the only act alleged by Loeffelholz to have occurred within three years of filing suit and after the June 7, 2006

amendment to the WLAD took effect – was directed at Loeffelholz, contributed to a hostile work environment, or was based upon Loeffelholz’s sexual orientation. This Court should accept review and reinstate the trial court’s dismissal on the ground that Loeffelholz’s hostile work environment claim was time-barred because Loeffelholz failed to establish at least one discriminatory act during the statutory period (May 13, 2006 to May 13, 2009).

This Court in ***Antonius*** adopted the analysis of the U.S. Supreme Court in ***National R.R. Passenger Corp. v. Morgan***, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), for calculating the three year statute of limitations period on a hostile work environment claim under the WLAD. See ***Antonius***, 153 Wn.2d at 268. In ***Morgan***, the Supreme Court held that “[a] charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and *at least one act falls within the time period.*” 536 U.S. at 122 (emphasis added). This Court held in ***Antonius*** that “[t]he acts must have some relationship to each other to constitute part of the same hostile work environment claim.” 153 Wn.2d at 271. The Court of Appeals has applied ***Antonius*** to reject claims where a plaintiff failed to establish a re-

lated act that occurred within the three year statutory period. See, e.g., **Clarke v. State Attorney General's Office**, 133 Wn. App. 767, 138 P.3d 144 (2006), *rev. denied*, 160 Wn.2d 1006 (2007).

Loeffelholz admitted in her deposition that the only statement allegedly made by Lukehart regarding her sexual orientation occurred in 2003, almost six years before this suit was brought. (CP 72-74, 197) Lukehart has not directly supervised Loeffelholz since early 2006, months before making the "angry man" comment at issue here. He has had no contact at all with her since his June 2006 deployment. (CP 23-26, 432) Lukehart allegedly made his "angry man" statement at a large meeting before a group of employees. (CP 342) Loeffelholz does not contend that it was directed specifically to her. Lukehart's alleged statement is devoid of any reference, express or implied, to Loeffelholz's sexual orientation or, for that matter, to Loeffelholz personally. This comment cannot be the basis of a claim by Loeffelholz that she was "singled out" and caused to suffer acts that were severe, pervasive and "objectively abusive" to a reasonable person, and based on animus toward a protected class. **Adams v. Able Building Supply, Inc.**, 114 Wn. App. 291, 296-98, 57 P.3d 280 (2002); **Doe**

v. State Department of Transportation, 85 Wn. App. 143, 148-50, 931 P.2d 196, *rev. denied*, 132 Wn.2d 1012 (1997).

The Court of Appeals erred in holding that Lukehart's "angry man" comment could contribute to a hostile work environment. The trial court correctly held that no rational trier of fact could find that Lukehart's recognition of the frustrations likely engendered by a lengthy period of overseas military deployment, directed at a large group and not to Loeffelholz personally, constituted such "objectively abusive" conduct that was motivated by animus toward Loeffelholz's sexual orientation, or a continuation of the "same hostile work environment" that she alleged was based upon her sexual preference. **Antonius**, 153 Wn.2d at 271. (RP 49) Because the court's decision conflicts with **Antonius** and decisions from the Court of Appeals, this Court should accept review, reverse the Court of Appeals, and reinstate the trial court's decision. See RAP 13.4(b)(1), (2).

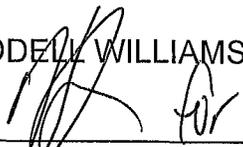
G. Conclusion.

The Court of Appeals erroneously made actionable conduct that was not unlawful when it occurred. This Court should accept review, reverse the Court of Appeals, and reinstate the trial court's

judgment of dismissal, or at a minimum, clarify that petitioners may not be held liable based on conduct occurring before June 7, 2006.

DATED this 15th day of September, 2011.

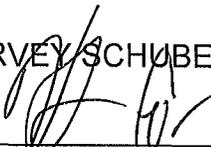
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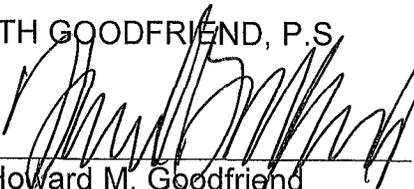
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 16, 2011, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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Anne Preston, Jared VanKirk Garvey, Schubert & Barer Second & Seneca Bldg., 18th Floor 1191 Second Ave. Seattle, WA 98101-2939	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E- Mail
Michael E. Withey Law Offices of Michael Withey 601 Union Street, Suite 4200 Seattle WA 98101-4036	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E- Mail

DATED at Seattle, Washington this 16th day of September, 2011.



Tara D. Friesen

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP 16 PM 9:29

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEBRA LOEFFELHOLZ,)
)
 Appellant,)
)
 v.)
)
 UNIVERSITY OF WASHINGTON)
 and JAMES LUKEHART and)
 JANE DOE LUKEHART, and the)
 marital community composed thereof,)
)
 Respondents.)

No. 65364-4-1
DIVISION ONE
PUBLISHED OPINION
FILED: June 27, 2011

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DIVISION ONE
JUN 27 2011

GROSSE, J. — A hostile work environment claim is composed of a series of separate acts that collectively constitute one unlawful employment practice. A plaintiff is entitled to present evidence of harassment before the statutory limitations period to show the cumulative effect of the acts, provided some of the objectionable conduct occurred within the limitations period. Here the record is unclear, but raises an inference, that objectionable conduct occurred within the statute of limitations and after the effective date of the amendment to the Washington Law Against Discrimination, chapter 49.60 RCW, prohibiting discrimination on the basis of sexual orientation. Accordingly, we reverse the summary judgment dismissal of Debra Loeffelholz's hostile work environment claim.

FACTS

Since April 2003, Debra Loeffelholz has worked at the University of Washington (UW) as a program coordinator in the asbestos office for facilities services. When she began her employment, Loeffelholz was supervised by James Lukehart. At some point prior to June 2006, Loeffelholz was put under

the supervision of Tony Mussio. The exact date of this transfer is unclear from the record, although Loeffelholz guessed that this happened probably five or six months prior to the end of June 2006.

Shortly after Lukehart became Loeffelholz's supervisor, he asked her whether she was gay. When Loeffelholz told Lukehart that she was gay, Lukehart told her not "to flaunt it at all" around him.

After Loeffelholz told Lukehart she was gay, she lost the privilege of flex time and approval to attend training seminars. Also, Lukehart told Loeffelholz that he could look online and see the positions Loeffelholz was applying for. He told her he had a gun in his vehicle and that he was trying to get information on people to use against them later. Lukehart frequently spoke about revenge and expressed his hatred for certain people. He refused to complete employment evaluations of Loeffelholz, even though she asked him to do so. Co-workers told Loeffelholz that Lukehart had made derogatory comments about her, namely that she was gay and overweight.

Lukehart is in the United States Army Reserves. He was deployed to Iraq on June 25, 2006. His last day of work at UW before his deployment was June 23, 2006. During the last group meeting before he left for Iraq, Lukehart informed those in attendance, including Loeffelholz, that he was going to come back from Iraq "a very angry man." The record does not reflect the exact date on which Lukehart made this comment.

After Lukehart was deployed to Iraq, several employees complained to his replacement about Lukehart's supervision. Rick Cheney, Lukehart's supervisor, started an investigation into the complaints. Cheney prepared summaries of the

complaints against Lukehart and of investigative interviews into these complaints conducted by UW's Human Resources Department. Cheney found serious problems with Lukehart's management style and concluded that Lukehart was manipulative, used intimidation in the workplace, and inappropriately shared personal information about other employees.

Lukehart returned to UW after his deployment ended, but has no supervisory authority over Loeffelholz.

On May 13, 2009, Loeffelholz filed a complaint against UW and Lukehart, alleging sexual orientation discrimination in violation of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. UW filed a motion for summary judgment in which Lukehart joined. The trial court granted the motion for summary judgment, finding that Loeffelholz's claim was time-barred and also that the June 7, 2006 amendment to the WLAD prohibiting discrimination on the basis of sexual orientation was not retroactive. Loeffelholz appeals the summary judgment dismissal of her hostile work environment claim.

ANALYSIS

Our review of an order granting summary judgment is de novo.¹ Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.² We construe the evidence and inferences from the evidence in favor of the nonmoving party.³

To establish a claim for hostile work environment, a plaintiff must prove that the harassment (1) was unwelcome, (2) was because she is a member of a

¹ Braaten v. Saberhagen Holdings, 165 Wn.2d 373, 383, 198 P.3d 493 (2008).

² CR 56(c).

³ Braaten, 165 Wn.2d at 383.

protected class, (3) affected the terms and conditions of her employment, and (4) was imputable to her employer.⁴ A plaintiff must also file the hostile work environment claim within the applicable statute of limitations. The WLAD does not contain its own limitations period. Rather, discrimination claims must be brought within three years under the general three-year statute of limitations for personal injury actions, RCW 4.16.080(2).⁵

In Antonius v. King County,⁶ our Supreme Court adopted the United States Supreme Court's analysis in National Railroad Passenger Corp. v. Morgan⁷ 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.^[8]

A hostile work environment claim is, therefore, composed of a series of separate acts that collectively constitute one unlawful employment practice.⁹ Accordingly, provided that an act contributing to the claim occurs within the filing period, a

⁴ Antonius v. King County, 153 Wn.2d 256, 261, 103 P.3d 729 (2004).

⁵ Antonius, 153 Wn.2d at 261-62.

⁶ 153 Wn.2d 256, 261, 103 P.3d 729 (2004).

⁷ 536 U.S. 101, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002).

⁸ Morgan, 536 U.S. at 115 (citations omitted).

⁹ Morgan, 536 U.S. at 117.

court may consider the entire time period of the hostile environment for purposes of determining liability.¹⁰

Under Antonius and Morgan, Loeffelholz needed to prove a discriminatory act within the limitations period in order to present earlier discriminatory acts.¹¹ The question of whether the alleged acts, occurring within and outside of the limitations period, are part of one unlawful employment practice is for the jury.¹² Loeffelholz claims that Lukehart's comment that he would return from Iraq a very angry man is a discriminatory act within the limitations period that allows her to present earlier discriminatory acts to support her hostile work environment claim. The trial court ruled as a matter of law that this comment by Lukehart was not an act occurring within the limitations period that would allow Loeffelholz to introduce evidence of earlier discriminatory acts. The trial court erred in so ruling.

In evaluating Loeffelholz's hostile work environment claim, Lukehart's comment about coming back from Iraq a very angry man cannot be viewed in isolation as a discrete act. Rather, hostile work environment claims "are based on the cumulative effect of individual acts."¹³ Properly viewing Loeffelholz's hostile work environment claim as composed of a series of separate acts that collectively constitute one unlawful employment practice, and properly viewing the evidence and reasonable inferences therefrom in favor of Loeffelholz, we conclude that the trial court erred by concluding as a matter of law that the

¹⁰ Antonius, 153 Wn.2d at 264 (citing Morgan, 536 U.S. at 117).

¹¹ Broyles v. Thurston County, 147 Wn. App. 409, 437, 195 P.3d 985 (2008).

¹² Broyles, 147 Wn. App. at 437.

¹³ Antonius, 153 Wn.2d at 264 (quoting Morgan, 536 U.S. at 117).

comment was not sufficient to constitute a discriminatory act for purposes of Loeffelholz's hostile work environment claim.

Because Lukehart's comment is the discriminatory act that Loeffelholz claims occurred within the three-year limitations period for her WLAD hostile work environment claim, the date on which Lukehart made the comment is critical to the viability of Loeffelholz's hostile work environment claim. The record does not reflect the precise date on which he made the comment. The record does, however, reflect that Lukehart made the comment during the last group meeting before he was deployed to Iraq and that his last day of work at UW before his deployment was June 23, 2006. This creates an inference that the comment was made after May 13, 2006 and therefore was within the three years preceding the filing of the suit on May 13, 2009. Accordingly, the summary judgment dismissal of Loeffelholz's hostile work environment claim was error and must be reversed.

A determination of the date the comment was made will also determine whether, if applied to Loeffelholz's hostile work environment claim, the WLAD amendment needs to be applied retroactively or only prospectively. The amendment to the WLAD adding sexual orientation as a prohibited basis of discrimination was enacted in 2006.¹⁴ The amendment was effective June 7, 2006, or more precisely, midnight on June 6, 2006.¹⁵ If Lukehart's comment about coming back from Iraq an angry man was made prior to June 7, 2006, application of the WLAD amendment to Loeffelholz's hostile work environment

¹⁴ LAWS OF 2006, ch. 4, § 2.

¹⁵ LAWS OF 2006, at ii (see (5)(a) setting out the effective date).

claim would constitute a retroactive application of the amendment. If, however, the comment was made after the effective date of the amendment, then application of the amendment to Loeffelholz's claim entails only a prospective application of the amendment.

Retroactive application of an amendment is proper only under certain circumstances. We presume that a statute applies prospectively unless it is curative or remedial in nature or unless the legislature provides for retroactive application.¹⁶ "A remedial statute is one which relates to practice, procedures, and remedies."¹⁷ A curative amendment is one that clarifies or technically corrects an ambiguous statute.¹⁸ Further, a statute which creates a new right of action applies prospectively only.¹⁹

When an amendment does not contain an express statement of whether it is retroactive, we may look to legislative bill reports to ascertain legislative intent on retroactivity.²⁰ The final bill report on the WLAD amendment states that, by virtue of the amendment, the WLAD "is expanded to prohibit discrimination based on a person's sexual orientation."²¹ This language shows a legislative intent to

¹⁶ Densley v. Department of Ret. Sys., 162 Wn.2d 210, 223, 173 P.3d 885 (2007).

¹⁷ State v. McClendon, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997).

¹⁸ Washington State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 303, 174 P.3d 1142 (2007).

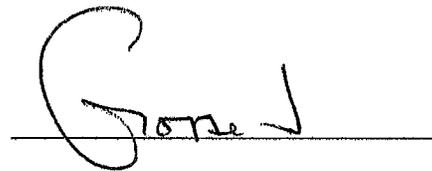
¹⁹ Johnston v. Beneficial Mgmt. Corp. of America, 85 Wn.2d 637, 641, 538 P.2d 510 (1975).

²⁰ Barstad v. Stewart Title Guar. Co., Inc., 145 Wn.2d 528, 537, 39 P.3d 984 (2002).

²¹ FINAL B. REP. on Engrossed Substitute H.B. 2661, at 2, 59th Leg., Reg. Sess. (Wash. 2006).

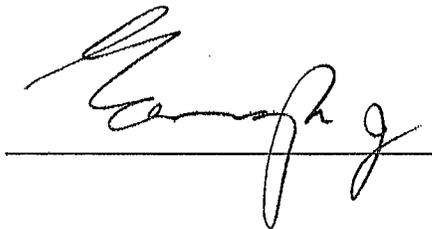
create a new cause of action by virtue of the amendment.²² Accordingly, the amendment can have prospective application only. If it is determined that Lukehart made the comment that he would return from Iraq a very angry man was made prior to the effective date of the amendment, then Loeffelholz cannot maintain her hostile work environment claim because applying the amendment to her claim would constitute a retroactive application of the amendment. If, however, it is determined that Lukehart made the comment after the effective date of the amendment, then the amendment can properly be applied to her claim, because such application would be prospective.

We reverse the trial court's order granting summary judgment in favor of UW and Lukehart and remand this matter for further proceedings consistent with this opinion.²³

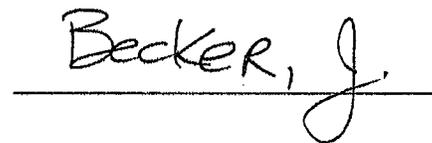


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WE CONCUR:



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²² The trial court concluded, as an alternative basis for granting summary judgment in favor of Lukehart and UW, that the amendment created a new cause of action.

²³ We need not and do not address UW's and Lukehart's claim that Loeffelholz's argument is based on inadmissible hearsay that was the subject of Lukehart's motion to strike. Lukehart's comment about returning from Iraq a very angry man was not among the statements Lukehart moved to strike.

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No. 65364-4-1

ORDER DENYING MOTION
FOR RECONSIDERATION

The respondents, University of Washington and James and Jane Doe Lukehart, have filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

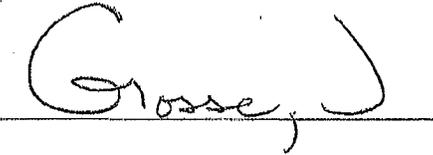
Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 17th day of August, 2011.

FILED
COURT OF APPEALS
DIVISION ONE
AUG 17 2011

FOR THE COURT:



Judge