

717430

717430

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUL -2 PM 2:56

NO. 71743-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JAMES A. KUEHN,

Appellant,

v.

SNOHOMISH COUNTY,

Respondent.

BRIEF OF RESPONDENT

MARK K. ROE
Snohomish County Prosecuting Attorney
Helene C. Blume, WSBA No. 15462
Steven J. Bladek, WSBA No. 24298
Deputy Prosecuting Attorneys
Attorneys for Snohomish County
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-6330

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE ISSUES 2

III. STATEMENT OF THE CASE..... 3

A. Work In The Snohomish County Road Maintenance Division. 3

B. Mr. Kuehn’s Medical Condition and Accommodation History. 5

C. Mr. Kuehn Received Discipline for Unexcused Tardiness. 9

1. June 13, 2007 Tardiness..... 10

2. June 27, 2007 Tardiness..... 11

3. Termination Decision..... 11

D. The County Processed Mr. Kuehn’s Union Grievance..... 12

E. Mr. Kuehn Files a Damage Claim and Lawsuit. 14

IV. ARGUMENT..... 14

A. Mr. Kuehn’s Wrongful Discharge Claim is Time-Barred. 15

B. Mr. Kuehn’s Disability Discrimination Claim is Time-Barred.17

1. The County Made and Communicated Its Decision Not to Accommodate Kuehn’s Disability in the August 2, 2007 Letters. 19

2. Continued Employment and Later Reconsideration of the Termination Decision in the Grievance Process Did Not Extend the Statute of Limitations. 21

V. CONCLUSION..... 30

TABLE OF AUTHORITIES

	Page
Cases	
State	
<u>Albright v. State</u> , 65 Wn. App. 763, 829 P.2d 1114 (1992).....	17, 18, 22, 23, 24, 30
<u>American Exp. Centurion Bank v. Stratman</u> , 172 Wn. App. 667, 292 P.3d 128, 133 (2012).....	15
<u>Antonius v. King County</u> , 153 Wn.2d 256, 103 P.3d 729 (2004).....	16
<u>Douchette v. Bethel Sch. Dist. No. 403</u> , 117 Wn.2d 805, 818 P.2d 1362 (1991).....	16, 18
<u>Goodman v. Boeing Co.</u> , 75 Wn. App. 60, 877 P.2d 703 (1994).....	26
<u>Greenhalgh v. Dep’t of Corr.</u> , 160 Wn. App. 706, 248 P.2d 150 (2011).....	15
<u>Hinman v. Yakima School District</u> , 69 Wn. App. 445, 850 P.2d 536 (1993).....	17, 18, 22, 24, 25
<u>Hintz v. Kitsap County</u> , 92 Wn. App. 10, 960 P.2d 946 (1998).....	16, 17, 22, 23, 24
<u>In re Kelly and Moesslang</u> , 170 Wn. App. 722, 287 P.3d 12 (2012).....	15
<u>Kauzlarich v. Yarbrough</u> , 105 Wn. App. 632, 20 P.3d 946 (2001).....	14
<u>Martini v. Boeing</u> , 88 Wn. App. 442, 945 P.2d 248 (1997).....	28, 29, 30
<u>Padron v. Goodyear Tire & Rubber Co.</u> , 34 Wn. App. 473, 662 P.2d 67, 68 (1983).....	15
<u>Wheeler v. Catholic Archdiocese of Seattle</u> , 65 Wn. App. 552, 829 P.2d 196 (1992).....	26
<u>Wilson v. Steinbach</u> , 98 Wn.2d 434, 656 P.2d 1030 (1982).....	14
<u>Young v. Key Pharm., Inc.</u> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	15

	Page
 Federal	
<u>Cardon v. Fernandez</u> , 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981).....	18
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317, 106 S. Ct. 2548 (1986).....	15
<u>Delaware State College v. Ricks</u> , 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980).....	16, 18, 22
<u>Electrical Workers v. Bobbins & Myers, Inc.</u> , 429 U.S. 229, 97 S. Ct. 441, 50 L.Ed.2d 427 (1976).....	16, 22
<u>Humphrey v. Memorial Hosp. Ass'n</u> , 239 F.3d 1128 (9th Cir. 2001)	31
<u>National Railroad Passenger Corp.</u> , 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002).....	16
 Other Authorities	
SCC 2.90.050(1)	17
 Rules	
CR 56(c).....	15

I. INTRODUCTION

The Court should uphold summary judgment dismissal of Plaintiff James A. Kuehn's claims of wrongful termination and failure to accommodate his disability because he did not initiate this action within three years after Snohomish County communicated its decision to impose discipline and terminate his employment for repeated instances of unexcused tardiness. At the time Snohomish County terminated Mr. Kuehn, he was operating under an accommodation plan of being excused for tardiness caused by his medical condition, and his wrongful termination and failure to accommodate claims are based solely on an allegation that the County should have accommodated him by excusing two final instances of tardiness that occurred in June 2007. No further tardiness occurred and Mr. Kuehn identifies no other event or manner in which the County could or should have accommodated his disability after his termination. Rather, he admits that, on August 2, 2007, he received the two disciplinary letters notifying him that the County would not be excusing his tardiness and was terminating his employment. Once Mr. Kuehn received such notice on August 2, 2007, he knew all the facts necessary to process his wrongful termination and failure to accommodate claims and it is immaterial that his termination did not take effect for another two weeks or that the County continued to process his union

grievances over the next several months. Mr. Kuehn's argument that the County breached an ongoing duty to accommodate his disability after termination is not supported by the facts and is based upon a misreading of applicable case law. Because Mr. Kuehn did not file his damage claim until more than three years after he received notice the County would not excuse his tardiness and was terminating his employment, his wrongful termination and failure to accommodate claims are time-barred and summary judgment should be affirmed.

II. STATEMENT OF THE ISSUES

1. Whether summary judgment dismissing a disability discrimination wrongful termination claim under the statute of limitations must be upheld when the Plaintiff filed his pre-suit notice of claim with a county employer three years and nine days after receiving notice of his termination.

2. Whether summary judgment dismissing a claim for failure to accommodate a disability under the statute of limitations must be upheld when the Plaintiff filed his pre-suit notice of claim with a county employer three years and nine days after he received notice the county would not accommodate his disability by excusing two instances of tardiness and instead imposed discipline and terminated his employment.

III. STATEMENT OF THE CASE

Plaintiff James A. Kuehn worked as a full-time employee for Snohomish County from July 1992 until the County terminated his employment on August 2, 2007 for repeated instances of unexcused tardiness. CP 41, 46, 133-34; CP 158. At the time of his termination, Mr. Kuehn worked as a Road Maintenance Worker (“RM Worker”) in the Road Maintenance Division of the Snohomish County Department of Public Works. CP 41, 46, 133-34, 259.

A. Work In The Snohomish County Road Maintenance Division.

RM Workers perform the central work of the Road Maintenance Division, which is paving County roads and performing road, bridge and sign maintenance work. CP 39-40. RM Worker positions are divided into four classifications, RMW I through IV, with each successive classification performing additional duties and with an increasing level of responsibility. Mr. Kuehn worked as a RM Worker I throughout his employment, but regularly bid to work out-of-class in positions and on crews which required he operate heavy machinery as part of his job duties. CP 40-41; CP 158-59.

At the beginning of each work day, RM Workers are required to report to roll call at one of three road maintenance shops. After roll call, RM Workers break into various work crews and disburse to assignments

throughout the County. When a RM Worker is late or absent from roll call, the day's work may be delayed or require a redistribution of the members of a given crew depending upon the role of the missing worker. In some instances, the crew may have to be sent home because it cannot operate without the missing worker. CP 40.

Under Road Maintenance Division guidelines applicable to all RM Workers, including Mr. Kuehn, unexcused tardiness is grounds for discipline, with each successive instance of unexcused tardiness resulting in greater discipline as follows:

First Instance:	Documented verbal reprimand
Second Instance:	Written reprimand
Third Instance:	One day off with no pay
Fourth Instance:	One week off with no pay
Fifth Instance:	One month off with no pay
Sixth Instance:	Termination

CP 259, 263. While employed by Snohomish County, Mr. Kuehn arrived late to work on numerous occasions. CP 41. On various occasions, the County excused Mr. Kuehn's tardiness due to his medical condition, while in other non-medical instances, the County did not excuse Mr. Kuehn's tardiness and imposed discipline under the tardiness policy. CP 259.

B. Mr. Kuehn's Medical Condition and Accommodation History.

Snohomish County accommodated Mr. Kuehn over a number of years by excusing instances of tardiness connected to his medical condition rather than imposing discipline under the tardiness policy. In 1999, Mr. Kuehn for the first time presented medical information to the County indicating he suffered from a sleep disorder that affected his ability to arrive at work on time. He requested various accommodations, which the County granted, including being allowed to report to a road maintenance shop closer to his home and being allowed to arrive late to work for medical reasons until his medical condition resolved. The County notified Mr. Kuehn it would accommodate him by excusing tardiness directly related to his medical condition but would impose discipline for tardiness unrelated to his medical condition. CP 177-78.

In August 2002, after receiving updated medical information from Mr. Kuehn regarding his sleep disorder, the County communicated the ongoing accommodation plan to Mr. Kuehn as follows:

I am writing today to advise you of several steps we are taking relative to Dr. DeAndrea's third opinion report. First we . . . have determined . . . that at this point your medical condition qualifies you for intermittent FMLA leave for absences and/or late arrivals related to your medical condition as identified by Dr. DeAndrea. Therefore, any time you are absent from work due to your medical condition will be designated as FMLA leave time

and will count towards your FMLA 12-week entitlement of FMLA leave in your 12-month period. . . .

...

Therefore, each time you are absent for medical reasons, including the current certified FMLA condition, you are required to write a statement to your supervisor indicating if the absence is for the current FMLA condition or for other medical reasons. . . .

...

Finally, I remind you that you have not been granted unlimited permission to be late to or absent from work at any time for any reason. Absences or tardiness unrelated to your medical condition will be subject to the Division's no fault [tardiness] policy (attached) of which you are on notice. . . . Failure to provide appropriate notice of your absence or late arrival will result in the absence or late arrival not being designated as FMLA leave. Unexcused absences or late arrivals will be treated in accordance with County and Division policy (see attached no-fault [tardiness] policy) . . . and shall be subject to discipline, up to and including termination.

CP 41, 49-51 (Pratt Decl. ¶ 9, Ex. A).

In August 2005, Mr. Kuehn again submitted an updated FMLA certification indicating, for the first time, that he suffered from chronic narcolepsy, which the County understood to be a medical condition that could cause Mr. Kuehn to fall asleep without notice while at work. CP 42, 58-59. In response, the County requested additional information to determine whether Mr. Kuehn could safely perform the essential functions of his job, which involved driving county vehicles and operating heavy machinery. CP 42. After a series of communications with Mr. Kuehn's medical providers and an independent medical evaluation, the County

received information in April 2006 stating Mr. Kuehn suffered from sleep apnea but not narcolepsy such that he was cleared to perform all job duties without restriction, including safety sensitive functions. CP 42, 61. As a result, the County cleared Mr. Kuehn to perform all duties. CP 64.¹

In January 2007, Mr. Kuehn again submitted an updated FMLA certification indicating he suffered from “obstructive sleep apnea with hypersomnolence and narcolepsy.” The certification also indicated Mr. Kuehn required intermittent medical leave and requested he be excused when arriving late to work due to his medical condition. CP 42-43, 66-67.

Based on the renewed diagnosis of narcolepsy, the County again requested follow-up information from Mr. Kuehn’s medical providers regarding his ability to perform safety sensitive functions in his job. CP 43, 87-93. In a March 19, 2007 letter to Mr. Kuehn, the County noted it was requesting information to clear the inconsistency regarding the narcolepsy diagnosis, which appeared to be based on medical information that pre-dated the information received indicating Mr. Kuehn did not have narcolepsy and could perform all functions of his job. CP 43, 69.

¹ Although there is some indication in the record that the County restricted Mr. Kuehn from performing safety sensitive functions while its initial inquiry into his narcolepsy diagnosis remained pending, the record further indicates he maintained his temporary upgrades in position and pay during the paving season from April through November as would be required under the union contract. See CP 40, 159.

While the information request regarding narcolepsy remained pending, the County did not restrict Mr. Kuehn in performing his job duties and followed his accommodation plan under which tardiness related to his medical condition was excused. In January 2007, for example, the County imposed discipline against Mr. Kuehn for a fourth instance of unexcused tardiness when he was late because he had to stop on the way to work to get gas, while in February 2007 his supervisor gave him a “pass” for a medical related instance of tardiness. CP 43, 119-21, 123.

On March 28, 2007, Mr. Kuehn’s medical provider responded to the County’s information request and stated Mr. Kuehn’s sleep apnea and hypersomnolence were well-controlled and when he calls in sick due to his medical condition he is able to safely return to work the next day. CP 88-91. As a result, the County followed up with Mr. Kuehn on April 10, 2007 regarding his accommodation plan and informed him that he would be “placed on sick leave on any date that [he called] in late for roll call due to [his] medical condition.” CP 43-44, 93.

While the March 28, 2007 response from Mr. Kuehn’s medical provider indicated a clear path with respect to Mr. Kuehn’s continued need to be excused for tardiness caused by his medical condition, it was equivocal regarding any restrictions regarding the narcolepsy diagnosis.

Mr. Kuehn's medical provider noted the narcolepsy diagnosis had been made by a sleep specialist no longer practicing in the area so he had referred Mr. Kuehn to another specialist to answer whether Mr. Kuehn could fall asleep while working in safety sensitive positions. CP 88. As a result, the County continued to request additional information from Mr. Kuehn regarding the narcolepsy diagnosis. Although the County followed up with Mr. Kuehn in April and again in May 2007, the County did not receive responsive information before Mr. Kuehn's employment ended in August 2007. See CP 95, 97. The only correspondence the County received regarding the narcolepsy issue was a fax from Mr. Kuehn's medical provider on July 10, 2007 stating he would be undergoing a sleep study on July 17, 2007 and to allow two weeks for results. CP 99.

C. Mr. Kuehn Received Discipline for Unexcused Tardiness.

Over the several years in which the County accommodated Mr. Kuehn by excusing instances of tardiness related to his medical condition, he was well aware of, and continued to be disciplined for unexcused tardiness under, the tardiness policy. CP 44. By early 2007, Mr. Kuehn had been disciplined on no fewer than four previous occasions for unexcused tardiness, the most recent instance in January 2007 when the County determined Mr. Kuehn had been late because he stopped for gas on the way to work and not for any reason related to his medical

condition. With the January 2007 tardiness, the County had imposed discipline against Mr. Kuehn up through the fourth step on the tardiness policy, a one week suspension, for unexcused tardiness. See CP 44-45, 100-121. Within the following month, in February 2007, the County had also excused Mr. Kuehn for a tardiness incident based on his medical condition. CP 43, 45, 119-21, 123.

1. June 13, 2007 Tardiness.

On June 13, 2007, Mr. Kuehn again arrived late for work. CP 45, 259. If unexcused, this would be Mr. Kuehn's fifth instance of unexcused tardiness under the policy. CP 259. On June 18, the County held a pre-disciplinary hearing. CP 45. On June 25, 2007, the County issued a preliminary response in which it noted Mr. Kuehn had not stated his tardiness was related to his medical condition and solicited him to provide additional information should he wish to do so:

Although you did not state that your tardiness on June 13, 2007, is linked in any way to your medical condition, the information previously provided to the County indicates a potential connection. As a result, I have decided to hold my disciplinary decision in abeyance in order to allow you to provide any additional information you wish me to consider. . . . Please provide any information you want me to consider not later than July 16, 2007 regarding this tardiness issue. I will make my determination at that time.

CP 125.

2. June 27, 2007 Tardiness.

On June 27, 2007, Mr. Kuehn again arrived late for work. If unexcused, this would be Mr. Kuehn's sixth instance of unexcused tardiness under the policy. On July 9, 2007, the County held a pre-disciplinary hearing during which Mr. Kuehn stated he had missed his wake-up call because his phone had been moved out of his bedroom. CP 133, 260.

3. Termination Decision.

On July 10, 2007, the County received a facsimile from Mr. Kuehn's medical provider stating Mr. Kuehn was scheduled for additional medical testing on July 17, 2007. Mr. Kuehn's provider requested the County wait two weeks (until July 31, 2007) for results. As requested, the County waited the additional time to allow Mr. Kuehn to supplement his initial responses to the disciplinary decisions in any way he chose, but the County did not receive a response. CP 46.

On August 2, 2007, in the absence of any additional information from Mr. Kuehn or his medical providers connecting his tardiness to his medical condition, the County issued two disciplinary results letters to Mr. Kuehn. In the first, relating to the June 13 tardiness, the County determined his tardiness would not be excused under his accommodation and imposed a one-month suspension for a fifth instance of unexcused

tardiness. CP 46, 127. In the second, relating to the June 27 tardiness, the County terminated Mr. Kuehn's employment for a sixth instance of unexcused tardiness. CP 46, 133. The August 2, 2007 termination letter specified that Mr. Kuehn would remain on paid administrative leave until August 16, 2007. CP 133. Mr. Kuehn received both disciplinary decision letters on August 2, 2007, which was also his last day of work. CP 217: CP 253, 255.

D. The County Processed Mr. Kuehn's Union Grievance.

On August 13, 2007, Mr. Kuehn's union representative filed grievances with the County challenging the disciplinary decisions under the just cause provisions of the union contract. The County denied the grievances and upheld the termination at all levels of the grievance process. CP 260.

In processing his grievances, Mr. Kuehn submitted additional medical information to the County. On August 27, 2007, the County received an August 16, 2007 letter from Mr. Kuehn's medical provider regarding a July 2007 sleep study conducted in response to the County's questions regarding the narcolepsy diagnosis. The letter notes Mr. Kuehn's Maintenance Wakefulness Test was normal, meaning no indication Mr. Kuehn would fall asleep while using dangerous equipment in the workplace. CP 196. On August 31, 2007, in a letter denying the

grievance at step 1 of the grievance process, the County noted that the new medical information did not have any bearing on the facts that led to the disciplinary decision and denied the grievance. CP 200.

On October 18, 2007, the County received more specific responses from Mr. Kuehn's medical provider to the April 2007 request for information about the narcolepsy diagnosis. In the responses, the medical provider states that Mr. Kuehn is not at increased risk of falling asleep while at work and need not be restricted from performing any of his previous job duties. CP 205-09. On November 2, 2007, in a memorandum denying the grievance at step 2 of the grievance process, the County again noted that the additional paperwork from the medical provider did not provide any new information bearing on the merits of the grievance:

Nothing in the information belatedly provided by Dr. Russian suggests that either instance of tardiness was caused by your medical condition. To the contrary, I understand the information to state that your medical condition is well-regulated by effective treatment and that you are not operating under any medical restrictions. This is consistent with the limited information you provided during the initial pre-disciplinary hearings and follow-up communications with respect to the June 13 and June 27 instances of tardiness. At no time did you state that your tardiness was caused by your medical condition despite numerous opportunities to do so. Based upon all the information before me, I find that there is no connection.

CP 213.

E. Mr. Kuehn Files a Damage Claim and Lawsuit.

On August 11, 2010, three years and nine days after Mr. Kuehn learned of the decision to terminate his employment for his fifth and sixth instances of unexcused tardiness, the County received a claim for damages filed on behalf of Mr. Kuehn. CP 287-88.

On October 13, 2010, Mr. Kuehn filed this lawsuit alleging disability discrimination and wrongful termination. On February 28, 2014, the Snohomish County Superior Court granted the County's motion for summary judgment and dismissed all claims. On March 19, 2014, the court denied Mr. Kuehn's motion for reconsideration.

The County now requests this Court affirm summary judgment dismissal of all claims under the statute of limitations because Mr. Kuehn did not initiate this action within three years after Snohomish County communicated its decision to impose discipline and terminate his employment for repeated instances of unexcused tardiness.

IV. ARGUMENT

When reviewing an Order Granting Summary Judgment, the appellate court engages in the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); Kauzlarich v. Yarbrough, 105 Wn. App. 632, 640, 20 P.3d 946 (2001). Summary judgment should be granted when there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). “A party cannot create genuine issues of material fact by ‘mere allegations, argumentative assertions, conclusory statements, and speculation.’” In re Kelly and Moesslang, 170 Wn. App. 722, 738, 287 P.3d 12 (2012), review denied, 176 Wn.2d 1018 (2013) (quoting Greenhalgh v. Dep’t of Corr., 160 Wn. App. 706, 714, 248 P.2d 150 (2011)). The purpose of summary judgment is to determine if there are any genuine issues of material fact so as to avoid long and expensive litigation and an unnecessary trial. See American Exp. Centurion Bank v. Stratman, 172 Wn. App. 667, 292 P.3d 128, 133 (2012); Padron v. Goodyear Tire & Rubber Co., 34 Wn. App. 473, 662 P.2d 67, 68 (1983). If a plaintiff cannot produce evidence to support an essential element of the case, the defendant is entitled to summary judgment as a matter of law. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986)).

A. Mr. Kuehn’s Wrongful Discharge Claim is Time-Barred.

The three year statute of limitations for wrongful discharge in discrimination cases begins to run on the date the employer communicates notice of termination or intent to terminate the employee on a specific future date. Douchette v. Bethel Sch. Dist. No. 403, 117 Wn.2d 805, 815-

16 n. 9, 818 P.2d 1362 (1991) (citing Delaware State College v. Ricks, 449 U.S. 250, 259, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980); see also Antonius v. King County, 153 Wn.2d 256, 264, 103 P.3d 729 (2004) (for discrete acts such as termination, the limitations period runs from the act itself); Hintz v. Kitsap County, 92 Wn. App. 10, 12-13, 960 P.2d 946 (1998) (plaintiff had three years from date of termination to file disability discrimination wrongful termination claim). Mere continuity of employment does not prolong the life of an employment discrimination claim once the termination notice is given. Douchette, 117 Wn.2d at 816. Nor does processing the decision through a union grievance process extend the statute of limitations because the discriminatory act occurs with the discharge, not with later reconsideration of the decision. National Railroad Passenger Corp., 536 U.S. 101, 111-12, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002) (citing Electrical Workers v. Bobbins & Myers, Inc., 429 U.S. 229, 234, 97 S. Ct. 441, 50 L.Ed.2d 427 (1976)).

Mr. Kuehn admits he received notice of his termination on August 2, 2007, which was also his final day of work. CP 217 (Kuehn Decl. ¶ 5). Under the cases cited, it is immaterial that Mr. Kuehn remained on paid administrative leave until August 16, 2007, or that the County processed his union grievances. The County made and communicated its decision to terminate Mr. Kuehn and no other relevant act occurred after he received

notice. Mr. Kuehn's wrongful termination claim accrued on August 2, 2007 and expired on August 2, 2010. As Mr. Kuehn did not file his damage claim until August 11, 2010, his wrongful termination claim is time-barred and must be dismissed.²

B. Mr. Kuehn's Disability Discrimination Claim is Time-Barred.

A line of Washington appellate decisions crossing all three divisions invokes the exact same reasoning applicable to wrongful termination claims to claims of failure to accommodate a disability. Under these decisions, the limitations period for a failure to accommodate a disability accrues when the employer makes a decision not to accommodate the employee's disability and communicates that decision to the employee. Hintz v. Kitsap County, 92 Wn. App. 10, 12-13, 960 P.2d 946 (1998); Hinman v. Yakima School District, 69 Wn. App. 445, 449-50, 850 P.2d 536 (1993), review denied, 125 Wn.2d 1010 (1994); Albright v. State, 65 Wn. App. 763, 767-68, 829 P.2d 1114 (1992).

² Under the claims filing statute, a plaintiff is required to file a claim with the county's designated agent "within the applicable period of limitations within which an action must be commenced" as a condition precedent to filing a lawsuit. RCW 4.96.020(2); see also Hintz v. Kitsap County, 92 Wn. App. 10, 12-13, 960 P.2d 946 (1998) (applying claims filing statute to disability discrimination and wrongful termination claims). Failure to file a claim within the statute of limitations requires dismissal of the lawsuit. See Hintz, 92 Wn. App. at 14-16. A claim is deemed presented under the claim filing statute when the claim form is delivered in person or is received by the agent. Id. The County's agent for claims filing purposes is the Risk Management Division of the Snohomish County Department of Finance. CP 287-300; see also SCC 2.90.050(1). In this case, Mr. Kuehn mailed his claim and the County's agent received it on August 11, 2010, nine days after the statute of limitations had run. CP 297-88.

Just as in wrongful termination cases, a failure to accommodate claim accrues when the decision to deny an accommodation is communicated, even when the effects of the decision do not manifest until a later date. Albright, 65 Wn. App. at 767 (citing Delaware State College v. Ricks, 449 U.S. 250, 259, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) and Cardon v. Fernandez, 454 U.S. 6, 8, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981)). At the time the decision is communicated, the facts to support a discrimination claim become apparent to a reasonably prudent person. Hinman, 69 Wn. App. at 450 (citing Douchette v. Bethel Sch. Dist. 403, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991)). Applying the statute of limitations to accommodation cases in this way is consistent with “the general rule that a statute of limitation commences to run when the plaintiff discovers or should discover all the essential elements of her cause of action.” Hinman, 69 Wn. App. at 450. “The policy behind statutes of limitation is ‘protection of the defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses’ memories faded.’” Douchette v. Bethel Sch. Dist. No. 403, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991).

1. The County Made and Communicated Its Decision Not to Accommodate Kuehn's Disability in the August 2, 2007 Letters.

In this case, Mr. Kuehn alleges the County failed to accommodate his disability by failing to excuse the two June 2007 instances of tardiness he now alleges were caused by his disability. As a result, the statute of limitations began to run on August 2, 2007 when the County made its decision not to excuse the June instances of tardiness and communicated that decision to Mr. Kuehn.

In the August 2, 2007 letters, the County conveyed its decision not to accommodate Mr. Kuehn by imposing discipline instead of excusing his tardiness. The discipline letters each state that Mr. Kuehn had been found to have violated the tardiness policy, that discipline was being imposed, and that there were no mitigating factors to consider in imposing discipline. CP 272-73; CP 278-79.

In addition, at the time Mr. Kuehn received these letters, he: (1) was well aware of the tardiness policy; (2) had requested that the County accommodate his medical condition by excusing instances of tardiness related to his medical condition; (3) had been informed by the County it would excuse instances of tardiness caused by his medical condition, but would not excuse instances unrelated to his medical condition; and (4) had

received discipline for tardiness unrelated to his medical condition. CP 42-45, 49-51, 93, 119-23.

Furthermore, the County issued a preliminary response to the June 13, 2007 instance of tardiness highlighting its consideration of any connection between the tardiness and Mr. Kuehn's medical condition. On June 25, 2007, the County delivered the preliminary decision, which stated:

Although you did not state that your tardiness on June 13, 2007, is linked in any way to your medical condition, the information previously provided to the County indicates a potential connection. As a result, I have decided to hold my disciplinary decision in abeyance in order to allow you to provide any additional information you wish me to consider. . . . Please provide any information you want me to consider not later than July 16, 2007 regarding this tardiness issue. I will make my determination at that time.

CP 125. In response the July 10, 2007 facsimile from Mr. Kuehn's medical provider, the County waited to issue its final results letter until August 2, 2007, but received no additional information, either from Mr. Kuehn or his medical providers linking the tardiness to his medical condition. In the absence of any additional information, the County imposed a one month suspension rather than excusing the tardiness as an accommodation.

Similarly, the County delayed any decision regarding Mr. Kuehn's sixth instance of tardiness to allow him the opportunity to provide any additional information he chose. The County eventually issued the results letter imposing termination on August 2, 2007. In that letter, the County

made a finding that Mr. Kuehn had missed his wake-up call because someone else in the house had moved his phone to another room and therefore considered the tardiness unexcused. CP 278-79. The County conveyed its decision not to excuse Mr. Kuehn's sixth instance of tardiness and communicated that decision on August 2, 2007. His accommodation claim began to run on that date and is time-barred.

2. Continued Employment and Later Reconsideration of the Termination Decision in the Grievance Process Did Not Extend the Statute of Limitations.

Mr. Kuehn's contention that his accommodation claim did not accrue while he remained on paid administrative leave or until the County later reviewed its decision during the grievance process is not supported by the undisputed facts or applicable case law. It is undisputed that, even if Mr. Kuehn was shocked that the County had made a decision to discipline him without waiting longer to receive additional medical information, it did so, and communicated that fact to him on August 2, 2007. He cannot dodge the fact that the County made its decision not to excuse his tardiness and impose discipline by saying he was shocked by the decision or that he thought it would be reversed either before his final day of employment or during the grievance process.³

³ While the County disputes that anyone promised Mr. Kuehn it would continue to wait for additional information beyond the July 31, 2007 date stated by his medical

The relevant question in this case is not when the duty to accommodate ended but when the statute of limitations began to run, which is governed by the reasoning in Albright, Hinman, Hintz, Douchette and related cases. Under the holdings in these cases, the statute of limitations begins to run when the decision is communicated, not at some later date such as the end of employment or when the decision is reviewed during the grievance process. The “proper focus is on the time of the [alleged] *discriminatory act*, not the point which the *consequences* of the act become painful.” Albright, 69 Wn. App. at 767 (citing Delaware State College v. Ricks, 449 U.S. at 259). In the same way, review of the decision in a grievance process is not a new discriminatory act that will extend the statute of limitations. See Electrical Workers v. Bobbins, 429 U.S. at 234 (review of decision in grievance process did not extend the statute of limitations because the discriminatory act occurred with the discharge decision).

Case law applicable to accommodation claims makes it clear the statute of limitations begins to run with communication of the decision not to accommodate the employee regardless of whether the decision is communicated **before or after** the employee is terminated or otherwise leaves employment. See Hinman, 69 Wn. App. at 447-51 (failure to

provider, even if the facts are as he alleges, it is immaterial to the issue of when the statute of limitations began to run.

accommodate claim accrued when plaintiff returned to work after medical leave and accommodation not in place); Albright, 65 Wn. App. at 765-67 (failure to accommodate claim accrued with notice denying request for accommodation two weeks before employee resigned); Hintz, 92 Wn. App. at 16 (failure to accommodate claim accrued “no later than” post-termination letter received informing plaintiff that laws requiring accommodation did not apply to him).

In Albright, for example, the court held that the statute of limitations began to run on a reasonable accommodation claim two weeks before the plaintiff’s employment ended. Albright, 65 Wn. App. at 767. In that case, the plaintiff requested reassignment to a low stress job to accommodate his hypertension. On February 23, 1984, the employer sent him a letter saying he was not entitled to a light-duty assignment for an off-the-job injury and required him to return to his regular position. Five days later, the employer issued a disciplinary write-up to the plaintiff for failing to report for work in his regular position. The employer then offered the plaintiff the opportunity to resign in exchange for a promise not to contest unemployment benefits. On March 8, 1984, the plaintiff resigned. Under these facts, the Court held that the statute of limitations started to run on February 23, 1984, the day on which the employer communicated it was denying the plaintiff’s request to be reassigned, which occurred before the

employer initiated discipline for failing to report to work and before the plaintiff resigned his employment. Albright, 69 Wn. App. at 765-67.

In Hintz, the court applied the same reasoning to dismiss an accommodation claim based on notice received almost a year after termination. In Hintz, the plaintiff had suffered a back injury and the employer terminated him on September 3, 1993 based on his inability to do his job. In holding that the statute of limitations began to run “no later than” September 1, 1994, and dismissing the claim, the court focused on a letter from the employer to the plaintiff on that date asserting that the laws requiring accommodation did not apply to him. Hintz, 92 Wn. App. at 16.

In Hinman, the court applied the same reasoning in holding that the statute of limitations began to run on a reasonable accommodation claim based on notice even though the plaintiff never left employment. There, a school employee began suffering from medical problems related to her work location near an employee smoking lounge in the fall of 1983. The school district initially tried to alleviate the problem by installing an electronic air cleaner, but this was ineffective, and the employee had to take medical leave for asthma in April 1985. Over the summer of 1985, the district continued to assure the employee that it would either move the smoking lounge or make other arrangements to avoid the issue in the fall. When the employee returned to work in the fall of 1985, however, the

smoking lounge had not been relocated and the district told her she would need to commence a “friendly lawsuit” to get the smoking lounge removed. The district later removed the lounge in October 1985 and the employee remained employed and moved to another school building in November 1985. Under these facts, the Court held that the employee’s cause of action accrued on the date the employee returned to school in the fall of 1985 after initial measures had been unsuccessful and the promised accommodation of moving the smoking lounge was not in place. Hinman, 69 Wn. App. at 450.

In this case, the statute of limitations began to run on August 2, 2007 when the County communicated its decision to deny the requested accommodation of excusing the June 2007 instances of tardiness. Being excused for medical related tardiness is the only accommodation Mr. Kuehn ever requested or identified and the County communicated its decision not to not excuse the June tardiness in its August 2, 2007 letters. This is the date his failure to accommodate claim accrued and it is now time-barred.

Mr. Kuehn’s reliance on cases holding that a duty to accommodate can extend beyond the end of employment has no application to the facts of this case. In the cases cited by Mr. Kuehn, the question was whether some part of a discriminatory course of conduct extended into the limitations

period, such as an ongoing failure to interact with an employee seeking reassignment to another position. See, e.g., Wheeler v. Catholic Archdiocese of Seattle, 65 Wn. App. 552, 829 P.2d 196 (1992) (plaintiff injured on the job and terminated while on medical leave without considering her for other positions for which she was qualified), rev'd on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994).

Unlike the cases relied upon by Mr. Kuehn, this is not a case in which the County made its separation decision based on a pending and unanswered request for accommodation. Mr. Kuehn was not terminated based on any perception that he was unable to perform the essential functions of his position. While the County had requested information from Mr. Kuehn's medical providers beginning in February, and again in April and May 2007, based on the renewed narcolepsy diagnosis, the County did not restrict Mr. Kuehn in his job duties and the County took no action based on the narcolepsy diagnosis that affected his employment in any way. To the contrary, the County made it clear to Mr. Kuehn that he continued to operate under his accommodation of being excused for instances of tardiness caused by his medical condition, but would discipline him for tardiness not related to his medical condition. He continued to perform all job duties as requested by his medical providers. The decision

to terminate his employment was not related to any pending accommodation issue.

Nor is this a case in which Mr. Kuehn sought reassignment or any other type of accommodation. At all times, Mr. Kuehn and his medical providers stated he was able to perform all functions of his position and he continued to do so through the end of his employment. Mr. Kuehn alleges the County failed to accommodate him only by failing to excuse his June 2007 instances of tardiness. No other later discriminatory acts are alleged. On August 2, 2007, the County imposed discipline under the tardiness policy as it had done previously on several occasions. Mr. Kuehn did not work after August 2, 2007, and therefore could not have been late for work after that date. As no tardiness occurred after August 2, 2007, the County had answered the only pending accommodation question with the disciplinary letters issued on that date.

In arguing breach of an ongoing duty to accommodate, Mr. Kuehn places great reliance on Martini v. Boeing, 88 Wn. App. 442, 945 P.2d 248 (1997), but Martini does not assist Mr. Kuehn in any way. In Martini, the plaintiff suffered from depression and sleep apnea and had requested various accommodations beginning in 1989. In June 1990, the plaintiff was scheduled to conduct training in England and, due to concern that the travel would exacerbate his sleep apnea, he requested vacation time rather

than going on the trip. After a meeting, the plaintiff agreed to go on the trip when the employer agreed to transfer him to a new position on his return that would accommodate his health concerns. When the plaintiff returned on July 9, 1990, and asked to be reassigned, the employer told the plaintiff it was busy relocating employees involved in the Gulf War was unable to address his request at that time. The employer also told the plaintiff that it expected him to train in England again in the coming months. On the following day, July 10, 1990, the plaintiff submitted a resignation letter stating his intent to use his remaining leave and terminate his employment on August 21, 1990. The plaintiff remained employed until August 21, 1990, and there was evidence that the employer believed the plaintiff would use the intervening time to reconsider his position about quitting. The plaintiff then filed his lawsuit on July 9, 1993. By special verdict, a jury found that the employer had discriminated against the plaintiff on and after July 9, 1990. Martini, 88 Wn. App. at 446-49.

Under these facts, the employer in Martini argued that its duty to accommodate the plaintiff ended on July 10, 1990, the day that he submitted his resignation letter, based on cases stating the duty to accommodate ends when an employee quits. In holding that the record contained evidence of ongoing acts of discrimination between July 9, 1990 and August 21, 1990, the court emphasized evidence supporting that

the employer expected the plaintiff would use his accrued vacation to reconsider his position about quitting such that the duty to accommodate by transferring him to another position continued through August 21, 1990, the effective date of his resignation. Under these facts, the statute of limitations did not begin before August 21, 1990 because the employer did not earlier communicate a denial of the accommodation. See Albright, 69 Wn. App. at 765-67 (limitations period begins on day employer communicated it was denying the plaintiff's request to be reassigned even though it was before end date of employment).

Unlike Martini, the County made and communicated its decision to deny the accommodation of excusing Mr. Kuehn's June 2007 instances of tardiness on August 2, 2007. Mr. Kuehn did not work after that date such that no further instance of tardiness occurred for the County to consider whether it should be excused within his requested accommodation. While the County did receive additional medical information in processing Mr. Kuehn's grievances, the grievance process is nothing more than reconsideration of the final communicated decision. The County's reiteration of that decision does not restart the statute of limitations as a matter of law.

Citing Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128 (9th Cir. 2001), Mr. Kuehn also suggests the County has an ongoing duty to

explore other methods of accommodating Mr. Kuehn before terminating him. Unlike Humphreys, however, Mr. Kuehn has never requested or identified at any stage of his employment or this litigation any other potential accommodation that would have been appropriate other than excusing his tardiness. This is not a medical separation case. This is not a reassignment case. Mr. Kuehn never requested or suggested reassignment, additional leave, or any other potential accommodation that would or could have been appropriate. Again, the only relevant acts Mr. Kuehn alleges were discriminatory are the decisions not to excuse the June 13 and June 27, 2007 instances of tardiness. The County communicated its decision not to accommodate Mr. Kuehn by communicating its decision not to excuse either June 2007 instance of tardiness and terminate his employment on August 2, 2007. The statute of limitations began to run on that date and his claims are now time barred.

V. CONCLUSION

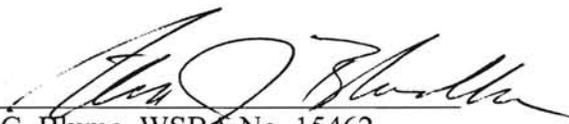
For the foregoing reasons, the County respectfully requests the Court affirm summary judgment dismissal of all claims.

///

///

Respectfully submitted on June 30, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
Helene C. Blume, WSBA No. 15462
Steven J. Bladek, WSBA No. 24298
Deputy Prosecuting Attorneys
Attorneys for Respondent Snohomish
County

CERTIFICATE OF SERVICE

I certify that on June 30, 2014, I caused a copy of the foregoing document to be served via First Class U.S. Mail, postage prepaid to the following counsel of record for Appellant:

Joel P. Nichols,
Deno Millikan Law Firm, PLLC
3411 Colby Avenue
Everett, WA 98201



Gail Bennett
Legal Assistant