

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II AT TACOMA  
No. 34431-9-11

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EUGENE WHITEHEAD and BOOTS L. WHITEHEAD

Plaintiff Appellant

V.

DSHS of the STATE OF WASHINGTON

Defendant Respondent

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**APPELLANT'S BRIEF**

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ON APPEAL FROM THE KITSAP COUNTY SUPERIOR COURT  
No. 00-2-02956-1  
HONORABLE RUSSELL W. HARTMAN, PRESIDING

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### (3) ASSIGNMENTS OF ERROR

The Appellant/Plaintiff EUGENE WHITEHEAD assigns as error

The following Assignments of Error in the trial court as follows:

1. As to the disregarding by the trial court of the Declaration of EUGENE WHITEHEAD dated 4, November, 2005 at Olympia, WA (CP235) which set forth in detail his failure to report the incidents of sexual harassment to CAROL KIRK, the Superintendent of the FRANCIS HADDEN MORGAN CENTER in Bremerton, AS TO THE REASONS OF HER INACTION ON OTHER COMPLAINTS and the Severe Depression, which the Plaintiff/Appellant suffered from. (CP235 at p.8) The Appellant lost his medical coverage and was seen by a psychologist of Group Health, and then it was determined that the sexual harassment was the cause of his depression from the home assignment and medications were prescribed.

2. Assignment of error is assigned to the disregarding of the aforementioned Declaration (CP235) in that the fact of the reporting by SHERI WILSON, RN of her being propositioned by SHERI WESTFAL, a fellow employee; further the fact that SHERI WILSON had solicited EUGENE WHITEHEAD to go with her to the Chieftain Motel for the purpose of having a sexual relationship and the fact that SHERI WILSON had been alleged to have used the computer of the DSHS agency to watch pornography and she was complaining to the Plaintiff over her sexual life with her husband. (CP235 at p. 7) All of this was disregarded in the granting of the summary judgment by the trial court. The trial court thus became the trier of fact in the favor of the employer. KAHN V. SALERO, 90 Wash.App. 110, 951 P.2d 321 (1998)

3. Assignment of Error is assigned to the trial court disregarding the conduct of

CAROL KIRK and the two Registered Nurses (RNs). SHEILA WILSON and ALLEEN WITTE that was sufficiently pervasive and elusive to affect the emotional and psychological well being of the employee. (CP235 p.8) Also the transfer to 2 years of home assignment in 2001 and then to the Rainier School in Buckley, Washington.

#### **ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the trial court disregard the statements of Plaintiff as to his failure to report the sexual harassments incidents and the causations and his treatment for his severe depression?
2. Did the trial court become a trier of fact in disregarding the sexual harassment by SHERRI WILSON, RN, CAROL KIRK and ALLEEN WITTE, RN ?
3. Did the trial disregard the conduct of CAROL KIRK in her recommending the transfer of the Plaintiff to his home for work for 2 years and to work at Rainier School at Buckley in retaliation?

#### **(4) STATEMENT OF THE CASE**

This is an Appeal from a Granting of a Summary Judgment Motion in favor of the State of Washington, Department of Social and Health Services before the Kitsap County Superior Court with Judge RUSSELL W. HARTMAN presiding in case 00-2-02956-1 on January 20, 2006. (CP289)

The Appellant EUGENE WHITEHEAD, a black male, state social worker, was pro se at the argument, which was conducted pursuant to Civil Rule 56 providing for Summary Judgment in the Superior Court. (CP289)

The Appellant commenced a lawsuit in Kitsap County Superior Court by Complaint and Summons filed September 28, 2000, (CP1) alleging

1. A violation of the National Labor Relations Act (NRLB)

2. That Plaintiff was sexually harassed at work by three different women all of whom are employees of the Defendant Department of Social and Health Services of the State of Washington. These are:

a. CAROL KIRK, the Superintendent at the Francis Haddon Morgan Center

b. ALLEEN WITTE, a Registered Nurse at the same state facility

c. SHERRI WILSON, also, a Registered Nurse at the same state facility

The Plaintiff EUGENE WHITEHEAD stated in his declaration (CP235 at p. 9) that he was fearful to report any of these claims as to the foregoing employees of the DSHS and this is the reason that no reports were made to any agency except the report made to his union. (CP235)

The Plaintiff/Appellant, who is a black male, takes the position that the sexual harassment was an on-going event by the three white women who particularly were attracted to black men during his time of employment and that the statute of limitations should not apply due to the continuing nature of such sexual harassment which continued up to the period within 3 years of the date of his filing a complaint in this case in the year 2000. (CP235)

The foregoing was denied by the State in its Amended Answer to the Complaint (CP205)

The Defendant filed a motion for Summary Judgment on October 21, 2005, (CP203)

and the Plaintiff filed a Memorandum in Opposition to Summary Judgment on November 8, 2005 (CP212), together with a Declaration (CP235) and its amended answer was filed October 21, 2005. (CP305)

The Order Granting Summary Judgment was filed January 20, 2006, (CP289) and Appealed on February 15, 2006 (CP291), the Appeal was filed within the 30 days of the entry of the Order Striking Motion for Summary Judgment (CP289), provided by Rule 5.3 of the Rules of Appellate Procedure and the full requirements of RAP 5.3 (a) have been complied with.

### **(5) SUMMARY OF THE ARGUMENT**

**A. THERE ARE MATERIAL GENUINE FACTS AT ISSUE IN THIS CASE and therefore SUMMARY JUDGMENT IS NOT APPROPRIATE.**

**B. DISCRIMINATION has been made out on a prima facie basis under RCW 49.60, et ux.**

**C. RETALIATION has been made out by the Appellant**

**D. IT WOULD HAVE BEEN FUTILE FOR THE PLAINTIFF TO MAKE ANY REPORT OF THE SECUAL HARASSMENT CHARGE TO CAROL KIRK, THE SUPERINTENDENT OF THE MORGAN FACILITY**

**E. A HOSTILE WORKING ENVIRONMENT WAS IN EFFECT FOR THE PLAINTIFF/APPELLANT WHO HAS HAD TO SEEK MEDICAL HELP FROM SUCH CONDITION**

### **ARGUMENT**

**A. THERE ARE MATERIAL GENUINE ISSUES OF FACT AND THEREFORE SUMMARY JUDGMENT IS NOT APPROPRIATE**

Cr 56 provides As to a Motion on Summary Judgment, provides inter alia

“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that 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.”

In ruling on this motion, the court “must construe all facts and reasonable inferences in the light most favorably to the non-moving party” YAKIMA FRUIT AND COLD STORAGE CO. V. CENTRAL HEATING AND PLUMBING CO., 81 Wn.2d 528, 503 P.2d 108 (1972).

A material fact is one upon which the outcome of the Litigation depends, ERIKA V. DENVER, 118Wn.2d 451, 456, 824 P.2d 298 (1986). The Moving party has the burden of showing the absence of any issue of material fact. BALDWIN V. SISTERS OF PROVIDENCE, 112 Wn.2d 127, 132, 769, P.2d 298 (1989)

On a Motion for Summary Judgment the court does not try issues of fact. It only determines whether or not factual issues are present which should be tried. GRAVES V. PJ TAGGARES CO., 94 Wn.2d 298, 616 P.2d 1223 (1980); 4 Washington Practice by Orland and Teglund, West Publishing, page 536.

Justice Richard Sanders recently in the case of DRINKWITZ V. ALLIANT TECHNOLOGY, 140 Wn.2d 291, 307-8, 996 P.2d 582, (April 2000) stated in his dissent:

“When applying this standard we are required to view the evidence most favorable to the non-moving party, and if any inferences are to be made, we must also make those inferences in favor of the non-moving party. It is axiomatic that on a motion for Summary Judgment THE TRIAL COURT HAS NO AUTHORITY TO WEIGH THE EVIDENCE OR TESTIMONIAL CREDIBILITY”

In the case of *KLINKE V. FAMOUS FRIED CHICKEN*, (1980) 94 Wn.2d 255, 616, P.2d 646, Chief Justice UTTER in his opinion with ALL members of the Supreme Court agreeing stated in his reversal of the trial court granting Summary Judgment at page 256:

“In ruling on a Motion for Summary Judgment, the court must consider the material evidence and all reasonable inferences wherefrom in favor of the non-moving party. If reasonable persons might reach different conclusions, the motion should be denied. *MILLIKAN V. BOARD OF DIRECTORS*, 93 Wn.2d 522, 532, 611 P.2d 414 (1980); *NOVENSON v. SPOKANE CULVERT AND FABRICATING CO.*, 91 Wn.2d 550, 552, 588 P.2d 1174 (1979).”

Thus on a Motion for Summary Judgment, a Summary Judgment is not Proper when Credibility issues involving more than collateral matters exist. *MORINAGA V. VUE*, 85 Wn.App. 822, 935 P.2d 637 (1997).

The rubbing of the back of the Appellant’s neck in a meeting which was testified to by EUGENE WHITEHEAD, in his Declaration (CP235) and the intentioned bumping into him by CAROL KIRK and holding hands at meetings by such supervisor which was humiliating all create a genuine issue of material fact.

**B. DISCRIMINATION HAS BEEN MADE OUT ON A PRIMA FACIE BASIS UNDER RCW 49.60 ET UX.**

**RCW 49.60.030 provides that**

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental or physical handicap is recognized and declared to be a civil right.

RCW 49.60.020 As to the Construction of the chapter states:

“The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. ...Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based on alleged violation of his civil rights.”

Sex discrimination falls under this discrimination statute *BLAIR V. WA STATE*

*UNIVERSITY*, 108 Wn.2d 558, 740 P.2d 1379 (1987).

Harassment and an offensive work environment is on the same tenor. *GLASGOW V.*

*GEORGIA PACIFIC CORP.*, 103 Wn.2d 401, 693 P.2d 708 (1985).

### **C. RETALIATION HAS BEEN MADE OUT BY THE PLAINTIFF**

The applicable Washington statute against Retaliation as to a whistleblower like *EUGENE WHITEHEAD* is set forth in RCW 49.60.210 as follows:

49.60.210 Unfair practices – Discrimination against person opposing unfair practice – Retaliation against whistleblower

(1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this proceeding under this chapter.

(2) It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW.

(8) “Whistleblower” means an employee who in good faith reports alleged improper governmental action to the auditor, initiating an investigation under RCW 42.40.040. For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term “whistleblower” also means: (a) An employee who in good faith provides information to the auditor in connection with an investigation under RCW 42.40.040 and an employee who is believed to have reported asserted improper governmental action to the auditor or to have provided information to the auditor in connection with an investigation under RCW 42.40.040 but who, in fact, has not reported such action or provided such information; or

(b) an employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so.

In this case the Plaintiff was assigned "home duties" for 2 years and transferred to Rainier School for being a whistleblower ! (CP235 p. 1)

In this case the Appellant did receive disciplinary action as noted. This is retaliation !

The Federal 1964 Civil Rights Act in Title VII forbids employment discrimination against "any individual based on that individuals race, color, religion, sex or national origin", 42 USC Sec 2000 e 2 (a).

The recent case of SHEILA WHITE V. BURLINGTON NORTHERN AND SANTA FE RAILWAY, is decisive. This case number, which is 05-259 of the U.S. Supreme Court is reported in a slip opinion decided on June 22, 2006, and is published in, 126 Supreme Court. 2406; no U.S. nor L.Ed. (Lawyer's Edition) numbers yet assigned due to it's recency.

This U.S. Supreme Court case is decisive on the facts of EUGENE WHITEHEAD case!

SHEILA WHITE was given a job changed by the railroad to a track crew which was retaliation due to the job status change.

EUGENE WHITEHEAD also had a major job change which impacted him. Thus when the employers action are sufficient to deter a reasonable employee from making a charge in

first place, this then is the proper definition of illegal retaliation and should set the standard for all future cases.

In view of the fact that the Washington State Legislature has mandated a liberal construction for RCW 49.60.010 ET SEQ. PROHIBITING DISCRIMINATION IN EMPLOYMENT AND Congress has expressed similar intent that similar Federal legislation be liberally construed and delegated to rule Washington State law making state agencies the powers to make regulations regarding employment standards, "FAHN V. COWLITZ COUNTY (1980) 93 Wn.2d 368, 610 P.2d 857.

Where no Washington court has specifically addressed an issue, Washington courts look to federal discrimination law as an aid in interpreting Washington discrimination statutes WEYER V. TWENTIETH CENTURY FOX FILM CORP., CA 9 (Wash) 2000, 198 F.3d 1104.

The federal language and the state statutes are identified on this point.

Federal cases construing federal statute prohibiting discrimination in employment may provide persuasive although not binding authority with respect to the construction of corresponding provisions in the state statute, where no different meaning is apparent from the language of the state statute. BROWN V. SCOTT PAPER WORLDWIDE CO., 98 Wash.App. 349, 989 P.2d 1187 (1999), review granted 140 Wn.2d 1021.

As noted, WASHINGTON PRACTICE ON TORT LAW AND PRACTICE by DeWolf and Allen, published by West Group on p. 115 Sec 24.16 on UNLAWFUL RETALIATION

DISCHARGE WILL SUPPORT AN AWARD OF DAMAGES WHEN

(1) The employee engaged in a statutorily protected opposition activity (state social worker)

(2) An adverse employment action was taken (home detention of 2 years and transfer to Rainier School) (CP235)

(3) The statutorily protected activity was a substantial factor in the employee's adverse employment decision. (CP235)

SCHONAUER V. DCR ENTERTAINMENT, LLC, 79 Wash.App. 808, 827, 905 P.2d 392, 403 (1995), COLVILLE V. COBARC SERVICES INC., 73 Wash.App. 433, 869 P.2d 1103 (1994)

Thus it is a substantial change, a job assignment by reason of a 2 year home detention and then followed by a transfer to another facility, in this case Rainier School, in the case of Appellant, this retaliation by the state should support an award of damages particularly in light of the aforementioned recent United States Supreme Court case. **This is retaliation for being a “whistleblower” !**

**D. IT WOULD HAVE BEEN FUTILE TO REPORT TO THE SUPERINTENDENT CAROL KIRK, BEYOND THE GRIEVANCES ALREADY FILED BY EUGENE WHITEHEAD.**

As stated by our State Supreme Court through Justice Jim Anderson in the case of GLASGOW V. GEORGIA PACIFIC (1985) 103 Wn.2d 401, 693 P.2d 708 at page 406:

“To establish a work environment sexual harassment case, the better reasoned rule is that an employee must probe the existence of the following elements:

1. The harassment was unwelcome
2. The harassment was because of sex
3. The harassment affected the terms or conditions of employment
4. The harassment is imputed to the employer

Each of the foregoing was testified to by EUGENE WHITEHEAD in his declaration read as a whole. (CP235)

**E. A HOSTILE WORKING ENVIRONMENT WAS IN EFFECT FOR THE PLAINTIFF / APPELLANT WHO HAS HAD TO SEEK MEDICAL HELP FROM SUCH CONDITION**

In order to establish a claim of sexual harassment hostile work environment against the Defendant employer, a Plaintiff has the burden of proving each of the following elements:

- 1) that there was language or conduct of a sexual nature, or that occurred because of the Plaintiff's gender
- 2) that the language or conduct was unwelcome in the sense that the Plaintiff regarded the conduct as undesirable and offensive, and did not solicit or incite it
- 3) that the conduct or language complained of was so offensive that it could be reasonably be expected to alter the conditions of Plaintiff's employment; and
- 4) either **(a)** that the person using the conduct or language was an owner, manager, partner or corporate officer of the employer who participated in the conduct or language; or

(b) that management knew, through complaints or other circumstances, that the harassing conduct or language existed and the employer failed to take reasonably prompt, corrective action designed to harassment, due to the pervasiveness of the conduct or language, or through other circumstances, and the employer failed to take reasonably prompt, corrective action designed to end the harassment; (c) that management should have known of the harassment, due to the pervasiveness of the conduct or language, or through other circumstances, and the employer failed to take reasonably prompt, corrective action designed to end the harassment. WPI 333.23, GLASGOW V. GEORGIA PACIFIC CORP., 103 Wn.2d 401, 693 P.2d 708 (1985)

The employee must prove that the conduct was because of their gender, (black male) and that the conduct would not have occurred had the employee been of a different gender. SCHONAUER V. DCR ENTERTAINMENT, INC., 79 Wn.App. 808, 820, 905 P.2d 392, 399 (1995). The employee's gender (black male) must be the "motivating factor" for the conduct; it is in this case. So long as the conduct is because of sex", it need not be "sexual in nature", or "involve sexual advances, innuendo, or physical conduct to be actionable." PAYNES V. CHILDREN'S HOME SOCIETY OF WASHINGTON, 77 Wn.App. 507, 513, 692 P.2d 1102, 1106 (1998).

To prove that conduct affected his or her terms or conditions of employment, the employee must establish that the conduct "is sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. "Whether conduct meets this test depends on the totality of the circumstances. GLASGOW V. GEORGIA PACIFIC CORP., 103 Wn.2d 401, 693 P.2d 708, 712 (1985) ante or it is physically threatening or **humiliating**,

or a mere offensive occurrence; and whether it unreasonably interferes with and employee's work performance.

The question of whether a particular conduct by a co-employee was unwelcome presents difficult problems of proof, and turns largely on credibility determinations reserved to the trier of fact. *KAHN V. SALERO* 90 Wash.App. 110, 951 P.2d 321 (1998). Summary Judgment was not appropriate. Conduct is unwelcome if the employee does not solicit or incite it, and regards it as undesirable or offensive, *SANGSTER V. ALBERTSONS, INC.*, 99 Wash.App. 156, 991 P.2d 674 (2000). Appellant so indicated, **holding hands, rubbing of the shoulders and intentional bumping of the Appellant**, meets this test !

In addition to considering the frequency and severity of allegedly harassing conduct in determining whether there was a hostile work environment, Washington courts consider whether the **conduct is physically threatening or humiliation**, or a mere offensive utterance, and whether it unreasonably interferes with employee's work performance.

Unlike certain federal case law, which does not distinguish between manager/owners and supervisors in hostile environment cases, Washington courts make that distinction. Washington courts hold that conduct **is** imputable to the employer if it is the conduct of an owner, manager, partner, or corporate officer, or, alternatively, if it is the **conduct of a supervisor** , *CAROL KIRK*, which the employer authorized, known of, or should have.

**E. A HOSTILE WORKING ENVIORNMENT WAS IN EFFECT FOR THE PLAINTIFF / APPELLANT WHO HAS HAD TO SEEK MEDICAL HELP FROM SUCH CONDITION**

*CAROL KIRK* was the Superintendent of the Morgan facility and there was a Hostile work environment that would make any kind of a reporting a useless act.

The statute of limitations for discrimination is 3 years. DOUCHETTE V. BETHEL SCHOOL, Dist. No. 403, 117 Wn.2d 805, 818 P.2d 1362 (1991); NEARING V. GOLDEN STATE FOODS CORP., 114 Wn.2d 817, 820, 792 P.2d 500, 502 (1990) RCW 4.16.080

However the statute of limitations may be tolled in employment discrimination cases where equitable grounds exist. DOUCHETTE B. BETH SCHOOL DIST. ante.

Also DOMINGO V. BOEING EMPLOYEES CREDIT UNION, 124 Wash.App. 71, 98 P 3d 1222 (2004)

The proof of management status itself then makes the employer responsible to the employee GLASGOW V. GEORGIA PACIFIC CORP., 103 Wn.2d 401, 407, 693 P.2d 700 (1985) 7d, ante.

Thus the continuing violation doctrine creates an equitable exception to chapter 49.60 where the discriminating conduct is of an ongoing nature. PROVERSHER V. CUS PHARMACY, 145 F.3d, 514. Also GOOMAN V. BOEING COMPANY, Wn.App. 61, 77, 877 P.2d 703 (1994).

Where the supervisor as in this instance is CAROL KIRK, the Defense of the case of reasonable care to prevent the harassing behavior is not available to the employer.

SURITON V. POTOMAC CORP., CA 9 (Wash) 2001, 27 F.3d 794 (main volume) cert denied, 122 S Ct 1609, 535U.S. 1018, 152 Ed 2d 623.

EUGENE WHITEHEAD testified to the harassment **was humiliating to him** by his supervisor rubbing his shoulders and back in the meetings at the Morgan Center, bumping hands and running into her. (CP235)

In addition to his Shop Steward duties he was involved in, he outlined his representing other employees. in grievances. (CP235)

Also, ALLEEN WITTE had been constant in her activity. And SHERI WILSON SOLICITING the Appellant for obtaining a room at the Chieftain Motel for intercourse. It should be noted there is NO RESTAURANT; only rooms to rent ! (CP235 at p. 7) **There are genuine issues of fact !**

#### (6) CONCLUSIONS

Appellant requests that this Court of Appeals reverse the decision of the Kitsap County Superior Court of Appeals of January 20, 2006, and remand this case to such court for a trial on the merits stated herein.

Respectfully Submitted,

A handwritten signature in black ink that reads "Horton Smith". The signature is written in a cursive style. Below the signature, the letters "DR" are printed in a small, sans-serif font.

HORTON SMITH, WSBA #9699  
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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Plaintiff Appellant

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DSHS of the STATE OF WASHINGTON

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DECLARATION OF SERVICE

I certify that I mailed the original and duplicate copy of Appellant's Response to Striking Portions of Opening Brief and (Corrected) Brief to the Clerk of the Kitsap County Superior Court, at 950 Broadway, Suite 300, Tacoma, WA 98402-4454; and copy of said documents to Mark A. Anderson, Assistant Attorney General, Torts Division, P.O. Box 40126, Olympia, WA 98504-0126. I personally delivered them to the main post office in downtown Seattle, 3rd and Union, at 8pm in the evening on September 7, 2006.

I declare under penalty of perjury under the laws of the United States of America that the foregoing documents were mailed on said date above.

Diane Roberts 9/13/06  
Diane Roberts