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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RODOLFO APOSTOL, Appellant

v.

RONALD WASTEWATER DISTRICT, Respondent

BRIEF OF RESPONDENT

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I. INTRODUCTION

Rodolfo Apostol (“Apostol”) was terminated by Ronald Wastewater District (“the District”) after refusing (1) to return to work, and (2) to provide a physician’s justification for his absence during a five month self-imposed leave. This appeal concerns whether Apostol’s 13 employment related causes of action against the District were properly dismissed by the trial court, primarily on statute of limitations grounds. First, the District’s motion for partial summary judgment dismissing 10 of Apostol’s 13 causes of action (A., D., E., F., G., H., J., K., L., and M) was granted on March 12, 2010. Second, the District’s motion for summary judgment dismissing Apostol’s remaining three causes of action (B., C., and I.) was granted on April 23, 2010. Because the undisputed facts showed none of the acts which served as the basis of Apostol’s thirteen causes of action against the District occurred within the three years of the filing of his lawsuit (August 28, 2008), the trial court granted both motions.¹

In his opening brief, Apostol fails to identify the statute of limitations issue as one of his “Assignments of Error.” As a result, the

¹ Although the District brought two separate summary judgment motions, Apostol opposed only the first motion with argument and/or evidence. In response to the District’s second motion, he simply incorporated his opposition to the District’s first motion.

District finds it extremely difficult to “answer the brief of Appellant” as required under RAP 10.3(b). Answering irrelevant arguments and factual allegations is a fruitless exercise, especially when those factual allegations contain no citation to the Clerk’s Papers. Accordingly, the District has “answered the brief of Appellant” as best it can, and in a way which addresses the judgments granted by the trial court.

II. STATEMENT OF THE CASE

Rodolfo Apostol was hired by Ronald Wastewater District (RWD) in 1994 as a “Maintenance Technician B.” (Declaration of Mike Derrick in support of RWD’s Motion for Partial Summary Judgment, CP 987, at ¶3.) The following year he was promoted to a Maintenance Technician A. (Id.) However, because of disciplinary and other problems, Apostol was later demoted to a Maintenance Technician “B” in 1995 and again in 2005. (Id.) Apostol has a long history of “complaints” and “harassment.” For purposes of brevity, and to illustrate the scope of the claims pending in this lawsuit, the following is a history of only those complaints made since 2002.

A. Chemical Sensitivity/Disability Complaints.

Apostol first complained of sensitivity to certain chemicals and fumes in December 1996. The complaints began shortly after being

employed with the District. After learning of this sensitivity, the District responded by:

- Providing instruction and re-training of maintenance staff in the proper field use of tailpipe exhaust “extension hose and adapter unit” purchased on January 24, 1997, at a cost of \$245.61;
- In early February 1997, the General Manager directed the maintenance manager to instruct Apostol to not work in, or around, the CCTV van until it was determined that any potential leaks in the exhaust system were found and corrected; and
- The District had the CCTV van completely inspected by All Truck Service which recommended the following corrections: sealing off a two inch hole in the floorboard and plugging the seam sealed cracks in the rear compartment and in the generator compartment at a cost of \$252.83 on March 25, 1997.

(CP 987, at ¶4) After that incident, and corrective action by the District, Apostol did not raise the issue of a “medical sensitivity” or a “disability” again until 1999. Following a warning for workplace related performance on May 20, 1999, Apostol read a statement at a safety meeting on June 18,

1999 declaring he had a “disability.” At that time, he stated that he had a problem with all vehicle/equipment fumes and that he now asked that all gas operated vehicles and equipment be shut down in his presence. (CP 988, at ¶5) After hearing Apostol’s statement at the June 18, 1999 meeting, the General Manager met with his staff to discuss ways to accommodate Apostol. (Id.) Apostol was asked to experiment with different types of respirators which could filter out fumes. (Id.) In addition, the general manager told Apostol that he could leave the shop area anytime the crew was painting in it. (Id.)

B. 2002 Claims of “Race Discrimination.”

On December 12, 2002, Apostol filed charges of discrimination with the Washington State Human Rights Commission and EEOC regarding a “discriminatory event which took place on June 1, 2002.” (CP 989, at ¶11) The complaint charged that Apostol expressed an interest in a “technical specialist” position and that he believed he was qualified for the position. He charged that the position was filled on June 1, 2002 by a Caucasian person with lesser skills. (CP 999) The District responded to the EEOC Complaint, by noting that Apostol’s Complaint against the District again followed a May 13, 2002 "Final Warning Review" for Apostol's inappropriate workplace behavior, and breach of the District's safety regulations. Furthermore, the General Manager stated in response

to the Complaint that Apostol was never in consideration for the open position of Technical Specialist because of his long track record of unacceptable workplace behavior. (CP 1001-1017)

On June 3, 2003, the EEOC issued a "Dismissal and Notice of Rights" finding that, based on its investigation, it was unable to conclude that the information obtained established any violation of statutes. (CP 990, at ¶12) The EEOC letter further informed Apostol that he had 90 days to file a lawsuit against the District or his right to sue based on the discrimination charge would be lost. (CP 1019-1020) Plaintiff failed to file a suit related to the June 2002 discrimination charge within the 90 days. (CP 990, at ¶12).

C. January 2004 Allegations of Harassment by Co-Workers.

On January 4, 2004, Apostol handed the General Manager of Ronald Wastewater District a memo regarding the "verbal abuse and harassment by [co-worker] Jason Sharp." (CP 990, at ¶13). The memo was copied to his union representative and set forth several acts of alleged abuse and harassment. (Id., and exhibit at CP 1022-1024). The District investigated these allegations, and then called a meeting with Mr. Sharp and Apostol present. At the conclusion of the meeting, Apostol and Mr. Sharp agreed that they would maintain a professional demeanor when

working together, and would respect the seniority, rank, and position classification of the other. (CP 990, at ¶13).

D. January 2005 Allegations of Harassment.

In January 2005, Apostol sent three e-mails to the General Manager alleging that he had been unfairly treated and harassed by the Maintenance Manager and members of the maintenance crew. (CP 990, at ¶14, and exhibits at CP 1026-1032). A meeting was held on February 24, 2005 between Apostol, the General Manager, and the Maintenance Manager. After the meeting, the General Manager spoke with numerous co-workers while investigating Apostol's allegations. (CP 990, at ¶14). In addition, the District hired a Human Resources firm to investigate Apostol's harassment complaint. (Id.) Apostol refused to be interviewed for the outside investigation. A report was issued which found no basis for Apostol's claims of harassment. (Id.) As a result, on May 18, 2005, the District sent a letter to Apostol giving him a written warning of unsubstantiated allegations of unfair treatment and harassment. (CP 1034) The letter set forth that the allegations of unfair treatment and harassment were proven to be unsupported, not backed up with evidence, found to have no merit, and in some cases completely refuted by the evidence. (Id.) Referencing a District policy regarding workplace harassment, and the District's intolerance about false complaints which adversely impact the

workplace, the District gave Apostol a warning stating that false accusations may lead to discipline, up to and including termination. (Id.)

E. Apostol's 2005 Disability Claim and Leave of Absence.

On September 19, 2005, the General Manager (Mr. Derrick) was presented with evidence that Apostol was not being attentive during flagging operations leading to safety concerns among his crew. (CP 991, at ¶15) To verify the claim, the General Manager and Maintenance Manager (Mr. Dicks) drove out to Apostol's workplace and observed him violating District safety rules. (CP 991, at ¶15, and CP 868, at ¶3) On September 21, 2005, the General Manager met with Apostol and the Maintenance Manager to discuss performance and safety related concerns. A memorandum was prepared by Mr. Dicks setting forth what the managers had witnessed and the District's concerns. (CP 868, and exhibit at CP 878-879).

Apostol abruptly left his workplace during the September 21, 2005 meeting. (CP 991, at ¶15) He failed to show up for work for the balance of that week (September 22 and 23, 2005). (Id.) On September 26, 2005, he sent an e-mail to the General Manager, Mr. Derrick, stating: "As of September 22, 2005, I will be taking medical leave until further notice." (Id., and exhibit thereto at CP 1036) On the same date, he filed a claim for disability with the Department of Labor & Industries for "stress." (CP

991, at ¶16, and Exhibit at CP 1040.) This claim was denied. (CP 991, at ¶16) However, on January 24, 2006, he also made a claim for a “fractured wrist” reportedly caused by using a sledgehammer to break concrete (Claim No. AD81723) (Id.) To support his claim, he submitted a letter to the Department of Labor and Industries dated April 4, 2006. (CP 1042) In that letter, he stated that his injury was the result of breaking concrete with a sledgehammer on August 1, 2005. (Id.)

Apostol never returned to work. (CP 991-994, at ¶¶16-21) Despite numerous requests from his employer for physician certification of his inability to return to work, he never provided the requested documentation. (CP 992-994, and Exhibits 12-19 referenced therein at CP 1044-1072) He was terminated on February 28, 2006 for refusing to return to work and for failing to provide certification from his medical provider as to his claimed disability. (CP 994, at ¶22, and exhibit 20 thereto at CP 1074-1075)

Apostol commenced a lawsuit against the District on August 28, 2008. (CP 1-18) In it he alleged 13 separate causes of action against the District related to his work environment and termination. (Id.) After some written discovery, including Apostol answering some interrogatories verbally before a court reporter, the District brought its motion for partial summary judgment to dismiss 10 of Apostol’s 13 causes of action (A., D.,

E., F., G., H., J., K., L., and M). (CP 841-866) On March 12, 2010, the trial court granted the District's motion and ruled that Apostol's claims A., D., E., F., G., H., J., were barred by the three year statute of limitations because the acts he complained of all took place more than three years before he filed suit (pre August 28, 2005). (CP 39-41) It also dismissed Apostol's causes of action J., K., L., and M. as a matter of law because the undisputed evidence showed that Apostol could not make a *prima facie* case for those claims. (Id.)

The District then moved the Court to dismiss Apostol's remaining causes of action (B., C., and I.) as a matter of law. (CP 1084-1095) The Court granted the District's motion dismissing the remaining claims on April 23, 2010. (CP 51-53)

III. STATEMENT OF ISSUES

A. Did the trial court err by dismissing Apostol's causes of action A., D., E., F., G., H., and J. as barred by the three year statute of limitations?

B. Did the trial court err by dismissing Apostol's causes of action for "Negligent Infliction of Emotional Distress" (Cause of Action "K.") and "Intentional Infliction of Emotional Distress/Outrage" (Cause of Action "L.") pursuant to RCW 51.24.020 when there is no evidence that the District deliberately caused injury to Apostol?

C. Did the trial court err by dismissing Apostol's cause of action for "Constructive Discharge" (Cause of Action "M.") as a matter of law when there was no evidence that Apostol voluntarily resigned because the District made his working conditions intolerable?

D. Did the trial court err by dismissing Apostol's cause of action for "Hostile Work Environment based on Race and Retaliation" (Cause of Action "B.") as a matter of law when Apostol failed to provide any evidence of a hostile act attributable to the District after August 28, 2005?

E. Did the trial court err by dismissing Apostol's claim for "Washington Law Against Discrimination-Continuing Violations Doctrine" (Cause of Action "C.") as a matter of law when that claim is simply a restatement of his cause of action "B"?

F. Did the trial court err by dismissing Apostol's claim of "Retaliation for Filing a Worker's Compensation Claim" (Cause of Action "I.") as a matter of law when the undisputed evidence showed he was terminated for failing to return to work or, alternatively, to provide adequate documentation supporting his five month leave of absence?

IV. ARGUMENT

Summary Judgment Standard and Standard of Review

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. CR 56(c); International Broth. of Elec. Workers, Local Union No. 46 v. TRIG Elec. Constr. Co., 142 Wn.2d 431, 435, 13 P.3d 622 (2000). Such a motion will be granted, after considering the evidence in the light most favorable to the non-moving party, only if reasonable persons could reach but one conclusion. Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998).

Unsupported assertions are also insufficient to defeat a motion for summary judgment. Dombrosky v. Farmers Ins. Co., 84 Wn. App. 245, 253, 928 P.2d 1127 (1996). Further, the non-moving party may not rely on the bare allegations of the pleadings to defeat summary judgment, but must set forth specific facts showing that there is a genuine issue of material fact for trial. Baldwin v. Sisters of Providence in Washington, Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Similarly, a motion for summary judgment cannot be defeated on speculation, conjecture or mere possibility. Chamberlain v. Dept. of Transp., 79 Wn. App. 212, 215-216, 901 P.2d 344 (1995).

If the plaintiff fails to show the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial, then the moving party is entitled to judgment as a matter of law and the trial court should grant the motion. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). *Pro Se* litigants are held to the same standard as attorneys in putting on their cases. In Re Marriage of Olson, 69 Wn.App. 621, 626, 850 P.2d 527 (1993). On appeal, the appellate court decides the case on a *de novo* basis, engaging in the same analysis as the trial court. Roger Crane & Associates v. Felice, 74 Wn.App. 769, 773, 875 P.2d 705 (Div. 3, 1994).

A. The Trial Court Properly Dismissed Apostol's Causes of Action A., D., E., F., G., H., and J. as Barred by the Three Year Statute of Limitations.

1. Plaintiff's Claims for Discrimination Under RCW 49.60 (Causes of Action A., D., E., F., G., and H.) are Subject to the Three Year Statute of Limitations.

Apostol alleges six causes of action based on RCW 49.60. These are causes of action A.², D., E., F., G., and H. The statute of limitations for discrimination claims under the statute is three years. Antonius v. King County, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2005). Apostol filed

² Apostol's Cause of Action "A." is for "Freedom From Discrimination – Declaration of Civil Rights. RCW 49.60.030." (CP 10) This cause of action fails to identify a specific type of discrimination, and instead alleges "Defendant created a hostile work environment for the Plaintiff." As pled, the cause of action is deficient for failure to state a claim for discrimination. To the extent the claim is really one for Hostile Work Environment, it was properly dismissed as part of Apostol's Causes of Action "B." and "C." on April 23, 2010.

his Complaint against the District on August 28, 2008. (CP 1) Therefore, only his RCW 49.60 discrimination claims concerning the District's conduct occurring since August 28, 2005 are actionable. Put another way, Apostol must show discriminatory acts by the District which occurred after August 28, 2005 for those claims to survive. No such alleged acts of discrimination by Defendant occurred after August 28, 2005.

The undisputed facts show that Apostol abruptly left his workplace on September 21, 2005, during a meeting with the General Manager and the Maintenance Manager. (CP 991, at ¶15) He failed to show up for work for the balance of that week (September 22 and 23, 2005). (Id.) On September 26, 2005, he sent an e-mail to the General Manager, Mr. Derrick, stating: "As of September 22, 2005, I will be taking medical leave until further notice." (Id., and exhibit thereto at CP 1036) Apostol never returned to work. (CP 991-994, at ¶¶16-21) He was terminated on February 28, 2006 for refusing to return to work and for failing to provide certification from his medical provider as to his claimed disability. (CP 994, at ¶22, and exhibit thereto at CP 1074-1075) Accordingly, from September 22 to February 28, 2006, there could be no instances of, let alone any opportunity for, the alleged discrimination because plaintiff was not at work. The only way for Apostol to sustain his discrimination claims is to prove discrimination occurred between August 28, 2005 and

September 21, 2005 (when he placed himself on medical leave). The trial court correctly found that, as a matter of law, there was no evidence of any discriminatory conduct by the District during that time.

a. There is No Evidence of Any Disability Discrimination by the District After August 29, 2005.

In his cause of actions “D.”, “E.”, “F.”, and “H.”, Apostol alleged various “disability discrimination” claims against the District. These include (a) “failure to accommodate” (“D.”), (b) “disability discrimination-disparate impact” (“E.”), (c) “disability discrimination—disparate treatment” (“F.”), and (d) “disability harassment—disparate treatment” (“H.”). Each of these causes of action was dismissed below as barred by the applicable three year statute of limitations.

i. Failure to Accommodate.

In Washington, an employee must prove the following to sustain a claim of unlawful disability discrimination: (1) he has a disability, (2) he is able to perform the essential functions of the job in question with reasonable accommodation, and (3) his disability was a significant or substantial factor in the employer's decision to terminate or not promote him. Becker v. Cashman, 128 Wn.App. 79, 114 P.3d 1210 (2005).

During his employment, Apostol first claimed a “sensitivity” to certain chemical fumes in December 1996. (CP 987, at ¶4) In response,

the District took steps to accommodate this sensitivity by permitting Apostol to be outside certain areas when painting or other jobs were taking place. (CP 987-988, at ¶¶4-5) In addition, the District upgraded its equipment and took steps to control exhaust fumes in its work trucks so that Apostol would not feel ill effects. (Id.)

Apostol's only claim concerning his "chemical sensitivity" during the latter half of 2005 related to his work with an herbicide with the trade name of "Rootx." Rootx is placed by maintenance workers into sewer lines. (CP 987, at ¶4) Plaintiff was asked to assist with the application of Rootx on July 19, 2005 by the maintenance manager, George Dicks. (Id.) When Apostol refused to apply the herbicide because of his chemical sensitivity, he was asked to perform other duties. (Id.) Eventually, he did work with Rootx using a mask, safety glasses, and rain gear. (CP 987, and exhibit 11 thereto at CP 997) Accordingly, Apostol's chemical sensitivity was actually accommodated.

After August 28, 2005, there is no evidence that the District failed to accommodate Apostol because of his chemical sensitivity. Apostol placed himself on medical leave, and filed a claim for worker's compensation benefits on September 26, 2005. (CP 1040) The disability claimed was "[s]tress due to hostile work environment at the workplace. Harassment by co-workers and management. Retaliation by management.

Threats and warning by management.” (Id.) The claim made no mention of chemical sensitivity. The claim was denied by the Department of Labor and Industries. (CP 991, at ¶16).

Apostol provided no evidence that the District “failed to accommodate” any “disability”, whether before August 29, 2005, or after. The trial court properly dismissed this cause of action as a matter of law.

ii. Disability Discrimination: Disparate Impact.

A discrimination claim based on “disparate impact” requires a plaintiff to show (1) an employment policy or practice that may be neutral or nondiscriminatory on its face, but which (2) has a disproportionate or disparate impact on a protected class. Shannon v. Pay ‘N Save, 104 Wn.2d 722, 727, 709 P.2d 799 (1985). Apostol failed to provide any evidence of such a policy or practice of the District which is non-discriminatory on its face, and yet which disproportionately affected his “disability.” Apostol’s cause of action “E.” was dismissed for failure to offer any evidence in support of this cause of action.

iii. Disability Discrimination: Disparate Treatment.

Washington courts recognize discrimination claims based on disparate treatment of employees with disabilities. Becker, supra. Disparate treatment occurs when the employer simply treats some people less favorably than others because of their race, color, religion, sex,

national origin or other prohibited characteristic. Shannon, *supra*, 104 Wn.2d, at 726.

Apostol's cause of action "F." alleges that the basis for his "disparate treatment" claim is that he suffered "discriminatory harassment, in the form of extraordinary job duties, lack of promotions to positions that plaintiff was qualified to fill, heightened criticism, physical and mental torture, and harassing conduct." (CP 13) However, he provided no evidence of any discriminatory harassment which occurred after August 28, 2005 *related to a disability*. Apostol's failure to provide any evidence of "disparate treatment" by the District related to his "disability and discrimination" claims occurring after August 28, 2005 was properly dismissed as a matter of law.

iv. Disability Harassment/Disparate Treatment (RCW 49.60).

Under his cause of action "H.," Apostol alleged "adverse employment action" by RWD because of his "disability." (CP 14) Substantively, this is no different than his cause of action "F." (Disability Discrimination/Race Discrimination/Disparate Treatment). The trial court properly dismissed this claim for the same reasons set forth in the discussion at section (c), *supra*.

b. Apostol's Claims of Race Discrimination Were Also Properly Barred by the Three Year Statute of Limitations.

Apostol alleged race discrimination in his causes of action "E." and "F." of his Complaint. (CP 12, 13) These include: (a) "race discrimination-disparate impact" ("E."), and (b) "race discrimination—disparate treatment" ("F."). To establish a *prima facie* case of race discrimination, an employee must prove:

1. He or she was a member of a protected group;
2. He or she was subjected to an adverse employment decision or action;
3. The person who got the job was outside the protected group; and
4. That the employee was qualified to do the job.

Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 493, 865 P.2d 507 (1993). An employer is entitled to judgment as a matter of law if the record conclusively reveals some other, non-discriminatory reason for the employer's decision, or if the plaintiff creates only a weak issue of fact as to whether the employer's reasons was untrue and there is abundant and uncontroverted evidence that no discrimination had occurred. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 184-85, 23 P.3d 440 (2001).

i. Race Discrimination: Disparate Impact.

The test for this type of discrimination is the same as set forth above under “disability discrimination,” *supra*: Plaintiff must show an employment policy or practice of defendant that may be neutral or nondiscriminatory on its face, but has a disproportionate or disparate impact on a protected class. Shannon, *supra*, at 727.

Apostol failed to produce any evidence of such a policy or practice by the District. The only such “practice”, identified in paragraph “E.2-3” of plaintiff’s complaint, is “imposing discipline.” (See CP 12) However, that is not a disparate “impact,” it is by definition disparate “treatment.” Apostol produced no evidence of any policy or practice of disciplining (or not promoting employees) which had a disproportionate impact on Filipino-Americans. Second, Apostol failed to establish any such disciplinary action took place after August 28, 2005. Because the three year statute of limitations applies to any such policies in place before August 28, 2005, this cause of action was properly dismissed as a matter of law.

ii. Race Discrimination: Disparate Treatment.

“Disparate treatment” occurs when the employer simply treats some people less favorably than others because of their race, color, religion, sex, national origin or other prohibited characteristic. Shannon v.

Pay N Save, supra, 104 Wn.2d, at 726. Apostol's cause of action "F. Race Discrimination/Disparate Treatment", alleged that (1) he was treated less favorably than white employees, (2) he was more qualified than white employees who worked in, or applied for the same positions, and (3) that he was not promoted or was given "more extraordinary job responsibilities" because of his race. (CP 13)

In answers to interrogatories, provided under oath before a court reporter,³ Apostol identified five District employees he claims were promoted over him because of "race":

(1) Mr. Dewey for a "technical specialist" position. This took place in 1995, thirteen years before the filing of Apostol's lawsuit on August 28, 2008. (CP 988, at ¶6). Apostol also admitted under oath that Mr. Dewey was qualified for the position, and was not "lesser qualified" than him. (CP 927-929, and specifically at pages 91:19-92:1)

(2) Mr. Al Dann for a "technical specialist" position. This job position was filled on September 1, 1999, 9 years before the filing of Apostol's lawsuit on August 28, 2008. (CP 988 at ¶7). Apostol never applied for this position (CP 988, at ¶7) Furthermore, Apostol admitted never even applying for this job vacancy. (CP 929, at page 94:8-17)

³ The trial court required Apostol to provide answers to the District's written interrogatories before a court reporter after he refused (and failed) on numerous occasions to provide answers. Even this proved difficult, given his refusal (and inability) to respond to the written discovery verbally.

(3) Mr. Mark Neumann for a “technical specialist” position.

This job was filled on June 1, 2002, 6 years before the filing of Apostol’s lawsuit on August 28, 2008. (CP 988-989 at paragraph 8) Apostol never applied for this position. (Id.) He also admitted under oath that Mr. Neumann was qualified for the position, and was as qualified as plaintiff for the position. (CP 930-931, at pages 98:5-99:5)

(4) Mr. Charlie Brooks for a “crew chief” position. This job

was filled on June 1, 2002, 6 years before the filing of Apostol’s lawsuit on August 28, 2008. (CP 989 at ¶9). Furthermore, Apostol did not apply for this position, and does not know what the qualifications for the position were. (CP 932-933, at pp. 104:22-107:19)

(5) Mr. Jessie Peterson for a “technical specialist” position.

This job was filled on January 2, 2004, over four years before the filing of Apostol’s lawsuit on August 28, 2008. (CP 989 at ¶10) Furthermore, Apostol did not apply for this position, and does not know what the qualifications for the position were. (CP 933-934, at pp. 110:18-112:5)

The trial court properly dismissed Apostol’s claims for “Race Discrimination-Disparate Treatment.” The undisputed evidence shows that each alleged act of RWD hiring “lesser qualified white employees” over plaintiff occurred more than three years prior to the filing of Apostol’s lawsuit on August 28, 2008. In addition, the evidence showed

that in each case, either (1) Apostol did not actually apply for the position or (2) the position was given to someone who was as qualified for the position as he was.

c. The Undisputed Facts Show No Evidence of Discriminatory Conduct by the District Which Occurred after August 28, 2005.

When answering the District's interrogatories under oath, Apostol was asked on July 14, 2009 to identify the acts of discrimination which occurred after August 1, 2005. In response, he identified the following acts of George Dicks, the District's Maintenance Manager, as being "discriminatory":

(a) He was ordered to break concrete with a sledge hammer; (CP 935)

(b) He was told to dig ditches and sewer lines on private property; (CP 935)

(c) His "standby duty" (overtime) was taken away; (CP 935)

(d) He wasn't allowed to drive the Vactor truck; (CP 936)

(e) He was told to pick up "parts and pieces" at Apple Tree Lane; (CP 936)

The undisputed evidence shows that none of these alleged "acts of discrimination" occurred after August 28, 2005.

The “Sledge Hammer Incident”: Apostol actually admitted in writing this occurred on August 1, 2005-- Three years and three weeks prior to the 3 year statute of limitations period. (CP 1042)

The “Ditch Digging Incident” on private property: This actually occurred on July 28, 2005, in connection with work performed by District contractors at the Apple Tree Lane pump complex. (CP 869 at ¶5, and daily time cards attached at CP 881-913).

The Removal of Standby Duty: The undisputed facts show his “Standby Duty” was never removed. Apostol continued to work standby duty on July 16-19, July 25-31, and August 29-30, 2005. He was scheduled to work standby duty again on October 17-23, 2005 when he left work and placed himself on medical leave. (CP 869 at ¶6, and CP 918-920 where Apostol is referred to by his nickname “Doddy”).

The “Vactor Truck Driving Prohibition”: This privilege was removed by the District on or before April 29, 2005, more than three years and four months prior to the three year statute of limitations period. As stated by George Dicks in his April 29, 2005 memo, the driving privilege had already been removed by then: *“I reiterated my instructions to Kim that [Apostol] was not to drive the vactor but could operate the pipeline cleaning and vacuum functions. These were the same instructions I had given to Rodolfo and the other maintenance personnel.”* (CP 875-876)

The “Apple Tree Lane Incident”: This occurred on July 29, 2005--Three years and one month prior to the 3 year statute of limitations period. (CP 869 at ¶7, and CP 922)

The District vigorously disputes that any discriminatory conduct has ever taken place toward Apostol. The undisputed facts show all of the *claimed* acts of discriminatory conduct took place before August 28, 2005 and, therefore, Apostol’s RCW 49.60 discrimination claims (Causes of Action A., D., E., F., G., and H) were properly barred by the applicable three year statute of limitations.

2. Apostol’s Claim for “Retaliation for Engaging in Organized/Union Activity” (Cause of Action “J.”) is also Barred by the Three Year Statute of Limitation Because All Acts Serving as the Basis for That Claim Occurred More Than Three Years Before he Filed Suit.

In his cause of action “J.,” Apostol alleges that the District retaliated against him because he engaged in “union activity” in violation of RCW 41.56. Specifically, he alleges that “the defendant discriminated against the plaintiff after he filed an unfair labor practice charge.” (CP 15) In response to interrogatories, however, Apostol identified the following event which serves as the basis for this cause of action:

“Maintenance staff of RWD met and oppose [sic] management to work for the City of Shoreline’s storm drain in its City limits. I was the only one that was penalized with adverse employment conditions. By demotions, thirty

day suspension, put on 1 year probation period,
and bonus pay taken away.”

(CP 939, Plaintiff’s answer to Interrogatory No 51.)

An employee who suffers adverse employment action through participation in union activities may maintain a cause of action for the tort of wrongful discharge in violation of public policy. Smith v. Bates Technical College, 139 Wn.2d 793, 807, 991 P.2d 1135 (2000). As such, the statute of limitations applicable to such claims is three (3) years. RCW 4.16.080. There is no separate remedy or separate statute of limitations appearing in RCW 41.56.

The actions Apostol describes took place on December 16, 2004 when he acted inappropriately at a staff meeting conducted by the District’s General Manager. As a result of that behavior, the latest in a long list of performance or behavioral problems exhibited by Plaintiff, he was disciplined. (CP 943-944.) In fact, Apostol acknowledged his poor behavior and apologized for it on December 30, 2004. (CP 946) Accordingly, the “retaliation” claimed by Apostol in cause of action “J.” occurred in December 2004, 3 years and 8 months prior to the date when his lawsuit was filed. The trial court properly dismissed this claim against the District as barred by the three (3) year statute of limitations.

B. Apostol's Claims For "Negligent Infliction of Emotional Distress" and "Intentional Infliction of Emotional Distress/Outrage" Pursuant to RCW 51.24.020 Were Properly Dismissed By The Trial Court When There is No Evidence That the District Deliberately Caused Injury to Apostol.

In causes of action "K." and "L." of his Complaint, Apostol alleges

(1) "negligence infliction of emotion distress" and (2) "outrage" pursuant to RCW 51.24.020. (CP 16) That statute provides:

If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, or any damages in excess of compensation of benefits paid or payable under this title.

This is also known as the "deliberate intention" exception to the Industrial Insurance Act. To pierce the Industrial Insurance Act shield protecting employers from civil suits, the worker must prove two elements: (1) that the employer had *certain knowledge* injury would occur and, (2) that the employer willfully disregarded that knowledge. Unless a reasonable jury could conclude that both prongs are met, summary judgment is appropriate. Judy v. Hanford Environmental Health Foundation, 106 Wn.App. 26, 31, 22 P.3d 810, *rev. denied* 144 Wn.2d 1020 (2001). Disregarded known risk of harm is insufficient to come within the intentional injury exception to the exclusivity provision of the

Industrial Insurance Act. Certainty of actual harm must be known and ignored. Henson v. Crisp, 88 Wn.App. 957, 961, 946 P.2d 1252, rev. denied 135 Wn.2d 1010 (1997). Neither gross negligence nor failure to observe safety procedures and laws governing safety constitutes a specific intent to injure, which is required to come within the intentional injury exception. Birklid v. The Boeing Company, 127 Wn.2d 853, 873, 904 P.2d 278 (1995).

Apostol presented no evidence that the District deliberately intended to cause him any injury, and the trial court properly dismissed his causes of action under RCW 51.24.020 as a matter of law.

C. Apostol's Cause of Action for "Constructive Discharge" (Cause of Action "M.") was Properly Dismissed by the Trial Court. Apostol Produced No Evidence That He Voluntarily Resigned Because the District Made His Working Conditions Intolerable.

Apostol's Complaint also alleged a cause of action "M." for "Constructive Discharge" against the District. (CP 16-17) To succeed on a constructive discharge claim, plaintiff must prove: (1) the employer deliberately made the employee's working conditions intolerable, (2) a reasonable person would be forced to resign, (3) the employee resigned solely because of the intolerable conditions, and (4) the employee suffered damages. Campbell v. State of Washington, 129 Wn.App. 10, 23, 118 P.3d 888 (2005).

The undisputed evidence showed that Apostol was terminated when he failed, after several months of requests and warnings from his employer, to provide documentation from his medical provider that he was unable to work. After meeting with his supervisors on September 21, 2005, Apostol simply left his job and “called in sick” on September 22nd and 23rd. (CP 991, at ¶15) On the following Monday, September 26, 2005, Apostol sent an email to his supervisor, Mr. Derrick with the following message: “As of September 22, 2005, I will be taking medical leave until further notice.” (CP 991, at ¶15, and CP 1036). There was no explanation as to the “medical condition” entitling him to leave.

On the same day, Mr. Derrick responded to Apostol stating (1) that Apostol’s email was insufficient to qualify him for medical leave, (2) that his absences were unacceptable, and (3) that he had until September 28, 2006 to supply appropriate medical documentation supporting his inability to work or risk termination due to job abandonment. (CP 1038). Apostol never provided proper medical documentation, despite repeated requests and extended deadlines from the District. (CP 992, and exhibits thereto at CP 1045-1058.)

Therefore, on February 6, 2006, Mr. Derrick wrote Apostol yet another letter and again asked for the supporting information in order to extend Apostol’s leave until March 22, 2006. The letter advised Apostol

that without the supporting medical documentation, he was expected to return to work on February 13, 2006: “Failure to return to work as scheduled will constitute a voluntary resignation unless we have received, before that date, the supporting information that we have requested from your physician.” (CP 992-993, and exhibit at CP 1060). Apostol failed to provide the requested information, despite another extension on February 14, 2006. (CP 993, 1065) He also failed to attend his Laudermill hearing. (CP 993, 1067, 1072).

On February 28, 2006, Apostol was terminated by letter:

“Based on your failure to either show up for work on February 13, 2006, or furnish adequate medical certification by the deadline of January 25, 2006, (and extended deadlines established by the District) supporting your third extension of medical leave. The letter your doctor faxed to the District on February 17, 2006, even if timely, does not certify that the medical conditions given as a reason for your leave prevent you from performing the essential functions of your position and necessitate medical leave...Accordingly, consistent with its written communications to you, your failure to report to work on February 13 is being classified as a voluntary resignation effective Wednesday, February 15.” (CP 1074-1075).

Accordingly, Apostol was terminated for abandoning his job, and for failing to provide the necessary medical documentation in support of his five month “medical leave.” He was not “constructively discharged.” He did not, under Campbell, “resign his employment” because the District

made his working conditions intolerable. Apostol could not, as a matter of law, maintain a “constructive discharge” claim, and the trial court properly dismissed that cause of action as a matter of law.

D. The Trial Court Properly Dismissed Apostol’s Claim of “Hostile Work Environment” Based on “Race” and “Retaliation” (Cause of Action “B.”) as a Matter of Law.

At the April 23, 2010 hearing on Defendant’s Motion for Summary Judgment on Remaining Claims, the trial court dismissed Apostol’s causes of action (B., C., and I.) Regarding his cause of action B., “Hostile Work Environment Based on Race and Retaliation,” the trial court found that Apostol failed to show a hostile act by the District occurring after August 28, 2005. A review of the trial court’s decision, and the undisputed facts, indicate that the dismissal was warranted as a matter of law.

To establish a claim for hostile work environment a plaintiff must file the claim within the applicable statute of limitations and must prove that harassment (1) was unwelcome, (2) was because he/she is a member of a protected class, (3) affected the terms and conditions of his/her employment, and (4) was imputable to her employer. Domingo v. BECU, 124 Wn.App. 71, 84, 98 P.3d 144 (Div.1, 2004). To satisfy the third element, the harassment must be sufficiently pervasive so as to alter his/her working conditions. Washington v. The Boeing Company, 105 Wn.App. 1, 10, 19 P.3d 1041 (2000). It is not sufficient that the conduct

is merely offensive. Adams v. Able Bldg. Supply, Inc., 114 Wash.App. 291, 296, 57 P.3d 280 (2002). The statute of limitations for actions involving a hostile work environment based on discrimination is three (3) years. Antonius, *supra*, at 261-62. Apostol filed his Complaint against the District on August 28, 2008.

Apostol alleges application of the “continuing violation doctrine” arguing he is entitled to recover damages based on acts occurring prior to August 28, 2005. In Antonius, *supra*, the Washington Supreme Court rejected the continuing violation doctrine in favor of the analysis set forth in NRCC v. Morgan, 536 U.S. 101, 122 S.Ct. 2061 (2002). Adopting the NRCC analysis, the Antonius court held that where discreet acts of discrimination are alleged, the limitations period runs from the date of the discreet act(s). For a hostile work environment claim, however, the objectionable practice does not occur on a particular day. A hostile work environment claim is composed of a series of separate acts that collectively constitute one “unlawful employment practice.” Conduct throughout the time when the acts occurred may be considered *provided* the plaintiff presents evidence that (1) one or more of the discriminatory acts took place within three years of when the complaint was filed, and (2) the acts about which the employee complains are part of the same actionable hostile work environment practice. That is, the acts must have

some relationship to each other to constitute part of the same hostile work environment claim. Antonius, supra, at 269-271. The Court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period. NRCC, supra, at 117. Where an employee fails to demonstrate a discriminatory act within the three year statute of limitations period, the employer is entitled to summary judgment.

1. There is no evidence of any "hostile acts" occurring after August 28, 2005 which are part of a "hostile environmental practice."

The undisputed evidence before the trial court was that Apostol abruptly left his employment during a September 21, 2005 meeting with the District's General Manager and Maintenance Manager and never returned. He placed himself on "medical leave" by email on September 26, 2005. (CP 991, and exhibit at CP 1036.) An employee cannot be subjected to a hostile work environment if he is not at work. *See Clarke v. State Attorney General's Office*, 133 Wn.App. 767, 786, 138 P.3d 144 (Div. 2, 2006) (Final day which could be considered for hostility was the employee's last day at the workplace.) The only opportunity for anything "hostile" to happen and sustain Apostol's hostile work environment claim, therefore, was between August 28, 2005 and September 21, 2005.

Apostol offered no evidence of any harassment which occurred within the limitations period--none. Furthermore, the trial court had previously ruled there was no evidence of any alleged discriminatory or retaliatory conduct by the District (or its employees) after August 28, 2005 in connection with the District's first Motion for Partial Summary Judgment. (CP 40) Mere allegations of such conduct or unsupported assertions are insufficient to defeat a motion for summary judgment. Dombrosky, supra. After September 21, 2005 there was no possibility of harassment under Clarke, supra, because Apostol never returned to work until he was terminated in February 2006.

2. Even assuming there were any hostile acts, Apostol failed to demonstrate they were attributable to the District.

Even if there were evidence of hostile acts by the District's employees between August 28, 2005 and September 21, 2005, Apostol produced no evidence that the District knew of any such conduct by its employees during this 23 day period. To impute to the employer the acts of its employees, the claimant must show the employer knew or should have known of the employee conduct and failed to take reasonable corrective action to end the harassment. Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 853-54, 991 P.2d 1182, *rev. denied*, 141 Wn.2d 1017 (2000). There are no emails, documents, witnesses, or evidence of

any kind, to show that Apostol notified the District of any hostile conduct during this time period.

Thus, Apostol's claim for hostile work environment also fails under Antonius because there are no such acts imputable to the District. The trial court properly dismissed Apostol's "hostile work environment" claim as a matter of law.

E. Apostol's Claim for "Washington Law Against Discrimination Continuing Violations Doctrine" (Cause of Action "C.") Was Properly Dismissed by the Trial Court as a Matter of Law.

In his third cause of action "C.", Apostol alleges a strange cause of action for "WLAD-Continuing Violation Doctrine-Personal Injury Actions-RCW 4.16.080(2)." As set forth above, the Washington Supreme Court rejected the "continuing violation doctrine" in Antonius, supra. Furthermore, Apostol's WLAD claims were dismissed as a matter of law on March 12, 2010. Accordingly, this cause of action was properly dismissed by the trial court for failing to state a claim.

F. Apostol's Claim of "Retaliation for Filing a Worker's Compensation Claim" (Cause of Action "I.") was Properly Dismissed by the Trial Court as a Matter of Law.

Under RCW 51.48.025, an employer may not discharge or in any manner discriminate against any employee because the employee has filed, or communicated to the employer an intent to file, a claim for worker's compensation benefits. This anti-retaliation statute allows an

employee to file a complaint with the director of the Department of Labor & Industries alleging discrimination within ninety (90) days of the date of the alleged violation. However, the filing of the ninety (90) day claim with L&I is not a condition precedent to initiation of a common law cause of action against the employer for retaliatory discharge. An employee may file a wrongful discharge suit against an employer who retaliates against her for filing a workers' compensation claim. Wilmot v. Kaiser Aluminum & Chemical Corp., 118 Wn.2d 46, 53, 821 P.2d 18 (1991). Washington courts follow the same "burden shifting" analysis as in other types of retaliation claims. (Id. at 70) To succeed on a claim for unlawful retaliation, the employee must prove by a preponderance of evidence that retaliation was the substantial or important factor motivating the discharge. (Id. at 71) Notwithstanding the above, however, an employer may discharge an employee for absenteeism resulting from a workplace injury where the employee is excessively absent. (Id.)

Here, Apostol placed himself on medical leave of absence on September 21, 2005 after abruptly leaving a meeting with the General Manager and Maintenance Manager concerning his unsafe workplace behavior. (CP 991, at ¶15, and CP 1036) He failed to show up for work on September 22 or September 23. (Id.) On September 26, 2005, he sent an e-mail to the General Manager stating "as of September 22, 2005, I will

be taking medical leave until further notice.” (*Id.*) On the same date, he filed a claim for disability with the Department of Labor & Industries for “stress.” (CP 991, and exhibit at CP 1040.) This claim was denied. However, on January 24, 2006, he also made a claim for a “fractured wrist” reportedly caused by using a sledgehammer to break concrete (Claim No. AD81723). To support his claim, he submitted a letter to the Department of Labor and Industries dated April 4, 2006. (CP 1042.) In that letter, he states that the injury is the result of breaking concrete with a sledgehammer on August 1, 2005.

The trial court found as a matter of law that the District showed a legitimate reason for terminating Apostol: failure to provide medical documentation after repeatedly being asked to provide it, and that Apostol failed to demonstrate that this reason was “mere pretext” for his termination. Under Wilmot, Apostol had the burden of establishing by a preponderance of the evidence that retaliation was a substantial or important factor motivating his termination the District. Wilmot, *supra*, 118 Wn.2d, at 73. Summary judgment is appropriate when no rational trier-of-fact could find that that a substantial factor in termination of an employee was the employee’s filing of a worker’s compensation claim. *See Anica v. Wal-Mart Stores, Inc.*, 120 Wash.App. 481, 494, 84 P.3d 1231 (Div.1, 2004) (Summary judgment affirmed on employees claim of

retaliation for filing a workers' compensation claim where employee failed to demonstrate filing was a substantial factor in termination).

Apostol was terminated because he repeatedly refused to provide the required documentation in support of his self imposed "medical leave." (*See* discussion *supra* at pp.27-30) No other inference is possible. He was clearly informed of the District's documentation requirement and the consequences if he failed to comply. He was given numerous extensions to provide the documentation, and failed to provide anything to the District until after his *Laudermill* hearing. Even then, the letter from his doctor did not certify that he could not return to work due to his medical condition. Under Wilmot and Anica, no rational trier of fact could find that a substantial factor in the District's decision to terminate plaintiff was a desire on its part to retaliate against him for filing the Worker's Compensation claim and the trial court properly dismissed this claim as a matter of law.

V. CONCLUSION

The trial court properly dismissed Apostol's 13 causes of action. As to each cause of action, the District provided undisputed evidence that such claims should be dismissed, and the trial court's award of summary judgment to the District should be affirmed by this Court.

RESPECTFULLY SUBMITTED this 28th day of December,

2010.

LAW OFFICE OF DANIEL P. MALLOVE, PLLC

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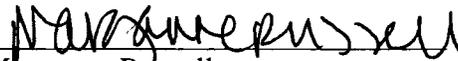
DECLARATION OF SERVICE

I, Marganne Russell, a resident of the County of King, declare under penalty of perjury under the laws of the State of Washington that on this date, I caused two copies of Brief of Respondent to be placed in the U.S. Mail, first class, postage prepaid, addressed to the appellant as follows:

Rodolfo Apostol
7936 Union Mills Road SE
Lacey, Washington 98503

Plaintiff, *Pro Se*

DATED at Seattle, Washington this 28 day of December, 2010.


Marganne Russell

2010 DEC 28 PM 3:00
COURT OF APPEALS
FIFTH DISTRICT
SEATTLE, WA