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NO. 717430-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JAMES A. KUEHN,

Appellant,

vs.

SNOHOMISH COUNTY,

Respondent.

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS DIV I
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A. INTRODUCTION:

Appellant, James Kuehn, appeals the trial court's decision at summary judgment to dismiss his claims against the Respondent, Snohomish County, under the Washington Law Against Discrimination ("WLAD"). The court based its decision on a finding that the statute of limitations ran on August 2, 2010--nine days before Mr. Kuehn provided statutory pre-suit notice to Snohomish County. The court held that Mr. Kuehn's claims against Snohomish County for its discriminatory failure to accommodate his disability "accrued" on the date Snohomish County provided notice to him that he would be terminated, August 2, 2007. Mr. Kuehn asserts that the statute of limitations did not begin to run until November 2, 2007—after Snohomish County provided its final notice that it would not accommodate his medically-related tardiness.

After the August 2, 2007 termination notice, Snohomish County continued to receive and consider additional medical evidence that demonstrated the connection between Mr. Kuehn's tardiness and his medical conditions. Snohomish County further admits that it continued to "interact" with Mr. Kuehn and his medical providers to investigate whether the purported basis for the termination (tardiness) was related to Mr. Kuehn's medical conditions. Snohomish County did not communicate its final decision on whether it would accept Mr. Kuehn's

contention that his medical conditions caused his tardiness until November 2, 2007. Nevertheless, the trial court held as a matter of law that Mr. Kuehn's claims against Snohomish County "accrued" on August 2, 2007 and, thus, his lawsuit was time-barred.

The trial court erred in concluding Snohomish County's duty to accommodate Mr. Kuehn's disability ended on August 2, 2007. The trial court's conclusion failed to apply the correct legal analysis for determining the statute of limitations in a case involving ongoing disability discrimination where the County admittedly continued to "interact" with Mr. Kuehn about an accommodation post-termination. The trial court's decision further required findings of fact that Mr. Kuehn disputed—such as the finding that Snohomish County communicated its final decision to deny any accommodation to Mr. Kuehn on August 2, 2007. Viewing the evidence submitted in favor of Mr. Kuehn, the statute of limitations did not begin to run until November 2, 2007, and Mr. Kuehn provided proper pre-suit notice to Snohomish County and timely filed this lawsuit. The trial court's decision should be reversed and this case remanded for trial on the merits.

B. ASSIGNMENTS OF ERROR:

1. The trial court erred by dismissing Mr. Kuehn's claims against Snohomish County at summary judgment based on the statute of

limitations affirmative defense:

- a. The trial court erred by holding, as a matter of law, that the duty to accommodate Mr. Kuehn's disability ended on the date that the County sent him a notice of his termination on August 2, 2007, when the County admittedly continued to "interact" with Mr. Kuehn purportedly to determine whether the termination causing conduct was related to his disability—until November 2, 2007.
- b. The trial court erred by making a decision based on disputed findings of fact, including that the County's termination notice communicated the County's final intent to deny Mr. Kuehn's accommodation request when Snohomish County sent its final refusal to accommodate Mr. Kuehn on November 2, 2007.
- c. The trial court erred by focusing on the termination as one actionable claim against Snohomish County, instead of the ongoing discriminatory conduct of the County or its ongoing obligations to Mr. Kuehn that continued post-termination.
- d. The trial court erred by relying on the limited holding of Douchette: Douchette was limited to the specific facts of that case, involved a claim of age discrimination, and did not abrogate the ongoing duty to accommodate.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. Whether Snohomish County's duty to accommodate Mr. Kuehn continued during the interactive process that continued after the date it terminated Mr. Kuehn?

2. Whether the statute of limitations began to run on the date that Snohomish County notified Mr. Kuehn that it would not accept his

request to accommodate his medical related tardiness on November 2, 2007?

3. Whether Snohomish County's failure to accommodate Mr. Kuehn post-termination when it continued the interactive process constituted ongoing discrimination in violation of WLAD?

D. STATEMENT OF THE CASE:

1. Procedural History

Mr. Kuehn filed this lawsuit against Snohomish County on October 13, 2010. CP 310. He provided statutory pre-suit notice to the County on August 11, 2010. CP 301-03, 310. Mr. Kuehn's Complaint alleged that Snohomish County had discriminated against him on the basis of his disability and had violated WLAD, RCW 49.60 *et seq.*, and the Washington Family Leave Act, RCW 49.78 *et seq.* Snohomish County answered the Complaint on November 30, 2010. CP 166.

2. Snohomish County Repeatedly Discriminates Against Its Employee, Mr. Kuehn, Because of His Medical Conditions

a. *Mr. Kuehn's director, Steve Pratt, repeatedly discriminates against Mr. Kuehn because of his medically related tardiness.*

Mr. Kuehn began working for Snohomish County in 1991, initially as a seasonal employee. CP 158-159. Mr. Kuehn suffers from sleep disorders causing him to fall into a deep sleep from which it is very difficult to wake, in turn causing him to sleep through his alarms and

periodically arrive late to work. *E.g.* CP 167. When Snohomish County first learned of Mr. Kuehn's medical conditions, the Civil Division of the County Prosecutor's Office drafted an accommodation plan for Mr. Kuehn's disability. CP 168, CP 176-78.

The plan required Mr. Kuehn to go straight to his doctor on mornings when he overslept his alarm. CP 177. Mr. Kuehn was expected to then promptly present the doctor's note to a lead worker or supervisor for further direction. *Id.* If feasible for Snohomish County, the supervisor was to allow Mr. Kuehn to begin work for the day. *Id.* If it was not feasible for Mr. Kuehn to work that day, Mr. Kuehn was to return home and report to work the next day. Any work time lost was to be excused medical leave under the Family Medical Leave Act (and presumably under the Washington Family Leave Act). *Id.*

However, the director of Mr. Kuehn's department, Steve Pratt, made his dislike of the accommodation plan clear to Mr. Kuehn almost immediately after Snohomish County implemented the plan. CP 216-17. On one occasion, Mr. Pratt flatly told Mr. Kuehn that he would make the accommodation "difficult" for Mr. Kuehn. *Id.* On another occasion, Mr. Pratt told Mr. Kuehn that he had over 300 employees, for whom he had no tardiness problems--but for Mr. Kuehn, he had a stack of documents several feet high, referring to Mr. Kuehn's medical file and

requests for accommodation. Id.

In 2006 or early 2007, Mr. Pratt held a meeting to discuss one of Mr. Kuehn's tardy arrivals. During the meeting Pratt asked to speak with Mr. Kuehn "off the record." CP 217, ¶3. While off the record, Mr. Pratt told Mr. Kuehn that the plaintiff had every right to re-file an FMLA claim, but that he would have Mr. Kuehn going in circles to the doctors for the next year and would challenge every doctor's diagnosis. Id.

Several months after this exchange, Mr. Kuehn re-applied for FMLA leave. Mr. Pratt challenged the application by repeatedly sending Mr. Kuehn to doctors for more information and testing. Snohomish County in turn deemed Mr. Kuehn's FMLA application to be pending and unapproved while the testing was taking place. Mr. Pratt began counting Mr. Kuehn's tardy arrivals as unexcused. CP 217, ¶¶3-4.

In January of 2007, Mr. Kuehn visited a new physician to reassess his treatment regimen and to reinstate his disability accommodation plan. On January 29, 2007, Mr. Kuehn's doctor provided Snohomish County with a statement that Mr. Kuehn was being successfully treated for "obstructive sleep apnea, hypersomnolence, and narcolepsy." CP 180-81. According to the doctor's written statement, Mr. Kuehn's conditions were under control and there were no "essential job functions" which Mr. Kuehn was "unable to perform." CP 181. However, the doctor

additionally cautioned that Mr. Kuehn was expected to be late for work “approx. 1 X / month.” Id.

Instead of providing an accommodation for the occasional tardiness, on February 12, 2007, Mr. Pratt wrote Mr. Kuehn a letter explaining that Mr. Kuehn might be laid off or transferred because it appeared his sleep conditions would interfere with the essential functions of Mr. Kuehn’s work. CP 183-84. Mr. Pratt wrote:

If the information on the January 27, 2007 [doctor’s statement] is correct and you have a medical condition that prevents you from performing the essential functions of your job as a Road Maintenance Worker I, with or without reasonable accommodation, the County can offer assistance in locating an available County position commensurate with your skills and abilities to which you may be reassigned. If you do not wish to receive reassignment services or if reassignment services are unsuccessful, the Road Maintenance Division of the Department of Public Works will place you on layoff...

CP 183. Although Mr. Kuehn provided Snohomish County with complete access to his providers, Mr. Pratt proceeded to document “unexcused” tardiness and instituted a plan of progressive discipline.

b. *Snohomish County sends a termination notice to Mr. Kuehn while the County is still waiting for additional information about Mr. Kuehn’s medical conditions.*

Snohomish County held a pre-disciplinary hearing on June 18, 2007 to address Mr. Kuehn’s alleged fifth instance of “unexcused

tardiness.” CP 308, ll.10-18. Mr. Pratt sent Mr. Kuehn a letter on June 25, 2007 summarizing his findings:

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 information you wish me to consider...not later than July 16, 2007.

CP 186. Mr. Pratt proceeded with another “pre-disciplinary” meeting on July 9, 2007 after another incident of tardiness occurred at the end of June.

The day after this second meeting, on July 10, 2007, Mr. Kuehn’s medical provider sent a letter to Mr. Pratt indicating that it needed additional time to respond to Defendant’s requests for information until after the doctor had an opportunity to review the results of additional testing expected in the next two weeks. CP 188. Snohomish County officials, including Mr. Pratt, informed Mr. Kuehn that it would not make any decision regarding disciplinary action prior to receipt of this information from his medical providers. CP 217, ¶4.

Despite these assurances to Mr. Kuehn, before this information had been submitted by the provider, Defendant provided Mr. Kuehn with two conflicting letters shortly before the end of his shift on August 2, 2007.

CP 217, ¶5. The first letter informed Mr. Kuehn that he would be suspended for one month. CP 190-91. The second letter provided that the suspension “would be held in abeyance” and that Mr. Kuehn would be terminated on August 16, 2007. CP 193-94.

c. ***Snohomish County continues to “Interact” with Mr. Kuehn through November of 2007, purportedly reviewing new information to determine whether Mr. Kuehn’s tardiness was related to his medical conditions.***

Mr. Kuehn was shocked by the August 2, 2007 letters. CP 217, ¶5. However, he continued to believe, based on County officials’ prior statements, that if Defendant received the medical information requested, it would either change its mind prior to the termination date or reinstate him in his position at a later date. Id. He believed Defendant unfairly blamed him for the medical provider’s delay in getting additional information so, *prior to receiving the notice of termination*, Mr. Kuehn made an appointment with his doctor to check on the status of the requested information. CP 218, ¶6. The appointment was scheduled with his sleep specialist, Dr. David Russian, for August 16, 2007. Id.

According to Snohomish County, it “interacted with Plaintiff and his union representatives...and reviewed and considered all materials submitted” regarding his disability *after* the date that Defendant officially terminated Mr. Kuehn’s employment. CP 160, ll. 13-21. As part of this

process, on August 20, 2007, Mr. Kuehn provided Snohomish County with a copy of his August 16, 2007 visit with the sleep specialist, Dr. Russian. CP 196; CP 198-201. Although it purportedly considered the information provided, Mr. Pratt wrote to Mr. Kuehn on August 31, 2007 that the new chart note did not have “any bearing” on the termination or Mr. Kuehn’s tardiness issues. CP 200.

Similarly, Dr. Russian provided additional details to Snohomish County about Mr. Kuehn’s medical conditions on October 18, 2007. CP 203-09. Nevertheless, the County again refused to reinstate Mr. Kuehn, alleging that the information received from the medical providers did not provide any new information that justified an accommodation. CP 211-13. Explaining its decision, on **November 2, 2007**, the defendant wrote to Mr. Kuehn regarding the information provided, “[n]othing in the information belatedly provided by Dr. Russian suggests that either instance of tardiness was caused by your medical condition. ... Based upon all the information before me, I find that there is no connection.” CP 212.

d. Timeline of Critical Events:

1999-2005: Snohomish County exhibits ongoing discriminatory conduct toward Mr. Kuehn--primarily instigated by Mr. Kuehn’s director, Steve Pratt. CP 216-17.

2006-2007: Mr. Pratt begins documenting “unexcused tardies” after threatening Mr. Kuehn for requesting an accommodation. *E.g.* CP 217.

January 29, 2007: Mr. Kuehn’s doctor sends information to Snohomish County, indicating that Mr. Kuehn will miss work approximately “1X” per month due to medical conditions. CP 181.

February 12, 2007: Snohomish County responds to this information by threatening termination because Mr. Kuehn cannot perform “essential” functions, although the medical information submitted expressly provided otherwise. CP 183-84.

June 25, 2007: Snohomish County documents a 5th “unexcused” tardy. The County writes that it knows the tardiness may be related to Mr. Kuehn’s medical condition, but that the County needs additional medical documentation. CP 186.

July 2007: 6th “unexcused” tardy documented.

July 9, 2007: Snohomish County holds another “pre-disciplinary meeting.” Mr. Kuehn is told that no decision will be made until further information is received from his medical providers. CP 217, ¶4.

July 10, 2007: Mr. Kuehn’s sleep specialist sends a fax to Snohomish County indicating that the provider needs more time before it can send additional information. CP 188.

August 2, 2007: The County sends two letters; the first suspending Mr. Kuehn, the second indicating the suspension would be held in “abeyance” and that Mr. Kuehn would be terminated on August 16, 2007. CP 190-91, 193-94.

August 16, 2007: The termination effective date. Mr. Kuehn continues to believe that the County will change its mind after it receives the requested medical information confirming the connection between his sleep conditions and

his tardiness. CP 217, ¶5.

August 16, 2007: Mr. Kuehn visits his sleep specialist, Dr. Russian, to try to expedite the process of providing Snohomish County with the requested information. CP 218, ¶6.

August 20, 2007: Mr. Kuehn provides the County with a chart note from the August 16, 2007 visit with Dr. Russian. CP 196, 198-201.

August 31, 2007: Snohomish County writes to Mr. Kuehn that it considered the chart note, but it still refuses to accommodate Mr. Kuehn's tardiness. CP 200.

October 18, 2007: Mr. Kuehn delivers a completed and signed checklist sent by Snohomish County to his sleep specialist, providing additional details about his medical conditions. CP 203-09.

November 2, 2007: Snohomish County writes again that it has considered the new information provided by Mr. Kuehn's provider, but it still finds no connection between his sleep conditions and the tardiness and, thus, will not accommodate Mr. Kuehn. CP 211-13.

3. The Trial Court Grants Snohomish County's Motion for Summary Judgment Based on a Finding that the Statute of Limitations Began to Run on August 2, 2007.

Snohomish County filed a motion to dismiss Mr. Kuehn's case on January 31, 2014. CP 306-314. The sole issue raised by the County in its motion was whether Mr. Kuehn failed to file the lawsuit against it within the statute of limitations by giving pre-suit notice to the County's agent "nine days after...the three-year statute of limitations had run." CP 307, ll. 1-5. The trial court heard oral argument on Snohomish County's

motion on February 28, 2014. CP 1.

Snohomish County argued at the summary judgment hearing that “the critical issue is when notice that the accommodation that is at issue is not going to be accommodated. That was clearly done on August 2nd of 2007.” RP p.6, ll.21-23; CP 20. Based on this factual position, Snohomish County alleged Mr. Kuehn’s claims accrued, at the latest, on August 2, 2007.

The trial court specifically focused during oral argument on whether an employer has a duty to accommodate an employee after termination. The court inquired of Mr. Kuehn’s counsel during the hearing about the medical information reviewed and considered by the County after Mr. Kuehn’s termination:

The Court: Did they have a duty to do anything upon receipt of that information.

Mr. Moore: Yes, I believe they did.

The Court: Why? I mean, he had been separated and terminated by the notice of August 2. So what—couldn’t they have just thrown that in the garbage?

I mean, I recognize they reviewed it, they responded to it, but did they have a duty to make some further accommodation? And, if so, why?

Mr. Moore: Yes, they did ... Washington’s long recognized that the duty to accommodate may continue post termination. It’s dependent and there’s the Wheeler

case is what - -

The Court: Does it ever end? Is there any end game here?

Mr. Moore: It may. And it's up to the jury to decide when...

RP 8:9-9:1. The trial court ultimately decided to grant Snohomish County's motion. CP 35-37. Explaining its rationale for granting Snohomish County's motion, the trial court stated:

I think the facts here are clear...I assume that it's a terribly wrong decision by the County to terminate this employee, but it's a question of when does that act become actionable by Mr. Kuehn? And that, I think, was clearly, by the case law, when he was given notice that he was being terminated...

RP p.18, ll.5-4; CP, p.32. Mr. Kuehn timely requested reconsideration of the trial court's ruling on March 10, 2014. CP 4-34. The trial court denied reconsideration on March 20, 2014. CP 1. Mr. Kuehn filed this appeal on April 15, 2014.

E. ARGUMENT:

1. Legal Standards

- a. *Standard for review of trial court's summary judgment decision granting dismissal based on affirmative defense of statute of limitations.*

A motion for summary judgment presents a question of law reviewed de novo by an appellate court. Osborn v. Mason Cnty., 157

Wn.2d 18, 22, 134 P.3d 197 (2006). The decision is reviewed based solely on the record before the trial court at the time of the motion for summary judgment. RAP 9.12; Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt., 121 Wn.2d 152, 163, 849 P.2d 1201 (1993). Summary judgment is only appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

Under CR 8(c), the statute of limitations is an affirmative defense for which the party asserting the defense bears the burden of proof. CR 8(c); see Locke v. City of Seattle, 133 Wn. App. 696, 713, 137 P.3d 52 (2006). In reviewing a motion for summary judgment, all facts and reasonable inferences are reviewed in the light most favorable to the nonmoving party. Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 485, 258 P.3d 676 (2011). In discrimination cases, summary judgment is often inappropriate because the WLAD “mandates liberal construction.” RCW 49.60.020; E.g. Martini v. Boeing Co., 137 Wn.2d 357, 364, 971 P.2d 45 (1999); Rice v. Offshore Sys., Inc., 167 Wn. App. 77, 88, 272 P.3d 865 (2012) (“Summary judgment should rarely be granted in employment discrimination cases.”)

b. Standard for employer's duty to accommodate an employee's disability.

WLAD requires an employer to reasonably accommodate a disabled employee unless the accommodation would pose an undue hardship. RCW 49.60.180(2); Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 639, 9 P.3d 787 (2000), overruled in part on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214, 228, 137 P.3d 844 (2006). A reasonable accommodation must allow the employee to work in the environment and perform the essential functions of her job without substantially limiting symptoms. See, e.g., Griffith v. Boise Cascade, Inc., 111 Wn. App. 436, 442, 45 P.3d 589 (2002). To accommodate, the employer must affirmatively take steps to help the disabled employee continue working at the existing position or attempt to find a position compatible with the limitations. Griffith, 111 Wn. App. at 442, 45 P.3d 589.

The statute of limitations for an action brought under WLAD is three years. Lewis v. Lockheed Shipbuilding & Constr. Co., 36 Wn. App. 607, 613, 676 P.2d 545 (1984). Generally, a cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief. O'Neil v. Estate of Murtha, 89 Wn. App. 67, 69-70, 947 P.2d 1252 (1997). However, Washington has liberally construed the

limitations period for claims of ongoing discrimination, as distinguished from discrete discriminatory acts. Antonius v. King Cnty., 153 Wn.2d 256, 264, 103 P.3d 729, 733 (2004) (hostile work environment claim constitutes a series of collective acts constituting one unlawful employment practice). “There is no statutory or regulatory authority indicating that the duty terminates upon termination of the employment relationship or at any particular time thereafter. Rather, it is for the trier of fact to decide at what point continued attempts to accommodate become an undue burden as opposed to a reasonable requirement.” Wheeler v. Catholic Archdiocese of Seattle, 65 Wn. App. 552, 563, 829 P.2d 196, 202 (1992), rev’d on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994).

2. The Trial Court Erred by Finding that the Statute of Limitations Began to Run on August 2, 2007

a. Snohomish County’s duty to accommodate Mr. Kuehn continued through the “Interactive” process: Its failure to accommodate Mr. Kuehn after the termination notice is actionable discrimination.

The trial court erred by not recognizing the significance of Snohomish County’s admission that it continued to “interact” with Mr. Kuehn and his medical provider regarding his request for an accommodation for his tardiness—after it sent Mr. Kuehn the termination notice. During this “interactive” process, Snohomish County’s duty to

accommodate Mr. Kuehn continued. It is axiomatic that while a legal duty continues, such as the duty to accommodate, a party will be liable for breaching this duty—yet the trial court apparently found otherwise.

A reasonable accommodation envisions an exchange between employer and employee, where each party seeks and shares information to achieve the best match between the employee’s capabilities and available positions. Frisino v. Seattle Sch. Dist. No. 1, 160 Wn. App. 765, 780, 249 P.3d 1044 (2011) (citing Goodman, 127 Wn.2d at 408-09, 899 P.2d 1265); RCW 49.60.040(7)(d) (“[A]n impairment must be known or shown through an interactive process to exist in fact.”). The employer has a duty to determine the nature and extent of the disability, but only after the employee has initiated the process by notice. Id.

During this “interactive” process, the duty to accommodate is continuing. Frisino, 160 Wn. App. at 781. “[W]here an objective standard is not available to measure whether an accommodation is effective, a good faith Goodman interactive process is especially important. Id. (citing Goodman v. Boeing, 127 Wn.2d at 409). Employers who fail to engage in the interactive process in good faith face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. Humphrey v. Memorial Hospitals Ass’n, 239 F.3d 1128, 1137-38 (2001). Courts analyzing this duty have held “that the duty

to accommodate is a continuing duty that is not exhausted by one effort.”

Id. (internal citations omitted).

An employer’s obligations during the interactive process were analyzed in detail under the duty to accommodate that arises under the ADA in Humphrey, 239 F.3d at 1137-38.¹ In that case, the employee was terminated after an initial accommodation attempt failed. Id. The Humphrey court held that the employer had “an affirmative duty...to explore further methods of accommodation before terminating” its employee. Id. Describing the interactive process, the court explained:

The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process. **Employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute** if a reasonable accommodation would have been possible. Moreover, we have held that the duty to accommodate is a continuing duty that is not exhausted by one effort.

Humphrey, 239 F.3d at 1137-38 (emphasis added).

In this case, the trial court recognized that the interactive process continued between the parties after Snohomish County sent Mr. Kuehn the

¹ Mr. Kuehn recognizes that the Humphrey decision is not binding on this Court. However, the analysis compliments state case law regarding the interactive process and provides guidance on the employer’s and employee’s shared obligations of good faith. See Antonius, 153 Wn.2d at 266 (“while federal discrimination cases are not binding, they may be persuasive and their analyses adopted where they further the purposes and mandates of state law”).

August 2, 2007 termination notice. RP p.8, ll.12-18. Snohomish County likewise admitted in discovery that it continued to “interact” with Mr. Kuehn post-termination when it accepted and reviewed additional medical information submitted by Mr. Kuehn to explain his medically related tardiness. CP 160, ll.13-21. Nevertheless, the trial court questioned “couldn’t they have just thrown that in the garbage? I mean, I recognize they reviewed it, they responded to it, but did they have a duty to make some further accommodation?” RP p.8, ll.12-18.

The trial court failed to appreciate Snohomish County’s ongoing duty to accommodate Mr. Kuehn’s disability continued during the acknowledged interactive process. The County discriminated against Mr. Kuehn when it refused to reinstate or in any other way accommodate him even though it continued to purportedly review information Mr. Kuehn provided showing the connection between his disability and the basis for the County’s adverse action. See Gambini v. Total Renal Care, Inc., 486 F.3d 1087, 1093 (9th Cir. 2007) (“Conduct resulting from a disability is part of the disability and not a separate basis for termination.”). It would be nonsensical for the duty to accommodate to continue through this interactive process if there is no liability for a breach of that duty when an employer such as the County learns of the need for an accommodation and still refuses. See Humphrey, 239 F.3d at 1137-38.

Snohomish County admits the interactive process continued after the August 2, 2007 termination notice—it was legally required to act in good faith to consider whether Mr. Kuehn’s tardiness was related to his medical conditions when this information was submitted post-termination. Because a question of fact exists regarding whether it considered in good faith the relationship between Mr. Kuehn’s tardiness and his medical conditions, or if it continued to discriminate against Mr. Kuehn, the trial court’s decision should be reversed.

b. *Snohomish County’s duty to accommodate Mr. Kuehn only ended after Snohomish County communicated its final refusal to accommodate Mr. Kuehn’s disability on November 2, 2007.*

The trial court further erred by focusing solely on the date of the termination notice, instead of the date Snohomish County communicated its refusal to accommodate Mr. Kuehn’s disability. To the extent that the Court found these dates to be the same, this required a finding of fact that Mr. Kuehn disputes. Snohomish County even agreed during oral argument that the date to examine for purposes of determining the limitations period was the date it communicated its denial of Mr. Kuehn’s accommodation. The County’s attorney stated “the critical issue is when notice that the accommodation that is at issue is not going to be accommodated.” Of course, Mr. Kuehn strongly disagrees with the

County's argument "[t]hat was clearly done on August 2nd of 2007." RP p.6, ll.21-23; CP 20. Based on the evidence offered by Mr. Kuehn, at a minimum, a genuine issue of material fact exists regarding when the County communicated its denial.

Washington has long recognized that the duty to accommodate a disabled employee may continue even after termination. See Wheeler v. Catholic Archdiocese of Seattle, 65 Wn. App. 552, 563, 829 P.2d 196, 202 (1992), rev'd on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994); see also Dean v. Municipality of Metro. Seattle-Metro, 104 Wn.2d 627, 637, 708 P.2d 393 (1985) (Finding that even after the plaintiff resigned "[i]t was the duty of Metro to reasonably accommodate Dean by informing him of job openings for which he might be qualified."). Wheeler analyzed three different cases to consider an employer's ongoing obligation to find an alternative accommodation for a terminated employee. After examining three different examples of Washington courts commenting on employer's obligations *post-termination* to find an accommodation for a terminated employee, the Wheeler court explained its position:

[t]here is no statutory or regulatory authority indicating that the duty terminates upon termination of the employment relationship or at any particular time thereafter. **Rather, it is for the trier of fact to decide at what point continued attempts to accommodate become an undue burden as opposed to a reasonable requirement.**

Wheeler, 65 Wn. App. at 563.

In a factually similar case, Martini, the court analyzed the factual context to determine when a cause of action for disability discrimination accrued. 88 Wn. App 442. In Martini, an employee's sleep apnea and resulting poor sleep interfered with his job performance. Id. at 446. On two separate occasions, Mr. Martini fell asleep while driving on his way to work. Id. After the second incident, Mr. Martini requested Boeing provide an accommodation, including relocation to a facility closer to his home and flexibility with his start time. Id. Nearly a year later, with his symptoms increasing and still no accommodation made by Boeing, Mr. Martini voluntarily resigned on August 9, 1990. The effective date of his resignation was August 21, 1990.

Boeing challenged that it had any ongoing obligation to accommodate Mr. Martini's disability after August 9, 1990 and attempted to avoid liability for any wrongful conduct prior to this date based on a statute of limitations defense. Id. at 453. The court rejected this argument, finding that the evidence showed Boeing's duty to accommodate Martini ended on August 21, 1990, the effective date of Mr. Martini's resignation notice. The court noted that the plaintiff's supervisor "testified that he believed that Martini would use his accrued vacation time to reconsider his position on quitting" and "that he expected

Martini “to come back from vacation and at least discuss with me what he planned to do.” Id. at 453-54. Thus, the duty to accommodate (and liability for failure to accommodate) continued through the end of Mr. Martini’s employment. Id. at 454.

Like Martini, the facts of this case demonstrate that Snohomish County’s duty to accommodate Mr. Kuehn continued after the date of the termination notice.² Mr. Kuehn presented evidence that the County did not communicate its final refusal to accommodate his disability until November 2, 2007. CP 211-13. Mr. Kuehn also testified by declaration that, based on the representations made by the County, he believed the defendant would reconsider its decision if he provided it with additional medical evidence relating his most recent tardiness to his disability. CP 217-18. Given this factual context, the duty to accommodate Mr. Kuehn’s disability continued until Snohomish County denied his accommodation on November 2, 2007.

c. *The trial court mistakenly focused on the termination as one actionable claim against Snohomish County, instead of the ongoing discriminatory conduct of the County or its ongoing obligations to Mr. Kuehn that continued post-termination.*

² Of note, whether the statute of limitations began to run on the effective date of Mr. Kuehn’s termination (August 16, 2007) or on the date Snohomish County communicated its final refusal to accommodate Mr. Kuehn (November 2, 2007), Mr. Kuehn provided timely pre-suit notice and filed his lawsuit within the limitations period.

The trial court further erred by determining that Mr. Kuehn's claims for discrimination under WLAD "accrued" on the date he received the termination notice, failing to recognize the broader discriminatory pattern that continued up through the end of the County's purported "interactive" process. The statute of limitations only began to run on the last date of the alleged discriminatory conduct—the date Snohomish County communicated its decision to deny Mr. Kuehn an accommodation on November 2, 2007.

An employer's failure to accommodate a disability is "one violation," and a lawsuit is timely filed as long as some act of discrimination occurred within the limitations period. Goodman v. Boeing Co., 75 Wn. App. 60, 76-78, 877 P.2d 703, 712-714 (1994). A wronged employee may recover damages for discrimination that begins during the period barred by the statute of limitations but continues into the three-year limitations period. Id.; Martini v. Boeing Co., 88 Wn. App. 442, 452, 945 P.2d 248 (1997) *aff'd* and remanded, 137 Wn.2d 357, 971 P.2d 45 (1999) (whether there was a continuing violation by employer of its duty to accommodate employee's disability that began prior to beginning of limitations period, and continued after that date, was a jury question).

In Goodman, the plaintiff alleged discriminatory mistreatment that occurred over a period of several years. 75 Wn. App. At 64-66. Boeing

argued on appeal that the trial court erred by allowing the jury to award damages for conduct that had occurred beyond the statute of limitations period. Rejecting Boeing's argument, the appellate court held that the continuing violation doctrine allowed a jury to consider these damages even if they fell beyond the period barred by the limitations periods:

...the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. When the doctrine is applicable, no part of a continuing violation which persists into the period within which suit is allowed is time-barred.

Goodman, 75 Wn. App. at 77 (internal citation omitted).

In Antonius, our Supreme Court expanded this doctrine beyond the parameters of Goodman. Antonius alleged sex discrimination spanning over a decade during her employment at King County as a corrections officer. 153 Wn.2d at 259-60. Most of the alleged discriminatory conduct occurred between 1985 and early 1996, with a second period of alleged misconduct from 1997 through 2000. Id. Antonius did not file her claims under WLAD against King County until December 22, 2000. Id. at 260.

The County argued that the lawsuit was untimely as to events occurring more than three years before suit was filed, and that Antonius did not face sex-based discrimination during the limitations period itself. Id. The County pointed out that gaps of years separated the alleged

discriminatory conduct. Id. Antonius argued that the hostile work environment was a continuing violation giving rise to an equitable exception to the statute of limitations. Id. The Antonius court accepted the employee's arguments, adopting the standard reasoning of the Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 n. 11, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), describing a hostile work environment claim as "one unlawful employment practice":

[An] "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.... Such claims are based on the cumulative effect of individual acts[.]

Antonius, supra, 153 Wn.2d at 264 (citing Morgan, 536 U.S. at 115).

Arguing against such an expansive view of the statute of limitations under WLAD, King County argued that "damage awards will be unbounded under state law..." if the court accepted the continuing violation doctrine that allowed for gaps spanning years between alleged discriminatory conduct. Antonius, 153 Wn.2d at 267. The Court rejected this argument, writing that "[t]he County is correct that potential liability may be broader" but that this concern "must be weighed against the need to eradicate unlawful sex discrimination and the legislature's command that WLAD be liberally construed." Id.

In this matter, the trial noted in its oral ruling that the County's

discriminatory conduct became “actionable” on the date Mr. Kuehn received the termination notice, and the limitations period ended on August 2, 2010. RP p.18, ll.9-12. However, Mr. Kuehn experienced repeated instances of “actionable” discrimination over the nearly 16 years he was employed by the County. The August 2, 2007 termination notice was only one part of the County’s unlawful employment practice. In this kind of case, the statute does not begin to run until the final act occurs. See Antonius, 153 Wn.2d at 266 (“As a unitary whole, the claim is not untimely if one of the acts occurs during the limitations period because the claim is brought after the practice, as a whole, occurred and within the limitations period.”). “[I]t does not matter that a plaintiff knows or should know at the time discriminatory acts occur outside the statute of limitations period that the acts are actionable.” Id. at 265.

The County’s discriminatory refusal to accommodate Mr. Kuehn continued through November 2, 2007. At that point, the County failed again to accommodate Mr. Kuehn despite receiving and “considering” new medical evidence showing a connection between the behavior disciplined and his disabilities. Thus, it is immaterial whether Mr. Kuehn could have taken action after receiving the termination notice--the County’s final discriminatory act did not occur until November 2, 2007. Because this ongoing, discriminatory conduct continued into November of

2007, pre-suit notice and this lawsuit were timely filed.

Moreover, the policy goal set forth in Antonius of eradicating sex discrimination that underlies the ongoing discrimination doctrine applies with equal force to this case, involving ongoing unlawful discrimination spanning nearly a decade based on Mr. Kuehn's medical conditions. The statute of limitations defense should not be used under these circumstances as a sword to avoid a trial on the merits of Snohomish County's discriminatory misconduct.

- d. ***The trial court erred by relying on the limited holding of Douchette: Douchette was limited to the specific facts of that case, involved a claim of age discrimination, and did not abrogate the ongoing duty to accommodate.***

During its oral ruling, the trial court noted it felt convinced by the ruling in Douchette v. Bethel Sch. Dist. No. 403 that the statute of limitations began to run from the date of the termination notice. 117 Wn.2d 805, 818 P.2d 1362 (1991); RP p.18, ll.5-8. However, Douchette does not involve an ongoing disability discrimination claim. Douchette does not hold that a duty to accommodate ends upon termination. The Douchette court specifically noted that its ruling was "limited to the specific facts" of that case. Douchette, 117 Wn.2d at 816, FN 9 ("Our holding today is limited to the facts of the case."). If Douchette controls under the facts of this case, Wheeler, Martini, Frisino, and Gambini, supra,

which describe the distinct obligation of an employer to accommodate a disability (before and after termination), would be rendered meaningless.

The plaintiff in Douchette gave notice of her resignation to her employer on February 16, 1983, with an effective date of March 15, 1983. Douchette, 117 Wn.2d at 807. She then filed a lawsuit for constructive discharge on March 17, 1986, alleging age discrimination. Id. at 808. The Douchette court ruled her claims were time-barred by the 3-year statute of limitations. Id. at 808, 816. In reaching this conclusion, the Douchette court reasoned that, because Douchette did not work for the employer after she submitted her letter of resignation, her claim for wrongful discharge accrued on February 15, 1983. Id. at 816.

Unlike the present case, in Douchette there were no allegations of acts of discrimination after the date the plaintiff provided notice. Id. There was no evidence of “interaction” or consideration of the duty to accommodate because Douchette involved an age discrimination claim, not a disability. These distinctions are critical. The Douchette court relied on the Supreme Court’s decision in Delaware State Coll. v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), which held the plaintiff’s claims were time-barred, because:

If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the

time of, the actual termination of his employment. But the complaint alleges no such facts.

Ricks, *supra*, 449 U.S. at 257, 101 S.Ct. at 504. Unlike Douchette and Ricks, Mr. Kuehn alleges and has provided evidence of the County's ongoing discrimination and breaches of its duty to accommodate his disability.

Douchette should not have altered the trial court's analysis of this case. The duty to accommodate continues after termination when evidence is presented that the employer continued to interact with a disabled employee—as occurred in this case. An employer cannot take adverse action or refuse to accommodate an employee when it learns that the offending behavior is related to a disability. *See Gambini*, 486 F.3d at 1093. Defendant's analysis requires the Court to construe the facts in Defendant's favor and operates to prevent a decision on the merits.

F. CONCLUSION:

The duty to accommodate continues during the “interactive process” and as the employee provides information to show the employer that the behavior resulting in the adverse action (i.e., suspension, termination) is related to the disability. The County admits it continued the interactive process post-termination and that Mr. Kuehn provided new medical support for his request that the County accommodate his

occasional tardiness. The duty to accommodate may continue after termination and whether this post-termination duty becomes an undue burden is a question of fact for the jury, not for disposition at summary judgment. The holding of Douchette was limited to the facts of that particular case involving a claim of age discrimination, not a failure to accommodate. It does not alter or limit the obligation of the County to Mr. Kuehn as it continued to discriminate against him after the termination. Mr. Kuehn timely filed this lawsuit and respectfully asks for an opportunity to present his case at trial.

A jury should decide whether Snohomish County's duty to accommodate Mr. Kuehn had become an undue burden in the two months since it sent Mr. Kuehn a termination notice. Wheeler, supra, 65 Wn. App. at 563. A jury should decide whether the County discriminated against Mr. Kuehn when it refused to accommodate him in November 2007, after receiving medical evidence connecting Mr. Kuehn's tardiness and his sleep disorders. A jury should decide whether the County acted in good faith when it received and "reviewed" the information it requested post-termination but failed to reinstate Mr. Kuehn. The trial court erred by dismissing this case without a trial of these factual issues. The trial court's decision should be reversed and the case remanded for trial.

RESPECTFULLY SUBMITTED this 29 day of May, 2014.

DENO MILLIKAN LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "J.P. Nichols", written over a horizontal line.

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AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF SNOHOMISH)

Kristine E. Allen, being first duly sworn on oath, deposes and states: On the 30th day of May, 2014, I caused to be served by legal messenger, the following: **Appellant's Opening Brief**

To the following:

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And to:

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SIGNED AND SWORN to before me this 30th day of May, 2014.



Denecia R. Evans
NOTARY PUBLIC

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In and For the State of Washington
Residing at: Oakington
My Commission Expires: 5/27/17