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No. 65364-4-I

COURT OF APPEALS – DIVISION I
OF THE STATE OF WASHINGTON

DEBRA LOEFFELHOLZ,

Appellant/Plaintiff,

v.

UNIVERSITY OF WASHINGTON, AND JAMES
LUKEHART AND JANE DOE LUKEHART, AND THE
MARITAL COMMUNITY COMPRISED THEREOF,

Respondent/Defendant

APPELLANT'S AMENDED REPLY BRIEF

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I. INTRODUCTION

The Respondents' Briefs ask this Court, on de novo review, to resolve the key factual issue in this appeal against the Appellant rather than allow the jury to resolve it. The statement to Appellant within the three year statute of limitation was that he would be a "very angry man" when he got back from Iraq. It is for the jury to determine whether this act was part of the hostile work environment created and was an "act contributing to the claim" within the three year statute of limitations period.

Respondents also ask this Court to find that the June 7, 2006 amendment to the Washington Law Against Discrimination (WLAD), RCW 49.60.180(3) created an "entirely new cause of action" that was prospective only, rather than a recognition that WLAD was a remedial statute which, even prior to June 7, 2006 had outlawed "all forms of discrimination" and is to be applied retroactively.

On both counts the trial court was wrong. On both counts this Court should reverse and remand for a jury trial.

II. LEGAL ARGUMENT

A. WASHINGTON LAW AGAINST DISCRIMINATION
OUTLAWS ALL FORMS OF DISCRIMINATION AND

AMENDING IT TO ADD SEXUAL ORIENTATION SHOULD BE APPLIED RETROACTIVELY BECAUSE IT IS REMEDIAL

Respondents' interpretation of WLAD invents the legal fiction that the 2006 amendment created an "entirely new cause of action" (Brief at p.21) for persons discriminated against on account of their sexual orientation, rather than merely codified the law which had been held to outlaw "all forms of discrimination" as early as 2001. *See Brown v. Scott Paper Worldwide Company*, 143 Wn.2d 349, 358-61, 20 P.3d 921 (2001). The Legislative history of WLAD and case law interpreting it makes it very clear that a cause of action for discrimination had already been created by the Legislature and the statute's amendment in 2006 was remedial in nature, expanded existing rights, not creating new ones, and therefore should be applied retroactively.

Several provisions in the Washington law against discrimination (WLAD), chapter 49.60 RCW, indicate that the Legislature intended *all* individuals to be able to bring an action against their employers on the basis of discrimination. First, RCW 49.60.010 explains the purpose of the WLAD. Specifically, it states: "This chapter shall be known as the 'law against discrimination.' It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this

state concerning civil rights." RCW 49.60.010. Further, it states "Discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." The fact that the Legislature identified certain categories of persons who have historically been discriminated against does not change the basic nature of the law itself: to outlaw all forms of discrimination as an affront to the "foundation of a free democratic state."

Second, RCW 49.60.020 declares, "the provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." Thus, several courts have liberally interpreted provisions of the WLAD. First, the court in *Antonius v. King County*, 153 Wn.2d 256, 267-69, 103 P.3d 729 (2005) chose to employ the *Morgan* 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) ("*Morgan*") analysis in part because it would best adhere to the Legislature's mandate that WLAD be liberally construed. The Plaintiff brought suit against King County, alleging that the County violated chapter 46.60 RCW "by fostering and maintaining a sex-based hostile work environment." *Id.* at 260. The Plaintiff worked in the County's Department of Adult and Juvenile Detention facilities and claimed that she had continuously been subjected to derogatory comments and discriminatory acts by both the inmates and her co-workers. *Id.* The court declared "*a person* has the right to hold

employment without discrimination." [Emphasis added.] *Id.* at 267. Additionally, in support of its holding, the court quoted RCW 49.60.010 to emphasize that discrimination "threatened not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic society," and that such discrimination statutes "embody public policy of the 'highest' priority." RCW 49.60.010, *Antonius*, 153 Wn.2d at 267 (citing *Xieng v. Peoples Nat. Bank of Washington*, 120 Wn.2d 512, 844 P.2d 389 (1993)). *See also*, *Griffith v. Boise Cascade, Inc.*, 111 Wn.App. 436, 442, 45 P.3d 589 (2002) (the Court of Appeals liberally construed the statute at issue to achieve the Legislative purpose of eliminating and preventing discrimination).

Likewise, in *Brown v. Scott Paper Worldwide Company*, 143 Wn.2d 349, 358-61, 20 P.3d 921 (2001), the Washington Supreme Court stated that the clear mandate of chapter 49.60 RCW is "to eliminate *all* forms of discrimination." [Emphasis added.] The court stated that the "overarching purpose of the law is to 'deter and eradicate discrimination in Washington'." *Id.* at 360. The Plaintiff in that case brought an action against her supervisor alleging sexual discrimination and sexual harassment. *Id.* at 355. While the issue on appeal was whether the employer could also be held liable under chapter 49.60 RCW, the court emphasized that the Legislature intended discrimination to be eradicated

in the workplace environment. The court recognized that the Legislature mandated a liberal construction of the statute, and stated "we 'view with caution any construction that would narrow the coverage of the law'." *Id.* at 357 (citing *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996)). The court ultimately held that the Legislature's "strong commitment to the elimination of discrimination" showed that it intended to hold the both the supervisor and the supervisor's employer liable. *Id.* at 360.

1. RCW 49.60.010 ALWAYS PROHIBITED ALL FORMS
OF DISCRIMINATION

A plain language reading of RCW 49.60.010 would certainly prohibit discrimination against homosexuals in the workplace based on their sexual orientation. RCW 49.60.180(3), both now and prior to the 2006 amendment, does not exhaust all of the potential classes of individuals that are subject to discrimination in the workplace. Instead, it merely lists examples of classes of individuals that are subject to such discrimination. This is supported by the plain language of RCW 49.60.010 that reveals the Legislatures intent that discrimination against individuals is prohibited. For instance, the Legislative's goal to protect "the public welfare, health, and peace of the people of this state" would

certainly not be furthered by excluding homosexuals from protection under WLAD. RCW 49.60.010. To read the aforementioned provisions as *excluding* a certain category of individuals would be in stark contrast to exact evil that the WLAD is intended to prevent: discrimination.

To be sure courts, tend to erect rigid and exclusive "categories" of persons, often, without looking at the underlying intent of the legislation, here: to outlaw all forms of discrimination without exception and even without specific enumeration. The argument advanced by the UW that up until June 7, 2006 persons of a particular sexual orientation could be discriminated against on its campus, could have a hostile work environment created by its supervisors, and could suffer the emotional slings and arrows of an employers' discriminatory hostility, as has Debra Loeffelholz, all without recourse in the law would read.

First, the Court should construe RCW 49.60.180 liberally to include homosexuals as a class of individuals who are discriminated against in the workplace. In doing so, the court would be adhering to the Legislature's intent, as described in RCW 49.60.010, to prohibit discrimination by employers. Furthermore, interpretation to include homosexuals is most consistent with precedent. For instance, the court in *Antonius* declared "*a person* has the right to hold employment without

discrimination." [Emphasis added.] 153 Wn.2d at 267. "A person" should not be interpreted to exclude homosexuals.

Similarly, if the Court interprets RCW 49.60.180(3) (prior to the 2006 amendment) to prohibit *all* discrimination, including discrimination against homosexuals, it would be consistent with the principals set forth in *Brown v. Scott Paper Worldwide Company*. In that case, the court articulated Legislative intent to eradicate all discrimination. *Brown*, 143 Wn.2d at 360.

2. THE 2006 AMENDMENT DOES NOT CREATE A NEW CAUSE OF ACTION, IT MERELY RECOGNIZED AN EXISTING CAUSE OF ACTION FOR DISCRIMINATION APPLICABLE TO GAYS; IT IS THEREFORE REMEDIAL.

The 2006 amendment to RCW 49.60.180(3), which recognized that the protected classes entitled to protection under the statute included persons of a particular sexual orientation, did not create a new cause of action because the law to outlaw discrimination in employment and the remedy for correcting it already existed. The amendment does not seek to impose a new liability on Washington employers that did not exist prior to the statute's modification. Instead, the amendment merely recognized a

remedy for persons of a particular sexual orientation was part of the law against discrimination in Washington. It was, after all, an amendment to an existing law against discrimination, not a new statute giving rise to a new cause of action.

Specifically, according to Black's Law Dictionary, a remedial law is one that was "passed to correct or modify an existing law." *Black's Law Dictionary* 1071 (8th ed. 2004). Furthermore, it is a "law that gives a party a new or different remedy when the existing remedy, if any, is inadequate." *Id.* Washington courts have employed this definition of "remedial" in determining whether or not a statute should be applied retroactively.

For instance, the court in *Johnston v. Beneficial Management Corporation of America*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975) stated that a statute is remedial if it expands already existing rights. If a statute is remedial in nature, then it is to be applied retrospectively. *Id.* The court defined a remedial statute as one that is related "to practice, procedure, or remedies and does not affect a substantive or vested right." *Id.*

Similarly, the court in *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) defined remedial statutes as those that "afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries," and will be applied retroactively if its

purpose is furthered through retroactive application. The Plaintiffs in that case brought suit against the State for negligently administering a psychopath program. The Plaintiffs claimed that the negligent conduct by the State resulted in a patient escaping and murdering two girls. *Id.* at 147. The State argued that the Plaintiffs' actions were barred under the Crime Victims Compensation Act, which became effective after the murders. The court ultimately held that the Act was remedial and could be applied retroactively. *Id.* at 154. The court explained that the purpose of the Act was to allow individuals to recover for physical injuries, disabilities, or financial hardships that they suffered as a result of being a victim to a crime. *Id.* Prior to the Act, such individuals had little chance to recover from the harm that they suffered as a result of their victimization. *Id.*

Similarly, out-of-state courts have recognized that such "remedial" statutes affect or expand an already existing right and are retroactive. For instance, the court in *Stanton v. City of Battle Creek*, 237 Mich. App. 366, 373, 603 N.W.2d 285 (1999) stated that a statute is remedial if it is designed to redress an already existing grievance, or if it is intended to reform or extend existing rights. In that case, the relevant statute subjected governmental agencies to liability for injury or property damage that resulted from negligent use by motor vehicles owned by government

agencies. *Id.* at 368-69. Subsequently, the statute was amended to exclude forklifts from "motor vehicles," thus allowing the government to escape liability from injury that resulted from the use of forklifts. *Id.* at 369. The Plaintiffs' injury (caused by a forklift) occurred before the amendment was enacted. Thus, on appeal, the Plaintiffs contested retroactive application of the amendment on the grounds that it deprived them of their due process rights. The court disagreed. It stated that the amendment applies to the statute because it was remedial and it was intended to *clarify* the definition of "motor vehicle." *Id.* at 373-74. Accordingly, the retroactive application did not violate the Plaintiffs' rights. *Id.* at 374. This case stands for the proposition that legislating changes to existing "categories" of harm, or persons, or goods, or equipment, etc., is a remedial statute because the underlying cause of action and legislative intent had already been recognized. Adding or taking away a particular category does not create or destroy a cause of action; it merely alters remedies "already existing for the enforcement or rights and redress of injuries." See *Haddenham, supra*.

Furthermore, out-of-state courts have retroactively applied amendments for the purpose of remedying discrimination. For instance, the court in *Poston v. Reliable Drug Stores, Inc.*, 783 F.Supp. 1166, 1170 (1992) retroactively applied the amendment to the Civil Rights Act of

1991. The Plaintiff, an African-American and Muslim, brought suit under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. § 1981. *Id.* at 1167. Plaintiff alleged that his employer, Defendant-Reliable Drug Stores ("Reliable"), had discriminated against him on account of his race and religious beliefs, and he was subjected to harassment in the workplace. *Id.* at 1166. Additionally, Plaintiff argued that his termination from the company, and the company's failure to rehire him, was racially motivated. *Id.* However, the 1991 amendment to Section 1981 became effective *after* the discriminatory behavior and his subsequent termination occurred. *Id.* at 1167. Yet, the court agreed with the Plaintiff that the amendment should be retroactively applied.

The court concluded that retroactive application would not result in "manifest injustice." *Id.* at 1170. The court relied on the principal the United States Supreme Court articulated in *Bradley v. School Bd.*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974) that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 1168-69. First, the *Poston* court explained that there was no "statutory direction or legislative history establishing congressional intent that the 1991 Act apply *prospectively*." [Emphasis added.] *Id.* at 1169.

Second, in determining whether retroactive application would result in manifest injustice, the court considered the following three factors: "(1) the nature and identity of the parties; (2) the nature of the rights affected; and (3) the impact of the change in the law on pre-existing rights." *Id.* (citing *Federal Deposit Ins. Corp. v. Wright*, 942 F.2d 1089, 1096 (7th Cir. 1991)); *See also, Cady v. Broome*, 87 A.D.2d 964, 451 N.Y.S.2d 206 (1982). The court determined that the first factor weighed in favor of retroactive application because the civil rights issues involved constituted a great public concern. *Id.* at 1169. Next, the second factor also weighed in favor of retroactive application. *Id.* The court explained that Reliable "never had a vested or unconditional right to engage in racially discriminatory harassment or termination, which were illegal under Title VII at the time of the alleged acts." *Id.* at 1170. Lastly, the court concluded that the third factor, that concerns the impact of the change in law on existing rights, also weighs in favor of retroactive application. The court concluded that Reliable was prohibited under federal law from discriminating on the basis of race, and retroactive application would only affect the Plaintiff's remedies. *Id.*

Similarly, the court in *Matter of New York State Div. of Human Rights v. Gruzdaitis*, 265 A.D.2d 904, 696 N.Y.S.2d 330 (1999), held that retroactive application of an amendment to the Humans Rights Law,

allowing victims of housing discrimination to receive punitive damages, was appropriate. Although the language of the amendment declared the modification to be effective "immediately," the court determined that the amendment was remedial and stated "remedial statutes constitute an exception to the general rule that statutes are not to be given a retroactive application." *Id.*

The purpose of RCW 49.60.180(3) is to allow a class of individuals to recover who were victims of workplace discrimination solely on the basis of their sexual orientation. This statute is remedial, as it seeks to provide individuals in that particular situation a remedy. Clearly, this statute is like the statute in *Haddenham* that allowed a class of individuals who have been victims of crime to recover for the harm they suffered. *Id.* The statute's remedial purpose, like the purpose of the statute in *Haddenham*, was intended to remedy hostile work environments and discriminatory situations in the context of sexual orientation. Thus, like the *Haddenham* court applied the statute retroactively to allow a specific class to recover, the court in the present case should apply RCW 49.60.180 retroactively to allow homosexuals to recover who have been discriminated against due to their sexual orientation.

Additionally, like the amendment in *Stanton v. Battle Creek*, *supra* the amendment to RCW 49.60.180(3) did not create a new cause of action.

Rather, it expanded the protection of the statute. Therefore, it is remedial and should be applied retroactively.

Furthermore, the amendment provides a remedy to discrimination very similar to the amendments in both *Poston v. Reliable Drug Stores, Inc.*, and *Matter of New York Div. of Human Rights, supra*. According to *Poston*, a manifest injustice would *not* result by applying RCW 49.60.180(3) retroactively. Specifically, the nature of the case involves civil rights that are of great public concern, just as the court in *Poston* acknowledged race-based discrimination constituted a great public concern. *Poston*, 783 F. Supp. at 1169. Next, the UW did not have a vested or unconstitutional right to engage in discriminatory harassment based on sexual orientation prior to the amendment to RCW 49.60.180(3). Therefore, retroactive application would not infringe upon or affect a pre-existing right and would only provide Loeffelholz with a remedy for the hostile work environment and harassment she suffered. The trial court erred in ruling the amendment was prospective only.

B. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER AN ACT OF DISCRIMINATION ('I AM GOING TO COME BACK A VERY ANGRY MAN') CONTRIBUTED TO THE CUMULATIVE EFFECT OF THE HOSTILE WORK ENVIRONMENT.

The trial court clearly invaded the province of the jury when it found, as a matter of law, that Lukehart's statement to Debra Loeffelholz that he was going to be "very angry" when he returned from Iraq ("I am going to come back a very angry man" CP 167, 342) could not have been an act of discrimination against her or even a part of the hostile work environment he created. It is axiomatic that such factual issues must be resolved by the jury, lest the Appellants' inviolate right to a jury trial, and the concomitant right to have all factual issues resolved by it, not a judge, be abridged. See *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989).

The legal test of whether such an act or statement was "part of the same actionable hostile work environment practice" is not high: it is whether this act "contribut[ed] to the claim." See *Antonius*, 153 Wn.2d at 264 (quoting *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, at 117, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)). In short, did Lukehart's comment contribute to the hostile work environment? This test is in accord with the holding that an "unlawful employment practice" of

creating a hostile work environment "occurs over a series of days or perhaps years...such claims are based upon the **cumulative effect** of individual acts." *Morgan*, 536 U.S., at 115; *Antonius* at p. 264. [Emphasis added.] Thus, by nature, determining whether any particular statement was an "individual act" i.e., a "trigger" that occurred within the limitations period must be viewed in the context of others, i.e., the cumulative effect of the sum, not the parts. The trial court failed to employ this important holding.

Rather the trial court, and the Respondents, had to perform mental gymnastics to claim that this threatening and hostile comment was totally unrelated to any other hostile actions and comments by Lukehart. In short, they wrenched this key comment out of the entire context of the hostile work environment that Lukehart created toward Debra Loeffelholz. But tellingly it was the University itself who found that Lukehart had engaged in similar hostile conduct toward Loeffelholz and her co workers, such as:

1. "Fear mongering;"
2. "Intimidation;"
3. "Reference to use of gun and killing people;"
4. References to "getting people;"
5. "Threats of jobs being in jeopardy;"
6. "Shock and awe" messages;

7. Creation of an "Enemies list."

See Exh. D (CP 205-208). The quoted sections are the notes of UW's Rick Cheney's describing Lukehart's misconduct which Cheney stated were the "findings of the [HR] investigation." (CP 109-210.) This comment should also be understood in the context of Debra Loeffelholz' unrebutted statement that Lukehart had told her that "he had taken anger management classes and that he had a very volatile temper." See Exh. A at p. 57 (CP 186). Debra had reported such temper to UW Central Services manager Anne Guthrie. *Id.*

The Respondents' dismissive comment that such a clearly intimidating comment was directed at others, not Debra Loeffelholz, and didn't refer to her sexual orientation, are arguments for the jury, not a trial court ruling on summary adjudication. They have the burden of establishing there are no genuine issues of material fact, not the Appellant. They have failed to do so.

First, it is important to underscore that the trial court found that the hostile work environment claim was properly alleged and refused to grant summary judgment for Respondents on this claim. (See RP 50 of App. C in the UW's Brief-Hearing on Summary Judgment) ("I would certainly, frankly, disagree with the University's argument that if there wasn't a statute of limitations argument, and we were looking at this, I

think there is sufficient allegations for a hostile work environment. But my problem is with the statute of limitations.") (emphasis added). The Appellant is therefore entitled to the inference that the Respondents created a hostile work environment over the years when Lukehart supervised Appellant. The only question is whether the statement Lukehart made in the last week before leaving contributed to that environment or not. That is not a hard question to answer. But the trial court answered it wrong. More importantly it is for the jury to answer, not the trial court, and not even this Court.

The proof that Lukehart's "very angry man" statement was part and parcel of the hostile work environment claim is supplied by the very findings of the University's own HR investigation cited above. Just because Lukehart's statement didn't add to his statement "...because I hate lesbians" or "...you lesbian you" is not dispositive of whether the display of hostility, aggression, meanness, and threats was part of his three year plus campaign waged against Debra on account of her sexual orientation. Lukehart may have had different reasons for creating hostility toward Debra than he did at Siad Rastegar or other co workers. His reasons were clearly stated the very first time he interacted with Debra whom he perceived as a lesbian: "Don't flaunt it." But the Respondents have cited no legal authority, and none exists, for the proposition that there is a legal

requirement that a particular comment must mention the reason why the comments were made or itself display the discriminatory animus that produced it. Such could not be the law. The law looks at the cumulative effects of conduct not isolated or discrete acts alone. See *Antonius* and *Morgan*.

The fact he made this "very angry" comment when other co-workers were present is also not dispositive because it is an argument the Respondents can make to the jury. The presence of other people when a comment was made certainly cannot mean, as a matter of law, that Debra was not an intended target of this comment. The jury could certainly infer that he included Debra Loeffelholz in the category of people he was going to be even more angry at when he returned. Furthermore the Appellant is entitled to the inference and the jury is entitled to determine that Lukehart's prior statement "don't flaunt being gay" and related comments about Debra being a lesbian, were all related to the many times he used hostile, threatening or intimidating actions toward her, leading her to fear his retaliation if she told anyone about it (See CP 184-185).

Since the trial court itself thought the evidence of a hostile work environment precluded summary judgment for the Respondents (See RP 50), there is every reason to believe that a jury might find that his

"very angry man" comment was part of that hostile environment and that the statement was intended to put Debra Loeffelholz on notice that, when he returned, she was in for more harassment and intimidation of the kind the University itself found to exist. It was the University who made the finding that Lukehart had an "enemies list." CP 205-208. It is for the jury to determine whether Appellant was on that list because she was gay. For a trial court to deprive the jury of the opportunity to make this finding and resolve this factual dispute against her violates the Appellant's rights to a jury trial under the Washington State Constitution, Art. I Section 22 and *Sofie v. Fibreboard, supra*. This Court should right this wrong and find that summary judgment is not appropriate where any reasonable jury could find Lukehart was directing his very angry man comment at Debra and did so as an individual act which helped create a hostile work environment.

III. CONCLUSION

The right to have a civil jury determine issues of fact is absolutely fundamental to our concept of ordered liberty and constitutional governance. Whenever any court deprives any party of that right, the entire civil justice system is the loser. The trial court substituted its judgment for that of a jury. This was error. The role of appellate courts is to correct errors. In this case, the role of the Court is to conduct a de novo

review of the record to determine if an individual act of discrimination, here Jim Lukehart's comment to Debra Loeffelholz, "contributed" to the hostile work environment. Since this is a jury question and the jury could find that it did, then Appellant has established that an act of discrimination took place within the three year limitation period. The Court should find that this statement precludes summary judgment for the Respondents and remand for a trial.

RESPECTFULLY SUBMITTED this 9th day of November, 2010.

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DECLARATION OF SERVICE

I, Ronnette Peters Megrey, declare as follows: on November 9th, 2010, I caused to be served upon Respondents, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

APPELLANT'S AMENDED REPLY BRIEF

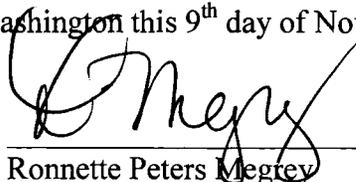
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 9th day of November, 2010.



Ronnette Peters Megrey