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No. 65364-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEBRA LOEFFELHOLZ,

Appellant,

v.

UNIVERSITY OF WASHINGTON and
JAMES LUKEHART and JANE DOE LUKEHART,
and the marital community comprised thereof,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE REGINA CAHAN

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BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATEMENT OF ISSUES.....	2
III.	RESTATEMENT OF THE CASE.....	2
	A. Mr. Lukehart Managed Ms. Loeffelholz From 2003 To Early 2006.	3
	B. An Investigation Into Allegations Against Mr. Lukehart Resulted In Mr. Lukehart's Reassignment.....	4
	C. In May 2009, Loeffelholz Filed A Lawsuit Alleging Discriminatory Actions Taken By Lukehart More Than Three Years Earlier.	7
	D. The Trial Court Dismissed Ms. Loeffelholz's Claims As Time-Barred And Held That The 2006 Statutory Amendment Prohibiting Discrimination Based On Sexual Orientation Does Not Apply Retroactively.	10
IV.	ARGUMENT.....	11
	A. The Plaintiff Had The Burden Of Establishing Both The Existence Of A Discriminatory Act Within The Three Year Limitations Period And Unlawful Discrimination Occurring Entirely After The Legislature Prohibited Discrimination On The Basis Of Sexual Orientation.....	11
	B. Ms. Loeffelholz's Hostile Work Claim Fails As A Matter Of Law Because She Did Not Establish That At Least One Discriminatory Act Took Place Within Three Years Of Filing Suit.....	13

C. The Amendment To The Washington Law Against Discrimination May Not Be Applied Retroactively Because It Is Not Remedial, But Rather Creates An Entirely New Cause Of Action..... 21

V. CONCLUSION 27

Appendices:

- App. A: Order Granting Summary Judgment. (CP 421-23)
- App. B: Order Granting Motion to Strike Hearsay from Plaintiff's Opposition to Motion for Summary Judgment. (CP 418-20)
- App. C: Summary Judgment Proceedings and Oral Decision. (RP 34, RP 49-54)

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Lynce v. Mathis</i> , 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997)	22
<i>National R.R. Passenger Corp. v. Morgan</i> , 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002)	14-16
<i>Railroad Telegraphers v. Railway Express Agency</i> , 321 U.S. 342, 64 S.Ct. 582, 88 L.Ed. 788 (1944)	16
<i>Torres-Rivera v. Puerto Rico Elec. Power Authority</i> , 598 F.Supp.2d 250 (D.P.R. 2009).....	12

STATE CASES

<i>Adams v. Able Building Supply, Inc.</i> , 114 Wn. App. 291, 57 P.3d 280 (2002)	18, 21
<i>Adcox v. Children's Orthopedic Hosp. and Med. Ctr.</i> , 123 Wn.2d 15, 864 P.2d 921 (1993).....	23
<i>Agency Budget Corp. v. Washington Ins. Guaranty Ass'n</i> , 93 Wn.2d 416, 610 P.2d 361 (1980)	25, 26
<i>Antonius v. King County</i> , 153 Wn.2d 256, 103 P.3d 729 (2004)	14, 15, 19
<i>Chadwick Farm Owners Ass'n v. FHC LLC</i> , 166 Wn.2d 178, 207 P.3d 1251 (2009)	12
<i>Clarke v. State Attorney General's Office</i> , 133 Wn. App. 767, 138 P.3d 144 (2006), <i>rev. denied</i> , 160 Wn.2d 1006 (2007)	13, 15

<i>Doe v. State Department of Transportation</i> , 85 Wn. App. 143, 931 P.2d 196, <i>rev. denied</i> , 132 Wn.2d 1012 (1997)	18
<i>Domingo v. Boeing Employees' Credit Union</i> , 124 Wn. App. 71, 98 P.3d 1222 (2004).....	11, 12
<i>Dunlap v. Wayne</i> , 105 Wn.2d 529, 716 P.2d 842 (1986)	3
<i>Estate of Burns</i> , 131 Wn.2d 104, 928 P.2d 1094 (1997)	22, 26
<i>Gilmore v. Hershaw</i> , 83 Wn.2d 701, 521 P.2d 934 (1974)	22
<i>Haddenham v. State</i> , 87 Wn.2d 145, 550 P.2d 9 (1976)	24-26
<i>Hale v. Wellpinit School Dist. No. 49</i> , 165 Wn.2d 494, 198 P.3d 1021 (2009)	23
<i>Hollenback v. Shriner's Hospitals for Children</i> , 149 Wn. App. 810, 206 P.3d 337 (2009).....	19
<i>Johnston v. Beneficial Management Corp. of America</i> , 85 Wn.2d 637, 538 P.2d 510 (1975).....	23, 24, 26
<i>Kuyper v. State</i> , 79 Wn. App. 732, 904 P.2d 793 (1995), <i>rev. denied</i> , 129 Wn.2d 1011 (1996)	12
<i>Lynn v. Labor Ready, Inc.</i> , 136 Wn. App. 295, 151 P.3d 201 (2006)	3
<i>Magula v. Benton Franklin Title Ins. Co., Inc.</i> , 131 Wn.2d 171, 930 P.2d 307 (1997).....	13
<i>Marine Power & Equipment Co. v. Washington State Human Rights Com'n Hearing Tribunal</i> , 39 Wn. App. 609, 694 P.2d 697 (1985)	25

<i>Matter of Estates of Hibbard</i> , 118 Wn.2d 737, 826 P.2d 690 (1992)	17
<i>Milligan v. Thompson</i> , 110 Wn. App. 628, 42 P.3d 418 (2002)	12
<i>Nieshe v. Concrete School Dist</i> , 129 Wn. App. 632, 127 P.3d 713 (2005), <i>rev. denied</i> , 156 Wn.2d 1036 (2006)	12
<i>Ruth v. Dight</i> , 75 Wn.2d 660, 453 P.2d 631 (1969)	17
<i>State v. Smith</i> , 144 Wn.2d 665, 30 P.3d 1245, 39 P.3d 294 (2001)	22
<i>Strong v. Terrell</i> , 147 Wn. App. 376, 195 P.3d 977 (2008), <i>rev. denied</i> , 165 Wn.2d 1051 (2009)	12

STATUTES

Laws of 2006, ch. 4, § 10	13, 21, 23
Laws of 2007, ch. 317, § 3	23
RCW 4.16.080.....	14
RCW 49.60.040.....	23
RCW 49.60.180.....	1, 2, 10, 13, 21, 23

I. INTRODUCTION

James Lukehart supervised Debra Loeffelholz at the University of Washington Office of Facilities Services from April 2003 until early 2006. Mr. Lukehart, who is a Lieutenant Colonel in the Army Reserves, was then deployed to Iraq on June 25, 2006, and has had no personal contact with Ms. Loeffelholz since June 23, 2006, his final work day before his deployment. Upon his return from Iraq, Mr. Lukehart was reassigned to a position in another location in which he had no supervisory duties over Ms. Loeffelholz.

Loeffelholz instituted this suit against both Lukehart and the University on May 13, 2009, claiming the creation of a hostile work environment based on her sexual orientation, and alleging as actionable conduct that occurred more than three years before she filed suit. The trial court correctly granted summary judgment because Loeffelholz failed to allege any actionable conduct within the applicable three-year statute of limitations period, and, alternatively, because the Washington Law Against Discrimination did not impose liability for discrimination on the basis of sexual orientation until the Legislature amended RCW 49.60.180(3) effective June 7, 2006. Either or both of these independent and

alternative grounds mandate affirmance of the trial court's summary judgment.

II. RESTATEMENT OF ISSUES

A. Did the trial court correctly dismiss this discrimination claim under RCW 49.60.180(3) where the plaintiff failed to allege that any act contributing to a hostile work environment occurred within the three-year statute of limitations period?

B. Does the 2006 amendment to the Washington Law Against Discrimination, which for the first time prohibited discrimination based on sexual orientation, apply retroactively to impose liability based on conduct that occurred before the statutory amendment's effective date?

III. RESTATEMENT OF THE CASE

Ms. Loeffelholz's statement of the case relies almost exclusively on events that occurred outside of the statute of limitations period and before the Washington Law Against Discrimination (WLAD) was amended to prohibit discrimination based on sexual orientation. Ms. Loeffelholz fails to cite to the record for many of her allegations, and where she does provide record citations, it is usually to hearsay that the trial court struck on defendants' motion. (CP 418-19, App. B) While this court reviews

the evidence in the light most favorable to the non-prevailing party on appeal from a summary judgment of dismissal, “a party may not rely on inadmissible hearsay in response to a summary judgment motion.” *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 308-09, 151 P.3d 201 (2006); *Dunlap v. Wayne*, 105 Wn.2d 529, 535-36, 716 P.2d 842 (1986). Appellant ignores that rule here, relying on multiple levels of hearsay, which the trial court properly struck in an unchallenged order (CP 418-19, App. B), to support her allegation that she was told by co-workers or by University investigators that Mr. Lukehart had made derogatory comments about her. In any event, however, even considering the inadmissible evidence proffered by Ms. Loeffelholz, all of the alleged discriminatory conduct occurred both outside the statute of limitations period and before such conduct was actionable.

A. Mr. Lukehart Managed Ms. Loeffelholz From 2003 To Early 2006.

Ms. Loeffelholz became the Program Coordinator in the University of Washington asbestos office for Facilities Services in 2003. (CP 21) Ms. Loeffelholz reported to Mr. Lukehart who was the Asbestos Coordinator. (CP 22) In December 2003, Mr. Lukehart became the Central Services Manager for Facilities

Services and assumed supervisory duties over additional employees. (CP 89-90) Mr. Lukehart reported to Rick Cheney, the Director of Maintenance & Alterations, Facilities Services. (CP 447)

Lukehart served as Loeffelholz's supervisor until early 2006. (CP 23-24) On June 25, 2006, Lukehart, who is a Lieutenant Colonel in the Army Reserves, was deployed to Iraq. (CP 432) Lukehart's last day of work before his deployment was June 23, 2006. (CP 432) Lukehart has had no contact with Loeffelholz since that day, over four years ago. (CP 432) Upon his return from Iraq in August 2007, Lukehart was reassigned to a different position that had no supervisory responsibility over Loeffelholz. (CP 25, 451-52)

B. An Investigation Into Allegations Against Mr. Lukehart Resulted In Mr. Lukehart's Reassignment.

After Lukehart's deployment, several employees whom he had supervised, including Loeffelholz, complained about Lukehart's management. (CP 440-42) These complaints resulted in an investigation conducted in Lukehart's absence by Karen Zaugg and Patrick Osby, which concluded following his return. (CP 442-43) As part of the investigation, Zaugg and Osby interviewed Loeffelholz and several of her co-workers about Lukehart's

management prior to his deployment. (CP 450-51) The materials generated during and after these interviews are cited repeatedly by Loeffelholz, but were struck as hearsay by the trial court in a decision not challenged in this appeal. (App. Br. at 5-10, 13; CP 418-19, App. B. See CP 212-52, 256-62)

The complaints alleged that between 2003 and April 2006, Lukehart had manipulated and intimidated employees, stating that he had taken anger management classes, had a volatile temper and had a gun in his vehicle, kept an enemies list, tried to get information to use against employees, referred often to military tactics, and used a militaristic chain-of-command style of management. (CP 40, 443) Several employees also stated that Lukehart offered to provide them advance notice of the questions they would be asked in interviews. (CP 443) Upon his return from Iraq, Lukehart was interviewed and placed on administrative leave pending completion of the investigation. (CP 443, 451)

Loeffelholz was unaware of many of the allegations reported in the University's investigation when she was interviewed in December 2006. (CP 257-60) Although Loeffelholz included many of these allegations in her 2009 complaint, she learned of them

second hand and did not base them upon personal interactions with Lukehart. (CP 342) Loeffelholz also alleged that between 2003 and April 2006 Lukehart denied her higher level duty opportunities, denied her training opportunities, took away her flexible schedule, restricted her use of overtime, and failed to give her an evaluation. (CP 39-40)

Mr. Cheney and his supervisor, Charles Kennedy, the Associate Vice President of Facilities Services for the University concluded that the allegations raised serious concerns about Lukehart's management. (CP 440-41, 451) Cheney and Kennedy concluded that Lukehart could not manage the same employees upon his return to the University. (CP 440-41, 451-52) However, because the 2006 complaints were the first complaints about Lukehart's management since he was hired by the University, Cheney and Kennedy decided that Lukehart should be given the opportunity to improve his performance with a new group of employees. (CP 441, 452)

Cheney discussed with Lukehart the results of the investigation and his conclusions, and offered Lukehart the option

to either accept a reassignment to the University's Health Sciences zone or face dismissal. (CP 441, 452) As a condition of reassignment Lukehart was required to participate in one-on-one customized management training sessions. (CP 441, 452) Although he disputes the complaints made in the investigation and Cheney and Kennedy's decision based on that investigation, Lukehart ultimately accepted reassignment and successfully completed the required training sessions. (CP 100-01, 441, 451-52) Lukehart has had no supervisory capacity over Loeffelholz since early 2006, before he was deployed to Iraq. (CP 25, 451) Loeffelholz has not spoken to Lukehart since he left for Iraq in June 2006. (CP 25-26, 432)

C. In May 2009, Loeffelholz Filed A Lawsuit Alleging Discriminatory Actions Taken By Lukehart More Than Three Years Earlier.

On May 13, 2009, almost three years following Col. Lukehart's deployment to Iraq, Loeffelholz filed this lawsuit against the University and against Lukehart, individually, asserting claims of disparate treatment, retaliation and hostile work environment. (CP 5-10)

Loeffelholz alleged that Lukehart made a comment to her regarding her sexual orientation a few weeks after she started work in 2003. (CP 7, 197) Loeffelholz alleged that in November 2003, Lukehart approached her and asked her whether she was gay. (CP 21, 197) Loeffelholz asserts that she responded "Yes," and was told by Lukehart, "I just don't want you to flaunt it around me." (CP 197) Loeffelholz admitted that since November 2003, she has not had any conversations with Lukehart regarding her sexual orientation, nor has Lukehart made any comments to her about her sexual orientation. (CP 73-74)

Relying on hearsay, Loeffelholz also claimed that sometime in 2005, she was told by co-worker Saied Rastegar that Mr. Lukehart said that he did not like lesbians. (CP 74) Loeffelholz similarly alleged that she was told by another employee, Steve Morton, in 2004 or 2005 that Lukehart had a problem with Loeffelholz's sexual preference. (CP 76) Loeffelholz also alleged that Lukehart's revocation of her flexible schedule in 2004 was a discriminatory act (CP 70-71, 436), as was his direction that Loeffelholz stop working overtime in 2005. (CP 433, 449) Loeffelholz also claimed that Lukehart interfered with her

application for another position in 2004 and 2005 (CP 190, 448, 455, 457, 459), that Lukehart denied her higher level duty in 2003 and 2004 (CP 67, 196), and that Lukehart denied her request to take training classes held in April of 2004, 2005, and 2006. (CP 68)

Although Loeffelholz claimed that such discrete acts constituted illegal discrimination and/or retaliation, as well as created a hostile work environment (CP 10), on appeal she has abandoned all claims except her allegation that Lukehart and the University maintained a hostile work environment based upon her sexual orientation. (App Br. at 1, 15-21) In support of her hostile work environment claim, however, Loeffelholz alleged only two acts that may have occurred after May 13, 2006. The first is a statement alleged to have been made by Lukehart to a group of employees on an unknown date before his deployment to Iraq. (CP 167, 342) Loeffelholz alleged that during a group meeting, Lukehart stated, "I am going to come back a very angry man." (CP 167, 342) Loeffelholz alleges that this statement demonstrates discrimination based on her sexual orientation. (App. Br. at 18)

Without any citation to the record, Loeffelholz raises a second allegation in her brief that involves not Lukehart, but

another employee, Eric Frolich. (App. Br. at 18) Loeffelholz alleged in her deposition that on one occasion, Mr. Frolich looked at her and tapped his watch with a “grin on his face.” (CP 31-32) Loeffelholz admitted that she did not know what Frolich was thinking when he made the gesture. (CP 36) She alleged no facts to support her contention that this incident is attributable to Lukehart, arguing only that Frolich is one of Lukehart’s “closest allies.” (App. Br. at 18) During oral argument on summary judgment before the trial court, Loeffelholz conceded that this incident could not make her claim timely. (RP 34, App. C)

D. The Trial Court Dismissed Ms. Loeffelholz’s Claims As Time-Barred And Held That The 2006 Statutory Amendment Prohibiting Discrimination Based On Sexual Orientation Does Not Apply Retroactively.

King County Superior Court Judge Regina Cahan (“the trial court”) dismissed Loeffelholz’s claim on summary judgment on two independent grounds. (CP 421-23, App. A) The trial court held that the three year statute of limitations barred the claim because Loeffelholz failed to prove any discriminatory acts occurring after May 13, 2006. (CP 422, App. A; RP 49-50, App. C) The trial court alternatively held that the 2006 amendment to the Washington Law Against Discrimination, RCW 49.60.180(3), which, for the first time,

prohibited discrimination based on sexual orientation, does not apply retroactively to conduct occurring before it became effective. (CP 422, App. A; RP 50-51, App. C) The trial court also granted a motion to strike much of Loeffelholz's evidence as hearsay. (CP 418-20, App. B) However, the trial court noted that it would not change its ruling even if all the hearsay evidence was admissible. (RP 51, 53, App. C)

Loeffelholz appeals the dismissal of her hostile work environment claim. She has not challenged the dismissal of her claim alleging discrete acts of discrimination, the dismissal of her claim for retaliation, or the trial court's order granting the motion to strike.

IV. ARGUMENT

A. The Plaintiff Had The Burden Of Establishing Both The Existence Of A Discriminatory Act Within The Three Year Limitations Period And Unlawful Discrimination Occurring Entirely After The Legislature Prohibited Discrimination On The Basis Of Sexual Orientation.

On summary judgment, "if a [discrimination] plaintiff cannot establish specific and material facts to support each element of the prima facie case, the defendant is entitled to judgment as a matter of law." *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 77-78, 98 P.3d 1222 (2004). "[S]tatements of ultimate fact and conclusory statements of fact will not defeat a summary

judgment motion.” **Strong v. Terrell**, 147 Wn. App. 376, 384, ¶ 14, 195 P.3d 977 (2008), *rev. denied*, 165 Wn.2d 1051 (2009).¹ When a discrimination claim is challenged as untimely, the plaintiff “bears the burden of demonstrating that at least one discriminatory act occurred within the limitations period.” **Torres-Rivera v. Puerto Rico Elec. Power Authority**, 598 F.Supp.2d 250, 254 (D.P.R. 2009) (Arg. § B, *infra*). Whether the statute of limitations bars a plaintiff’s discrimination claim is a legal question that this court reviews de novo. **Nieshe v. Concrete School Dist**, 129 Wn. App. 632, 638, 127 P.3d 713 (2005), *rev. denied*, 156 Wn.2d 1036 (2006).

This court also reviews de novo the question of whether a statutory amendment applies retroactively as an issue of law. See **Chadwick Farm Owners Ass’n v. FHC LLC**, 166 Wn.2d 178, 186,

¹ Washington courts have not hesitated to dismiss claims under the Washington Law Against Discrimination where the plaintiff fails to meet her burden of showing a genuine issue of fact for trial. See, e.g., **Domingo**, 124 Wn. App. at 78 (“summary judgment is still proper if no rational trier of fact could conclude the action was discriminatory.”); **Milligan v. Thompson**, 110 Wn. App. 628, 637-38, 42 P.3d 418 (2002) (affirming summary judgment where plaintiff established only “a weak issue of fact’ that DSHS discriminated against him.”). **Kuyper v. State**, 79 Wn. App. 732, 739, 904 P.2d 793 (1995), *rev. denied*, 129 Wn.2d 1011 (1996) (“Where, as here, the plaintiff has produced no evidence from which a reasonable jury could infer that an employer’s decision was motivated by an intent to discriminate, summary judgment is entirely proper.”).

207 P.3d 1251 (2009) (“A question of statutory interpretation is reviewed de novo.”); ***Magula v. Benton Franklin Title Ins. Co., Inc.***, 131 Wn.2d 171, 181-82, 930 P.2d 307 (1997) (amendment to WLAD’s prohibition against marital discrimination applied prospectively only). Because the June 2006 amendment to RCW 49.60.180(3), Laws of 2006, ch. 4, § 10, created a new cause of action for persons alleging discrimination on the basis of sexual orientation, the trial court correctly held that Ms. Loeffelholz had no claim based on conduct occurring before the amendment’s effective date. (Argument C, *infra*)

B. Ms. Loeffelholz’s Hostile Work Claim Fails As A Matter Of Law Because She Did Not Establish That At Least One Discriminatory Act Took Place Within Three Years Of Filing Suit.

To establish a claim for a 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 she is a member of a protected class; (3) affected the terms and conditions of her employment; and (4) was imputable to her employer.” ***Clarke v. State Attorney General’s Office***, 133 Wn. App. 767, 785, 138 P.3d 144 (2006), *rev. denied*, 160 Wn.2d 1006 (2007). While, “WLAD does not contain its own limitations

period,” the Court has held that such claims are governed by RCW 4.16.080(2)’s “general three-year statute of limitations for personal injury actions.” ***Antonius v. King County***, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004). The trial court correctly concluded that Ms. Loeffelholz’s hostile work environment claim was time-barred because Loeffelholz failed to establish at least one discriminatory act during the statutory period (May 13, 2006 to May 13, 2009) that could have contributed to a hostile work environment and that was based on her sexual orientation.

In ***Antonius***, the Washington Supreme Court adopted the analysis of the U.S. Supreme Court in ***National R.R. Passenger Corp. v. Morgan***, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), for calculating the statute of limitations period on a hostile work environment claim under the WLAD. See ***Antonius***, 153 Wn.2d at 268. In ***Morgan***, the Supreme Court held that “[a] charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and *at least one act falls within the time period.*” 536 U.S. at 122 (emphasis added).

In adopting the U.S. Supreme Court’s analysis in **Morgan**, the **Antonius** Court expressly recognized that the limitations period on a hostile work environment claim is not infinite. 153 Wn.2d at 271. Ms. Loeffelholz cites **Antonius**, but omits its key holding – that a claim is timely “provided that *an act* contributing to the claim occurs within the filing period.” 153 Wn.2d at 264 (*quoting Morgan*, 536 U.S. at 117) (emphasis added). “A 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.” 153 Wn.2d at 271 (*quoting Morgan*, 536 U.S. at 120). “The acts must have some relationship to each other to constitute part of the same hostile work environment claim.” 153 Wn.2d at 271. The Court of Appeals has applied **Antonius** to reject claims where a plaintiff failed to establish a related act that occurred within the statutory period. See, e.g., **Clarke v. State Attorney General’s Office**, 133 Wn. App. 767, 138 P.3d 144 (2006).

Highlighting the public policies behind statutes of limitation, Justice O’Connor expressed concern that the rule adopted in

Morgan would make it difficult for defendants to defend against allegations of misconduct occurring long in the past:

Statutes of limitation . . . promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

536 U.S. at 125 (O'Connor, J., dissenting) (*quoting Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-349, 64 S.Ct. 582, 88 L.Ed. 788 (1944)). Justice O'Connor concluded, "An employer asked to defend such stale actions, when a suit challenging them could have been brought in a much more timely manner, may rightly complain of precisely this sort of unjust treatment." 536 U.S. at 125-26.

The Washington Supreme Court has similarly recognized the policies behind statutes of limitation noted by Justice O'Connor:

[S]tale claims may be spurious and generally rely on untrustworthy evidence. The court further observed that society benefits when it can be assured that a time comes when one is freed from the threat of litigation. . . . "[W]hen an adult person has a justiciable grievance, [that person] usually knows it and the law affords [the person] ample opportunity to assert it in the courts", but that that goal is balanced by

recognition that compelling one to answer a stale claim is in itself a substantial wrong.

Matter of Estates of Hibbard, 118 Wn.2d 737, 745, 826 P.2d 690 (1992), quoting ***Ruth v. Dight***, 75 Wn.2d 660, 665, 453 P.2d 631 (1969). These considerations of dated evidence and faded memories are particularly pertinent here, where Loeffelholz seeks to hold the University and Lukehart liable based upon allegations of misconduct occurring as far back as 2003, and cites as supporting evidence allegations that she was not even aware of until after the University completed an investigation that it started over four years ago. (CP 342)

Lukehart has not supervised Loeffelholz since early 2006, and has had no contact at all with her since his June 2006 deployment. (CP 23-26, 432) Loeffelholz admitted in her deposition that the only statement allegedly made by Lukehart regarding her sexual orientation occurred in 2003, almost six years before this suit was brought. (CP 72-74) While she claims that Lukehart's prediction that he would be a "very angry man" when he got back from Iraq was made shortly before he was deployed, she cites to no evidence that it was made after May 13, 2006.

But even if she could place this comment within the three year statutory period, Lukehart allegedly made this statement at a group meeting before all his subordinates. (CP 342) Loeffelholz does not contend that it was directed specifically to her. Lukehart's alleged assertion is devoid of any reference, express or implied, to Loeffelholz's sexual orientation or, for that matter, to Loeffelholz personally. Moreover, this statement was made after Lukehart had ceased to manage or have any supervisory control over Loeffelholz. (CP 23-25)

Loeffelholz had the burden of establishing that she was "singled out" and caused to suffer acts that were severe, pervasive and "objectively abusive" to a reasonable person, and based on animus toward a protected class. ***Adams v. Able Building Supply, Inc.***, 114 Wn. App. 291, 296-98, 57 P.3d 280 (2002); ***Doe v. State Department of Transportation***, 85 Wn. App. 143, 148, 931 P.2d 196, *rev. denied*, 132 Wn.2d 1012 (1997). She also had the burden of showing that "the acts about which [she] complains are part of the same actionable hostile work environment practice" and that they "have some relationship to each other to constitute

part of the same hostile work environment claim.” *Antonius*, 153 Wn.2d at 271.

The trial court correctly held that no rational trier of fact could find that Lukehart’s frank recognition of the frustrations likely engendered by a lengthy period of military deployment constituted such “objectively abusive” conduct, directed toward Loeffelholz because of her sexual orientation, let alone a continuation of the “same hostile work environment” that she alleged was based upon her sexual preference. (RP 49, App. C) Even when viewed in the light most favorable to the plaintiff, Lukehart’s statement is nothing more than an acknowledgement that after a year of military service a person might come back emotionally upset.

The watch-tapping incident – the only “harassment” alleged by Loeffelholz that allegedly occurred within the limitations period – similarly cannot anchor a claim of hostile work environment discrimination. First, at the summary judgment hearing, Loeffelholz abandoned her argument that this incident involving Frolich could possibly be interpreted as a discriminatory act. (RP 34) See *Hollenback v. Shriner’s Hospitals for Children*, 149 Wn. App. 810, 822, 206 P.3d 337 (2009) (employer’s concession at summary

judgment hearing that employee engaged an oppositional activity waived argument on appeal that employee did not engage in statutorily protected activity). Having disclaimed this argument below, this court should reject Loeffelholz's argument for this reason alone.

Second, it is undisputed that this incident did not involve Lukehart at all, and Loeffelholz admitted that she had no knowledge that Lukehart played any role in the incident. (CP 184) Loeffelholz's bare assertion that Frolich was one of Lukehart's "closest allies," (App. Br. at 18) is devoid of any evidentiary support and does not raise a triable issue of fact. Even assuming that Lukehart was somehow involved in Frolich's gesture, nothing suggests that Frolich's non-offensive behavior was based on Loeffelholz's sexual orientation, or establishes the requisite objectively hostile conduct to establish a claim of discrimination by creating a hostile work environment. Loeffelholz admitted that she did not know what Frolich meant by this gesture. (CP 36) "[R]andom and unpredictable episodes of verbal abuse, and public humiliation" far more severe than that alleged here have been held insufficient to establish a triable claim of a hostile work environment

in the absence of any evidence that the conduct was motivated by animus against a protected class. **Adams**, 114 Wn. App. at 297-98.

Because Loeffelholz failed to present evidence that this event had any relationship to Lukehart, that Frolich's conduct had any connection with the acts Lukehart is alleged to have committed prior to his deployment, or that Frolich's harmless gesture was based on Loeffelholz's sexual orientation, it cannot "anchor" her claim that respondents created a hostile work environment on the basis of sexual orientation more than three years before she filed suit. This court should affirm the dismissal of the hostile work environment claim as time barred.

C. The Amendment To The Washington Law Against Discrimination May Not Be Applied Retroactively Because It Is Not Remedial, But Rather Creates An Entirely New Cause Of Action.

Effective June 7, 2006, the Legislature amended WLAD to, for the first time, prohibit discrimination "[a]gainst any person in compensation or in other terms or conditions of employment because of . . . sexual orientation." Laws of 2006, ch. 4, § 10, *codified at* RCW 49.60.180(3). Ms. Loeffelholz cannot recover for alleged harassment involving actions taking place prior to June 7,

2006, unless the statutory amendment applies retroactively to conduct occurring before the statute's effective date. The trial court correctly held that the statute applies prospectively only because it created a new cause of action and there is no indication that the Legislature intended the statute to apply to conduct occurring before the law became effective.

A statute applies retroactively when a precipitating event that triggers the application of the statute occurs before the statute's effective date. *Estate of Burns*, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997). "A legislative enactment is presumed to apply prospectively only." *Gilmore v. Hershaw*, 83 Wn.2d 701, 705, 521 P.2d 934 (1974). See *State v. Smith*, 144 Wn.2d 665, 673, 30 P.3d 1245, 39 P.3d 294 (2001) ("The presumption against retroactive application of a statute or amendment 'is an essential thread in the mantle of protection that the law affords the individual citizen.'"), quoting *Lynce v. Mathis*, 519 U.S. 433, 439, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997). The presumption against retroactivity can be overcome only if the Legislature intended for the statute to apply retroactively, the statute is curative, or the statute is remedial. *Smith*, 144 Wn.2d at 673.

Where the Legislature has intended to apply retroactively a change to the classes protected under Washington's Law Against Discrimination, it has stated its intent in clear and unambiguous language. See, e.g., Laws of 2007, ch. 317, § 3 (stating that change to definition of "disability" in RCW 49.60.040(25)(a) "is remedial and retroactive, and applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after the effective date of this act."), *discussed in Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 502, 198 P.3d 1021 (2009). Here, the Legislature failed to include any statutory language expressing its intent to make its amendment to RCW 49.60.180(3) retroactive. Laws of 2006, ch. 4, § 10.

The amendment to RCW 49.60.180 is not a "remedial" change that could be applied retroactively. A statute is remedial "when it relates to practice, procedure, or remedies and does not affect a substantive or vested right." *Johnston v. Beneficial Management Corp. of America*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975). "[A] statute which creates a new liability or imposes a penalty will not be construed to apply retroactively." 85 Wn.2d at 642; see also *Adcox v. Children's Orthopedic Hosp. and Med.*

Ctr., 123 Wn.2d 15, 30, 864 P.2d 921 (1993) (“statutes imposing new penalties are applied prospectively only”).

In *Johnston*, the plaintiffs brought suit under the Consumer Protection Act (CPA) based on actions that occurred prior to the CPA’s 1970 amendment that, for the first time, authorized a private right of action for “unfair or deceptive acts” in trade or commerce. 85 Wn.2d at 639-40. The *Johnston* Court held that the plaintiffs had no cause of action because the CPA did not authorize private suits for damages until it was amended in 1970. The Court held that “[the amendment] is not merely remedial. It creates a new right of action.” 85 Wn.2d at 641. Nor can the amendment to the WLAD be considered remedial here because the Legislature created an entirely new cause of action, and did not simply improve upon existing remedies.

Loeffelholz relies on *Haddenham v. State*, 87 Wn.2d 145, 550 P.2d 9 (1976) (App. Br. at 19), in which the plaintiffs sued the State for negligence in monitoring a psychopath at a state hospital who escaped and murdered the plaintiffs’ daughters. 87 Wn.2d at 146. The Court held that the Crime Victims Compensation Act, which became effective between the time of the murders and the

filing of the suit, provided the exclusive remedy for such suits. 87 Wn.2d at 146-47. The **Haddenham** Court held that the statute was remedial and applied retroactively because it did not create an entirely new cause of action, but “better[ed] or forward[ed] remedies already existing for the enforcement of rights and the redress of injuries.” 87 Wn.2d at 148. See also **Marine Power & Equipment Co. v. Washington State Human Rights Com’n Hearing Tribunal**, 39 Wn. App. 609, 694 P.2d 697 (1985) (change to WLAD authorizing Human Rights Commission to award up to \$1,000 in damages for humiliation and mental suffering was remedial and retroactive because it supplemented the Commission’s remedies previously available for enforcing an existing right to be free from illegal discrimination).

By contrast, in **Agency Budget Corp. v. Washington Ins. Guaranty Ass’n**, 93 Wn.2d 416, 610 P.2d 361 (1980), plaintiffs held liability policies that were cancelled after their insurer became insolvent. The statute governing the rights of creditors of insolvent insurers did not authorize the Washington Insurance Guaranty Association to pay claims for unearned premiums until a statutory amendment enacted one year after the insurer was adjudicated

insolvent. 93 Wn.2d at 419-20. The Court distinguished **Haddenham** and held that the amendment did not apply retroactively because the statutory change imposed liability against the WIGA that did not previously exist:

In our view, **Haddenham** is not applicable to this case. . . . [T]he legislature did not, in the crime victims' compensation act, create an entirely new cause of action; it merely substituted it as the exclusive remedy for a cause of action previously established. Here, however, no claimant was in any way entitled to [recover] before the 1976 amendment included them in a 'covered claim.'

93 Wn.2d at 426-27.

Here, as in **Johnston**, the amendment to the WLAD created an entirely new right of action where none existed before. Likewise, as in **Agency Budget Corp.**, the amendment seeks to impose new liability against Washington employers that did not exist prior to the statute's enactment. Regardless of how morally reprehensible such conduct may be, until the Legislature amended the WLAD in 2006, Washington employers did not face legal consequences for discriminatory treatment on the basis of sexual orientation. See **Estate of Burns**, 131 Wn.2d at 111-12 (statute that imposes new "legal ramifications" for past conduct may not be applied retroactively).

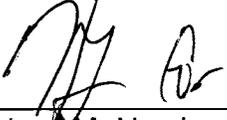
Here, no discriminatory actions took place after June 7, 2006 when the statutory amendment became effective. Moreover, even were Loeffelholz able to establish an act that is sufficient to “anchor” her claim that the hostile work environment she alleges existed in 2003 continued in some manner within three years of filing suit for purposes of the statute of limitations, no liability can attach to conduct occurring before June 7, 2006. Because Ms. Loeffelholz’s hostile work environment claim is based on conduct occurring before the amendment to the WLAD, the trial court’s summary judgment of dismissal on the grounds that the statute does not apply to Mr. Lukehart’s prior conduct should be affirmed.

V. CONCLUSION

Ms. Loeffelholz can establish no discriminatory act that took place within the three years of filing her lawsuit, and may not bring a claim for discrimination based on sexual orientation that involves conduct occurring prior to June 7, 2006, because the amendment prohibiting such discrimination does not apply retroactively. This court should affirm the trial court’s grant of summary judgment on either, or both, of these grounds.

DATED this 24th day of September, 2010.

RIDDELL WILLIAMS P.S.

By: 

Robert M. Howie
WSBA No. 23092
Skylar Sherwood
WSBA No. 31896

Attorneys for Respondent
University of Washington

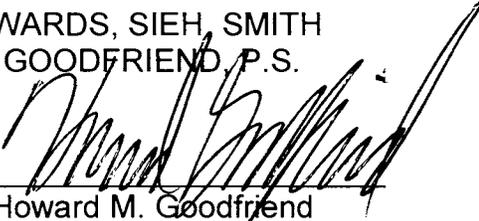
GARVEY SCHUBERT BARER

By: 

Anne F. Preston
WSBA No. 19033
Jared VanKirk
WSBA No. 37029

Attorneys for Respondents
Lukehart

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355

Attorneys for Respondents

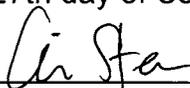
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 27, 2010, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input checked="" type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Robert M. Howie, Skylar Sherwood Riddell Williams 1001 Fourth Ave. Plaza, Suite 4500 Seattle WA 98154-1065	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Anne Preston, Jared VanKirk Garvey, Schubert & Barer Second & Seneca Bldg., 18th Floor 1191 Second Ave. Seattle, WA 98101-2939	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Michael E. Withey Law Offices of Michael Withey 601 Union Street, Suite 4200 Seattle WA 98101-4036	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 27th day of September, 2010.



Carrie Steen

APPENDICES

- App. A: Order Granting Summary Judgment. (CP 421-23)
- App. B: Order Granting Motion to Strike Hearsay from Plaintiff's Opposition to Motion for Summary Judgment. (CP 418-20)
- App. C: Summary Judgment Proceedings and Oral Decision. (RP 34, RP 49-54)

FILED

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7 THE HONORABLE REGINA CAHAN
Hearing Date: 3/26/10
Time: 1:30 PM

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9 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

10 DEBRA LOEFFELHOLZ,

11 Plaintiff,

12 v.

13 UNIVERSITY OF WASHINGTON and
14 JAMES LUKEHART and JANE DOE
15 LUKEHART, and the marital community
composed thereof,

16 Defendants.

NO. 09-2-19061-5 SEA

**ORDER GRANTING SUMMARY
JUDGMENT**

17
18 **THIS MATTER** came before the Court on Defendant University of
19 Washington's ("UW") Motion for Summary Judgment and Defendant James
20 Lukehart's Joinder Motion and Motion for Summary Judgment. The Court has
21 considered the following documents:

- 22
- 23 1. Defendant UW's Motion for Summary Judgment;
 - 24 2. Declaration of Skylar A. Sherwood, with Exhibits;
 - 25 3. Declaration of Rick Cheney, with Exhibits;
 - 26 4. Declaration of Patrick Osby, with Exhibits;

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT
(NO. 09-2-19061-5) - 1
4835-1722-5477.03
033110/0905

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4500
SEATTLE, WA 98154-1192
(206) 624-3600

App. A

Page 421

- 1 5. Declaration of Charles Kennedy;
- 2 6. Declaration of James Lukehart, with Exhibits;
- 3 7. Defendant James Lukehart's Joinder Motion and Motion for
- 4 Summary Judgment;
- 5 8. Plaintiff's Opposition, including supporting declarations and exhibits;
- 6 9. Defendant UW's Reply in Support of its Motion for Summary
- 7 Judgment, including any supporting declarations and exhibits;
- 8 10. Defendant Lukehart's Reply in Support of Defendant UW's Motion
- 9 for Summary Judgment and Defendant Lukehart's Joinder Motion
- 10 and Motion for Summary Judgment;
- 11 11. The files and pleadings in this matter; and
- 12 12. The arguments of counsel.

13 The Court being fully advised of the premises and the record and files
14 herein, **FINDS:**

15 A. Plaintiff's retaliation claim is barred in full by the applicable statute of
16 limitations;

17 B. Plaintiff's discrimination claim is barred in full by the applicable
18 statute of limitations;

19 C. Plaintiff's hostile work environment claim is barred in full by the
20 applicable statute of limitations; and

21 D. The amendment to chapter 49.60 RCW to include sexual orientation
22 as a protected class, effective June 7, 2006, is not retroactive such that Plaintiff's
23 retaliation, discrimination, and hostile work environment claims are not actionable
24 based on alleged conduct that occurred prior to June 7, 2006.

25 **NOW THEREFORE, IT IS HEREBY ORDERED** that on each of the above
26 stated grounds Defendant UW's Motion for Summary Judgment and Defendant
Lukehart's Motion for Summary Judgment are **GRANTED**. Plaintiff's action is

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT
(NO. 09-2-19061-5) - 2
4835-1722-5477.03
033110/0905

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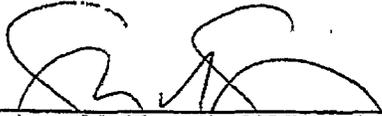
1 hereby dismissed in its entirety against Defendants UW and Lukehart, with
2 prejudice.

3 DONE this 2 day of April, 2010.

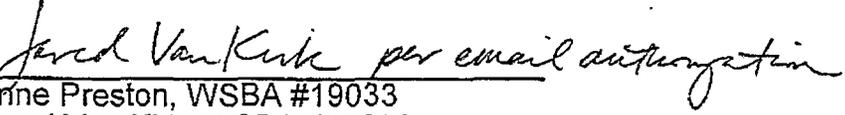
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6 _____
7 Honorable Regina Cahan

8 Presented by:

9 RIDDELL WILLIAMS P.S.

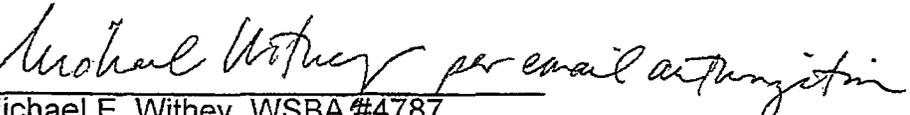
10 By: 
11 _____
12 Robert M. Howie, WSBA #23092
13 Skylar A. Sherwood, WSBA #31896
14 Attorneys for Defendant University of
15 Washington

16 GARVEY SCHUBERT BARER

17 By: 
18 _____
19 Arne Preston, WSBA #19033
20 Jared Van Kirk, WSBA #37029
21 Attorneys for Defendant James Lukehart

22 Approved as to form,
23 notice of presentation waived

24 LAW OFFICES OF MICHAEL WITHEY, PLLC

25 By: 
26 _____
Michael E. Withey, WSBA #4787
Attorneys for Plaintiff

FILED

10 APR -2 AM 11:59

The Honorable Regina S. Cahan

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Debra Loeffelolz,

Plaintiff,

vs.

University of Washington and James Lukehart
and Jane Doe Lukehart, and the marital
community composed thereof,

Defendants.

NO. 09-2-19061-5 SEA

**ORDER GRANTING
MOTION TO STRIKE HEARSAY FROM
PLAINTIFF'S OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT**

THIS MATTER came before the Court on Defendant James Lukehart's Motion to Strike Hearsay from Plaintiff's Opposition to Motion for Summary Judgment. The Court considered the following materials:

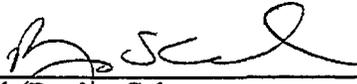
1. Plaintiff's Opposition to Defendants' Motions for Summary Judgment;
2. Defendant Lukehart's Motion to Strike;
3. The Declaration of Jared Van Kirk, with exhibits;
4. Defendant University of Washington's Response to Defendant Lukehart's Motion to Strike;
5. Plaintiff's Opposition to Defendant Lukehart's Motion to Strike;
6. The Declaration of Michael Withey, with exhibits;

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- 7. Defendant Lukehart's Reply in Support of Motion to Strike;
- 8. The files and pleadings in this matter; and
- 9. The arguments of counsel.

NOW, THEREFORE, having considered the aforementioned pleadings and documents, and having heard oral argument, I T IS HEREBY ORDERED that Defendant Lukehart's Motion to Strike is GRANTED as to Defendant Lukehart.

DONE this 2 day of April, 2010.



 Honorable Regina Cahan

Presented by:

GARVEY SCHUBERT BARER

By: 
 Anne F. Preston, WSBA #19033
 Jared Van Kirk, WSBA #37029
 Attorneys for Defendant James Lukehart

Approved as to form,
 notice of presentation waived

RIDDELL WILLIAMS P.S.

By: 
 Robert M. Howie, WSBA #23092
 Skylar A. Sherwood, WSBA #31896
 Attorneys for Defendant University of Washington

LAW OFFICES OF MICHAEL WITHEY, PLLC

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By: Michael E. Withey *per email authorization MR*
Michael E. Withey, WSBA #4787
Attorneys for Plaintiff

1 to you because you're gay. Well, I happen to think "you're
2 gay, don't flaunt it" is such an act. I think the fact that
3 the University in their brief said, she's gay and
4 overweight, we're going to get her fired, is such an act.
5 But the key thing is that this is a hostile work environment
6 case that went on for three years -- at least three years,
7 2003 to 2006.

8 We don't care about the Frolich. Frolich's off the table
9 as far as I'm concerned. When he said, "I'm going to come
10 back meaner and anger than ever," that was an act of
11 intimidation. And that was part and parcel as to Debra
12 Loeffelholz of his antigay bias, of his discrimination
13 against her, of his creating a hostile work environment.

14 Now let me address Irene Hrab. First of all, the
15 stipulation. The University of Washington says, no, you
16 don't have to take everybody's depositions because we can
17 stipulate as to the authenticity, we won't object to
18 hearsay, just tell us what documents you're talking about.
19 And that's what I did, I put them in the motion -- in our
20 opposition to motion, I put all those documents in. So
21 there wasn't any time limit on when I was supposed to tell
22 them which documents I'm relying on. They did not move to
23 strike it. Nor did Mr. Lukehart move to strike it in the
24 original hearing. The hearing was set to go and Judge Fox
25 granted the 54 -- or 56(f) the day -- I think the morning of

1 knows -- to say that you do -- well, first of all, let me
2 start with the discrimination claims, not the hostile work
3 environment. I am going to grant the motion. Well, let's
4 start for discrimination. I don't see any acts -- any of
5 the discrete acts outside the -- they're all outside the
6 statute of limitations. So I think that's clear. I didn't
7 really hear much argument outside of that. Same for
8 retaliation. And with respect to Mr. Lukehart and,
9 specifically, he had no knowledge that there was even any
10 complaint or any protected activity.

11 With respect to the University, they, of course, knew she
12 complained, but there's no adverse action within the statute
13 of limitations. So I am going to dismiss that as well.

14 With respect to hostile work environment, I am going to
15 dismiss that as well. I think that under Antonius you need
16 an anchor. And I don't find the one comment that "I'll be
17 meaner when I get back from Iraq" to be a sufficient anchor.
18 And it's not just said to a lot of people because I -- lots
19 of things can be said to a lot of people. But there's no --
20 I don't think that even viewing this in the light most
21 favorable to the non-moving party that there is a
22 reasonable -- that it's reasonable to say that this was
23 based on the of plaintiff's sexual orientation. And because
24 of that, I have nothing within the period to anchor all the
25 other things.

1 I would certainly, frankly, disagree with the University's
2 argument that if there wasn't a statute of limitations
3 argument and we were looking at this, I think there is
4 sufficient allegations for a hostile work environment. But
5 my problem is the statute of limitations. And most of all,
6 those allegations are outside of the statute. And I'm even
7 putting aside the motion to strike at the moment and looking
8 at everything. And I'll get to the motion to strike in a
9 minute. But I just didn't see enough with that one
10 statement to be an anchor.

11 I also think there's a problem with the fact that the
12 sexual orientation statute, you know, was enacted, what,
13 6/7/06, I think. And I don't see it as -- I do think it
14 creates a new cause of action. I read Johnston, frankly,
15 the same way as the University and Mr. Lukehart. I don't
16 think it is retroactive. If the legislature had wanted to
17 make it that way, they would have stated that and I think
18 they clearly didn't. And in a way it very much pains me to
19 say that because it should have been long in coming. We
20 should have that ages ago. But I don't think -- you know,
21 I'm sworn to uphold the law and by the way I read this, I
22 don't think that you can apply it retroactively.

23 So for both of those reasons, I just don't think there's
24 enough -- I mean, I actually thought, well, if you can't
25 apply it retroactively, could you in a hostile work

1 environment? If you have some in those 13 days, would you
2 be able to pull it? I don't think you could. But since I'm
3 not finding the anchor, it doesn't really matter.

4 The motion to strike in some ways is theoretical because I
5 think even considering all of it, there isn't enough. But
6 of course, I'm sure you all want a proper record in case you
7 appeal. So I do think most of it's hearsay. I'm a
8 little -- perturbed really isn't the right word -- but the
9 fact that there were these discussions about stipulations, I
10 hate to kind of use that against the plaintiff to suddenly
11 have them be somehow prejudiced at the last minute because
12 there wasn't a motion to strike before. So I'm not quite
13 sure how you all got to my court from Fox. I don't know
14 if -- did he recuse himself or something?

15 MR. WITHEY: Through Ron Kessler, Your Honor, I think he
16 recused himself.

17 THE COURT: Oh, I see.

18 MR. HOWIE: Well, Fox was just taken off the calendar. He
19 went on to a different calendar and the case was
20 transferred --

21 THE COURT: It just got moved and.

22 MR. HOWIE: -- and then Kessler recused himself, yeah.

23 MR. WITHEY: Oh, yeah, Judge Fox got reassigned, right.

24 THE COURT: When we transferred and then Kessler recused
25 himself, okay, yeah. Yeah, things get shuffled when we

1 move.

2 Anyway, I am a little hesitant to just grant it, given
3 that you folks had these discussions and maybe there were
4 some reliance on that. So I'm not a hundred percent sure
5 what to do with it. I do think it's mostly -- I mean, I
6 think it's hearsay. I don't -- I don't think that Ms. Hrab
7 is a speaking agent. I don't think these are public
8 records. I don't see any exceptions to the hearsay rule on
9 them. So unless -- I guess unless there was a written
10 stipulation, I'm going to grant it. But I'm -- I'm a little
11 concerned with that because I don't -- as I've expressed,
12 I'm not thrilled about that part of it.

13 MR. WITHEY: At any rate, it was only Mr. Lukehart who
14 brought the motion, not the University of Washington. So I
15 think you're granting it as to the use for Lukehart.

16 THE COURT: Oh, okay. Okay. Well, then that doesn't --
17 okay.

18 MR. WITHEY: That's kind of where --

19 THE COURT: That helps me out.

20 MR. WITHEY: I heard that --

21 THE COURT: This makes sense, actually.

22 MR. WITHEY: Yeah, okay. Thank you.

23 THE COURT: Okay. All right. So I will sign proposed
24 orders.

25 MR. VAN KIRK: May I ask for just a couple of

1 clarifications for the record?

2 THE COURT: Yes.

3 MR. VAN KIRK: Very briefly. Just since I know we're
4 recording this and you spoke generally, I just want to
5 clarify on the record that all your rulings were as to
6 Mr. Lukehart as well as the University of Washington?

7 THE COURT: Yes, absolutely.

8 MR. VAN KIRK: Okay. Thank you. And I also wanted you to
9 clarify what I believe you said was that, although you're
10 granting the motion to strike, your rulings on the
11 substantive issues would remain the same regardless of your
12 ruling on the motion or that you weren't relying on the
13 motion to strike?

14 THE COURT: I am not. And I wanted to actually have that
15 be clear.

16 MR. VAN KIRK: Okay.

17 THE COURT: In case -- because we, frankly, haven't gone
18 through the motion to strike in complete detail, which is
19 what I normally do on motions to strike. Just in case any
20 of you are in front of me in the future, I really prefer
21 a -- like a proposed order where each -- we outline each
22 thing and they you say grant or deny, because it's easier
23 for a -- just to look at each statement and say, oh, is
24 there an exception. And since we're not doing it that way
25 here, my ruling would be the same. Frankly, even if I

1 looked at it all, I just don't think there's enough there
2 within the statute of limitations or within that 13 --
3 however long it is, how many days it is when the sexual
4 orientation is actionable.

5 MR. HOWIE: I'm embarrassed to say, Your Honor, I did
6 not -- of all the things I brought, I did not bring my --

7 THE COURT: Proposed order.

8 MR. HOWIE: -- proposed order.

9 THE COURT: I actually have --

10 MR. VAN KIRK: I believe mine is specific to Jim Lukehart
11 and doesn't cover University of Washington.

12 MR. HOWIE: We filed one.

13 THE COURT: I have the University of Washington's.

14 MR. HOWIE: In 16 years, you would think I would learn to
15 do that.

16 MR. WITHEY: I just wondered -- because that's, general, I
17 wondered if we should -- I've looked at it, Your Honor. I
18 just wonder if we should prepare a little more detailed
19 order not so much the rationale that's on the record, but
20 more what -- I'm not sure how to do this, but each -- you
21 dismissed on the statute of limitations. You dismissed on
22 the retaliation. You dismissed on the discrimination and on
23 the grounds of the -- as to the hostile work environment on
24 the grounds of the statute of limitations. I think that
25 would be important for a reviewing court to know that