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No. 86511-6
SUPREME COURT
OF THE STATE OF WASHINGTON

DEBRA LOEFFELHOLZ,

Respondent,

v.

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

Petitioners.

SUPPLEMENTAL BRIEF OF PETITIONERS

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ORIGINAL

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I. INTRODUCTION

Petitioners University of Washington and James Lukehart ask this Court to reverse the Court of Appeals and affirm the trial court's summary judgment dismissing respondent Debra Loeffelholz's employment discrimination claim on either of two grounds:

First, Loeffelholz's May 13, 2009 hostile work environment lawsuit was time barred because she failed to allege any single act occurring within three years of filing suit that was directed at her or based on her sexual orientation. Lukehart's statement that he would return from his deployment in Iraq an "angry man" was made to a large group of employees, was not directed at Loeffelholz, was not motivated by discrimination against gays or lesbians, and therefore could not be part of any "hostile work environment" previously existing at the University of Washington, even if such an environment were actionable under the Washington Law Against Discrimination (WLAD).

Second, the "pattern of hostility and intimidation" that Loeffelholz alleges the University maintained before May 13, 2006 (Answer at 5), was not an *unlawful* hostile work environment prohibited by the WLAD. A hostile work environment is unlawful

only if it is motivated by plaintiff's membership in a protected class. The Legislature did not include an employee's sexual orientation as a protected class under the WLAD until June 7, 2006, the effective date of the amendment to RCW 49.60.180(3). Even if Lukehart's June 2006 "angry man" comment could have contributed to a "hostile" environment at the University, it could not as a matter of law have contributed to an *unlawful* hostile work environment until June 7, 2006, when gays and lesbians were first included as a "protected class" under the WLAD.

II. SUPPLEMENTAL STATEMENT OF FACTS:

From 2003 until early 2006, Loeffelholz was supervised at the University of Washington Facilities Services Division by James Lukehart, a colonel in the United States Army Reserve. (CP 21-25) Lukehart was Central Services manager for Facilities Services. (CP 22) Loeffelholz was the Program Coordinator in the Facilities Services' asbestos office. (CP 21) As her supervisor, Lukehart met with Loeffelholz weekly until early in 2006, when Tony Mussio assumed supervisory duties and took over the weekly meetings. (CP 23-26)

Loeffelholz filed suit on May 13, 2009, claiming that the University and Lukehart maintained a hostile work environment

based on her sexual orientation. (CP 1-12) Loeffelholz alleged that Lukehart asked her if she was a lesbian, told her not "to flaunt it," expressed dissatisfaction with her sexual orientation, and denied her promotions, training opportunities and overtime. (CP 68-76, 190-99)

In support of her claim Loeffelholz also cited the results of an investigation conducted by the University after Lukehart stopped supervising Loeffelholz, and after Lukehart was deployed to Iraq in June 2006. (CP 153) That investigation found that Lukehart had an intimidating management style, instilling fear and manipulating those under his supervision. (CP 210) Loeffelholz admitted that she learned of many of her allegations concerning Lukehart from this investigation based on the complaints of other individuals and not on her personal experiences. (CP 342) On summary judgment, the trial court struck much of Loeffelholz's evidence as hearsay. (CP 418-20)

Loeffelholz based her lawsuit on the amendment to RCW 49.60.180(3), effective June 7, 2006, making sexual orientation a protected class under the WLAD. See Laws of 2006, ch. 4. The only act that Loeffelholz alleged occurred within three years of filing

her May 13, 2009 lawsuit occurred in a group meeting before Lukehart's June 25, 2006, deployment:

He held a meeting to let everybody know that he was going to Iraq, and toward the end of that meeting, he said, "I am going to come back a very angry man."

(CP 342) As Loeffelholz concedes, Lukehart's statement was not directed toward her, but to the entire assembled group.

III. SUPPLEMENTAL ARGUMENT.

A. Loeffelholz's Claim Is Time Barred Because Lukehart's Single Comment That He Would Return From Iraq "A Very Angry Man" Was Not Directed Toward Loeffelholz And Could Not Have Contributed To A Hostile Work Environment Based Upon Loeffelholz's Sexual Orientation.

The trial court correctly held that Loeffelholz's lawsuit was barred by the statute of limitations because Loeffelholz failed to establish that the University maintained a hostile work environment within three years of filing suit. (CP 421-23; RP 49-50) Lukehart's June 2006 statement that he would return from his deployment for military service in Iraq an "angry man" was not directed at Loeffelholz, was not motivated by hostility toward her sexual orientation, and did not affect the terms and conditions of her employment. This court should affirm the trial court's summary judgment because Loeffelholz's claim was time barred.

1. Loeffelholz Had No Disparate Treatment Claim For Discrete Acts Occurring More Than Three Years Before She Filed Suit. Instead, She Had To Establish That Lukehart's Comment Contributed To A Hostile Work Environment On The Basis Of Her Sexual Orientation.

In order to maintain a hostile work environment claim, the plaintiff must show (1) unwelcome harassment, (2) motivated by plaintiff's membership in a protected class, (3) affecting the terms and conditions of employment, and (4) imputable to her employer. See *Robel v. Roundup Corp.*, 148 Wn.2d 35, 44-45, 59 P.3d 611 (2002) (hostile work environment based on disability); *Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985) (hostile work environment based on sex); *Fisher v. Tacoma Sch. Dist. No. 10*, 53 Wn. App. 591, 595-96, 769 P.2d 318 (race-based hostile work environment), *rev. denied*, 112 Wn.2d 1027 (1989). Though comprised of a series of individual acts, a hostile work environment constitutes a single unlawful employment practice under the WLAD, and a claim is timely if any of the separate but related acts that comprise the hostile work environment occur within three years of filing suit. *Antonius v. King County*, 153 Wn.2d 256, 264, 103 P.3d 729 (2004).

This Court in *Antonius* distinguished between “cases involving discrete retaliatory or discriminatory acts, such as termination, failure to promote, denial of transfer, or refusal to hire, from cases involving claims of a hostile work environment.” *Antonius* 153 Wn.2d at 264, citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108-113, 122 S.Ct. 2061, 2069-72 153 L.Ed. 2d 106 (2002). Claims for discrete discriminatory acts, such as the failure to promote or the denial of training, must be brought within three years of the specific act in order to be actionable. See *Antonius*, 153 Wn.2d at 264; *Crownover v. State ex rel. Dept. of Transp.*, 165 Wn. App. 131, 142, 265 P.3d 971 (2011), *rev. denied*, __ Wn.2d __ (March 28, 2012).

Loeffelholz confuses these distinct theories of recovery by alleging acts of disparate treatment that occurred more than three years before she filed suit, including the failure to promote and the denial of training opportunities, to support her hostile work environment claim. (Answer at 6) Loeffelholz alleges that Lukehart denied her higher level duty in 2003 and 2004 (CP 67, 196), revoked her flexible schedule in 2003 (CP 70-71), interfered with her applications for another position in 2004 and 2005 (CP 190, 448, 455-59), denied her overtime in 2005 (CP 72, 449), and

denied her request to take training classes in April 2004, April 2005, and April 2006. (CP 68) None of these alleged acts of disparate treatment occurring before May 2006 is actionable. Under **Antonius** and **Morgan**, Loeffelholz may not recover for these time-barred acts of disparate treatment by characterizing them as part of a hostile work environment claim.

Loeffelholz also argues that the University, through Lukehart's unwelcome comments and acts, maintained a hostile work environment after Loeffelholz disclosed to Lukehart that she was gay in 2003, citing the trial court's decision that "if there wasn't a statute of limitations argument . . . I think there is sufficient allegations for a hostile work environment." (RP 50; see Answer at 11) However, Loeffelholz had the burden under **Antonius** of showing that this hostile work environment based on her sexual orientation continued after May 13, 2006 – three years before she filed her action on May 13, 2009. The trial court properly held that Loeffelholz could not show at least one act contributing to a hostile work environment that occurred within three years before she filed suit.

2. Lukehart's "Angry Man" Comment Was Not Evidence Of A Hostile Work Environment Based On Sexual Orientation.

In order to be actionable, the timely act alleged by Loeffelholz must be sufficiently related to the previous actions to allow a reasonable juror to find that it was a continuation of the same hostile work environment. "The acts must have some relationship to each other to constitute part of the same hostile work environment claim, and if there is no relation, or if for some other reason, such as certain intervening action by the employer the act is no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts as part of one hostile work environment claim." *Antonius*, 153 Wn.2d at 271, quoting *Morgan*, 536 U.S. at 118 (internal quotation omitted). See also *Crownover*, 165 Wn. App. at 142 ("Under the statute of limitations, 'the employee cannot recover for the previous acts, at least not by reference to [an unrelated timely act].'"), quoting *Morgan*, 536 U.S. at 118.

Loeffelholz's attempt to link Lukehart's June 2006 statement to a hostile work environment existing before May 2006 fails for any of four reasons. First, it is largely based on inadmissible hearsay that the trial court properly refused to consider. Second, the

comment was made to a group and not directed at Loeffelholz personally. Third, Lukehart was no longer Loeffelholz's supervisor when he addressed the group prior to his deployment. Fourth, the "angry man" comment is not similar in nature or severity to her allegation that Lukehart previously interfered with the terms and conditions of Loeffelholz's employment because of Loeffelholz's sexual orientation.

a. Loeffelholz Cannot Rely On Inadmissible Hearsay.

Loeffelholz argues that the "angry man" comment was related to a prior hostile work environment, citing the University's investigation that characterized Lukehart as "manipulative," "derogatory," and finding that he engaged in "fear mongering" in the work place. (Answer at 3-5) As Loeffelholz concedes in her Answer, many of her hostile work environment allegations are based on interviews that the University conducted with Loeffelholz's coworkers after Lukehart's deployment. (Answer at 3 (citing "written summaries" of complaints by other employees in Facilities Division)) Loeffelholz did not know of many of these complaints regarding Lukehart's behavior at the time it occurred. (CP 342)

The trial court struck these statements as hearsay in a decision that Loeffelholz did not challenge on appeal. (CP 418-20) Because that decision is binding on Loeffelholz as the law of the case, this Court should disregard the hearsay allegations relied upon by Loeffelholz in her answer to the petition for review.

b. Lukehart Addressed His “Angry Man” Comment To A Large Group And Not To Loeffelholz Personally.

Second, no reasonable juror could find that Lukehart’s “angry man” comment was “*motivated by* discrimination within the limitations period.” *Crownover*, 165 Wn. App. at 144 (emphasis added). Accord, *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 76 (2nd Cir. 2010) (“We start by asking whether McGullam alleged any discriminatory act within the limitations period.”). This Court recently denied review of the Court of Appeals decision in *Crownover*, that a supervisor’s statement, made to the plaintiff’s entire work crew, that they would be “spending quality time together . . . does not reasonably and objectively allow us to conclude the conduct was sexual in nature or motivated by gender discrimination.” 165 Wn. App. at 144-45. Similarly here, Lukehart’s statement that he would come back from Iraq an “angry man” was made to the Central Services team, and not to Loeffelholz

individually. (CP 342) Even when viewed against the backdrop of Loeffelholz's allegations of prior hostility, there is no objective evidence from which a juror could conclude that this single statement to a diverse group of workers was motivated by sexual orientation discrimination.

The WLAD, like Title VII, "does not prohibit all verbal or physical harassment in the workplace; it is directed only at *discrimination* because of sex" or membership in another protected class. ***Oncala v. Sundowner Offshore Services, Inc.***, 523 U.S. 75, 80, 118 S. Ct. 998, 1002, 140 L. Ed. 2d 201 (1998) (emphasis in original and internal quotation omitted). An employer does not discriminate *because of* membership in a protected class where, "all employees had to endure [a superior's] uncontrollable temper, random and unpredictable episodes of verbal abuse, and public humiliation." ***Adams v. Able Bldg. Supply, Inc.***, 114 Wn. App. 291, 297-98, 57 P.3d 280 (2002) (emphasis added). Lukehart's statement, however ill-tempered, was not discriminatory because it was not made to any specific individual, let alone directed at Loeffelholz because of her sexual orientation.

c. Lukehart Was No Longer Loeffelholz's Supervisor In June 2006.

Third, Lukehart could not have been perpetuating the "same" hostile work environment that previously existed because Lukehart was no longer supervising Loeffelholz when he made his "angry man" comment before being deployed to Iraq in June 2006. "[I]ntervening action by the employer" may negate any continuity between pre- and post-limitation conduct. *Morgan*, 536 U.S. at 118. See *McGullam*, 609 F.3d at 78 (no relationship between prior gender-based hostile work environment and post-limitation remark where plaintiff had been transferred "from the . . . department [] where she experienced harassment"). Here, it was undisputed that Tony Musslo assumed supervisory responsibility over Loeffelholz sometime between late 2005 and early 2006, months before Lukehart addressed the entire group in June 2006. (CP 23-26)

d. Lukehart's Comment Was Not Comparable To Any Previous Acts Upon Which Loeffelholz Based Her Claim Of A Discriminatory Hostile Work Environment.

Finally, the act within the limitation period must be "so *similar in nature, frequency, and severity*" that it is "part and parcel of the hostile work environment that constituted the unlawful employment practice that gave rise to the action." *Wilkie v. Dep't of Health*

and Human Services, 638 F.3d 944, 951-52 (8th Cir. 2011) (quotation omitted) (emphasis added). The “prior unlawful employment practice” giving rise to Loeffelholz’s claim is Lukehart’s harassment based upon her sexual orientation, which started when Lukehart allegedly told her not to “flaunt” her sexual orientation in November 2003 (CP 197), and continued in 2004 and 2005 when Loeffelholz was told by a co-worker that Lukehart had said he did not like lesbians. (CP 74)

The “angry man” comment was not comparable to Loeffelholz’s previous allegations. *See McGullam*, 609 F.3d at 78 (“The sleep-over comment – offensive though it may have been – was not lewd, it was not about McGullam, and it was not addressed to her . . .”). Even if Loeffelholz may have reasonably found the remark offensive, it was not comparable to Lukehart’s previously expressed hostility to her sexual orientation. For any of these reasons, and for all of them, Loeffelholz’s claim for a hostile work environment based on her sexual orientation fails as a matter of law.

B. The University Could Not Have Maintained An Unlawful Hostile Work Environment On The Basis Of Sexual Orientation Prior To June 7, 2006.

Lukehart’s “angry man” comment could not be part of the “same unlawful” hostile work environment because the work

environment existing before the Legislature's June 7, 2006 amendment to RCW 49.60.180, however hostile, was not unlawful. Lukehart's single comment made after the effective date of the 2006 amendments to the WLAD could not make actionable conduct that was not unlawful when it occurred. Because the hostile work environment that Loeffelholz alleges existed before June 7, 2006 was not unlawful she had no discrimination claim based on Lukehart's single "angry man" comment which, standing alone, is not actionable.

1. The 2006 Amendment To The WLAD Cannot Apply Retroactively To Conduct That Was Not Unlawful When It Occurred.

The Court of Appeals held that the Legislature "inten[ded] to create a new cause of action by virtue of the amendment [to RCW 49.60.180]" and that "[a]ccordingly, the amendment can have prospective application only." (Opinion at 7-8). Loeffelholz has not sought review of that decision and it is now the law of the case. RAP 13.7(b) ("Supreme Court will review only the questions raised in the . . . petition for review and the answer, unless the Supreme Court orders otherwise upon the granting of the motion or petition.") Indeed, Loeffelholz concedes that the University cannot be held

liable under a new law imposing damages for past conduct that was not unlawful when it occurred. (Answer at 9)

The Court of Appeals followed settled law in holding that a statutory amendment that provides a new right of action where none previously existed may not be applied to impose liability for acts that occurred before the amendment became effective. (Opinion at 7-8) See *Johnston v. Beneficial Mgmt. Corp. of America*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975). Both the U.S. and Washington Constitutions prevent retroactive imposition of a new liability:

[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. . . . In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf v. USI Film Products, 511 U.S. 244, 265-66, 114 S. Ct. 1483, 1497, 128 L. Ed. 2d 229 (1994).¹

¹ The Due Process Clause requires "fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Products*, 511 U.S. at 266. See also Petition at 12-13, discussing Wash. Const. Art I § 23.

The Court of Appeals correctly held the 2006 amendment applied only “prospectively,” but erroneously reasoned that the University may nevertheless be liable for damages under a newly created cause of action for conduct that was not unlawful when it occurred because the hostile work environment continuing after June 7, 2006 was “one unlawful practice.” (Opinion at 8) Regardless whether Lukehart made his “angry man” comment after the effective date of the new law, any injury suffered by Loeffelholz because of Lukehart’s prior conduct is not compensable.

Just as the defendant in *Johnston* could not be held liable for damages before the Consumer Protection Act gave plaintiffs the right to sue for unfair and deceptive acts, 85 Wn.2d at 639-42, the University cannot be liable for employment practices, however offensive, if they were not illegal when they occurred. The Court of Appeals’ contrary holding undermines the predictability in the rule of law that the prohibition against retroactive liability is designed to further.

The fact that Loeffelholz raises only one “claim” for a hostile work environment existing before and after the conduct became illegal does not mean that harassment that occurred before June 7,

2006 was unlawful.² Where, as here, a plaintiff's claim of discriminatory harassment straddles the effective date of a new law, a court's refusal to limit the defendant's liability for damages to those occurring after the effective date of the new law is "plain error that is so clearly prejudicial that it must be corrected." **Caviness v. Nucor-Yamato Steel Co.**, 105 F.3d 1216, 1220 (8th Cir. 1997) (plaintiff alleged harassment both before and after the Civil Rights Act of 1991 amended Title VII to authorize compensatory and punitive damages).

The University and Lukehart may not be held liable for creating a hostile work environment that was not unlawful. Loeffelholz may not recover damages for a hostile work

² Loeffelholz's analogy to a charge of conspiracy, "where one overt act of the conspiracy was committed prior to the passage of a criminal section but another overt act occurred after the law was amended" (Answer at 9-10) is inapt because conspiracy punishes the agreement itself, even if the underlying overt acts are separately punishable as crimes. See **State v. Pacheco**, 125 Wn.2d 150, 156, 882 P.2d 183, 186 (1994) ("the essence of a conspiracy is the agreement to commit a crime."). The Legislature thus can punish a continuing conspiracy even though some of the underlying offenses are beyond the statute of limitations. But it cannot retroactively punish a conspiracy that was not itself unlawful when it existed. See **United States v. Brown**, 555 F.2d 407, 420 (5th Cir. 1977) (reversing conviction where RICO conspiracy provision of 18 U.S.C. § 1962(d) was applied "retroactively in the indictment and the jury instructions, thus allowing appellants to be convicted for acts done before the passing of the law, and which were innocent when done.") (quotation omitted), *cert. denied*, 435 U.S. 904 (1978).

environment based on her sexual orientation before June 7, 2006, regardless whether Lukehart's post-amendment conduct "contributed" to her claimed damages.

2. Lukehart's "Angry Man" Comment, Standing Alone, Did Not Create A Hostile Work Environment.

Because the University and Lukehart could not, as a matter of law, have created an unlawful hostile work environment based on Loeffelholz's sexual orientation before June 7, 2006, Loeffelholz's claim must stand or fall on Lukehart's and the University's conduct *after* the Legislature made it unlawful to discriminate on the basis of sexual orientation. Lukehart's "angry man" comment is therefore the only conduct that may be actionable. Standing alone, this comment is insufficient to establish a hostile work environment because it was neither motivated by discriminatory animus toward Loeffelholz's sexual orientation nor sufficiently severe and pervasive to affect the terms and conditions of Loeffelholz's employment.

The plaintiff's protected status must "be the motivating factor for the unlawful discrimination." *Glasgow*, 103 Wn.2d at 406. No reasonable juror could find that Lukehart's single "angry man" comment to a group of employees with diverse backgrounds had

anything to do with Loeffelholz's sexual orientation. See **Crownover**, 165 Wn. App. at 144; **Adams**, 114 Wn. App. at 297. Loeffelholz's speculation that Lukehart's comment was motivated by her sexual orientation, or even directed toward her, "is not enough to survive summary judgment." **Domingo v. Boeing Employees' Credit Union**, 124 Wn. App. 71, 85, 98 P.3d 1222 (2004) (plaintiff's claim that co-worker hit her with a chair "because of my sex or gender" insufficient to show that she was singled out because of her sex). Loeffelholz cannot "show that the conduct was directed at [lesbians] and motivated by animus" toward lesbians. **Clarke v. State Attorney Gen.'s Office**, 133 Wn. App. 767, 787, 138 P.3d 144 (2006), *rev. denied*, 160 Wn.2d 1006 (2007).

To be actionable as unlawful discrimination, the harassment must also be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." **Antonius**, 153 Wn.2d at 261. No reasonable juror could find that Lukehart's single "angry man" comment, made on the eve of Lukehart's deployment to Iraq and when he was not, and would no longer be, serving as Loeffelholz's supervisor, was sufficiently severe and pervasive to interfere with Loeffelholz's work

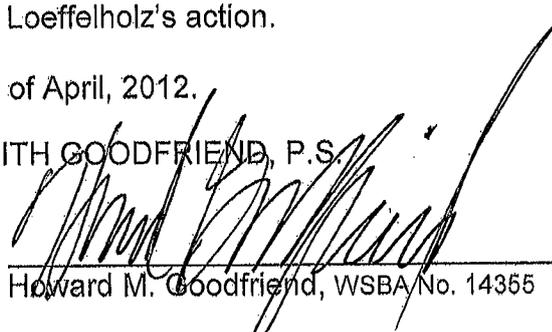
performance or otherwise alter the terms and conditions of her employment. *Washington v. Boeing Co.*, 105 Wn. App. 1, 13, 19 P.3d 1041 (2000) ("Referring to [plaintiff's] hair as 'brillo head,' while highly offensive, was an isolated incident and not sufficiently pervasive to alter the conditions of her employment."); *MacDonald v. Korum Ford*, 80 Wn. App. 877, 886, 912 P.2d 1052 (1996) ("Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law."), quoting *Glasgow*, 103 Wn.2d at 406. Lukehart's single statement is not actionable.

IV. CONCLUSION

This court should reverse the Court of Appeals and affirm the trial court's dismissal of Loeffelholz's action.

DATED this 13th day of April, 2012.

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By: 

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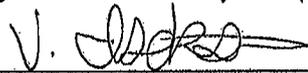
DECLARATION OF SERVICE

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

That on April 13, 2012, I arranged for service of the foregoing Supplemental Brief of Petitioners, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 13th day of April, 2012.



Victoria K. Isaksen

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Attached for filing in .pdf format is the Supplemental Brief of Petitioners in *Loeffelholz v. University of Washington*, Cause No. 86511-6. The attorney submitting this document is Howard M. Goodfriend, WSBA No. 14355.

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