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No. 65364-4-I

COURT OF APPEALS – DIVISION I  
OF THE STATE OF WASHINGTON

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DEBRA LOEFFELHOLZ,

Appellant/Plaintiff,

v.

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

Respondent/Defendant

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**APPELLANT'S AMENDED OPENING BRIEF**

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## **I. INTRODUCTION AND SUMMARY OF CASE**

This is a hostile work environment case involving discrimination on the grounds of sexual orientation. The Defendant University of Washington (“UW”) and its senior manager Defendant James Lukehart created a hostile work environment for Plaintiff Debra Loeffelholz (Plaintiff) from April 2003 (when the UW first assigned Lukehart to exercise supervisory powers over Plaintiff in the Facilities Services Department) at least until June 23, 2006 when he shipped out to Iraq but continuing until he was demoted and reassigned by the UW when he returned in 2007.

A hostile work environment was created from shortly after Lukehart was assigned to supervise Plaintiff and he first informed her that he knew she was gay and to “not flaunt it”, through the times when Lukehart told Plaintiff’s co-workers that Debra was “gay and overweight” that he “didn’t like lesbians” and that he would have her fired. Plaintiff was treated in a manner that Irene Hrab, a consultant in the UW’s own Human Resources (“HR”) department, after an extensive investigation which turned up these detailed examples of intolerance and discrimination, described as creating a “hostile work environment”. This HR investigation and the UW’s Rick Cheney, Lukehart’s superior, determined

that Lukehart had engaged in “intimidation,” “inappropriate sharing of personal information,” was “manipulative” and had a poor “management style” toward Plaintiff, and a number of other employees.

There was literally not a day over those three plus years that Debra Loeffelholz was not in fear of Lukehart on account of his bias against lesbians and his threatening, intimidating behavior. In fact, Cheney’s own declaration filed by the UW (Para. 16) documented such “deep and ongoing concern, even fear” of Lukehart. As such, the frequency and severity of Lukehart’s offensive conduct, described in great detail by the HR investigation of him, adversely affected the terms or conditions of Plaintiff’s employment. In fact, it led directly to his demotion and reassignment by the UW.

In its Motion for Summary Judgment filed below, the defendant UW, in addition to ignoring the very findings of their own investigation, utterly failed to meet its burden of establishing that, taking all facts and inferences in the light most favorable to the Plaintiff, there is no genuine dispute of material facts as to Plaintiff’s “hostile work environment” case. Furthermore, although giving lip service to the leading case of *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2004) (which adopted the underlying policy and rationale of *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. E. 2d 106 (2002)

(“*Morgan*”), the UW’s Motion contorted its central holding as to: (1) what are the elements to prove a case of hostile work environment under RCW 49.60 and *Morgan*; (2) that the entire hostile work environment claim constitutes a single unlawful employment practice and (3) that the statute of limitations does not bar such an action where, as here, the complaint is filed within three years of the end of such period of hostility, even if it began (and concrete acts of hostility occurred) more than three years prior to the suit being filed. Unfortunately the trial court adopted these misstatements in granting summary judgment and in doing so, erred.

The UW’s Motion yanked out of the broader context of the hostile environment created at work only certain individual discrete acts toward Plaintiff and tried to “spin” the idea that the UW demoted Lukehart only for “concerns about his management style” not its own findings of his intimidation, manipulation and inappropriate use of personal information. Tellingly the UW gave short shrift to the Plaintiff’s un rebutted account that, after Lukehart inappropriately accessed Plaintiff’s application to another UW job opening to get away from him, and confronted her with it. Plaintiff informed Rick Cheney’s assistant, Ms. Brothers, who acknowledged that Lukehart should not have had access to such “personal information” yet neither she nor Rick Cheney, her boss, did anything about it. Accordingly, the Motion and Lukehart’s unsubstantiated

“joinder” in such motion should have been denied. This Court should reverse.

## II. STANDARD OF REVIEW

The standard of review of a grant of summary judgment is de novo; the appellate court engages in the same inquiry as the trial court. *Scaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665 (1995); *Wilson v. Steinback*, 98 Wn.2d 434, 656 P.2d 1030 (1982); *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976). The Court of Appeals will review the record in a light most favorable to the non-moving party and grant all inferences to that party. .

## III. ISSUES ON APPEAL

The issues on appeal are straight forward:

A. Do genuine issues of material fact exist as to when the Plaintiff knew or should have known about all elements of her causes of action against the defendants within three years of the date of filing this lawsuit? The trial court held that there were no such factual issues and granted summary judgment for defendants. This was error.

B. Did the Legislature’s amendment of the state’s laws against discrimination in employment to add the grounds of sexual

orientation, apply retroactively. The trial court ruled that it was to be applied prospectively only. This was error.

#### **IV. STATEMENT OF THE FACTS**

Plaintiff is currently employed by the University of Washington. Her job title is Program Coordinator – Facilities Services – Asbestos Office. She has held this position since April of 2003. From this date until early 2006, she was supervised by Lukehart. See Withey Declaration, Ex. A (Loeffelholz Dep. p. 20, CP 183). In November of 2003, Lukehart asked Plaintiff if she were gay. Although shocked by the question, she said yes. His reply was “I just don’t want you to flaunt it around me.” See Ex. A at p. 133, CP 197.

##### **A. Facts Establish a Hostile Work Environment Was Created and the UW’s HR Consultant Irene Hrab so Found.**

From that point on, Plaintiff experienced the condition described in one UW document as follows: “Hostile work environment was created”. See Withey Declaration, Ex. B (UW00129-130, CP 201). This document constitutes the handwritten notes that Rick Cheney, Lukehart’s supervisor and the Director of Maintenance and Acquisitions, Facilities Management made during his investigation of the serious charges against Lukehart. It reflects that Cheney talked with HR consultant Irene Hrab, lists the

questions that she had about the investigation and then quotes Ms. Hrab as stating “Hostile work environment was created.” Hrab is described in another Cheney document as an HR “consultant” for the UW and someone who Plaintiff was encouraged to contact because “She [Hrab] is aware of this specific circumstance and has offered her availability to be of assistance to you.” See Ex. C to Withey Decl. (Ex. 14 to Cheney Dep., CP 204). This document goes on to acknowledge that Cheney understood that Plaintiff was “fearful for your safety at work” as a result of Lukehart’s behavior. Id.

The Hrab conclusion that a “hostile work environment was created” is amply supported by numerous HR investigative interviews with Plaintiff and her co-workers. Cheney prepared two written summaries of the complaints against Lukehart, which he used to interview him, make his findings and come to his decision to demote and reassign Lukehart. These two documents are attached as Exs. D and E to the Withey Declaration (CP 206-210) and were shown to and testified about by both Lukehart and Cheney in their depositions. These two documents establish beyond any doubt that the UW investigators uncovered serious, ongoing, threatening, intimidating, manipulative, hostile and inappropriate behavior of Lukehart toward the Plaintiff and her co-workers which covered the entire time he was allowed to supervise her from 2003 through

2007. These “findings” (in Cheney’s words, see Ex. E, CP 210) are supported by detailed “bullet points” and by two pages of specific “comments reported” See Ex. D (CP 206-208) which, in turn, was taken from the interviews conducted by HR with Plaintiff and others. Cheney created a “meeting outline” for his meeting with Lukehart which is Ex. E to the Withey Decl. (CP 210). It states “The **findings of the investigation** include significant issues associated with how you operate as a senior manager.” (Emphasis added.) In Ex. D (CP 206) there are four categories of Lukehart’s misconduct noted:

- (1) **Management Style**, including “[Lukehart getting] “angry when chain of command broken”, “engenders personal indebtedness”, “power building”, and “management by espionage.”
- (2) **Manipulative**, including “pulling strings to get things to go a certain way, including sharing interview questions about candidates”, “soliciting personal information to obtain advantage”, “deliver favors to build obligations”.
- (3) **Intimidation** in the workplace, including “fear mongering, references to use of gun and killing people”, “references to ‘getting’ people”, “threats of jobs being in jeopardy”, position vulnerability, “use strategy to discredit people”, “displays personal animus” and
- (4) **Inappropriate sharing of personal information**, including “shock and awe” messages, “enemies list” and “derogatory comments about other staff.” Id. (Emphasis added.)

In his meeting with Lukehart, Cheney also discussed his “**violating the integrity of the recruitment process**”. See Ex. E (CP 210). He stated to Lukehart that his “manner of management is problematic”, and is

“deeply embedded, with no apparent recognition by [him]”. He states that the “recruitment process in M&A [Management and Acquisitions] has been a ‘hotbed’ of criticism and dissatisfaction” and that Cheney “[c]annot allow a manager to destroy the credibility of the M&A recruitment process.” He further states that he “[c]annot allow Jim to continue in the role of a Senior Manager given these serious issues.” See Ex. E (CP 210).

**B. The Evidence Strongly Supports the Claim that Such Hostile Work Environment Occurred Because of Lukehart’s Animus Against Plaintiff Because She is a Lesbian.**

In addition to his instructing Plaintiff not to “flaunt” her being gay, Plaintiff testified in her deposition that she was told by co-worker Saeid Rastegar sometime in 2005 that Lukehart did not like lesbians. In 2006 Plaintiff was told by co-worker Terry Mosier that Lukehart had made a number of derogatory comments about lesbians. Plaintiff also learned from co-worker Morton that Lukehart had said that he had a problem with her being a lesbian. See Withey Declaration, Ex. A, Loeffelholz Dep. at pp. 142-144 (CP 74-76). The UW’s interviews with her co-workers substantiate her testimony. Co-worker Saeid Rastegar told investigators that Lukehart did not like colored people or women. See Withey Declaration, Ex. F (Interview Saeid Rastegar, CP 218). Mosier stated that Lukehart talked constantly about Plaintiff being gay and overweight and

that Lukehart stereotyped lesbians and that Debra's sexual preferences bothered him. See Withey Declaration, Ex. G (Mosier interview with HR, CP 225). As a consequence of his bias toward her, she was subjected to verbal abuse, and other forms of discrimination and maltreatment, outlined below. See Withey Declaration, Ex. L (Interview of Loeffelholz, CP 257-262).

Briefly summarized, the statements Plaintiff gave to the HR investigators and her deposition testimony are as follows (Abbreviations are used in the notes: DL for Plaintiff, JL for Lukehart, SR as Saied Rastegar, TM for Tracy Mosier.)

Debra Loeffelholz:

DL was concerned for her personal safety, concerned that JL would retaliate. She was aware of JL's anger management problem. JL told her he had a gun and was willing to use it. JL said "When I get back [from Iraq] I am going to be very mean." She was instructed not to talk to co-employees. JL told her he had on-line access to confidential job applications. [This comment was reported to Cheney's assistant, Meredith Brothers, who "confirmed that JL did not have [permitted] access.] JL routinely shared confidential information about others. JL would solicit personal information from employees as a means to "get" them, to obtain power, to create obligations. JL would solicit personal information about others. JL would refer to people in a derogatory manner. JL called DL a dummy in front of others. JL referred to SR as a "fucking moron." DL was told by TM that JL was "after DL" during an investigation into overtime. JL also told SR that he wanted DL fired. DL had been told to work overtime and then was threatened by JL that she would have to pay the overtime wages back to

the UW. JL interfered with her attempts to change jobs at the UW, wanting her to work for him. DL was told by TM that JL would use information to get people fired. JL had DL moved to supervision by Tony M.”

See Withey Decl. Ex. H (Interview notes with Plaintiff, CP 257-262).

Tracey Mosier, a co-worker of Plaintiff made the following statements to HR investigator Pat Osby about Lukehart’s treatment of Plaintiff:

“JL talked constantly about Debra being gay and overweight. The comments were usually subtle stereotyping of lesbians. It seemed that Debra’s sexual preference bothered JL...DL wrote to JL by e-mail about going to a training with other PSS-2’s. JL told TM that he would deny the request because “he didn’t like the language used in the request.” See Withey Ex. G, CP 225 (typed Interview of P. Osby with Tracy Mosier)

Other notes state: “ DL felt “harassed” and “paranoid.” JL commented about “Debra being lesbian & overweight. Well you know those lesbians. ” TM overheard JL saying that he could get records of DL’s phone use. TM told DL to talk to Cheney, Brothers, or the ombudsman. Brothers talked to Cheney and 4-6 weeks later, TM heard JL talking to Mussio about “tapping Debra’s phone so he could find out who she was talking to.” TM felt that DL’s concerns about the dangers of talking to Cheney were validated.”

See Withey Decl. Ex. G (Osby handwritten interview notes with Tracy Mosier, CP 228-229).

**C. The Evidence Strongly Supports the Fact that Lukehart's Actions as UW's "Senior Manager" at Facility Services Affected the Conditions of Plaintiff's Work.**

Based upon this pattern of hostility and intimidation, it became clear to Plaintiff that her treatment by Lukehart affected her work conditions, her job prospects and lead to her difficulties in advancement. The offensive and homophobic comments documented in the investigation were clearly the result of discrimination directed towards her as the result of her sexual orientation. It became clear to her that she, in particular, was singled out for being a lesbian and that Lukehart wanted to have her fired. Plaintiff testified that Lukehart "had told me he had taken anger management classes and that he had a very volatile temper." See Ex. A at p. 57 (CP 186). She informed UW Central Services management manager Anne Guthrie that she had observed his temper on several occasions. *Id.* Plaintiff testified that Lukehart made it clear that he could affect and interfere with the selection process. *Id.* at pp. 77 and 86 (CP 187, 190). He specifically told her that he wanted another employee to obtain a position Plaintiff had applied for and the other employee did in fact obtain that position. *Id.* at pp. 78-79 (CP 188, 189). Lukehart refused to consider a reclassification of her position. *Id.* at p. 104. She was denied training opportunities three years in a row by Lukehart. *Id.* at p. 127 (CP 68). For three years she did not receive any performance evaluations although

everyone else received such evaluations. *Id.* at p. 160 (CP 198). When first hired, Plaintiff was told by Lukehart to work as much overtime as needed to keep up with the job requirement. Subsequently, after denying her any more overtime, she was told by Lukehart that she might have to pay the University back for the overtime wages. On a number of occasions, she asked Lukehart for higher level duty for helping to instruct the employees that were filling in for Lukehart's old position, but was turned down by Lukehart. *Id.* at pp. 122-126 (CP 192-196). After Lukehart found out that she was a lesbian, Plaintiff lost her permission to have flex time. *Id.* at p. 205 (CP 199).

But the most extreme form his discrimination took was his determination to have Plaintiff fired. Lukehart told both Rastegar and Mosier that they were to get some "dirt" on Plaintiff to accomplish this purpose and Rastegar reported that Lukehart's motive was that Lukehart did not like the fact that she was gay. Finally, after Plaintiff screwed her courage to the sticking post and informed Lukehart's supervisor Rich Cheney (through his assistant Ms. Brothers) that Lukehart had admitted to her about knowing that she had applied for a different job (to get away from him), Lukehart had told Plaintiff that he could look on line and see what positions that she had applied for, and that Ms. Brothers confirmed Lukehart should not have been able to access it. (i.e., that it was an act of

unauthorized access into the UWHIRES data base) Plaintiff informed Brothers that she was very disturbed by the comment but she was afraid to talk to Cheney saying; “I’m too afraid to; it’s a hostile work environment. If I say anything, I’m sure that he [Lukehart] will retaliate.” See Ex. A to Withey Decl. at pp. 54-55 (CP 184-185). Cheney did nothing. Id.

The interviews with Plaintiff’s other co-workers supported both Plaintiff’s claims of discrimination on the grounds of sexual orientation as well as the UW’s finding that a “hostile work environment” was created. These interviews are attached as Exhibits F (Rastegar), G (Mosier), H (Morton), I (Mussio) and J (Klein) to the Withey Declaration (CP 212-252).

The UW purports to adhere to a policy of non-discrimination based upon sexual orientation. See Withey Declaration, Ex. K (UW 1273, CP 255). To implement this policy, employees are provided documents which help define impermissible harassment and workplace violence. Examples of harassment include:

- Hostile, threatening or intimidating actions, gestures, or physically interfering with normal work or movement;
- Slurs;
- Taunting;
- Verbal abuse or epithets; and
- Degrading comments or jokes.

Workplace violence includes behavior that:

- Is violent;
- Threatens violence;
- Harasses or intimidates others;
- Interferes with an individual's legal rights of movement or expression; and
- Disrupts the workplace.

See Withey Declaration, Ex. J (UW 1233, CP 254). The evidence establishes that the UW investigation found that Lukehart exhibited most of the conduct prohibited by this UW's policy. Yet the UW resists so admitting.

## V. LEGAL ARGUMENT

In a fundamental sense, this case can be resolved by resort to first principles. Under Civil Rule 56, summary judgment is disfavored because it deprives a non moving party of the inviolate right to a jury trial. *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989). The burden placed on a moving party to obtain summary adjudication is high: it must establish that it is necessary to avoid a useless trial and only when there is no genuine issue of material fact. *Olympic Fish Products v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). The burden of proving by uncontroverted facts that no genuine issue exists is upon the moving party. *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 598 P.2d 1358 (1979); *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975); *Graves v. P.J. Taggares Co.*, 25 Wn. App. 118, 605 P.2d 348 (1980). The motion will be

granted only if, after viewing the pleadings, depositions, admissions and affidavits and all reasonable inferences that may be drawn therefrom in the light most favorable to the nonmoving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment. *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977). The UW and Lukehart cannot and have not met this burden.

**A. Under *Antonius* the Statute of Limitations Has Not Run Out Because Plaintiff Filed Her Tort Claim and Lawsuit Within Three Years of the End Point (Whether in 2006 or 2007) of the Hostile Work Environment at UW.**

In *Antonius v. King County, supra*, the Washington Supreme Court adopted the underlying rationale and factual elements which the U.S. Supreme Court case of *Morgan, supra*, found necessary to prove a case alleging a hostile work environment, and thus, when the statute of limitations runs on any such claim. The four elements of such a case, as stated in *Washington v. Boeing Co.*, 105 Wn. App. 1, 19 P.3d 1041 (2000) (distinguished on other grounds in *Antonius*) and *Adams v. Able Building Supply, Inc.*, 114 Wn. App. 291, 57 P.3d 280 (2002) (distinguished on other grounds in *Antonius*) are easily stated: (1) offensive and unwelcome conduct that (2) was serious enough to affect the terms or conditions of

employment, (3) occurred because of a protected classification [here sexual orientation], and (4) can be imputed to the employer. In *Antonius* and *Morgan*, those Courts held that “hostile work environment claims are different in kind from discrete acts” and “[t]heir very nature involves repeated conduct.” *Morgan*, 536 U.S. at 115, *Antonius* at p. 264. The Court said that the:

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

*Morgan*, 536 U.S. at 115 (citations omitted) *Antonius* at p. 264.

These courts explained that “[a] hostile work environment claim is composed of a series of separate acts that collectively constitute a ‘single unlawful employment practice.’” [Citations omitted]. Thus it does not matter that a plaintiff knows or should know at the time discriminatory acts occur outside the statute of limitations period that the acts are actionable. *Morgan*, 536 U.S. at 117, *Antonius* at p. 265.

Both *Antonius* and *Morgan*, *supra*, also described how the statute of limitations applies to a claim of a hostile work environment. These courts explained that “[a] hostile work environment claim is composed of a series of separate acts that collectively constitute a ‘single unlawful employment practice.’” [Citations omitted]. Thus **it does not matter that**

**a plaintiff knows or should know at the time discriminatory acts occur outside the statute of limitations period that the acts are actionable.**

*Morgan*, 536 U.S. at 117, *Antonius* at p. 265. (Emphasis added).

The trial court below did not grant summary judgment to the defendants on Plaintiff's hostile work environment claim, although that relief was requested by the defendants. Rather, the trial court held that the statute of limitations had run, ostensibly because there was no separate actionable event, i.e., a "trigger", related to the hostile work environment claim that had occurred within three years of when this lawsuit was brought.

The trial court adopted the UW's attempt to "slice and dice" the events into individual acts rather than examine the cumulative impact which this hostile work environment created over time. *Antonius, supra* held: "Moreover, the nature of the hostile work environment claim strongly indicates that it should not be parsed into component parts for statute of limitations purposes." 153 Wn.2d at 268. This is precisely what the moving parties have done and what the trial court ruled.

The defendants convinced the trial court to focus only on the discrete acts of intolerant behavior (as if they had no relation to one another) because much of which took place occurred more than three years before Plaintiff filed this lawsuit. The period of the hostile work

environment, as found by the HR investigation and Hrab's assessment, continued at least until Lukehart left his employment for deployment in Iraq in late June 2006, within three years of when Plaintiff filed her suit. By Plaintiff's account it actually continued beyond June of 2006 when one of Lukehart's closest allies (Eric Frolich) pointed at and tapped his watch as if to say "It's time" and because she lived in fear of Lukehart's return because he told her "When I get back [from Iraq] I am going to be very mean." This comment itself is a sufficient "trigger" to demonstrate that discrete acts of discrimination occurred within three years of when the lawsuit was filed. The trial court erred in holding that it was not.

Under *Antonius*, the statute of limitations did not run until three years after the hostile work environment, a single "cumulative" condition of employment for Plaintiff ended, i.e., at the very earliest in June of 2009, after Plaintiff filed suit in May of this year. Furthermore, Lukehart's comments about "being very mean" when he returned meant he had continued his threats and intimidation and the hostile work environment still existed until he was demoted and reassigned away from the Plaintiff, in 2008.

**B. The Amendment to RCW 49.60 to Add Sexual Orientation to the Protected Classes is Retroactive Because the Statute is Remedial in Nature.**

RCW 49.60 was amended on the 7<sup>th</sup> of June, 2006, although the

UW had in its Handbook a ban on discrimination on account of sexual orientation since 1983. See: *The Final Report of The President's Task Force on Gay, Bisexual, Lesbian and Transgender Issues - Affirming Diversity: Moving from Tolerance to Acceptance and Beyond* UNIVERSITY OF WASHINGTON, February 2001:

The University Handbook covers policies on “non-discrimination and affirmative action” (Volume 4, Part I, Chapter 2). Language prohibiting discrimination based on sexual orientation was first added by Executive Order of the President on December 5, 1983. See: <http://www.washington.edu/reports/gblt/gblt.pdf> (emphasis added).

It has long been established that where, as here, a statute in remedial and its remedial purposes is furthered by retroactive application, the presumption favoring prospective application is reversed. See *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) citing *State v. Heath*, 85 Wn.2d 196, 532 P.2d 621 (1975); *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 494 P.2d 216 (1972); *Pape v. Department of Labor & Indus.*, 43 Wn.2d 736, 264 P.2d 241 (1953). *Haddenham* goes on to hold: “Remedial statutes, in general, afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries. 3 Sutherland, *Statutory Construction* Section 60.02 (4<sup>th</sup> rev. ed. 1974)” 87 Wn.2d at p. 148. And see *Addleman v. Board of Prison Terms*, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986) holding that the

“statute is remedial and has retroactive application when it relates to practice, procedure or remedies, and does not affect a substantive or vested right.” 107 Wn.2d at p. 510. Accord: *In Re F.D. Processing*, 119 Wn.2d 452, 832 P.2d 1303 (1992).

*In 1000 Virginia Ltd. v. Vertecs*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006) the Court further elaborated that a statute is retroactively applied if it is remedial “provided that retroactive application does not ‘run afoul of any constitution prohibition’” at p. 584, citing *Mc Gee Guest Home, Inc. v. Dep’t of Soc. & Health Servs.*, 142 Wn.2d 316, 324-25, 12 P.3d 144 (2000).

Here, without doubt, Washington’s law against discrimination is remedial and the addition of one’s “sexual orientation” to the protected class of employees covered by the statute “afford” a remedy and “forward[s] remedies already existing for the enforcement of rights and redress of injuries” under *Haddenham* and authorities cited therein. Nor has the UW even attempted to claim that it has some “vested right” or “constitutional” right to practice discrimination against people based upon their sexual orientation prior to the amendment to RCW 49.60 in June of 2006. Yet it is the UW’s burden, on summary judgment, to establish its right to prevail as a matter of law. The UW and Lukehart failed to do so. Plaintiff asks this Court to rule that the amendment to RCW 49.60 to add

sexual orientation as a protected class is remedial and is to be applied retroactively.

Furthermore, the conduct alleged against the UW and James Lukehart in creating a hostile work environment continued even after the statute was amended on June 7 of 2006. Although Lukehart shipped out to Iraq on June 23, 2006, that leaves two weeks of hostility. Furthermore, Lukehart had not been removed from his position as a senior UW manager in June 2006, he was on temporary leave and when he returned he was expected to continue to supervise Plaintiff and other employees. The HR investigation found that at his departure for military leave, he told staff, including Loeffelholz, that he would “be meaner when he returned.” So the very evidence the UW offered in support of its Motion belies its bare assertion that “all of Lukehart’s allegedly (sic) discriminatory acts occurred before RCW 49.60 was so amended”.

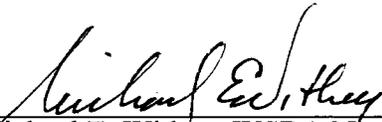
## **VI. CONCLUSION**

Plaintiff has stated and can prove a valid claim that Lukehart and the UW created a hostile work environment on account of her sexual orientation. She brought such claim within three years of discovering each element of that cause of action. The remedial statute adding sexual orientation as a category of discrimination should be applied retroactively.

As such the motion for summary judgment should have been denied. This Court should reverse.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of July, 2010.

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