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COURT OF APPEALS  
DIVISION ONE  
DEC 1 2010

**NO. 65434-9-I**

**COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON**

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**RODOLFO APOSTOL, Appellant**

**vs.**

**RONALD WASTEWATER DISTRICT, Respondent.**

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**BRIEF OF APPELLANT RODOLFO APOSTOL**

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DIVISION ONE  
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### **Statues and Authorities**

**RCW 4.16.080 (2) Statutes of Limitations-Personal Injury Action**

**RCW 49.60.030 Freedom from Discrimination-Declaration of Civil Rights**

**RCW 49.60.030 Washington Law Against Discrimination (Antidiscrimination Statue). Public Policy-Mandate.**

**(1) The right to be free from discrimination because of race, creed, color, national origin, sex, ...sexual orientation, or the presence of any sensory, mental, or physical disability .....is recognized as and declared to be a civil right. This right shall include, but not be limited to:**

**The right to obtain and hold employment without discrimination;  
The right to the full enjoyment of any of the accommodations, facilities, or privileges or any place or public resort, accommodation assemblage, or amusement;**

**(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the**

actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.) [Failure to Accommodate]

**RCW 49.60.180 Unfair practices of employers.**

**(1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter. (Unfair practice for Employer**

**(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, .....or the presence of any sensory, mental, or physical disability ....**

**(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex marital status, sexual orientation, race, creed, color, national origin, .....or the presence of any sensory, mental, or physical disability ....**

**RCW 49.60.210 Unfair practices-Discrimination against person opposing unfair practice-Retaliation against whistleblower.**

**(1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter. (Unfair practice for Employer)**

**RCW 51.52.130 Attorney Fee Award**

**RCW 51.24.020 Action against employer for intentional injury. Deliberate intent to injure and the outrage claim are based on intentional infliction of emotional distress. Action for Damages.**

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**Retaliation against for filing a Workers Compensation claim**

**RCW 41.56.140 Unfair labor practices for public employer enumerated. It shall be an unfair labor practice for a public employer.**

**(1) To interfere with restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter.**

**To control, dominate or interfere with a bargaining representative.**

**To discriminate against a public employee who has filed an unfair labor practice charge.**

**To refuse to engage in collective bargaining.**

**Regulations and Rules**

**AGREEMENT by and between RONALD WASTEWATER DISTRICT and PUBLIC, PROFESSIONAL & OFFICE-CLERICAL EMPLOYEES AND DRIVERS, LOCAL UNION NO. 763. (Representing Maintenance Employees).**

**ARTICLE XIII. UNION RIGHTS**

**3.1 Non Discrimination – The Employer shall not discriminate against any employee(s) for protected Union activity.**

In compliance with RCW 49.44.090, 49.60.180, and 49.60.190, neither the Employer nor the Union shall discriminate against any employee for employment because of such employee's....,age, sex, marital status, race, creed, color. National origin or the presence of any sensory, mental or physical disability, unless based on a bona fide occupational qualification, filing a workers' compensation claim, veteran's status, or any status protected under applicable Local, State or Federal law....

## ARTICLE X HEALTH AND WELFARE

Medical Leave- Leaves of absence for illness or injury shall be granted to employees who have completed the probation period when a physician's certificate is provided documenting the reason for leave and the expected duration. The Employer may request a second medical opinion; provided however, if a second opinion is required by the Employer the Employer shall reimburse the employee of any cost incurred that is not covered by the medical plan.

The limitation for a medical leave shall be six (6) months or one (1) year in the event of an on-the-job injury.

## ARTICLE XIII APPROPRIATE BEHAVIOR

Appropriate Behavior – Employees are expected to adhere to acceptable business principles...Certain behavior such as theft, misappropriation of property, violation of the District's drug and alcohol policy or health, safety or sanitation policies, fighting, insubordination.....and other forms of dishonesty, discrimination, bribery, violence or threatened violence is clearly unacceptable at any time in any workplace. Other conduct (such as failure to cooperate with other employees, harassing or intimidating others and rudeness to co-workers....is equally unacceptable.

Work Place Harassment – Sexual harassment or other harassment bases on protected status is prohibited and a violation of Section 703, Title VII of the Civil Rights Act of 1964 and is prohibited by the Equal Opportunity Commission and by State Law under RCW Chapter 49.60 and the regulations governing and promulgated by Washington State Human Rights, Commission and District Policy, Resolution 99-12.

SHORELINE WASTEWATER MANAGEMENT DISTRICT-  
PERSONAL GUIDLEINES. RESOLUTION 00-33 (Amending  
Resolution 96-28) Effective Date July 11, 2000  
ARTICLE VII LEAVES  
MEDICAL LEAVE OF ABSENCE-p 15

Definition of Sexual Harassment and other Harassment Based on  
Protected Status, reporting harassment, no retaliation, p.28.

#### OTHER AUTHORITIES

TITLE VII of the CIVIL RIGHTS ACT OF 1964

UNLAWFUL EMPLOYMENT PRACTICES  
SEC. 2000e-2. [Section 703]

(a) It shall be an unlawful employment practice for an employer –  
  
to fail or refuse to hire or to discharge any individual, or to discharge  
any individual, or otherwise to discriminate against any individual  
with respect to his compensation, terms, conditions, or privileges or  
employment, because of such individual's race, color, religion, sex, or  
national origin; or

to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect status as an employee, because of such individual's race, color, religion, sex, or national origin.

SEC. 1977 (42 U.S.C. 1981)

Provide for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, the Americans with Disabilities Act of 1990 and section 501 of the Rehabilitation Act of 1973.

Washington State Constitution

Article I. Declaration of Rights

Section 21. Trial by Jury. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

## **ASSIGNMENTS OF ERROR**

### **Assignments of Error**

**No. 1 - The trial court erred in granting employer, Ronald Wastewater District summary judgment.**

**No. 2 - The trial court erred in failure to adopt the continuing violation doctrine .**

**No.3 - Genuine issues of material fact exist for a jury decision .**

**No.4 - The trial court judge erred in dismissing retaliation claims for filing workers' compensation claims and in retaliation for engaging in union protected bargaining rights.**

**No 5 - The trial court judge erred in dismissing remaining claims for economic and non-economics damages suffered by Mr.**

**Apostol as well as his Tort of Outrage claim**

### **Issues Pertaining to Assignment of Error**

**Issue No. 1 - Was it error for Hon. Judge Jeffery Ramsdell to dismiss Rodolfo Apostol's claims in this lawsuit against his former employer, Ronald Wastewater District, when clearly there exist circumstantial, substantial and overwhelming evidence as well as a discrimination motive which were committed by Mr. Apostol's employer, Ronald Wastewater District? The evidence provided in**

the Designation of Clerk's Paper (CP) and the Certified Appealed Board Documents (CABR) clearly supports Mr. Apostol's (all) claims against his former employer, Ronald Wastewater District.

Issue No. 2 - Was it error for Hon. Judge Jeffery Ramsdell to not consider and apply the continuing violation doctrine for acts of discrimination occurring outside the statute of limitations when at least one act or offense of a discrimination act occurred well within the statute of limitation for further proof of intentional discrimination, unfair patterns of discrimination and intent to inflict injury and harm to Mr. Apostol. Mr. Apostol's resulting permanent disability can be imputed to Ronald Wastewater. A tort cause of action for wrongful discharge against an employee in retaliation for having pursued workers' compensation benefits can be based on the common law or on under RCW Title 51.48.025 of the Industrial Insurance Act.

Issue No. 3. - The trial court's summary judgment was not supported by factual and substantial evidence produced by Mr. Apostol. Mr. Apostol produce overwhelming evidence contained in the Designations of Clerk's Papers and Certified Appeals Board

Record file, thus, protect Mr. Apostol's constitutional right to a trial by jury.

Issue No.4. - When a worker is injured and disabled as a result of the on the job injury, would it be proper for an employer to force an injured and disabled worker to return to work for whatever reason stated by the employer? Issue No.5- There is no questions of fact that Mr. Apostol suffered mentally, physically and emotionally which can be imputed to his former employer, Ronald Wastewater District. The ordeal which he endured left him permanently disabled for life, unemployable, and reduce his quality of life. The amount of damages Mr. Apostol is entitled is determined in the trial courts.

Since, the question of liability can be imputed to Mr. Apostol's employer, Ronald Wastewater District, it is reasonably to conclude that claim for damages can be rule proper and in favor to Plaintiff, Mr. Apostol for damages declared in the Clerk's Papers p.44-50.

## II. Statement of the case

The Laws of Discrimination in the State of Washington parallel Title VII of the Civil Rights Act of `1964 where it is illegal to discriminate a person base on their, race, color, national origin,

disability. When the employer fosters a hostile work environment in the means of forcing an employee to quit because the employer labeled an employee lacks the necessary communications skills and labeled the employee unqualified due to their bad history file which the employer intently and planned for their justification for not promoting the employee and in the process permanently injured and disabled the employee in the course of employment. A tort of outrage claim can be made in this case since the deliberate intentional acts of discrimination to intently harm and injure Mr. Apostol were repeated patterns and acts of discrimination that occurred within the statute of limitations as well as outside the limitation period to apply the continuing violation doctrine to include acts of discrimination outside the statute of limitation. On first impression an ordinary person or a jury trial can cry outrageous from the evidence presented.

Ronald Wastewater District is vicariously liable for all damages done and due to Rodolfo M. Apostol.

This is the case of Rodolfo Apostol v. Ronald Wastewater District.

This is what happened to me during my time working for Ronald

Wastewater District, a public municipality government agency located in Shoreline, Washington.

### III. Summary of Argument

A party seeking determination of an issue of law has the burden of providing the appellate court with briefing addressing the issue presented. Kahn v. Salerno 113, 90 Wn. App. 110, 951 P.2d 321.

#### Prior History:

Due to Mr. Apostol's race, color, and national origin of Philippines descent, Mr. Apostol was denied promotions within the District (short. for Ronald Wastewater District). Due to Mr. Apostol's documented history of chemical sensitivity such as motor and diesel gas exhaust fumes (carbon monoxide) and enamel paints, herbicides such as ROOT-X known by the District and his co-workers; Mr. Apostol was harassed repeatedly time and time again and forced to work under these the disabling conditions by his co-workers in the maintenance staff causing conflict. Furthermore, District Managers Phil Montgomery and Michael Derrick and Maintenance Manager George Dicks wrote Final and Last Warning Notices into Mr. Apostol's file for insubordination and

unprofessionalism among others, would result in immediate termination. (Clerk's Papers and CABR)

These working conditions which Mr. Apostol's had to endure clearly violated RCW 49.60 Washington Law Against Discrimination in the failure to accommodate Mr. Apostol's chemical sensitivity disability giving rise to Mr. Apostol's suffering from headaches, migraines, dizziness, nausea, breathing difficulties, thinking and concentration. Compounding the stress, the District failed to address his concerns effectively and thus failed to accommodate Mr. Apostol's disability.

In the meantime, Mr. Apostol was harassed, sexual harassed, physical assaulted, physical threats for his life, verbally abused, defamed and lied about by his co-workers and the District Manager along with the Board of Commissioners refused to act to Mr.

Apostol's complaints throughout the total time of eleven and a half years that Mr. Apostol was employed. (Clerk's Paper and CABR)

The District Managers (Phil Montgomery and Michael Derrick) with the Board of Commissioners approved and wrote unwarranted and numerous write-ups into his personal file, multiple disciplinary actions and last warning notices included in his personal file, poor-

work performances memos ,including suspension and probations memos, annual longevity pay was strip from his wages, his Standby Duty privilege were taken away and he was demoted to Maintenance Technician B, Mr. Apostol's initial position title when he first worked for the District. (Clerk's Papers and CABR)

The intentional acts of discrimination made by Mr. Apostol's employer and co-workers were intended to force Mr. Apostol to quit and seek employment elsewhere where he can utilize his engineering skills and experience in another industry (CP CABR)

The stated and written reason Mr. Phil Montgomery GM did not promote Mr. Apostol for the Technical Support Position back in 1995 were for lack of communication skills and lack of CAD/computer skills. (Clerk's Papers and CABR).

The reason proffered by Mr. Apostol's employer was merely pretext and the legitimate reason is due to his protected status (race, color and his national origin.).

During this time, Mr. Apostol made complaints to his co-workers, supervisors and eventually to Management and getting sick and suffering from headaches, dizziness, nausea, whenever he would

work around diesel and motor powered vehicles, more especially from the TV Truck Van. His co-workers never took him seriously and many times he was totally ignored and even made fun of and have been told by them that “....we did not have to follow any safety rules....”

This resulted in conflict which Management did nothing or very little or too late for a corrective action due to Mr. Apostol's chemical sensitivity disability for the next eleven years until Mr. Apostol was injured and unable to return to work (Mr. Apostol found other unpleasant products that caused him headaches and light-headedness and nausea from many other hazardous materials for which he was exposed and worked with such as paints, solvents, ammonia liquid cleaners and others.) (Clerk's Papers and CABR).

The discrimination animus and motive of intent to discrimination and the following years of malicious acts of intent to harm and injure Mr. Apostol through acts of adverse employment actions causing emotional distress and mental anguish for the sake of not promoting him in the District and, nevertheless, the Wastewater Industry.

Nevertheless, Ronald Wastewater District fostered the hostile work environment to force Mr. Apostol to quit rather than to promote. Therefore, Mr. Apostol has established a prima facie case for his discrimination claims to proceed to a jury trial.

The right to trial by jury in a civil proceeding in this state is guaranteed solely by article 1, section 21 of the state constitution.

*Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260. April 27, 1989.

Protected Activity:

Was it proper for the District to demote, suspend Mr. Apostol 30 days without, put on probation, and his annual longevity pay taken away from him when Mr. Apostol acted within his collective bargaining rights when Michael Derrick General Manager began berating at Mr. Apostol during a maintenance staff meeting on December 2004 regarding cleaning storm drains for the City of Shoreline?

Hostile Work Environment

The continuing pattern of abuse and workplace harassment, made by several co-workers which includes assaults, assault and battery, physical violence, physical threats and verbal threats, several

intentional threats to his life by co-workers such as rolling a bus size vehicle while Mr. Sehnert knew Mr. Apostol was working underneath the vehicle, and on June 1, 2005, during a maintenance morning staff meeting, Jason Sharpe took a gun and pointed it directly to the side of Mr. Apostol's head while the maintenance staff and the Maintenance Manager, George Dicks just watched and said nothing. These left permanent psychological injury to Mr. Apostol and he later was diagnosed with post-traumatic-stress-disorder (PTSD) by Dr. David Dixon. See Clerk's Papers and CABR).

The exclusive remedy provision of the Industrial Insurance Act (RCW 51 Title 51) does not bar common law actions against an employer for injuries that fall outside the basic coverage of the act, i.e., that constitute neither an "injury" nor an "occupational disease" under the act. The exclusive remedy provision of the Industrial Insurance Act, does not bar an employee's tort claim against the employer if the tort claim resulted in emotional damages that are readily distinguishable from any damages covered by the act. *Wheeler v. Catholic Archdiocese*, 65 Wn. App., 552, 829 P.2d 196, May 1992.

In sum, the Department of Labor & Industries determined and ruled, Mr. Apostol's resulting diagnose PTSD constitute neither an "injury" nor an "occupational disease" under the act.

Mr. Apostol's tort claim resulting in his diagnose PTSD (emotional damage) is distinguishable from any damages covered by the act to survive summary judgment against him in trial court.

Soon after the shooting incident took place on June 1, 2005, Mr.

Apostol no longer can sleep at night. For the next following months of July, August and until September 21, 2005 (Mr.

Apostol's last day at before he took Medical Leave) Mr. Apostol would go to work with little or no sleep and when he came to work each day technicians Mr. Sharpe and Mr. Sehnert would heckle at him from the streets while driving away in the Vactor truck and calling him "coo-coo" several times. And whenever Mr. Apostol was at the shop, Mr. Sharp would come from behind and make loud crashing noises with his fist against the lockers while Mr. Apostol was changing to his street clothes, or kick the bathroom door and yelling at Mr. Apostol to get out of the bathroom near quitting time when Mr. Apostol would wash and clean himself, slamming his fist against the steel table desk where the microwave

sits while Mr. Apostol would warm his lunch. The daily stalking made by Mr. Sharpe made and targeted against Mr. Apostol the last few months leading up to September 21, 2005 made Mr. Apostol more vigilant to his surroundings in the workplace, more hyperactive and anxiety ensued that Mr. Apostol would no longer change in the dressing room, and he would no longer use the microwave, would lock the bathroom door when using the restroom and would no longer sit in the maintenance office with the rest of the group waiting for 4:30 p.m. to come then go home as he had done everyday for eleven years since he came to work for the District. See Clerk's Papers and CABR.

These hostility acts fostered by Mr. Apostol's employer were all acts committed within the statute of limitations that would qualify Mr. Apostol to apply for the continuing violation doctrine to include acts of discrimination and hostility outside the statute of limitation.

The adverse employment actions taken by the Management of Ronald Wastewater District (General Managers Phil Montgomery and Michael Derrick and Maintenance Manager George Dicks and supported by the Board of Commissioners) were repeated acts of

discrimination that can be considered one large discrimination act throughout Mr. Apostol employment.

The mandate of RCW 49.60.030 (1)(a) that a person has the right to hold employment without discrimination embodies a public policy of the highest that a court may consider when resolving a disputed issue of law concerning a claim of unlawful discrimination. 153 Wn.2d 256, *Antonius v. King County* Dec. 2004.

For purposes of a claim of hostile work environment sexual harassment under RCW 49.60.180(3), an employer is not vicariously liable for harassment committed by its supervisors or employees unless the employer knew or should have known of the harassment and failed to take reasonably prompt and adequate corrective action. *Brown v. Scott Paper Worldwide Co.*, 98 Wn. App. 349, December 1999.

The repeated pattern of the District's failure to take reasonably prompt and adequate corrective action is evident when Mr. Apostol would be the only person subjected to adverse employment actions, whereas, perpetrators co-workers were praised and

promoted. Clerk's Papers and Certified Appeal Board Record file supports this fact which were never disputed in the trial court.

A finding of fact to which no error is assigned is verity on appeal.

Robel v. Roundup 76, 103 Wn. App. 75, Oct. 2000.

In general, an action alleging sex discrimination in employment based on hostile work environment sexual harassment is timely filed if any act contributing to the hostile work environment occur within three years before the action was filed. So long as an act contributing to the claim occurs within the three-year period, the entire time period of the hostile work environment may be considered by the court for the purpose of determining liability on the claim. It does not matter that some of the component acts of the hostile work environment occurred more than three years before the action was filed if some of them occurred within the three-year period. The entire hostile work environment claim encompasses a single unlawful employment practice; i.e., the timeliness of the claim does not depend on whether the claimant knew or should have known at the time an offensive act occurred that it was actionable an unlawful employment practice. The court's task is to determine whether the acts about which the

plaintiff complains are part of the same actionable hostile work environment practice and, if so, whether any act falls within the three-year time period. If a relationship does not exist or, if for some other reason, such as some intervening action by the employer, the act is no longer part of the same hostile work environment claim, then the plaintiff cannot recover for the previous acts as part of a single claim. A gap in the plaintiff's employment in the particular work environment is not, in and of itself, a reason to treat acts occurring before and after the gap as not constituting parts of the same unlawful employment practice. The equitable defenses of waiver, unreasonable delay, and laches are available to assert against the claim. 153 Wn.2d 256, Antonius v. King County, Dec. 2004.

The United States Supreme Court has sensibly concluded that the same actual or apparent authority to make personnel decisions that is necessary to carry out quid pro quo sexual harassment also inherently assists supervisory personnel in creating a hostile work environment.

When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions

necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise-[which may be] to hire and fire, and to set work schedules and pay rates-does not disappear....when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion."

*Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 2291, 141 L. Ed 2d 662 (1998) (citation omitted)

Adopting these principles of agency and Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employee, " the U.S. Supreme Court adopted the following rule for holding employers liable for hostile work environment.

An employer is subjected to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over

the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability to damages, subject to proof by a preponderance of the evidence. See Fed. Rule Civ. Proc. 8©. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure( Ronald Wastewater District has such a policy in the District's Handbook Guidelines and under the Bargaining Contract for union employees-CP and CABR) is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure by the employer, a demonstration of such

failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. Faragher 118 S. Ct. at 2292-93; accord Ellerth, 118 S. Ct. 2270.

Division Three of this court has recently applied the Faragher analysis to a claim of hostile work environment. See Sangster v. Albertson's Inc. 99 Wn. App. 156, 991 P.2d 674 (2000).

But unlike quid pro quo sexual harassment, the actual or apparent authority invested in supervisory personnel to make employment decisions is not necessary to create a hostile work environment.

Indeed, co-employees with no actual or apparent supervisory authority can create hostile work environments. Glasgow, 103 Wn.2d at 407, Ellerth, 524 U.S. at 762. Therefore, notwithstanding some case law suggesting the contrary, we conclude that under established principles of agency, an employee's actual or apparent authority to make employment decisions-standing alone is not sufficient to hold the employer automatically liable for the employee's sexually harassing conduct.

But “[w]hen a supervisor makes a tangible employment decision [based on discrimination], there is assurance the injury could not have been inflicted absent the agency relation.” *Id.* At 761-762. It is just this assurance that is found in quid pro quo harassment cases but that is not always found in hostile work environment cases, that led to the rule, as pronounced in *Glasgow*, that in hostile work environment cases “[t]o hold an employer responsible for the discriminatory work environment created by a plaintiff’s supervisor(s) or co-worker(s), the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action.” *Glasgow*, 103 Wn.2d at 407. Put another way, unless recognized agency principles support imputed liability, the plaintiff must establish liability on negligence principles, to be entitled to damages. *Henningsen v. Worldcom* 841, 102 Wn. App. 828.

But at the *Ellerth* court explained, in the course of its discussion of why the categories quid pro quo and hostile work environment are not necessarily controlling on the issue of vicarious liability and

that tangible employment action will render the employer automatically subject to vicarious liability even in hostile work environment cases involving supervisors.

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision required an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.

For these reasons, a tangible employment action by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment actions against a subordinate. In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability.

Ellerth, 524 U.S. at 762-63 (citations omitted).

Here, the adverse employment actions taken by the District through demoting Mr. Apostol from Tech A to a Tech B, 30 days suspension without pay, several 2 day suspensions without pay, his annual longevity pay taken away each year it was written in the contract, his Standby Duty privilege and responsibility withdrawn since he no longer permitted to drive and operate the Vactor Truck (Mr. Dicks later recanted and said he meant only not to drive the Vactor truck) endless write-ups of poor work performances incidences which occurred away from the office and out in the field where he was simply performing his duties as instructed, and numerous warning notices and last final notices which includes threats of immediate termination, as well as breach of contract from the times when Mr. Apostol would exercise his rights from his employer when Mr. Apostol would exercise his rights to walk away from hostile work situations amongst his coworkers and whenever Mr. Apostol was working with certain cleaning and paints, chemicals and/or chemical fumes and exhaust fumes from equipment which would make him sick. See Certified Appeals Board Record file letter dated July 27, 1999 and written by Local Union Business Representative John Slaughter.

A memo issued by Maintenance Manager Steve Paulis dated August 27, 1999 addressed to Phil Montgomery, regarding my chemical sensitivity disability; maintenance staff would force Mr. Apostol to continue to work in these situations and when I would refuse or given them an explanation why, they would reply that I would be terminated immediately for insubordination instructed by George Dicks . See Clerk's Papers and CABR.

#### Discrimination

WLAD does not contain its own limitations period.

Discrimination claims must be brought within three years under the general three-year statute of limitations for personal injury actions. RCW 4.16.080 (2). Prior to the decision in Morgan, the Court of Appeals employed the "continuing violation doctrine" analysis also used by some federal circuits to determine whether conduct occurring more than three years before the suit was filed could result in employer liability in a discrimination action under chapter 49.60 RCW. The continuing violation doctrine acted as an equitable exception to the statute of limitations for such suits, allowing a plaintiff to recover damages for otherwise time-barred acts. *Washington v. Boeing Co.*, 105 Wn. App. 1, 8, 19 P.3d 1041

(2001). The doctrine is explained in *Provencher v. CVS Pharmacy*, 145 F.3d 5 (1<sup>st</sup> Cir. 1998), overruled in part by *Morgan; Crowley v. L.L. Bean, Inc.*, 303 F.3d 387 (1<sup>st</sup> Cir. 2002).

Continuing violations could be serial or systemic. *Provencher*, 145 F.3d at 14; see *Washington v. Boeing Co.*, 105 Wn. App. At 8; *Milligan v. Thompson*, 90 Wn. App. 586, 595, 953 P.2d 112 (1998) A systemic violation was rooted in a discriminatory policy or practice, and if the policy or practice continued into the limitations period, a plaintiff could be deemed to have filed a timely complaint. *Provencher*, 145 F.3d at 14. No identifiable act of discrimination was required in the limitations period, and systemic violations were found, for example, with regard to general policies or practices in hiring, promotion, training and compensation. *Provencher*, 145 F.3d at 14.

A breach to Mr. Apostol's terms and working employment conditions were not honored nor followed as agreed upon between GM Phil Montgomery and his union, Mr. Apostol's (see again John Slaughter's letter located in CABR)) in regards to his chemical sensitivity disability and anger disabilities and issues whenever faced with conflict amongst his fellow co-workers. Mr.

Apostol continued and repeated was written-up and warning and last final warning notices were issued and threatened his immediate termination.

These repeated acts were patterns of discrimination committed by Mr. Apostol's employer and any remedial action taken by the District were too little too late, ineffective and ignored and Mr. Apostol's complaints were met with retaliation (See CP and CABR) and further harassment which was fostered by the District and constituted a hostile work environment.

The elements of a prima facie case of sex discrimination based on hostile work environment sexual harassment are (1) unwelcome harassment, (2) the harassment was because of sex, (3) the harassment affected the terms or conditions of employment, and (4) the harassment is imputable to the employer. *Antonius v. King County*, 153 Wn.2d 256.

The trial judge erred by not applying the continuing violation doctrine to Mr. Apostol hostile-work environment claim based on his disability and race discrimination and (sexual) harassment.

A sex discrimination in employment action based on a claim of hostile work environment sexual harassment requires harassment

that is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. This is considering the totality of the circumstances. *Antonius v. King County*, 153 Wn.2d 256.

Whenever Mr. Apostol filed a grievance with his union, the Board of Commissioners would deny each and every one of them, See CABR and CP.

**Disparate Treatment.**

An issue arises here when there exist a pattern of intentional discrimination targeting Mr. Apostol in disparate treatment when Mr. Apostol would be the only person on staff to be treated differently by Management along with the Board of Commissioners (through means of approval of disciplinary actions of all forms and the Boards denied grievance conclusion).

Instead, other maintenance staff were either promoted to the Technical Support position, Al Dann and Mark Neumann and Jesse Peterson all are white and of the Caucasian race. Technician Charlie Brooks was promoted to Crew Chief. And GM Phil Montgomery took Maintenance Managers Steve Paulis's management responsibilities and given it to Kim Chung and



Charlie Brooks (letter written by Phil Montgomery-see in CABR)  
Chad Sehnert and Jason Sharpe were both promoted to Tech A and  
I was demoted to Tech B. All maintenance staff members  
received their annual longevity pay. I was removed from Standby  
Duty and the responsibility was given to Charlie Brooks from  
George Dicks Maintenance Manager, who was never given this  
responsibility due to his learning disability and/or dyslexia as Mr.  
Brooks attempt to explained to me.

No maintenance staff members were ever written up for the  
incidences in which I was involved in and they were not given any  
disciplinary 2 days nor 3 days suspensions without pay, and none  
of them were sent to Mr. Phil Montgomery's office and being  
reprimanded to the point where office staff members were afraid  
because they could see and hear Mr. Montgomery yelling loudly at  
me through the glass walled office Mr. Montgomery sat in and  
where Mr. Montgomery would yell and say to me not to come  
back for 2 days, or 3 days, or yell at me and say to me that you just  
leave right now and come back on Monday morning and think  
about what I just told you and decide what you plan on doing....  
Or else say things like "...I know Kim and Charlie better than that,

they would not say those things and tells me to get out of my office and I don't want to see your face again....! I would come out of Mr. Montgomery's office with sadness and sometimes with tears running down my face as I drove away from the parking lot. No one in the workplace was treated the way I was treated. See Clerk's Papers and CABR.

Two other Filipina workers worked for the District. Zenida Baker worked there before I started, because staff members would ask me if I knew her because they told me that she was from the Philippines, I replied that I do not know her nor ever met her.

The other Filipina worker was hired as a receptionist and she worked there only for a couple of months (?) and then I was told she was fired because she was accused of taking the District's credit card and buying personal office equipment for her personal use. I only spoke to her once and found that she was a very hardworking and pleasant person who is a single mom and trying to raise her young child. I was instructed to go and get a message waiting for me at the front desk. The message was from the Ford Dealership located in Lake City Way where I was having a new transmission and new exhaust system and muffler put in my

Green Ford Explorer I drove at the time. I would never believe she was capable of doing such acts as she was alleged. I later learned that the District never pursued any charges against her. (Learned from Maintenance Manager Steve Paulis).

#### Discrimination-Direct Evidence

Factual evidence were established, existed and known and stated and documented by the General Managers and the Board of Commissioners that Mr. Apostol “lacks the communication skill” as written by GM Phil Montgomery where Board Member Commissioner Gary Shirley written and states in his confirming letter honoring Mr. Montgomery in his selection for another candidate from the “outside” (chosen candidate is Mark Dewey, Caucasian race who is now employed by the City of Bellevue as a Professional Utilities Inspector? And the time of his hire had no sewer experience) that I .....would best serve the District well in the position that I am presently employed.....is mere pretext. See Clerk’s Papers and CABR.

When a trial court in an action for employment discrimination based on national origin in violation of RCW 49.60.180 (3) enters

unchallenged findings that (1) the employee's accent was the reason for the employee not receiving a promotion and (2) the accent would not have materially interfered with the employee's job performance, there is no factual basis supporting the employer's claim on appeal that it in good faith believed that the employee's national origin accent would materially interfere with the employee's job performance. *Xieng v. Peoples National Bank*, 120 Wn.2d 512, P.2d 389, Jan. 1993.

Here, there is no factual basis supporting Ronald Wastewater District's claim on appeal that it in good faith believed that Mr. Apostol's communication skills would materially interfere with the employee's job performance as a Technical Support or any other available promotions within the District.

On appellate review of an employment discrimination claim, issues concerning the employee's and employer's burdens of production and proof at trial merge into the trial of fact's determination of the ultimate discrimination issue. Such a factual determination is upheld on review if it is supported by substantial evidence. *Xieng v. Peoples National Bank*, 120 Wn.2d 512, P. 2d 389. Jan. 1993.

The right to trial by jury in a civil proceeding in this state is guaranteed solely by article 1, section 21 of the state constitution. *Sofie v. Fibreboard Corp.* 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260, April 27, 1989.

A jury or a trier of fact could well conclude that the District had violated Washington Law Against Discrimination RCW 49.60 to survive summary judgment in trial court for Mr. Apostol's entire claim against his employer.

Tort Claim.

It can be found that the employer violated RCW 51.24.020 when the District intended to not promote Mr. Apostol and in the process proceeded and fostered a hostile working environment by subjected him to years of abuse from co-workers and management in a manner to force him to quit. Instead Mr. Apostol health deteriorated to the point he had to take Medical leave. While recovering from his injuries, the District terminated his employment in an attempt to escape all liability through the legal system. In their attempt and actions the District violated RCW 51.24.020 and Mr. Apostol can claim a tort of outrage claim under

Title 51 RCW Industrial Insurance to recover damages stated herein.

To prevail on a claim for outrage, a plaintiff must prove three elements: “(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff....” Although the three elements are fact questions for the jury, this first element of the test goes to the jury only after the court “determine(s) if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.” *Id . Robel v. Roundup Corp* 51, 148 Wn. 2d 35, Dec. 2002.

The discrimination acts in the manner of being denied for any advancement opportunities, unwarranted forms of write-ups and false accusations made by upper management along with the Board of Commissioners in denied grievances made by Rodolfo Apostol through his union, demotions in title and rank and suspensions without pay, contracted union bargaining yearly longevity pay bonus was taken away from him when Ronald Wastewater District intently put him on probation which justified their adverse employment action against Rodolfo Apostol and including ongoing

threats of termination of his employment in the form of final warning notice letter for alleged unprofessional conduct, insubordination, Together, the illegal harassment discrimination acts made by Rodolfo Apostol's co-workers and along with the intentional acts of discrimination made by Ronald Wastewater District Managers and the Board of Commissioners constituted a hostile work environment which any fair minded person would conclude. See documents in Clerk's Papers and Certified Appeal Board Records.

Two types of sex discrimination claims are recognized-the quid pro quo sexual harassment claim, where the employer requires sexual consideration from the employee for job benefits, and the hostile work environment claim. 153 Wn.2d 256, Antonius v. King County. Here Mr. Apostol claims the hostile work environment claim.

#### Disability Discrimination

Under the antidiscrimination statute, "[i]t is an unfair practice for any employer [t]o discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin or the presence of

any sensory mental or physical disability.” RCW 49.60.180(3) (emphasis added). This court has recognized that the antidiscrimination statute prohibits sexual harassment in employment, with such claims being ‘generally categorized as ‘quid pro quo harassment’ claims or ‘hostile work environment’ claims.’ DeWater v. State, 130 Wn. 2d 128, 134-35, 921 P.2d 1059 (1996) (quoting Payne v. Children’s Home Soc’y of Wash., Inc., 77 Wn.App. 507, 511 n.2, 892 P.2d 1102, reviewed, 127 Wn.2d 1012 (1995))). Whether the antidiscrimination statute supports a disability based hostile work environment claim is an issue of first impression in this state. In Robel 103 Wn. App. At 86-87, the court hold that the antidiscrimination statue supports a disability based hostile work environment claim, and conclude that the trials court’s unchallenged findings of fact satisfied each element of the claim.

To determine whether the antidiscrimination statute supports a disability claim based on a hostile work environment, we may look to federal cases construing analogous federal statutes. Fahn v. Cowlitz County, 93 Wn.2d 368, 376, 610 P.2d 857, 621 P.2d 1293 (1980). A number of federal courts have considered whether the

Americans with Disabilities Act of 1990 (the ADA, 42 U.S.C. ss 12101) supports a disability claim based on the employer's creation of a hostile work environment. The ADA forbids discrimination that impacts a disabled person's "terms, conditions, and privileges of employment," a phrase likewise found in Title VII of the Civil Rights Act which forbids discrimination based on a person's race, color, religion, sex, or national origin, 42 U.S.C. ss12112(a), ss2000e-2(a)(1). The United States Supreme Court has interpreted the language in Title VII to prohibit harassment that is so "severe or pervasive" as to alter the conditions of employment and create a hostile work environment. *Meritor Sav. Bank, FSB v. Vinson.*, 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 48 (1968). When asked to extend to ADA plaintiffs this same protection afforded under Title VII, most federal courts have recognized a hostile work environment claim under the ADA and have applied the Title VII standards to those claims. *Robel v. Roundup Corp.* 45, 148 Wn.2d 35.

Mr. Apostol's work environment was so "severe or pervasive" as to alter the conditions of employment and create a hostile work environment he had to take Medical Leave.

## Medical Leave.

When Mr. Apostol filed for workers compensation claims for injuries sustained on the job in September 2005 and January 2006 for mental trauma and a fractured left wrist, respectively, the District ended his Medical Leave at the 5<sup>th</sup> month (short of the 6 months allowable as written in the Collective Bargaining Agreement. Medical Leave can be extended up to one (1) year as well). Despite Mr. Apostol's mental and physical disability and unable to return to work and disabled status at the time by Dr Kenneth E. Mayeda and Dr. David Kim, the District terminated Mr. Apostol. This left Mr. Apostol without Medical Benefits he so badly needed for treating the injuries he sustained from his workplace. In addition, the District denied both Industrial Claims which Mr. Apostol sought, therefore, denying Mr. Apostol any medical and wage loss benefits until an investigation by Washington State Labor and Industry was made and any decisions regarding allowable payments and coverage for the injuries Mr. Apostol suffered under the Industrial Insurance Act of Washington State. See Clerk's Papers and CABR.

An issue of what would the proper statute of limitation date for this case be the date of the last discrimination act made by the District when Mr. Apostol was terminated? Would it be the date when the letter is dated of February 29, 2006 or the date in the letter when the District made retroactive Mr. Apostol's termination date back two weeks earlier of February 15, 2006.

The trial court's summary judgment was not supported by factual and substantial evidence produced by Mr. Apostol contained in his Designation of Clerk's Paper and additional evidence contained in the Certified Appeal's Board Record file.

Factual evidence such as Rodolfo Apostol's bone fracture on his left wrist sustained while breaking concrete and cement for four straight hours and specifically ordered by Maintenance Manager George Dicks that I was only to use a sledgehammer and without the use of a jack hammer (the proper tool for the job). If I objected, George Dicks threatened of immediate job termination for insubordination as stipulated in my Final Warning Notice made by General Manager Mike Derrick. Factual evidence such as Medical Documentation letters and certified and signed by Mr. Apostol's attending Physicians were produced and provided and

mailed and faxed to Ronald Wastewater District. See Clerk's Papers and CABR.

Was the information Mr. Apostol supplied from his physician to Ronald Wastewater District adequate for his Medical Leave when nothing in the District's Handbook Guidelines for Medical Leave requirements nor the Collective Bargaining Agreement states or specify the additional information which the District requested.? Did the District failed to accommodate Mr. Apostol disabilities from the claims he just filed when the District terminated his position short of the 6 months Medical Leave as stated in the Collective Bargaining Agreement as well as the District Handbook Guidelines? See Clerk's Papers and CABR)

When a worker is injured and disabled as a result of the on the job injury, would it be proper for an employer to force an injured and disabled worker to return to work for whatever reason stated by the employer? Also, is it proper for an employer to demand all medical details of an injury the worker suffered in the course of employment as well as demanding privileged information between Doctor and patient for decision of a Medical Leave request from an injured worker? Or would the Medical Doctor's signed letter and

present medical diagnosis at the time suffice for the Medical Leave? Did Ronald Wastewater action violated master servant code and acted with malice? And can the resulting termination apply with the multiple claims Mr. Apostol is seeking here in this case?

No.5- There is no questions of fact that Mr. Apostol suffered mentally, physically and emotionally which can be imputed to his former employer, Ronald Wastewater District. The ordeal which he endured left him permanently disabled for life, unemployable, and reduce his quality of life.

Mr. Apostol had sign Medical waiver forms for all Medical Records and Patient Files to opposing counsel to very each medical conditions, ailments, disease, past surgeries, examinations symptoms that all contributes to Mr. Apostol permanent disability.

(Mr. Apostol has been diagnosed with Fibromyalgia and Chronic Fatigue Syndrome as a result from breaking concrete with a sledgehammer specifically ordered by George Dicks Maintenance Manager as well as several digestive disorders.

Since, the question of liability can be imputed to the employer, Ronald Wastewater District, it is reasonably to conclude that claim

for damages can be rule proper and in favor to Plaintiff, Mr.

Apostol. Clerk's Papers.p.44-50.

#### IV Argument

Materials and issues of fact exist to deny Defendant summary judgment on plaintiff's claims for race discrimination, disability discrimination, retaliation, wrongful discharge action and Plaintiff's claims for emotional distress and outrage under RCW 51.24.020.

An appeal from an order of summary judgment requires the appeals court to view the facts of record in the light most favorable to the nonmoving party. CR 56(c); Sea-Pac. Co. v. United Food & Commercial Workers Union 44, 103 Wn.2d 800, 801, 699 P.2d 217 (1985).

Mr. Apostol has provided sufficient evidence of his discrimination allegations that Ronald Wastewater District demoted, denied Mr. Apostol advancement opportunities and discharged Mr. Apostol when he took Medical Leave to recover from injuries he suffered at his workplace.

Ronald Wastewater District reprimand Mr. Apostol and took adverse employment actions against him. Mr. Apostol was placed

on probation, required to take anger management training, his annual longevity pay stripped from his wages. Mr. Apostol was put on suspension for 2-3 days without pay at a time and on one occasion put on 30 days leave without pay, he was berated and humiliated by his superiors and by management in front of co-workers and office staff,

When Mr. Apostol made personal safety complaints to Management concerning his chemical sensitivity disability, his co-workers refused to abide and cooperate with his pleas but instead his co-workers would retaliate by verbal abuse, assaults, threats, damage his personal properties, sabotage his work in which Management did nothing or very little to stop the harassment from continuing.

Management continued intent of discrimination by not promoting Mr. Apostol to position he was qualified in which he applied in the past and made a written statement to his General Manager for advancement opportunities.

The District retaliated against Mr. Apostol when he participated in a union protected activity. Mr. Apostol filed workers compensations claims and took Medical Leave for injuries

he sustained at the workplace, his employer retaliated and soon after terminated his employment

Mr. Apostol was subjected to numerous adverse employment actions which affected his working conditions as well as his wages, pay and benefits. The District removed him from the Standby duty roster, and fostered a hostile work environment and harassed him for discriminatory reasons, and also failed to accommodate his disability and retaliation for filing a workers compensation claim(s), within the limitations period to survive summary judgment. Clerk's Papers (CP) and Certified Appeals Board Records file (CABR) documents in the form of memo, emails, letters, Doctors Reports, grievances, final warning letters, and letters written by Phil Montgomery the General Manager and Gary Shirley Board Commissioner provides the discrimination animus and motive for not promoting Mr. Apostol and the intent to harm and injure Mr. Apostol through by making his working conditions intolerable and attempt to force Mr. Apostol to either quit from the hostile working environment or forcing him to quit by mental, physical and emotional injuries.

Instead, Mr. Apostol became disabled and unable to enter the workforce.

#### Washington Law Against Discrimination (WLAD)

Under Washington's Law Against Discrimination, it is unlawful for an employer to discriminate against any person in the terms or conditions of employment or discharge any employee because of the presence of any sensory, mental, or physical disability. (1) An employer's failure to reasonably accommodate the limitations of a disabled employee constitutes discrimination unless the employer can demonstrate that such an accommodation would result in undue hardship to the employer's business.

A complete file from the Department of Labor and Industries regarding Mr. Apostol's Worker's Compensation Claim he filed in January 2006 from an injury he sustained that previous summer working for the Defendant while braking concrete and cement for four straight hours on Apple Tree Lane Grinder Pumps #18, #19, can all be found in the Certified Appeal Boards Record (CABR). (The copies of the CABR Mr. Apostol received were not numbered; therefore no page number designation can be designated; only the reference of see CABR will be used herein). Additional

Department of Labor and Industry file pertaining to Mr. Apostol's fractured wrist claim can be found at CP p523-546.

A copy of Dr. David Kim's notes for treating Mr. Apostol from January 2006 to April 2006 and disability status and inability to work can be found in the Designation's of Clerks Papers (CP) on page 107-108.

A copy of a letter written by Mr. Apostol to Michael Derrick, General Manager of Ronald Wastewater District and notifying his employer regarding his wrist injury can be found at CP p.106.

A copy of an email written by Mr. Apostol to Michael Derrick and copies sent to along to Robert McCauley, Mr. Apostol's Local Union 763 and Business Agent as well as to the President of Local Union 763 D. Grage, Susan Mindenbergs, an attorney whom Mr. Apostol hired to help him during this time, Tim O'Connell, attorney from the Law Firm of Stoel, Rives representing Ronald Wastewater District (or the "District" for short), and Mr. Montoya, an attorney whom Mr. Apostol was referred from the King County Bar Association Referral Service notifying about the shooting incident when a co-worker pointed a gun inches away to Mr. Apostol's head during a routine morning maintenance staff

meeting on June 1, 2005 causing psychological trauma injury to Mr. Apostol. Later, Mr. Apostol was diagnosed with post-traumatic-stress-disorder or PTSD; can be found in CP p109.

A copy of Ronald's Wastewater District termination letter dated February 28, 2006 to Mr. Apostol, terminating his employment is found in CP p113-114.

#### Disability Discrimination

A person has a "disability" for purposes of a disparate treatment disability discrimination claim under RCW 49.60.180 if the person (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such impairment. A "major life activity" is a task that is central to a person's everyday activities. "Substantially limits" means unable to perform a major life activity that the average person in the general population can perform. Footnote3.

It is evident that Mr. Apostol was injured and disabled when his employer terminated his employment.

A copy of Mr. Apostol's Workmen's Compensation application late September 2006 for a brain injury resulting and due to a hostile work

environment where Mr. Apostol insomnia “disability” prevented him from returning to work is contained in CABR.

Mr. Apostol’s insomnia and eventual diagnosed chronic sleep apnea from Dr. David Chang at the Polyclinic in Seattle can be found in CABD. The report includes a complete overnight sleep study of Mr. Apostol’s brain function during his sleep and other pertinent data regarding Mr. Apostol’s sleeping habits which would impair and limit Mr. Apostol’s daily life activities.

The medical documentation and diagnosis of sleep apnea from Dr. David Chang which Mr. Apostol suffers is identical to Luc Martini, a Boeing employee who sued and prevailed against Boeing for disability discrimination. *Martini v. Boeing Co.*, 137 Wn. 2d 358, [No. 66239-8. En. Banc.]

Luc Martini suffered from sleep apnea and he sought damages from his former employer for disability discrimination.

Superior Court for King County, No. 93-2-17162-5, Charles W. Mertel, J., on October 27, 1995, entered a judgment on a verdict in favor of Martini.

Furthermore, the Washington State Supreme Court held that the plaintiff was not required to prove a separate claim of constructive

discharge in order to be awarded damages for front and back pay, the court affirms the decision of the Court of Appeals. Footnote4.

Therefore, Mr. Apostol is not required to prove a separate claim of constructive discharge to prevail as the Defendant infers in this case in their earlier briefs.

A copy of Dr. Kenneth E. Mayeda letter dated February 14, 2006 for Medical Leave and Unable to Return to Work Status until April 17, 2006, can be found at CP p.111.

During this time Mr. Apostol was indeed disabled from the fractured wrist he sustained the previous summer while breaking concrete cement with a sledgehammer for four straight hours. The injury was not apparent until that fall when Mr. Apostol's noticed his left wrist starting to swell and became red. After several weeks of self treatment of ice therapy failed, Mr. Apostol sought medical treatment and saw Dr. David Chang on early January 2006.

The issue of whether an employer can decline an injured workers request for Medical Leave for injuries sustained in the workplace and with existing District Guidelines and included in the injured workers Collective Bargaining Agreement that states Medical Leave ".....of an 6 months up to one (1) year Medical Leave from which an worker

was injured while on the job. See Ronald Wastewater District Guidelines within CABR as well as the CP p. and determine if the District would be in violation of State as well as Federal Law regarding disallowing Medical Leave to workers who were injured on the job. An act which the District commits here.

The issue of whether or not the District approved or disapproved Mr. Apostol's request for Medical Leave would fall under Washington Law Against Discrimination, Chapter 49.60 RCW.

Once a discharged employee has made out a prima facie case of unlawful employment discrimination under RCW 49.60 and the employer has met its burden of articulating a nondiscriminatory reason for the termination, to withstand a motion for summary judgment the employee must produce evidence that the employer's reason is a mere pretext. *Kohn v. Georgia-Pacific*, 69 Wn. App. 709 850 P. 2d 517, Mar. 1993. [No.28615-3-I. Division One. March 1, 1993.]

Apostol sought treatment for his fractured wrist. Since the District knew Mr. Apostol sought treatment when the Department of Labor and Industry notified the District to verify the injury. (See notes and correspondence contained in CABR).

A letter dated February 8, 2006 from the Department of Labor and Industries, stated “.....the Department called your employer of injury for the exact date of the injury. Your employer does not have an injury report regarding your left wrist for any dates in the fall of 2005. Your employer also informed the department that you never informed him of any injury prior to your last date worked....” CP p.550.

It is evident that Mr. Apostol did inform his employer by letter dated January 24, 2006 written to Mike Derrick regarding his left wrist injury. Clerk’s Papers p.106.

Whether Mr. Derrick received the letter, read the letter or received the letter and did not read the letter or never received the letter of being informed of Mr. Apostol’s left wrist injury, the District did not act upon the Department of Labor and Industries informing them of Mr. Apostol’s injury. The District never contacted Mr. Apostol, neither directly by any mailing, phone calls, neither email nor any other means in regards to Mr. Apostol’s wrist injury he was claiming. The District neither mentions any inquiry with regards to Mr. Apostol’s left wrist injury when requesting Mr. Apostol attendance for a Loudermill meeting. See Clerk’s Papers

The District had three weeks from the date of February 8, 2006 (when the Department called and notified the District of Mr. Apostol's wrist injury claim) to February 28, 2006, the date of the letter written by Mike Derrick District informing Mr. Apostol the District terminated his employment retroactive on the date of February 15, 2006

In this letter the District further articulated a reason for the termination.

To withstand a motion for summary judgment Mr. Apostol must produce evidence that the employer's reason is a mere pretext. *Kohn v. Georgia-Pacific*, Mar. 1993. [No. 28615-3-I. Division One. March 1, 1993.]

The denial of advancement opportunities were demonstrated by the District by not promoting Mr. Apostol to the Technical Support/Technical Support Specialist stem from the discrimination animus and "smoking gun" evidence of letters written by General Manager Phil Montgomery and Gary Shirley, Member of the Board of Commissioners for Ronald Wastewater District.

A letter stamped CONFIDENTIAL written by Phil Montgomery, General Manager reflecting a meeting held on Oct. 31, 1995 @ 10:00 am between Rodolfo (Doddy) Apostol and Phil Montgomery to advise

selection of candidate to fill new position of Technical Support. Mr. Montgomery stated “.....Verbal communication skills will be a key factor in the requirements of this new position. I felt this was one area that Doddy needs to work to improve, and other candidates being considered were much stronger.....Another essential function of the new position is in the area of Computer problem solving.....” Letter located in CABR.

#### CONCLUSION

Mr. Apostol ask for relief from this court by making a motion and REVERSE summary judgment ruling from Hon Judge Jeffrey Ramsdell in Superior Court of King County and REMAND all claims to trial court to CLAIM FOR DAMAGES stated in Clerk’s Paper p. 44-50.

For noneconomic damages pain and suffering, mental anguish Mr. Apostol seeks an amount total of sixteen million dollars.

December 1, 2010

Respectfully submitted,

 12/1/2010

Rodolfo M. Apostol, pro se  
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Lacey, WA 98503

NO. 65434-9-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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RODOLFO APOSTOL, Appellant

vs.

RONALD WASTEWATER DISTRICT, Respondent.

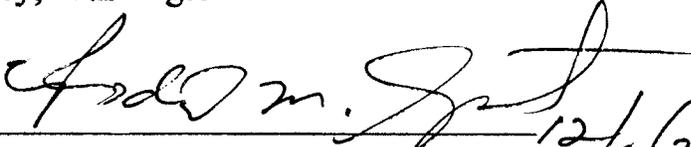
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CERTIFICATE OF MAILING

On December 1, 2010, at Seattle, Washington, I deposited in the United States mail a properly addressed, postage prepaid envelope, containing a copy of the Brief of Appellant Rodolfo Apostol directed to: Daniel P. Mallove, Law Ofc. Of Daniel P. Mallove PLLC, 2003 Western Ave. Ste. 400, Seattle, WA 98121-2142 and to: Scott Royal Sawyer, Law Ofc., of Daniel P. Mallove, PLLC, 2003 Western Ave. Ste. 400, Seattle, WA 98121-2142.

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

Dated: December 1, 2010, at Lacey, Washington

  
Rodolfo M. Apostol, pro se

12/1/2010