IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RODOLFO M. APOSTOL, Appellant, v. RONALD WASTEWATER DISTRICT, a King County municipal corporation, Respondent.	)))))))))	NO. 65434-9-I DIVISION ONE UNPUBLISHED OPINION FILED: July 5, 2011

Lau, J. — Former maintenance technician Rodolfo Apostol sued the Ronald Wastewater District (the District), alleging discrimination based on race, disability, and retaliation for (1) "engaging in organized/union activities," (2) reporting a hostile work environment, and (3) filing a workers' compensation claim. But because Apostol's claims are either time barred or he fails to present admissible evidence to establish a prima facie case, we affirm the trial court's orders granting the District's summary judgment motions on all claims.

FACTS

Viewing the evidence and reasonable inferences most favorably to Apostol, the evidence shows the District hired Rodolfo Apostol in 1994 as a maintenance technician. On December 12, 2002, Apostol filed discrimination charges with the

Washington State Human Rights Commission and Equal Employment Opportunity Commission (EEOC), alleging a "discriminatory event that took place on June 1, 2002." Apostol, of Filipino descent, claimed he expressed an interest in a technical support position but that the District hired a lesser skilled, Caucasian person. The District responded that Apostol's complaint followed its final warning review for Apostol's inappropriate workplace behavior and breach of safety regulations. It also cited Apostol's long record of unacceptable workplace behavior that disqualified him from consideration for the position.

On June 3, 2003, the EEOC issued a dismissal and notice of rights, which found no established statutory violation. The notice also informed Apostol that he had 90 days to file a lawsuit against the District or his right to sue based on the discrimination charges would be barred. The notice provided, "The time limit for filing suit based on a state claim may be different." Apostol filed no suit within the 90 days.

On January 4, 2004, Apostol gave District general manager Michael Derrick a memo, claiming "verbal abuse and harassment by [co-worker] Jason Sharpe." The District investigated these allegations and then called a meeting attended by Sharp and Apostol. Apostol and Sharp agreed to maintain a professional demeanor when working together.

In January 2005, Apostol sent three e-mails to Derrick, alleging unfair treatment and harassment by maintenance manager George Dicks and maintenance crew members. A meeting occurred on February 24, 2005, attended by Apostol, Derrick,

and Dicks. After the meeting, Derrick investigated Apostol's allegations by interviewing his co-workers. In addition, the District hired a human resources firm to investigate Apostol's harassment complaint. Apostol declined to participate in this outside investigation. The investigator found no basis for Apostol's harassment claims. Therefore, on May 18, 2005, the District sent Apostol a letter warning him that false accusations could lead to discipline, including possible termination.

On September 21, 2005, Derrick met with Apostol and Dicks to discuss safety concerns relating to Apostol's performance during flagging operations. Derrick and Dicks presented Apostol with a letter describing the District's concerns. Apostol refused to sign the letter and left the workplace during the meeting. He did not return to work for the next two days. On September 26, Apostol sent an e-mail to Derrick, stating, "[A]s of September 22, 2005, I will be taking medical leave until further notice." On the same day, Apostol filed a Department of Labor and Industries (DLI) disability claim for a psychological condition, which DLI later denied.[1] On January 24, 2006, Apostol filed a separate workers' compensation claim for a fractured wrist reportedly caused by using a sledgehammer to break concrete. To support this claim, he

[1] Division Two of this court affirmed the denial in Apostol v. Board of Industrial Appeals, noted at 153 Wn. App. 1027, 2009 WL 4646157. The Department's findings described the September 21 meeting as follows: "The September 21, 2005 meeting . . . was a verbal exchange that was not violent, vulgar, abusive, or constituted a physical threat to Mr. Apostol's safety or well-being. This meeting was held to present Mr. Apostol with a letter requesting improvement in his work performance and management's desire for Mr. Apostol to improve his work performance." Apostol, 2009 WL 4646157, at *2. Although we view all evidence and inferences from the evidence in the light most favorable to Apostol, Apostol cites no evidence in the record that the meeting involved yelling, vulgarities, or other offensive conduct.

submitted an April 4, 2006 letter to the DLI. In that letter, he stated that his injury resulted from breaking concrete at work with a sledgehammer on August 1, 2005. Apostol never returned to work with the District. Despite the District's requests for physician certification of his inability to return to work, he provided insufficient documentation to meet the District's requests.[2] He did not attend a Loudermill hearing scheduled for February 23, 2006.[3] Five days later, the District terminated his employment on February 28, 2006. The District acknowledged at oral argument to this court that it knew about the workers' compensation claims when it terminated Apostol.[4]

Apostol sued the District on August 28, 2008, alleging 13 claims.[5] The District

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[2] Apostol attached several unauthenticated and unsworn documents purportedly from his doctor to his summary judgment response. One was a letter dated February 14, 2006, stating that Apostol "has been unable to work all this time and will probably not be able to return to work until April 17, 2006. He is under stress and has insomnia. The stress seems to originate from the work place, which he finds very hostile. It sounds like it is a very nonsupportive environment. He feels physically threatened. He feels he has been harassed. Because of the adverse working conditions, I recommend he not work at this time until the situation is resolved." A second letter, dated February 15, 2006, stated that Apostol's work status was "full disability" until follow-up. A third letter, dated March 15, 2006, stated that Apostol "had a left wrist stress fracture directly related to work on 9/21/05."

[3] A Loudermill hearing is a due process requirement for certain government employees that allows an employee an opportunity to be heard before termination. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-45, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

[4] Based on our review of the record, the DLI initially denied the wrist injury claim on February 8, 2006. However, it appears the Department later allowed the claim and paid benefits for the period between January 4, 2006, and April 25, 2006.

[5] Apostol alleged the following claims:
"A. Freedom from discrimination–Declaration of civil rights. RCW 49.60.030"
"B. Hostile work environment, public policy mandate the Washington law

first moved for partial summary judgment to dismiss 10 claims (A, D, E, F, G, H, J, K, L, and M) on statute of limitations grounds.[6] On March 12, 2010, the trial court granted the District's motion, ruling the three year statute of limitations barred Apostol's claims A, D, E, F, G, H, and J. As to claims K, L, and M, the court dismissed these claims as a matter of law due to Apostol's failure to raise prima facie fact issues. The District then moved to dismiss as a matter of law Apostol's remaining B, C, and I claims, which the court granted on April 23, 2010. Apostol appeals.

Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). A court will grant

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against discrimination RCW 49.60; based on race RCW 49.60.180, .030(1)(a), .010 and retaliation. Continuing violation doctrine."

"C. Washington law against discrimination continuing violation doctrine personal injury actions RCW 4.16.080(2)"

"D. Disability discrimination–failure to accommodate–RCW 49.60."

"E. Disability discrimination–race discrimination–RCW 49.60–disparate impact"

"F. Disability discrimination–race discrimination–RCW 49.60–disparate treatment"

"G. Retaliation for opposing a discriminatory practice–RCW 49.60.210 when plaintiff reported the hostile work environment"

"H. Disability harassment–RCW 49.60–disparate treatment"

"I. Retaliation for filing a workers' compensation claim"

"J. Retaliation for engaging in organized/union activity"

"K. Negligent infliction of emotional distress (RCW 51.24.020)"

"L. Intentional infliction of emotional distress/outrage (RCW 51.24.020)"

"M. Constructive discharge"

(Capitalization omitted.)

[6] For clarity, this opinion adopts the District's briefing using letter designations for each claim.

such a motion if, after considering the evidence in the light most favorable to the nonmoving party, reasonable persons could reach but one conclusion. Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). The nonmoving party may not rely on bare allegations in the pleadings but must set forth specific facts showing a genuine issue of material fact exists for trial. Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Similarly, a party may not defeat a motion for summary judgment based on speculation, conjecture, or mere possibility. Chamberlain v. Dep't of Transp., 79 Wn. App. 212, 215-16, 901 P.2d 344 (1995). If the plaintiff fails to show the existence of an element essential to his or her case and on which the plaintiff will bear the burden of proof at trial, then the moving party is entitled to judgment as a matter of law. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The appellate court reviews the trial court's ruling de novo, engaging in the same analysis as the trial court. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

ANALYSIS

Apostol argues that issues of fact remain on all his claims.[7] The District counters that all of Apostol's claims are either barred by the statute of limitations or are unsupported by evidence necessary to establish a prima facie case.

Pro se litigants are held to the same standard as attorneys. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). An appellant should provide

[7] Apostol appeared pro se below and on appeal to this court.

"argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). Arguments unsupported by reference to the record or citation to authority need not be considered. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Appellate courts are also not required to search the record to locate the portions relevant to a litigant's arguments. See Cowiche, 118 Wn.2d at 819. And "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

We note, with minor exceptions, Apostol fails to comply with the rules cited above and presents no reasoned argument addressing the statute of limitations question or his failure to raise fact issues to survive summary judgment.

In addition, most of the letters Apostol submitted with his summary judgment opposition brief below are neither sworn to nor authenticated, which renders them inadmissible and insufficient to defeat summary judgment. See CR 56; Spokane Research & Defense Fund v. Spokane County, 139 Wn. App. 450, 459, 160 P.3d 1096 (2007). A signature alone is insufficient to authenticate a document. Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 364-67, 966 P.2d 921 (1998). The District moved to strike Apostol's evidence because it was untimely filed, unsworn, and contained hearsay.[8] The trial court granted the motion to strike, and Apostol assigns

[8] The District moved to strike "various portions of evidence submitted by plaintiff." The District explained that because Apostol filed his summary judgment

no error to this ruling. Accordingly, we decline to consider this evidence. But even if we considered this evidence, it creates no genuine issue of material fact on his claims.

Claims for Discrimination Under Chapter 49.60 RCW—Claims A, D, E, F, G, and H[9]

Apostol alleges six claims under chapter 49.60 RCW.[10] The three year statute of limitations applies to chapter 49.60 RCW claims. Antonius v. King County, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004). The record undisputedly shows Apostol filed his complaint against the District on August 28, 2008. To avoid the statute of limitation bar, Apostol must show discrimination occurred after August 28, 2005.

Disability Discrimination

As to claims D, E, F, and H, Apostol alleged various disability discrimination claims against the District, which the court dismissed as barred by the applicable three year statute of limitations.

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opposition late, "it is impossible to address each of the deficiencies in the evidence submitted by plaintiff in opposition to defendant's motion." The District specifically objected to a letter by Apostol's co-worker, Steve Paulis, wherein Paulis suggests he witnessed "remarks and incidents related to harassment as well as discrimination . . . ." The letter was unsworn and, regardless, cites no incident occurring within the three-year statute of limitations of Apostol's claims. The District also specifically moved to strike Apostol's references to having a brain injury and mental disability because those injuries were unsupported by evidence in the record.

[9] To the extent that Apostol alleges other claims under chapter 49.60 RCW, those are dealt with in other sections of this opinion.

[10] The statute prohibits "discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability . . . . " See RCW 49.60.030.

1. Failure to Accommodate—Claim D

> To establish a prima facie case for failure to reasonably accommodate a disability, the employee must show that (1) he or she had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) he or she was qualified to do the job; (3) he or she gave the employer notice of the abnormality and its substantial limitations; and (4) after notice, the employer failed to adopt available measures that were medically necessary to accommodate the abnormality.

Becker v. Cashman, 128 Wn. App. 79, 84, 114 P.3d 1210 (2005).

During his employment, Apostol first claimed a sensitivity to certain chemical fumes in December 1996. In response, the District permitted Apostol to work outside certain areas when painting or other jobs were taking place and upgraded its equipment to control exhaust fumes. Apostol's only chemical sensitivity claim during the latter half of 2005 related to his work with "RootX," a herbicide that maintenance workers applied in sewer lines. George Dicks asked Apostol to apply RootX on July 19, 2005. When Apostol declined to apply the herbicide, he was assigned to other duties. Eventually, he agreed to work with RootX, using a mask, safety glasses, and rain gear.

After August 28, 2005, the record shows no evidence that the District failed to accommodate Apostol due to his chemical sensitivity. His September 26, 2005 disability claim made no mention of chemical sensitivity.

Similarly, Apostol fails to cite any evidence to support the District's alleged failure to accommodate his alleged wrist fracture. He cites no admissible evidence that before his termination, he gave notice to the District about the fracture and the District

failed to accommodate this condition. Apostol also cites no evidence to support any claim that the District failed to accommodate his alleged psychological disability. Accordingly, the trial court properly dismissed these claims as a matter of law.

2. Disparate Impact—Claim E

> A claim for disparate impact addresses facially neutral employment practices that fall more harshly on one group than another and that cannot be justified by business necessity. . . . To establish a prima facie case of disparate impact, the plaintiff must prove (1) a facially neutral employment practice that (2) falls more harshly on a protected class.

Clarke v. State Attorney General's Office, 133 Wn. App. 767, 783, 138 P.3d 144 (2006).

In opposing summary judgment, the record shows Apostol provided no evidence that any District policy or practice fell more harshly on disabled persons than nondisabled persons or that any such practice occurred after August 28, 2005. Accordingly, the court properly dismissed this claim on summary judgment.

3. Harassment/Disparate Treatment—Claims F and H

Apostol alleged adverse employment action by the District because of his disability. RCW 49.60.180 prohibits employers to "refuse to hire," "discharge or bar any person from employment," or "discriminate against any person in compensation or in other terms or conditions of employment" because of "any sensory, mental, or physical disability." Washington courts apply a three-part burden shifting analysis.[11]

[11] "Washington courts have adopted the McDonnell Douglas/Burdine three-part burden allocation framework for disparate treatment cases. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

The first step requires the plaintiff to prove a prima facie case. As discussed above, Apostol's termination is the only nontime barred claim. To establish a prima facie case based on termination due to his disability, Apostol must establish (1) he was disabled, (2) he was able to perform his job, (3) he was fired and not rehired, and (4) a nondisabled person was hired. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004).

Even assuming sufficient evidence of a disability, the record shows that Apostol presented no admissible evidence to establish an ability to perform his job, he was fired and not rehired, and the District replaced him with a nondisabled worker. We conclude the court properly dismissed this claim.

Racial Discrimination

1. Disparate Impact—Claim E

To establish a prima facie case based on disparate impact, Apostol must show an employment policy or practice by the District that may be neutral or nondiscriminatory on its face but has a disproportionate or disparate impact on a protected class. Shannon v. Pay 'N Save, 104 Wn.2d 722, 727, 709 P.2d 799 (1985).

"Under McDonnell Douglas/Burdine, the plaintiff has the initial burden to prove a prima facie case. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to present evidence of a legitimate nondiscriminatory reason for its actions. The burden then shifts back to the plaintiff to produce evidence that the asserted reason was merely a pretext. The plaintiff carries the ultimate burden at trial to prove discrimination was a substantial factor in employer's actions. But to survive summary judgment [the employee] need show only a reasonable judge or jury could find his disability was a substantial motivating factor for the employer's adverse actions." Hines v. Todd Pac. Shipyards Corp., 127 Wn. App. 356, 370-71, 112 P.3d 522 (2005) (citation omitted).

The only such practice identified in Apostol's complaint is "imposing discipline." But Apostol produced no evidence of any District policy or practice of disciplining (or not promoting employees) that resulted in a disproportionate impact on persons of Filipino descent or that any such policy or practice occurred or was in place after August 28, 2005. Accordingly, the court properly dismissed this claim.

2. Disparate Treatment—Claim F

"Disparate treatment" occurs when the employer treats some people less favorably than others because of their race, color, religion, sex, national origin, or other prohibited characteristic. Shannon, 104 Wn.2d at 726.

> To establish a prima facie case of racial discrimination based on disparate treatment, a plaintiff must show that his or her employer treats some people less favorably than others because of his/her race. The plaintiff must show (1) [he or] she belongs to a protected class, (2) [he or] she was treated less favorably in the terms or conditions of her employment than a similarly situated, nonprotected employee, and (3) [he or] she and the nonprotected "comparator" were doing substantially the same work.

Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 81, 98 P.3d 1222 (2004). Alternatively, an employee may also "provide direct evidence that defendant acted with a discriminatory motive and that the discriminatory motivation was a "significant or substantial factor in an employment decision . . . ." Kastanis v. Educ. Employees Credit Union, 122 Wn. 2d 483, 491, 865 P.2d 507 (1993) (quoting Buckley v. Hosp. Corp. of Am., Inc., 758 F.2d 1525, 1529, (11th Cir. 1985)).

Apostol alleged that (1) he was treated less favorably than Caucasian employees, (2) he was more qualified than Caucasian employees who worked in or

applied for the same positions, and (3) he was not promoted or was given "extraordinary job duties" because of his race. In answers to interrogatories, Apostol identified five employees he claims the District promoted over him because of race. But the record undisputedly shows these promotions all occurred more than three years before he filed his complaint.[12]

In response to the District's interrogatories, Apostol also identified as discriminatory the following acts by the District's maintenance manager, George Dicks: being ordered to break concrete with a sledge hammer; being told to dig ditches and sewer lines on private property; being removed from "standby duty," (overtime) was taken away; not being allowed to drive the Vactor truck; and being told to pick up "parts and pieces" at Apple Tree Lane. The record similarly shows these alleged acts of discrimination all occurred before August 28, 2005. Apostol also cites no evidence of a race based termination, a discriminatory motive, or replacement by a person outside the protected group. Accordingly, the court properly dismissed this claim.

Other Claims

1. Retaliation for Lawful Activity—Claim J

Apostol alleges that the District retaliated against him because he engaged in union activity. Specifically, he argues, "Maintenance staff of [the District] met and

[12] (1) Mark Dewey for a technical specialist position (1995), (2) Al Dann for a technical specialist position (1999), (3) Mark Neumann for a technical specialist position (2002), (4) Charlie Brooks for a crew chief position (2002), and (5) Jessie Peterson for a technical specialist position (2004).

oppose[d] management to work for the City of Shoreline's storm drain in its City limits. I was the only one that was penalized with adverse employment conditions. By demotions, thirty day suspension, put on 1 year probation period, and bonus pay taken away." An employee who suffers adverse employment action through participation in union activities may maintain a claim for the tort of wrongful discharge in violation of public policy. Smith v. Bates Technical Coll., 139 Wn.2d 793, 807, 991 P.2d 1135 (2000). Such claims are subject to a three year statute of limitations. RCW 4.16.080.

The record shows the actions alleged above by Apostol occurred in December 2004. Accordingly, his retaliation claim is time barred. And he makes no argument and cites no evidence that his union activities caused his termination.

2. Negligent and Intentional Infliction of Emotional Distress Pursuant to RCW 51.24.020—Claims K and L

Apostol alleges negligent infliction of emotional distress and outrage under RCW 51.24.020, which provides:

> If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation of benefits paid or payable under this title.

(Emphasis added.)

To avoid the Industrial Insurance Act's protection for employers from civil suits, an employee must prove (1) the employer had certain knowledge injury would occur and (2) the employer willfully disregarded that knowledge. Unless a reasonable jury

could conclude that both prongs are met, summary judgment is appropriate. Judy v. Hanford Envtl. Health Found., 106 Wn. App. 26, 31, 22 P.3d 810 (2001). "Neither gross negligence nor failure to observe safety procedures and laws governing safety constitutes a specific intent to injure." Birklid v. Boeing Co., 127 Wn.2d 853, 860, 904 P.2d 278 (1995). Because Apostol presented no evidence to establish these claims, the court properly dismissed his RCW 51.24.020 claims.

3. Hostile Work Environment and Retaliation for Reporting Hostile Work Environment—Claims B and G

To establish a claim for hostile work environment, a plaintiff must prove that harassment (1) was unwelcome, (2) was because he or she is a member of a protected class, (3) affected the terms and conditions of his or her employment, and (4) was imputable to his or her employer. Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 84, 98 P.3d 1222 (2004).[13] To satisfy the third element, the harassment must be sufficiently pervasive so as to alter his or her working conditions. Washington v. Boeing Co., 105 Wn. App. 1, 10, 19 P.3d 1041 (2000). It is not sufficient that the

[13] An employee may also prove retaliation for reporting a hostile work environment. See RCW 49.60.210. To show a prima facie case for retaliation, the employee must show that (1) he or she opposed an activity forbidden by the Washington Law Against Discrimination, (2) the defendant took an adverse employment action against him or her, and (3) retaliation was a substantial factor behind the adverse employment action. Balkenbush v. Ortho Biotech Prods., LP, 653 F. Supp. 2d 1115, 1122 (E.D. Wash. 2009). But if the employee fails to demonstrate that the reasons given by the employer discharge are not worthy of belief with evidence, the employer is entitled to dismissal as a matter of law. Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 619, 60 P.3d 106 (2002). Because Apostol cites no such evidence here, the court properly dismissed the retaliation claim.

conduct is merely offensive. Adams v. Able Bldg. Supply, Inc., 114 Wn. App. 291, 296, 57 P.3d 280 (2002). The statute of limitations for actions involving a hostile work environment based on discrimination is three years. Antonius, 153 Wn.2d at 261-62.

Apostol assigns error to the court's failure to apply the continuing violation doctrine, arguing he is entitled to recover damages based on acts occurring prior to August 28, 2005. In Antonius, our Supreme Court rejected the continuing violation doctrine in favor of the analysis set forth in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). Adopting the Morgan analysis, the Antonius court held that where discreet acts of discrimination are alleged, the limitations period runs from the date of the discreet acts. For a hostile work environment claim, however, conduct throughout the time when the acts occurred may be considered, provided the plaintiff presents evidence that (1) one or more of the discriminatory acts took place within three years of when the complaint was filed, and (2) the acts about which the employee complains are part of the same actionable hostile work environment practice.

Because undisputed evidence shows Apostol left the workplace on September 21, 2005, any hostile act must necessarily have occurred between August 28, 2005, and September 21, 2005, to be timely. But Apostol offered no evidence that any harassment occurred within this period.[14] The undisputed evidence

[14] Although Apostol asserted at oral argument on appeal that the September 21 meeting was a form of harassment, he cites no evidence, admissible or otherwise, supporting his contention.

shows that when the District presented Apostol with a letter outlining its concerns with his flagging operations, Apostol refused to sign the letter and walked off the job. Apostol also cites no evidence in the record that harassment, if any, was because of his race or a disability. And even if evidence existed showing hostile acts by the District's employees between August 28, 2005, and September 21, 2005, Apostol produced no evidence that the District knew about any such conduct by its employees during this period, as required by Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 853-54, 991 P.2d 1182 (2000). The record contains no evidence demonstrating that Apostol notified the District about hostile conduct during this period. The court properly dismissed Apostol's hostile work environment claim as a matter of law.

4. Worker's Compensation Retaliation Claim—Claim I

An employee may file a wrongful discharge claim against an employer who retaliates against him or her for filing a workers' compensation claim.[15] Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 53, 821 P.2d 18 (1991). "Proximity in

[15] Under RCW 51.48.025, an employer may not discharge or in any manner discriminate against any employee because the employee has filed, or communicated to the employer an intent to file, a claim for workers' compensation benefits. This anti-retaliation statute allows an employee to file a complaint with the director of the Department of Labor and Industries alleging discrimination within 90 days of the date of the alleged violation. However, filing a claim with DLI is not a condition precedent to initiation of a common law cause of action against the employer for retaliatory discharge. Wilmot, 118 Wn.2d at 53.

time between the protected activity and the employment action when coupled with evidence of satisfactory work performance supports an assertion of retaliatory motive." Anica v. Wal-Mart Stores, Inc., 120 Wn. App. 481, 491, 84 P.3d 1231 (2004). Once the employee makes this prima facie showing, "the employer must articulate a legitimate reason for the discharge that is neither pretext nor retaliatory." Anica, 120 Wn. App. at 492. "The employee may respond to the employer's legitimate reason by showing that the reason is pretext or by showing that although the employer's stated reason is legitimate, the employee's pursuit of workers' compensation benefits was a substantial factor motivating the employer to fire the employee. Anica, 120 Wn. App. at 492.

On September 26, 2005, Apostol filed a claim for disability with the Department of Labor and Industries for his psychological condition. The Department later denied the claim (after Apostol's termination). And on January 24, 2006, Apostol also made a claim for a fractured wrist purportedly caused by using a sledgehammer to break concrete. By letter dated the same day, he notified the District about this injury. The District terminated Apostol's employment February 28, 2006.

The District acknowledged at oral argument before this court that the closeness in time between Apostol's workers' compensation claims and his termination shifted the burden of production to the District.[16] But here, the District provided a legitimate reason for Apostol's termination—abandonment of the job and failure to provide

[16] Although the District conceded that Apostol established this prima facie showing, our review of the record reveals no evidence that Apostol's work performance was satisfactory at the time of his 2006 termination. Apostol attached to his summary opposition strong performance evaluations only for 2002 and before.

adequate documentation of his inability to work. Summary judgment is appropriate when no rational trier of fact could find that a substantial factor in termination of an employee was the employee's filing of a workers' compensation claim. See Anica, 120 Wn. App. at 494. Once the District met its burden of production by stating a legitimate reason for termination, Apostol was required to show either some evidence of pretext or evidence that filing a workers' compensation claim was a substantial factor in his termination. He made neither showing. Because of the absence of evidence here, no reasonable trier of fact could find that retaliation for filing a workers' compensation claim constituted a substantial factor in the District's decision to terminate Apostol or that the District's

stated reasons are mere pretext. Accordingly, the trial court properly granted summary judgment on this claim.

5. Constructive Discharge-Claim M

Apostol also alleges constructive discharge by the District.[17] But as discussed above, the undisputed evidence shows he was terminated for cause—failure to provide

[17] To prove constructive discharge, Apostol must show (1) the employer deliberately made the employee's working conditions intolerable, (2) a reasonable person would be forced to resign, (3) the employee resigned solely because of the intolerable conditions, and (4) the employee suffered damages. Campbell v. State, 129 Wn. App. 10, 23, 118 P.3d 888 (2005).

proper medical documentation that he was unable to work and walking off the job without legitimate cause. Accordingly, his constructive discharge claim fails.

CONCLUSION

Because Apostol's claims are either time barred or he fails to present admissible evidence to establish a prima facie case, we affirm the trial court's orders granting summary judgment dismissing all claims.

Dwyer, J.

WE CONCUR:

Leach, A.C.J.

Grosse, J.