Gay v. Snohomish County

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Court of Appeals Division I

State of Washington

Opinion Information Sheet

Docket Number: 44042-0-I

Title of Case: Richard Gay, Respondent

v.

Snohomish County, Appellant

File Date: 01/16/2001

SOURCE OF APPEAL

Appeal from Superior Court of King County

Docket No: 95-2-22169-6

Judgment or order under review

Date filed: 12/23/1998

Judge signing: Hon. William L. Downing

JUDGES

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

RICHARD GAY,)

) DIVISION ONE

Respondent,)

) NO. 44042-0-I

vs.)

)

COUNTY OF SNOHOMISH,) UNPUBLISHED OPINION

)

Appellant.) FILED:

)

BAKER, J. - Richard Gay was terminated from his job as a solid waste laborer for Snohomish County following several extended periods during which he was unable to work or restricted to light duty due to medical problems. Gay filed suit, alleging that he was terminated because of his disability and that the County failed to reasonably accommodate his disability. The jury refused to find that Gay was unlawfully discharged, but did find that Gay was discriminated against by the County's failure to reasonably accommodate his disability. The County appeals, arguing that Gay failed to present substantial evidence that the County failed to reasonably accommodate him, and also challenging certain jury instructions, evidentiary issues, and the award of fees and costs to Gay. We affirm the jury verdict, but reverse and remand for a new trial on damages and for a revision of the award of attorney fees and costs.

I

Richard Gay began working as a site attendant for Snohomish County's Solid Waste Division in 1975, and was promoted to Laborer I in 1977. This job required Gay to perform tough physical labor such as shoveling garbage. In 1984, Gay sustained a hernia while on the job. Gay had two surgeries, but continued to complain of debilitating groin pain. Gay returned to work with instructions from his doctor to avoid heavy lifting, but his supervisor John Costa told him that he 'had to be able to do the full scope of {the} job or not at all.' Other workers testified that Costa did not believe in light duty for injured workers, preferring that they be accommodated by obtaining less physically demanding jobs with the County

until released to return to their regular duties.

Gay again went on time loss late in 1987 due to his continuing groin pain. When Gay's doctor released him for light duty, the County temporarily moved Gay to a lower paying, relatively sedentary site attendant position. During this time, Gay was diagnosed with claudication of the leg, a vascular disease involving a narrowing of the arteries. Apparently, the condition did not prevent him from working as a site attendant.

After 17 months as a site attendant, Gay was released to full duty and he returned to work as a laborer. A few weeks later, Gay was diagnosed with degenerative arthritis in his legs, and his doctor restricted him from climbing ladders greater than six feet or changing trailers. Costa asked Gay to obtain his doctor's release for a return to light duty as a site attendant. But Gay did not want to return to that lower-paying job, so he asked his doctor to lift the ladder restriction and had his attorney ask Costa to retain him as a laborer. The doctor removed the ladder restriction and Gay kept his laborer position.

The following year, Gay injured his knee in a fall at work and was unable to work for several weeks. Ten months later he underwent exploratory knee surgery. The surgery confirmed that Gay had degenerative arthritis, but without a need for surgical repair, and Gay was released for regular work. However, he soon returned to industrial leave after being diagnosed with phlebitis (blood clots) in his left leg. Gay's doctor eventually released him for modified work, but Gay never returned to his regular laborer position.

The County retained a vocational rehabilitation counselor for Gay. The

counselor discussed the site attendant position with Gay, but he said he could not do that job because it was too strenuous. Gay then spoke to County safety officer Mike Hoyt about applying for a position as Transfer Site Operator (TSO), which paid more than site attendant and was more physically demanding. Gay did not get the job. Gay then turned to the director of solid waste for the County, claiming that no one was trying to put him back to work. This contact resulted in several temporary light duty office assistant positions for Gay, which did not require him to take any of the tests required to establish eligibility for permanent employment in the positions.

In the fall of 1992, approximately one year after Gay last worked as a laborer, the County terminated Gay's employment. The termination letter stated that Gay was being laid off because his disability leave duration limit had expired and he was not medically able to resume the duties of his position or any other position with the County. Bridget Clawson, the County human resources director, testified that she thought Gay would never be able to return to work as a laborer because Gay's doctor had issued notes and certifications of disability in 1991 and 1992 detailing significant, ongoing restrictions on Gay's ability to do physical labor. She also noted that Gay had applied for long-term disability insurance benefits and that according to those applications, his doctor 'never' expected a fundamental or marked change in Gay's condition.

Following his termination, the County continued to provide Gay with workers' compensation payments and vocational services. Gay's vocational rehabilitation counselor again suggested the site attendant position, but

Gay rejected it as 'too stressful.' The counselor prepared a vocational rehabilitation plan, and Gay completed a course to acquire skills needed for entry-level office positions. The County told Gay about an open Office Assistant II position, but he failed both of the tests required to qualify. The County also held a courier position open for Gay, but withdrew it after Gay's doctor restricted him from lifting more than 30 pounds.

Gay opened a drive-up espresso stand business in 1993. The business proved successful, and Gay opened a second stand in 1997.1 Nevertheless, Gay and his counsel met with a County personnel director and employee specialist in 1993 to consider employment accommodation for Gay. Gay was also sent to a doctor for an evaluation of his limitations. The doctor concluded that Gay could return to his laborer job, but only with numerous modifications.2

Gay applied for a County site attendant position but failed the qualifying test. He also failed his second attempt at the office assistant tests. He passed the test for a laborer position, but did not respond to the County's request for medical information and was not offered a job.

Gay then filed this suit, alleging disability and age discrimination and retaliation under RCW 49.60 and federal law. After the County removed the case to federal court and Gay stipulated to dismissal of his federal claims, the federal court remanded the case. The trial court granted summary judgment to the County on Gay's age and retaliation claims, but allowed Gay's disability claim to proceed to trial. The jury found that Gay was not discriminated against by being terminated because of a disability, but that the County had discriminated against Gay by failing to reasonably accommodate his disability. The jury awarded back pay and

emotional distress damages, but no front pay. The court entered judgment and awarded attorney fees and costs to Gay, but denied his motions for reinstatement and injunctive relief. The court denied the County's motion for judgment as a matter of law or a new trial. The County appeals.

II

The County contends that the trial court erred in denying its motion for judgment as a matter of law because there is insufficient evidence in the record to show that it failed to reasonably accommodate Gay either before or after he was terminated from his Laborer I position.

The appellate court applies the same standard as the trial court when reviewing the trial court's decision to deny a motion for judgment as a matter of law.3 Judgment as a matter of law is appropriate if, when viewing the material evidence most favorable to the nonmoving party, there is no substantial evidence to sustain a verdict.4 Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise.5

Under Washington's law against discrimination (WLAD), it is an unfair practice for an employer to discharge or otherwise discriminate against any person because of a disability.6 To establish a prima facia case of handicap discrimination, an employee must prove that he or she (1) has a disability; (2) could perform the essential functions of the job with or without reasonable accommodations; and (3) was not reasonably accommodated.7 Employers have an affirmative obligation to reasonably accommodate the disability unless the employer can demonstrate that the accommodation would

cause undue hardship on the employer's business.8 However, an employer does not discriminate by denying a job to a handicapped person who is not qualified to perform it,9 or 'if the particular disability prevents the proper performance of the particular worker involved.'10 Furthermore, an employer is not required to eliminate the essential functions of a job in order to provide reasonable accommodation.11 The employee has a corresponding duty to make the employer aware of his qualifications, to apply for all jobs that might fit his abilities, and to accept reasonably compensatory work he could perform.12

Gay argues that the County failed to reasonably accommodate him because he was qualified for many positions that the County was seeking to fill. Gay's expert witness, vocational rehabilitation counselor Stanley Owings, testified that he found 57 County job openings available from October 1991 through October 1992 for which he believed Gay should have been considered, including five manual labor jobs: Laborer, TSO, Site Attendant, Courier, and Parking Attendant. Gay further contends that the County failed to take appropriate affirmative steps to help him find an alternative position after he was discharged from his laborer job.

There are serious questions as to whether Gay met his burden of proof to show that he was qualified or able to perform the essential functions of most of the jobs he claimed the County should have considered him for. But we need not decide whether Gay failed on his burden of proof as to each job. The County did not request a limiting instruction designed to eliminate from the jury's consideration those jobs for which Gay failed to present substantial evidence that he was qualified, nor did it move for

judgment as a matter of law before the case went to the jury. Furthermore, the County did not object to Instruction 10, which allowed the jury to determine the essential functions of each job. As a result, we must uphold the jury verdict if Gay met his burden of proof as to even one job.

We conclude that Gay did meet his burden of proof as to the courier position. According to the job description, couriers pick up and deliver mail and merchandise and perform other routine clerical duties. The work involves routine manual labor tasks such as loading and unloading a vehicle and lifting objects weighing up to 80 pounds. The County asserts that Gay was unable to perform the essential functions of that job because Gay's doctor had restricted him from lifting more than 30 pounds. Gay argued that the County could have accommodated him by providing a handtruck. The County contended that a handtruck would not help Gay load and unload an 80-pound package from the truck. But this is irrelevant, because the jury was free to determine whether or not lifting 80 pounds was an essential function of the job. Because the jury could have determined that lifting 80 pounds was not an essential function of the job, we must affirm the jury's verdict.

III

In the alternative, the County asks us to reverse and remand for a new trial due to erroneous evidentiary rulings and improper jury instructions. First, the County argues that the trial court abused its discretion in failing to properly instruct the jury regarding the standard for reasonable accommodation and the burden of proof on that claim. Jury instructions are

reviewed for an abuse of discretion.13 There is no abuse of discretion where the instructions (1) permit the parties to argue their theory of the case; (2) are not misleading; and (3) properly inform the jury of the applicable law, when read as a whole.14 An error of law in the instructions is reversible only if it prejudiced a party by affecting the outcome of the trial.15

The County objected to Instruction 9, which stated in part that '{t}he law does not require the employer to eliminate essential functions of a job or to create a new position in order to provide reasonable accommodation.' According to the County, this instruction prevented it from arguing that it was not required to hire Gay over a more qualified person, and that the jury should have been instructed that 'reasonable accommodation does not require an employer to eliminate essential functions of an employee's job, hire a disabled person over a more qualified person, or create a new position for a disabled employee.' Gay argues that Instruction 9 permitted the County to argue its theory because the instruction stated that a reasonable accommodation 'may also include locating a vacant position and considering hiring the employee for it if the employee is qualified for the position and able to perform its essential functions with or without accommodation.'

The County also objected to Instruction 13, which provided that the plaintiff had the burden of proving (1) that the plaintiff had a disability; (2) that the defendant, his employer, was aware of the disability; (3) that the plaintiff was able to perform the essential functions of a job in question with reasonable accommodation; and (4) that,

either during the plaintiff's employment or following his termination while he was seeking employment in a new position, the defendant failed to reasonably accommodate the plaintiff's disability. Arguing that job 'qualifications' are distinct from 'essential functions,' the County contends that Instruction 13 allowed the jury to conclude that the County discriminated against Gay even though he failed the qualifying tests for many of the jobs that he claimed the County should have offered him. Therefore, the instruction should have included the additional element that 'the plaintiff was qualified for the job in question.' Gay argues that Instruction 13 properly allowed the County to argue that he had to prove he was qualified, because there is no factual distinction between being 'qualified' for an available position and being able to perform the Sessential functions' of the job.

We hold that the trial court did not abuse its discretion in giving these instructions. The language in Instruction 9 stating that reasonable accommodation includes 'considering' hiring an employee for a vacant position 'if the employee is qualified' permitted the County to argue that Gay was not qualified for many positions because he failed the required exams, did not bother to take them, or lacked the required education. And although Instruction 13 refers only to 'essential functions' rather than 'qualifications,' the instructions when viewed as a whole did not shift the burden of proof regarding job qualifications to the County or prevent it from arguing its theory of the case.

Next, the County argues that the trial court abused its discretion in excluding exhibits containing medical reports prepared by two psychologists

of the Virginia Mason Pain Clinic. The County served an ER 904 notice on Gay prior to trial, but Gay failed to object to those documents within 14 days as required by the rule. Gay later objected on the grounds that the County's ER 904 notice did not comply with the rule. The trial court declined to exclude the documents on that basis. However, ruling that ER 904 gave it the discretion to 'determine admissibility by giving consideration to whether or not the admission of the document would serve the interests of justice,' the court refused to allow the County to introduce the documents unless they were heavily redacted. The County chose to call one of the psychologists as a witness instead, but the court curtailed the scope of the opinions he was permitted to present.

The purpose of ER 904 is 'to expedite the admission of documentary evidence.'16 Parties must give notice of the offered documents no less than 30 days before trial. The opposing party must object within 14 days of the date of notice, or the documents are deemed authentic and admissible.17 However, objection on the grounds of relevancy need not be made until trial.18

Here, Gay's untimely objection was not based on relevancy. Rather, Gay asserted that he would have objected to the documents based on admissibility if the County's ER 904 notice had been sufficient. ER 904 does not permit untimely objection on these grounds. Furthermore, ER 904 does not give the trial court discretion to redact portions of documents. ER 904(a), which describes the types of documents admissible under the rule, allows the trial court to admit '{a} document not specifically covered by any of the foregoing provisions but relating to a material fact

and having equivalent circumstantial guaranties of trustworthiness, the admission of which would serve the interests of justice.'19 But this provision relates specifically to the types of documents admissible under the rule, rather than the relevancy of the materials contained therein. Therefore, the trial court should have admitted the unredacted documents under ER 904.

However, we hold that the error does not require reversal. An evidentiary error does not warrant reversal unless the outcome of the trial was materially affected.20 The court permitted the County to call one of the psychologists as an expert witness and allowed him to testify regarding many matters raised in the reports, including that Gay was adversarial towards his employer, seemed fit only for a sedentary job, and had 'immense psychological contributions to his pain disorder.' Because the County was allowed to bring out most of the relevant matters contained in the reports via the doctor's live testimony, we do not think that the outcome of the trial would have been different had the documents been admitted in their entirety. The County was able to use that testimony to argue that Gay's professed desire for employment with the County was insincere and not made in good faith. And, because this was live testimony, the trial court retained its usual discretion to exclude prejudicial matters and to limit the psychologist's testimony to matters it deemed relevant.21

Next, relying on Janson v. North Valley Hospital,22 the County argues that the trial court abused its discretion in excluding evidence that Gay committed insurance fraud as early as 1985 by identifying a woman to whom he was not married as his spouse in order to obtain County insurance for

her, and then making claims and accepting payment for her. In Janson, a wrongful termination case, the trial court barred the employer from introducing evidence that the plaintiff had failed to disclose a cocaine conviction on her employment application. The Court of Appeals, Division III held that that evidence of employee misconduct, discovered after termination, is relevant in a WLAD action because it may bar reinstatement and front pay and limit recovery of backpay.23 The court reasoned that once an employer learns about serious employee wrongdoing that would have led to legitimate discharge, it makes little sense to require the employer to ignore the information, even if it is acquired during the course of discovery and even if the information might have gone undiscovered absent the lawsuit.{24}

Such after-acquired evidence is admissible for the purpose of limiting damages where the employer submits evidence sufficient to allow a jury to find that the misconduct would have resulted in termination.25

Here, the County was prepared to present evidence that Gay's insurance fraud would have precluded him from further County employment and that other employees had been terminated for similar conduct, thus satisfying the requirements of Janson. The trial court excluded the evidence, finding that the issue was 'more of law than fact' and the evidence prejudicial.

This was error.

Gay argues that Janson does not apply here because the jury found no discriminatory discharge. But Gay has not explained why the same rule should not apply to limit back pay for failure to reasonably accommodate.

If Gay's insurance fraud would have resulted in his termination prior to the County's failure to reasonably accommodate him, then 'it makes little sense to require the employer to ignore {employee wrongdoing}.'26 Gay also argues that any error is moot because the jury did not award reinstatement or front pay. However, the jury could have concluded that Gay's insurance fraud would have resulted in his discharge, and limited its award of back pay accordingly. The error was not harmless. Thus, we reverse and remand for a new trial on the backpay element of the damages award.

Next, we consider whether the trial court abused its discretion in admitting deposition testimony of two witnesses based on Gay's unsupported allegations that the witnesses resided out-of-county. Gay does not deny that he failed to affirmatively prove that the witnesses were out-of-county, but argues that this small amount of deposition testimony was admissible under the relaxed standard of CR 32.

Deposition testimony is admissible if the witness is legally unavailable to testify at trial.27 Under ER 804(a)(5), an absent witness is unavailable if 'the proponent of the statement has been unable to procure the declarant's attendance . . . by process or other reasonable means.' Under CR 32(a)(3)(B), the deposition of a witness is admissible if the court finds 'that the witness resides out of the county and more than 20 miles from the place of trial . . . .' The admission of transcript testimony without a showing of unavailability is reversible error.28

Gay asserted without proof that both witnesses were out-of-county and more than 20 miles from the courthouse. Both ER 804 and CR 32 place the burden of demonstrating unavailability on the party seeking to admit the

deposition testimony. The trial court abused its discretion in admitting the deposition testimony over objection without any affirmative proof of unavailability.29 However, given the small amount of testimony, the error was harmless.

Lastly, the County challenges numerous aspects of the trial court's award of $225,912 in attorney fees and $50,720 in costs. First, the County alleges that counsel for Gay failed to maintain or provide contemporaneous, accurate records and that the court should have reduced the fee award accordingly. Second, the court did not deduct time for unnecessary and unproductive work as evidenced by the court's sanctions against Gay for violating discovery and local rules. Third, the court did not deduct hours spent on Gay's unsuccessful claims and limited success in recovering damages. Fourth, the court awarded excessive fees for two new attorneys who did not examine any witnesses at trial. Fifth, the court awarded fees for contract attorneys at approximately four times the actual expense. Lastly, the court improperly awarded various nonrecoverable costs.

Generally, a trial court's fee award will not be reversed absent a manifest abuse of discretion.30 Washington courts use the lodestar method in determining the reasonableness of attorney fees in civil cases. The lodestar fee is calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred, and may in rare instances be adjusted upwards or downwards in the court's discretion.31 The party seeking fees bears the burden of proving the reasonableness of the fees.32 Counsel must provide contemporaneous records documenting the hours worked.33 However, a detailed analysis of each expense claimed is not required as long as the

trial court considered relevant facts and the reasons given for the award are sufficient for review.34

We reverse and remand for a reassessment of the trial court's award of attorney fees and costs. We conclude that the trial court's addendum of findings is inadequate to support its award of fees and costs in several respects. First, the findings do not explain why there was no deduction for unsuccessful claims. Courts generally exclude requested hours that pertain to unsuccessful claims.35 When the plaintiff's claims involve a common core of facts and related legal theories, and the plaintiff won substantial relief, the fee award should not be reduced simply because the court does not adopt each contention raised.36 Here, Gay's claims did involve a common core of facts and related legal theories. Yet his age and retaliatory discrimination claims were dismissed on summary judgment, his federal claims were dismissed, and the jury refused to find for Gay on his wrongful termination claim. Gay prevailed solely on his failure to accommodate claim, and there the jury awarded substantially smaller damages than Gay requested. Viewed as a whole, these results do not constitute 'substantial relief,' and the award should have been reduced accordingly. Second, the court abused its discretion in awarding fees for three contract attorneys whose services were billed out at approximately four times the rate that they were actually paid. Gay's reliance on Steele v. Lundgren in support of this practice is misplaced. In Steele, this court upheld an award of fees based on the rate the attorneys billed in 1998 even though the litigation began in 1992.37 The court explained that an upward adjustment from historic rates is appropriate in public interest litigation

because it encourages attorneys to accept risky cases.38 But this is not persuasive authority for the very different practice of billing out contract attorneys at four times the rate they were actually paid. Gay also argues that the inflated billing rate is justifiable because the lead attorney added supervisory value to their work and financed their efforts. But the lead attorney was amply compensated for her own billable hours. Finally, the court failed to explain its award of costs, including the award of prejudgment interest, an award for the service of an expert witness who never testified at trial, service and witness fees for 27 witnesses that Gay subpoenaed but did not call, and other costs such as service of process, office supplies, and costs arising from Gay's counsel's failure to appear at depositions.39 Persons prevailing in civil rights actions may recover damages, fees and costs under RCW 49.60.030(2).40 Costs are more liberally awarded under RCW 49.60.030(2) than under the general costs statutes.41 Nevertheless, the County should not be forced to compensate Gay for wasteful, unnecessary costs.

We uphold the jury's verdict on the reasonable accommodation claim, but reverse and remand for a new trial on the limited question of backpay damages and for a reassessment of attorney fees and costs. Because Gay prevails on his primary claim, he is entitled to attorney fees on appeal under RAP 18.1 and RCW 49.60.030(2).

WE CONCUR:

BECKER, A.C.J. (dissenting) -- I respectfully disagree with the majority's conclusion that Gay did not achieve substantial relief. Majority, at 17. I would not order a reduction of the fee amount on that basis.

Gay's judgment was for $178,000. He requested a fee award of $288,063.25 and costs of approximately $50,000. The trial court awarded him $225,912.50 for fees, a total reduction of $65,150.75 from the amount requested, as well as costs. In findings entered in support of the fee award, the court recognized 'the importance of full and fair compensation for attorneys handling civil rights cases', but explained that 'there has been no conscientious effort made to write off such things as unproductive time'. Also, the court declined to award a multiplier as requested by Gay.

The trial court's award was consistent with Steele v. Lundgren, 96 Wn. App. 773, 982 P.2d 619 (1999), review denied, 139 Wn.2d 1026 (2000). There, the plaintiff obtained a damage award of $43,500. The trial court awarded fees and costs of more than $250,000. This court, affirming, held that the damages award was 'substantial relief' although, like Gay, the plaintiff prevailed on only one of several legal theories she pursued, and her damages were substantially less than those awarded to Gay. Steele, 96 Wn. App. at 783. The result was found to be consistent with the Legislature's declaration that discrimination is a 'matter of state concern'. Steele, 96 Wn. App. 784 (quoting Martinez v. City of Tacoma, 81 Wn. App. 228, 241, 914 P.2d 86, review denied, 130 Wn.2d 1010 (1996)). The anti-discrimination statute, RCW 49.60, evinces no intent to limit fees

according to the complainant's degree of success. See Brand v. Department of Labor and Indus., 139 Wn.2d 659, 667-70, 989 P.2d 1111 (1999) (reversing this court's decision that fees awarded under the worker's compensation statute should have been reduced based on degree of success). To the contrary, the provisions of RCW 49.60 are to be liberally construed in the interest of vigorous enforcement. RCW 49.60.010, 020; see Martinez, 81 Wn. App. at 235 (abuse of discretion to limit fee award to the contingency fee agreement where the plaintiff proved discrimination and the jury awarded $8,000).

In assessing whether a plaintiff has achieved substantial relief, the relevant fact is not the degree of success, but whether the plaintiff prevails in proving unlawful discrimination. Martinez, 81 Wn. App. at 243. Gay prevailed in his discrimination claim against the County and as the majority recognizes, all of his claims were based on a common core of facts. Majority, at 17. By holding that Gay failed to achieve substantial relief, the majority improperly substitutes its discretion for the trial court's and reaches a result inconsistent with precedent.

1 Gay hires employees to work at his espresso stands because he believes that the job requires too much standing.

2 The doctors felt that Gay should refrain from 'more than just occasional kneeling and squatting,' as well as 'frequent ladder climbing.' The doctors also reported Gay's opinion that he should not 'do any ladder work more than climbing six or seven rungs at a time' or close the '500-pound doors,' and that shoveling, sweeping and handling hoses should be

minimized.

3 Wright v. Engum, 124 Wn.2d 343, 356, 878 P.2d 1198 (1994).

4 Martini v. Boeing Co., 88 Wn. App. 442, 450, 945 P.2d 248 (1997), aff'd,

137 Wn.2d 357, 971 P.2d 45 (1999).

5 Martini, 88 Wn. App. at 451.

6 RCW 49.60.180.

7 Easley v. Sea-Land Serv., Inc., 99 Wn. App. 459, 468, 994 P.2d 271

(2000).

8 Martini, 88 Wn. App. at 451; WAC 162-22-080(1).

9 Clarke v. Shoreline School Dist., 106 Wn.2d 102, 121, 720 P.2d 793

(1986).

10 RCW 49.60.180(1).

11 Dedman v. Personnel Appeals Bd., 98 Wn. App. 471, 485, 989 P.2d 1214

(1999).

12 Dean v. The Municipality of Metropolitan Seattle, 104 Wn.2d 627, 637-38,

708 P.2d 393 (1985).

13 Martini, 88 Wn. App. at 468.

14 Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

15 Stiley v. Block, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996).

16 Miller v. Arctic Alaska Fisheries Corp., 133 Wn.2d 250, 258, 944 P.2d

1005 (1997).

17 ER 904(b).

18 ER 904(c)(2).

19 ER 904(a)(6).

20 State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982).

21 ER 403.

22 93 Wn. App. 892, 971 P.2d 67 (1999).

23 Janson, 93 Wn. App. at 898-903. Although the court refused to bar backpay, it held that the backpay award should be calculated from the date of the unlawful discharge to the date the lawful basis for discharge was discovered. Janson, 93 Wn. App. at 900.

24 Janson, 93 Wn. App. at 900.

25 Janson, 93 Wn. App. at 901-03.

26 Janson, 93 Wn. App. at 900.

27 ER 804(b)(1).

28 Rice v. Janovich, 109 Wn.2d 48, 58, 742 P.2d 1230 (1987).

29 This is particularly so where the County asserted that one of the witnesses resides in Seattle and the other in Edmonds, quite possibly within 20 miles of the courthouse.

30 Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993).

31 Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

32 Mahler, 135 Wn.2d at 434.

33 Mahler, 135 Wn.2d at 434.

34 Steele v. Lundgren, 96 Wn. App. 773, 786, 982 P.2d 619 (1999), review denied, 139 Wn.2d 1026 (2000).

35 Mahler, 135 Wn.2d at 434.

36 Steele, 96 Wn. App. at 783, citing Martinez v. City of Tacoma, 81 Wn. App. 228, 242-43, 914 P.2d 86 (1996).

37 Steele, 96 Wn. App. at 785-86.

38 Steele, 96 Wn. App. at 785-86.

39 The County also refers this court to its trial court briefs for more examples. But a party may not incorporate by reference parts of its trial brief into its appellate brief as this would violate the page limit for briefs to the prejudice of the other party. US West Communications, Inc. v. Utilities and Transp. Comm'n, 134 Wn.2d 74, 112, 949 P.2d 1337 (1997).

40 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 attorney fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. sec. 3601 et seq.). RCW 49.60.030(2).

41 Martinez, 81 Wn. App. at 245.