

Statute of Limitations Skewers Ex-Employee's Claims

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In a recent decision, *Cox v. Oasis Physical Therapy*, 153 Wn. App. 176 (2009), the Washington Appellate Court held that a plaintiff's failure to timely assert her claims against her former employer resulted in her losing the majority of her claims without considering the merits of those claims. In *Cox*, the plaintiff was a physio-therapist assistant who had been treated by her employer and claimed that he had engaged in inappropriate touching during the treatment. She terminated the treatment, but remained employed with the clinic for three more years until she quit after a state investigation into the therapist and the clinic. She claimed that she did not file her claims immediately because the therapist had told her his treatment was medically necessary and she did not understand until after the state investigation that he had violated the law. She filed numerous claims: medical negligence, gender discrimination, hostile work environment, wrongful discharge, unlawful retaliation, negligent hiring, retention and supervision, outrage, negligent infliction of emotional distress, and assault and battery. At summary judgment, the trial court dismissed the claims as time barred without addressing the underlying merits of her allegations. The plaintiff appealed.

The *Cox* court affirmed the dismissal for the majority of these claims because they were time barred under the appropriate statutes of limitations. The *Cox* court did not toll or extend the statute of limitations simply because the therapist repeatedly claimed that his touching treatment was medically necessary. Nor did the statute toll until the state had conducted its own investigation. The *Cox* court held that, once a plaintiff is aware of facts that could give rise to a claim, the statute of limitations begin to run even if she does not know that the law had allegedly been broken. The negligence claims had to be filed within two years of notice. The plaintiff had waited more than two years since the therapist's alleged inappropriate touching to sue so they were time barred. As to the wrongful discharge and sex discrimination claims, the *Cox* court held that Washington no longer uses the continuing violation doctrine which tolled the statute of limitations with each violation. She had to bring the claim within three years of the alleged sex discrimination, which she did not. The *Cox* court held that where a discreet act of discrimination is alleged, the limitations period runs from the act.

However, not all of the plaintiff's claims were dismissed. The *Cox* court found that the sexually hostile work environment claim was preserved for trial. Although the majority of the alleged conduct occurred more than three years before the filing of the lawsuit, and would normally be time barred, the plaintiff had claimed that some similar conduct occurred up to the point where she left the clinic. The *Cox* court held that the time barred acts could be considered if they were part of the same actionable hostile work environment that continued inside the three year period. Because the plaintiff had alleged that the therapist had continued to harass her throughout her employment with the clinic, the *Cox* court reversed the trial court and remanded the case for trial to determine whether the alleged acts in fact constituted unlawful harassment. The lesson from this case is that the statute of limitations can generally act as a shield to protect employers from stale and time-barred claims, except hostile work environment claims can often reach far back in time to cover acts that allegedly occurred years previously as long as some of the acts occurred within the

three year period. The alleged bad actors and fact witnesses could be long gone from the employer, and employee memories fade or become distorted after years of employment. Thus, employers should be proactive and investigate any alleged claims of harassment or discrimination to stop any improper conduct, document witness testimony and the events, and hopefully preclude a lawsuit years later after an employee is terminated for poor performance.