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Court of Appeals
Division I
State of Washington

No. 74260-4-I
(Appeal from Snohomish County Court No. 14-2-07161-1)

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

RHONDA MOEN, a married individual,

Respondent,

v.

NORTHWEST EDUCATIONAL SERVICE DISTRICT NO. 189,
a municipal corporation,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The instructor wanted to teach a class her way. The building principal said no and told the instructor to teach the class in a different manner. After the Defendant sided with the principal, the instructor quit. The instructor then filed suit claiming wrongful constructive discharge in violation of public policy.

To survive summary judgment, a plaintiff alleging wrongful discharge must establish the existence of a clear and relevant public policy. To establish a constructive discharge, the plaintiff must show objectively intolerable working conditions that would compel a reasonable person to resign. Because Respondent Rebecca Moen has failed to identify a clear mandate of public policy and because no reasonable jury would find objectively intolerable working conditions, Moen's wrongful constructive discharge in violation of public policy should have been dismissed by the trial court.

A. Moen's response brief fails to identify a clear mandate of public policy at issue in this case.

Although Moen claims that several statutes demonstrate that a public policy exists, Resp. Br. at 10, her brief never actually identifies the specific public policy that governs her case. Nor does Moen's brief state

how the various statutes she cites are relevant to her wrongful discharge in violation of public policy claim.

At various times, Moen has cited to *seven* statutes that she claims establish a clear mandate of public policy. Her response brief identifies four statutes: RCW 28A.320.127, 28A.320.1271, 28A.300.2851, and 28A.320.125. Resp. Br. at 17. Three other statutes were identified in Moen's summary judgment response: RCW 28A.310.010, 28A.310.500, and 28A.300.070. CP at 120-22.¹

None of these statutes are relevant to this case because these statutes, either individually or taken as a whole, do not impose a duty upon the Defendant Northwest Educational Service District No. 189 ("NWESD") to support Moen in her quest to teach the Project Success curriculum in a manner that she found acceptable. Rather, these statutes address areas that are not relevant to Moen's claim:

- RCW 28A.320.127 directs school districts to adopt a plan for recognizing, screening, and responding to emotional or behavioral distress in students.

¹ In her brief, Moen states that she has never argued that RCW 28A.310.010 "constitutes a public policy establishing the clarity element." Resp. Br. at 10. This statement, however, is contradicted by her brief opposing NWESD's summary judgment motion, where Moen argued that RCW 28A.310.010 was a relevant public policy. *See* CP at 120.

- RCW 28A.320.1271 directs Office of the Superintendent of Public Instruction (“OSPI”) to create a model school district plan for recognizing, screening, and responding to emotional or behavioral distress in students.²
- RCW 28A.300.2851 requires OSPI and the office of the education ombuds to convene a work group on school bullying and harassment prevention.
- RCW 28A.320.125 requires schools to have safe school plans in place to assist schools in responding to emergencies.
- RCW 28A.310.010 states that the purpose of educational service districts is to assist OSPI and to provide services to school districts and schools for the deaf and blind.
- RCW 28A.310.500 requires educational service districts to offer suicide screening and referral training to school districts.
- RCW 28A.300.070 authorizes the state and school districts to receive federal funds.

² Neither RCW 28A.320.1271 nor RCW 28A.320.127 were in effect when Moen resigned her position. App. Br. at 18; Ruling at 10. In response, Moen appears to argue that these statutes should be applied retroactively. Resp. Br. at 10-11. Statutes, however, “are presumed to apply prospectively, unless there is some legislative indication to the contrary.” *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981).

While citing seven statutes, Moen never identifies the public policy that governs her claim.

In her ruling granting discretionary review, Commissioner Masako Kanazawa wrote that it *appears* that Moen contends that there is public policy requiring that Project Success be taught with fidelity:

Moen appears to define the allegedly violated public policy as a requirement that NWESD "implement" a model school district plan, which she asserts is Project Success as taught with fidelity, in the manner that incorporates research-based best practices.

Commissioner's Ruling Granting Review at 10-11 (footnote omitted).

Consistent with the Commissioner's approach, the NWESD assumed that Moen believed that a public policy existed that required the NWESD to support Moen in her efforts to implement the Project Success curriculum in manner that Moen believed to be appropriate. *See, e.g.*, App. Br. at 18-19.

In her response, however, Moen rejects that approach and claims that: "she does not need to prove that a relevant public policy exists that requires Project Success be taught in a manner she feels appropriate or that her employer support her in some dispute with the building principal." Resp. Br. at 17. Moen never states what public policy governs her claim.

Instead, Moen claims that she need only point to a public policy, without proving that it was actually violated at the summary judgment

stage. Resp. Br. at 17. But Moen’s argument misses the point; the NWESD has never argued that she must prove that a public policy was violated at summary judgment.

Moen, however, must demonstrate that the public policy at issue is relevant to her case by at least showing a potential violation of public policy. *Becker v. Cashman*, 128 Wn. App. 79, 87, 114 P.3d 1210 (2005) (“To create a prima facie case, the plaintiff must first prove the existence of a clear, relevant public policy.”) In the absence of relevancy, a plaintiff could point to any public policy in an attempt to contest her termination regardless of whether that public policy has any bearing on her claim.

Moreover, “most Washington cases finding a public policy violation have identified a single statute that clearly sets forth the relevant policy.” *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 953, 913 P.2d 377 (1996). Merely pointing to a potential source of public policy is not sufficient: “[W]e cannot conclude that a clear mandate of public policy exists merely because the plaintiff can point to a potential source of public policy” *Sedlacek v. Hillis*, 145 Wn.2d 379, 389, 36 P.3d 1014 (2001). Instead, the public policy must be clear and relevant. *Id*; *Becker* at 87. Instead of one statute, Moen has cited seven.

Having failed to identify a clear mandate of public policy, Moen’s claim for wrongful constructive discharge in violation of public policy

should have been dismissed by the trial court. Because the trial court erred in allowing this claim to go forward, this Court should reverse the decision of the trial court.

B. Moen’s brief fails to identify the intolerable working conditions necessary to constitute a constructive discharge.

An employee who resigns her position is presumed to have acted voluntarily. *Sneed v. Barna*, 80 Wn. App. 843, 849, 912 P.2d 1035 (1996). To overcome this presumption, a plaintiff must introduce evidence that the employee was constructively discharged, which occurs when “an employer deliberately makes an employee’s working conditions intolerable, thereby forcing the employee to resign.” *Id.* at 849. This standard is measured objectively and requires working conditions so intolerable that “a reasonable person in [the plaintiff’s] position would have felt compelled to resign.” *Washington v. Boeing Co.*, 105 Wn. App. 1, 16, 19 P.3d 1041 (2000).

In response to this standard, Moen cites the following reasons in support of her constructive discharge claim:

1. Her inability to teach the Project Success with fidelity;
2. Her employer directed her to implement Project Success in a manner that was contrary to her training; and

3. Her employer directed her to implement Project Success in a manner that she believed “could potentially create a risk of harm to the students.”

Resp. Br. at 19.

There is no evidence of rude, hostile, or abusive behavior by NWESD employees, nor is there any evidence of intolerable working conditions. Because no reasonable jury would conclude that the conditions cited by Moen would compel a reasonable employee to resign, summary judgment should have been granted.

II. CONCLUSION

Because Moen failed to identify a clear mandate of public policy and because no reasonable jury would find objectively intolerable working conditions that would compel a reasonable employee to resign, this Court should reverse the trial court and order that Moen’s claim for wrongful constructive discharge in violation of public policy be dismissed as a matter of law.

RESPECTFULLY SUBMITTED this 16th day of May, 2016.

VANDEBERG JOHNSON &
GANDARA, LLP

By 

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CERTIFICATE OF SERVICE

The undersigned makes the following declaration under penalty of perjury under the laws of the State of Washington.

That on May 16, 2016, I caused to be delivered a true and correct copy of the following:

Reply Brief of Appellant

to:

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2825 COLBY AVE., SUITE 302
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ATTORNEYS FOR RESPONDENT

by delivering a copy via regular mail to the same person(s) identified above, and by email to: rmoody@rodneymoodylaw.com.

DATED this 16th day of May, 2016, at Tacoma, Washington.

/S _____
Linda Cook