

CO. 34458-1-11  
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STAT. COURT  
BY Chm

No. 34458-1-II

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IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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SUSAN BLACK and DAVID WALKER

Appellants,

v.

DEPARTMENT OF SOCIAL and HEALTH SERVICES,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KITSAP COUNTY

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BRIEF OF APPELLANTS

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ORIGINAL

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## I. ASSIGNMENT OF ERROR

### A. Assignments of Error

1. The Trial Court erred when it resolved issues of disputed fact while considering a motion for summary judgment and failed to grant all inferences in favor of the non-moving party.
2. The Trial Court erred when it failed to rely upon the ruling in Christensen v. Grant County Hospital, 152 Wn.2d 299, 311, 96 P.3d 957 (2004) and adopted the ruling in Molsness v. City of Walla Walla, 84 Wn. App. 393, 400, 928 P.2d 1108 (1996) as dispositive.
3. The Trial Court erred when it determined that the Plaintiff had failed to make a prima facie showing or meet her burden to show that the reason articulated by the Defendant, Department of Corrections, for an adverse employment action was not valid.

### B. Issue Pertaining to Assignments of Error

1. Whether the Trial Court properly considered summary judgment by resolving material facts that were at issue.
2. Whether the Trial Court properly held the ruling in Molsness to be dispositive and supported dismissal on summary judgment instead of following the ruling in Christiansen.
3. Whether the trial court properly granted summary dismissal when the Plaintiff had made a *prima facie* showing and met her burden of persuasion to establish the articulated reason of the Defendant agency was pretextual.

## II. STATEMENT OF THE CASE

### A. Procedural Steps:

This cause of action was filed on 28 September 2000 in Kitsap County Superior Court. [CP 1] The Plaintiffs, Susan Black and David Walker, sought relief in a claim of violation of the National Labor Relations Act (pre-empted by federal law), a wrongful discharge claim and claim of the Tort of Outrage (melded into discharge claim). [CP 7-8] Ms. Black alleged that she had been constructively discharged from her employment with the Francis Hadden Morgan Center (FHMC) a developmental disabilities institution operated by the Department of Social and Health Services of the State of Washington.

This matter progressed until the Defendants filed a Motion for Summary Judgment on or about 21 December 2005. [CP 13] It was noted for hearing before The Honorable Jay B. Roof in Kitsap County Superior Court on 20 January 2006. [RP 1-18]

A hearing for oral argument was held on the 20<sup>th</sup> of January 2006 and the Court announced that he would take the matter under advisement. [RP 18] A ruling on the Motion for Summary Judgment was filed on the 7 February 2006. [CP 134-35] The decision dismissed the complaint of the Plaintiff in summary judgment.

An appeal was timely filed in this cause on the 17<sup>th</sup> Day of February 2006. [CP 136-38]

B. Facts Relevant to the Appeal:

The Plaintiff, Susan Black began employment with the Department of Social and Health Services at FHMC in February 1991 as a part-time employee. [CP 5] She was employed as a resident attendant and assigned to work at one of the residential units operated by FHMC. [CP 118] Her duties were to see to the daily needs of a certain group of residents of the facility. FHMC was established as a facility that provided residential care, health care treatment and training and education for autistic citizens of the State.

In 1998, after several years of employment, Ms. Black received two personnel conduct reports alleging that she had engaged in misconduct for which disciplinary action would be taken. [CP 5-6] She also received a Letter of Reprimand for an issue related to communications. Ms. Black filed a grievance in August 1998 under her Collective Bargaining Agreement and was successful in avoiding disciplinary action. [CP 5-6]

In November and December 1998 [CP 5], Ms. Black received two memoranda from the Superintendent, Carol Kirk, informing her that she would be required to work full-time during certain periods of the holiday period in December 1998. When Ms. Black, who was a part-time employee, objected to the assignment of full time work, she was informed

that if she refused to accept the assignment, her action would be considered neglect of her duty and abandonment of her position and she would be subject to discipline.

In November 1999, Ms. Black was again subjected to the production of two personnel conduct reports (PCRs) by the Superintendent. [CP 6, 115] The incidents that were subject to the personnel conduct reports allegedly occurred in August 1999. She responded to the reports and denied her misconduct. She waited for approximately six months while an “investigation” was conducted by the Superintendent. In May 2000, the Superintendent informed Ms. Black that she would be suspended for one week without pay due to the August 1999 incidents. She was also informed that when she returned, she would have a new work schedule that included Tuesday, Thursday and Friday off. Previously, she had had the week-ends off. [CP 116-17]

Ms. Black concluded that Ms. Kirk was making her working life intolerable since she had not committed the misconduct alleged to have occurred in August 1999 and had earned her work days after having worked at the FHMC for over nine years. She submitted her resignation and claimed a constructive discharge. [CP 6]

It is the contention of the Appellant that the Motion for Summary Judgment should not have been granted and that the matter should have proceeded to trial on the claims of Ms. Black.

### **III. SUMMARY OF ARGUMENT**

A. Whether the Trial Court properly considered summary judgment by resolving material facts were at issue.

Appellant contends that a summary ruling could not be entered on the facts before the trial court on the 20<sup>th</sup> of January 2006. Specifically, Ms. Black contends that she established the elements of a *prima facie* showing of constructive discharge and retaliation for exercising her labor agreement rights, and that although the agency articulated a reason why the change had occurred, Ms. Black provided controverted evidence that 1) the misconduct did not occur; 2) the allegations made by the principal witness for FHMC had misrepresented the truth, 3) she had exercised her union labor rights and been successful, and 4) her decision to leave her work was contemporaneous with the long-delayed decision to take disciplinary action against her and change her work hours.

Further, Ms. Black contends that the Personnel Appeals Board did not have the authority to hear claims of violation of the collective bargaining agreement which eliminated her ability to exhaust her administrative remedies – a defense claimed by the Defendant FHMC.

B. Whether the Trial Court properly held the ruling in Molsness to be dispositive and supported dismissal on summary judgment instead of following the ruling in Christiansen.

Ms. Black contends that the ruling in Christensen v. Grant County Hospital District No. 1, supra at 311, establishing that public employees are not required to exhaust administrative remedies because they have a “right to be free from wrongful termination in violation of public policy... independent of any underlying contractual agreement or civil service law.”

It is her contention that the ruling in Molsness does not control, and the motion for summary judgment should not have been granted.

C. Plaintiff Established a *Prima Facie* Showing and Responded to the Reason Articulated by the Defendant with Evidence from Which Inference Could be Drawn that Reason was Pretextual.

The evidence before the trial court established a *prima facie* showing the claim of wrongful discharge by Ms. Black. Her claim arose from the efforts of the Superintendent to bring disciplinary action against her and her use of the collective bargaining rights she possessed to fight that effort. Ms. Black contends that her exercise of collective bargaining rights led to her suspension (since there was no truth to the allegation) and that upon her return, she would be assigned to a new position with different days off. Ms. Black contends that this action was taken in violation of the public policy in favor of a member of a collective bargaining unit being

able to use their rights to challenge violations of the collective bargaining agreement. Further, discouraging this effort by enabling the employer to retaliate against the employee who exercises the right jeopardizes that public policy. The facts supported that there was a causal connection between Ms. Black's exercise of her rights and the disciplinary action and change of working circumstances imposed by the Superintendent. Finally, the justification offered by the employer in this cause was at a minimum subject to controversy and at a maximum invalid or pretextual. Hence, the claim of wrongful discharge in violation of public policy was established by Ms. Black and the motion should have been denied leaving for the trier of fact the issues that were controverted.

#### **IV. ARGUMENT**

##### **A. DISPUTED FACTS.**

The Appellant, Susan Black, disputes the underlying basis for the suspension determination made by Ms. Kirk, the Superintendent. In this regard, Ms. Black is supported by the declarations of Ms. Gloria Tyler [CP 87-88] and Ms. Vi Schaaf [CP 80-81], two co-workers who witnessed one or more of the alleged communications by and between Nurse Wilson and the Appellant.

The underlying disciplinary action was based upon the alleged interaction by the Appellant, Susan Black, with a resident, Johnny H. and

his wearing of a helmet. The facts show that although the allegation of neglect of duty by the Appellant occurred in the Fall of 1999, the Appellant continued to work with the resident until she was placed on suspension from her job and moved to a different position in May 2000, some six or eight months later. The underlying disciplinary action relied upon the alleged failure of Ms. Black to provide protection for the resident that she was alleged to have been directed to provide. Yet, the unrebutted evidence shows that Ms. Kirk did not believe that Ms. Black had failed to protect the resident during the six or eight months between the alleged incident and the date of suspension.

Ms. Black disputes that any disciplinary action should have been taken. She disputes that she failed to follow any direction from Nurse Wilson. [CP 113] She disputes that Nurse Wilson gave her a directive related to the wearing of a helmet by resident Johnny H. [CP 113] She contends the motivation for the action was based upon her use of her collective bargaining rights in the period before and after the alleged incident, but before the date of the discipline. [CP 116-17]

It is contested whether the position to which Ms. Black was assigned upon her return from suspension had been “saved” for Ms. Black as further punishment since it substantially changed her work hours and days off. [CP 117-18] There was no evidence that the position she had

been filling for several years was eliminated while she was subject to the 20 hours of suspension.

Because of the fashion in which the Trial Court ruled, it is unknown to Ms. Black how each of these controversies was resolved by the Trial Court. If the Trial Court had followed the means of analysis applicable in summary proceedings, then each of these controversies would have been resolved in favor of the non-moving party, Ms. Black. To resolve them in favor of Ms. Black would have caused the civil action to survive. Reasoning in a backward fashion then, it can only be concluded that the trial court resolved some or all of the controverted issues against Ms. Black which the trial court was not permitted to do.

1) Standards in Summary Judgment

In reviewing a summary judgment order, the appellate court engages in the same inquiry as did the superior court. Atherton Condo Apartment-Owners Association Board v. Blume Development Company, 115 Wn.2d 506, 515-16, 799 P.2d 250 (1990). Summary judgment is appropriate

“if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

The standard to be used in a summary judgment motion was succinctly stated by Justice Sanders in his dissenting opinion in Drinkwitz v. Alliant Technology, 140 Wn.2d 291, 307-08, 996 P.2d 582 (April, 2000). Justice Sanders summarizes the standard after quoting the text of CR 56; he states:

When applying this standard we are required to view the evidence in the light most favorable to the nonmoving party, and if any inferences are to be made, we must also make those inferences in favor of the nonmoving party...It is axiomatic that on a motion for summary judgment the trial court has no authority to weigh the evidence or testimonial credibility.”

Justice Sanders added in Drinkwitz, supra, at page 308 :

When reviewing a case on appeal from a summary judgment order, we must be mindful that we are not charged with making factual findings, and we must be particularly careful to give deference to the position of the nonmoving party to avoid usurping the role of the fact finder. It follows we must view the evidence and the inferences that may be drawn there from in the light most favorable to... (the nonmoving party), and we are not entitled to weigh the evidence.

The burden is on the moving party in a summary judgment to set forth an un rebutted version of the facts and to allege that there is no genuine issue as to the facts offered. McMann v. Benton County, 88 Wn.App.737, 946 P.2d 1183, review denied 135 Wn.2d. 1005, 959 P.2d 125 (1997).

Appellants contends that it can only be concluded that the Trial Court abridged the very clear legal standards in a motion for summary judgment and either weighed the evidence or failed to realize that the moving party, the agency, had failed to set forth an unrebutted version of facts upon which summary judgment could operate.

B. Constructive Discharge – Wrongful Termination in Violation of Public Policy under Christiansen v. Grant County Hospital.

Ms. Black contends that although her resignation is presumed to be voluntary, she has met the burden to rebut that presumption. Sneed v. Barna, 80 Wn.App. 843, 912 P.2d 1035, review denied, 129 Wn.2d 1023 (1996).

1) Molsness v. Walla Walla

The Respondent relies upon Molsness v. Walla Walla, *supra*, and claims that Ms. Black did not “stand pat” and fight the suspension and change of work hours and conditions. [RP 5] The Respondent contends that Molsness applies in this factual circumstance. It does not.

Molsness dealt with a fact pattern that showed the appellant was given a choice to either resign or be subjected to discipline. The threat of discipline was not direct. At page 396. Mr. Molsness elected to resign and the trial court and Division III of the Court of Appeals found that he had resigned voluntarily despite his claim of constructive discharge. In

Molsness, there had been no changes to the working hours, conditions or duties of the Appellant when he had acted. Further, no disciplinary action had been taken against Mr. Molsness. In short, his circumstance was entirely different than that of Ms. Black in this cause of action.

Ms. Black had been subjected to a series of disciplinary inquiries, a lengthy period of waiting for the disciplinary decision to be made and then a suspension followed by a change of position, work hours and days off that appeared to be retaliatory. [CP 5-6] Her contention, corroborated by Ms. Tyler [CP 87-88] and Ms. Schaaf [CP 80-81], was the disciplinary action was based upon invalid facts. All of these employment actions had occurred in a context of her use and recognition of use of her collective bargaining rights. [CP 5-6] Mr. Molsness did not face any of these problems and he had not exercised his union collective bargaining rights as had Ms. Black.

Thus, appellant contends that the ruling in Molsness is inapplicable. The discussion related to the constructive discharge in that case was whether it was voluntary or not. Not whether it was based upon a claim of violation of public policy as is the contention of Ms. Black.

2) Christiansen v. Grant County Hospital

The Christiansen v. Grant County Hospital case, *supra*, dealt specifically with the issue of collateral estoppel in a constructive discharge

scenario. Mr. Christiansen had contested the employer's action before the Public Employees Relations Commission (PERC) and had been unsuccessful. The issue before Division III of the Court of Appeals was generally whether the findings reached by PERC served to estop Mr. Christiansen from defending a summary judgment motion arising from his claim of wrongful discharge from employment in violation of public policy.

The Court in Christiansen, at page 311, acknowledged that public employees have an independent right of pursuing a wrongful discharge claim of retaliation in violation of public policy apart from administrative remedies that may be available to the employee. Korslund v. Dynacorp Tri-Cities Services, 121 Wn.2d. 295, 316, 88 P.2d 966 (2004). The Christiansen Court did rule that an administrative proceeding may preclude a later claim due to the administrative agency's factual findings, at page 313, like the ruling in Molsness; but, it found that a public employee "...should not be precluded from seeking relief on his own under the separate tort theory of wrongful discharge in violation of public policy. At page 312. The Christiansen Court did not address the issue of voluntary resignation because it was not at issue in the appeal. Further, the collateral estoppel issue at bar in Christiansen involved the effect of

the finding by PERC on material facts in the summary judgment consideration and whether those facts were in controversy.

3) Korslund v. Dynacorp

Division III of the Court of Appeals has addressed the issue of constructive discharge in a wrongful discharge claim in violation of public policy context. The ruling in Korslund v. Dynacorp Tri-Cities Services, *supra*, distinguished among three appellants, Mr. Korslund and Ms. Miller and Mr. Acosta, and whether they had made a sufficient claim for constructive discharge. The Appellate Court held that Miller and Acosta did not make a *prima facie* showing; but that Korslund did. At pages 316-17.

Mr. Korslund had presented a series of facts that the Appellate Court found could be considered by a jury that could find constructive discharge. Chief Judge Kato, in the unanimous opinion, noted that Mr. Korslund was removed from his position (which he viewed as a demotion), he became the target of investigations (after his complaint of alleged abuse), he was accused of misconduct and threatened with termination, and there were plans to transfer him to another work unit. At page 318.

To establish a *prima facie* showing of constructive discharge, an employee must demonstrate "...an employer deliberately [made] an

employee's working conditions [so] intolerable that a reasonable person would be compelled to leave." Bulaich v. AT&T Information Systems, 113 Wn.2d 254, 258-61, 778 P.2d 1031 (1989). The employee must show "...a deliberate act of the employer creating the intolerable condition, without regard to the employee's mental state as to the resulting consequence." Bulaich, 113 Wn.2d at 261. "The intolerable element may be shown by aggravated circumstances or a continuous pattern of discriminatory treatment." Haubry v. Snow, 106 Wn. App. 666, 677, 31 P. 3d 1186 (2001). Whether conditions are objectively intolerable is a question of fact. Nielson v. AgriNorthwest, 95 Wn.App. 561, 578, 977 P.2d 613, review denied, 138 Wn.2d 1023 (1999).

Here, Ms. Black suffered a series of investigations, allegations of misconduct and initial attempts to discipline her, a suspension for what she claimed was an invalid reason, and a change of her work hours and a shift to a different working circumstance and days off. All of this was similar to the issues faced by Mr. Korslund. Appellant contends that she established a prima facie showing and that the response from the employer was at a minimum controverted by her proffer and at a maximum was pretextual.

Ms. Black contends that the actions taken against her were in retaliation for her use of the collective bargaining rights which conduct

violates the public policy supporting the application of such rights for employees in this State. Certainly, a question of fact, the kind required to be decided by a trier of fact established by the rule in Nielson, supra, exists which precluded the entry of the Order on Summary Judgment.

C. Plaintiff Established a *Prima Facie* Showing and Responded to the Reason Articulated by the Defendant with Evidence from Which Inference Could be Drawn that Reason was Pretextual.

The preceding arguments express the basis for the claim of a *prima facie* showing by Ms. Black, the Appellant. Her efforts to seek protection from adverse administrative action through use of her collective bargaining rights were publicized in the Union Newspaper or Monthly Newsletter. [CP 6 ] This publication came between the time the first PCRs were issued and the decision was made by the Superintendent to discipline Ms. Black with a suspension from work. [ CP 5-6 ]

Under the shifting burden analysis, if the agency can articulate a reason why the adverse action was undertaken, then the burden shifts back to the employee to show the rationale offered by the employer was pretextual. Here, the substantial evidence, from the Appellant, and her two co-workers (Taylor and Schaaf) create a factual issue whether there was a “real” basis to undertake the suspension or not. That production of evidence by the Appellant, by itself, meets the burden of showing pretext.

In addition, the pattern of action identified above by the Superintendent demonstrates, circumstantially, an effort to punish or retaliate against the employee. The contention of the Appellant is that the stream of events needs to be viewed in context. It must be recalled that between the time when the initial PCR was issued in October 1999, the delay in investigation was occasioned by the Superintendent until she made the decision in May 2000 to suspend Ms. Black from work.

It is un rebutted that during that intervening period when the “investigation” was in process, Ms. Black continued her work with Johnny H. and the other residents in the facility without corrective action, additional monitoring or any change whatsoever. [CP 118] Appellant therefore contends that in context, the conduct of Ms. Black was unquestioned during the “investigation”. In a functional sense, the hiatus in disciplinary efforts while the “investigation” was in progress appears not to have slaked the willingness of the Superintendent to forge ahead with discipline.

Thus, the actual pattern of conduct by the Superintendent should be viewed sequentially (eliminating the hiatus period) to show that there was a connection between the circumstances and events in August 1998 through December 1999 and the disciplinary action undertaken in May

2000 and the change in working conditions and circumstances of Ms. Black after suspension.

Appellant contends that the pattern establishes a factual issue that requires resolution by a trier of fact and not in summary judgment. This is true because of the controverted evidence and the rule that the Court must interpret all evidence in the light most favorable to the non-moving party, Ms. Black.

Appellant has met her burden and demonstrated that the reason proffered by the Respondent is pretextual and summary judgment should not have been entered.

## **V. CONCLUSION**

The Appellant contends that she has fairly produced evidence that she was subjected to an adverse employment action undertaken by her employer due to her exercise of collective bargaining rights. She lost the position she had held for years of part-time employment for no just reason. Her days off were changed for no just reason.

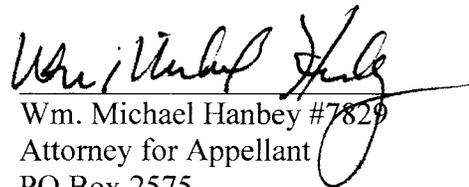
She was not required to exhaust her administrative remedy as is proposed by the Respondent. Indeed, the right to pursue a wrongful discharge claim is independent of any administrative remedy she may possess where there is a violation of the public policy. Ms. Black contends that public policy requires that employers not retaliate against

employees who exercise their bargained-for labor rights. She contends that because there was no valid reason to take the suspension action the asserted reason for the adverse conduct of the Superintendent is pretextual and directed toward Ms. Black in retaliation.

Certainly, issues of fact have been created by the submissions of Ms. Black and her co-workers in this matter. Those controverted facts should have precluded the trial court from entering summary judgment, especially when those facts are interpreted in the light most favorable to the Appellant.

On the facts before the trial court and before this court on appeal, there is only one result that would be just. The ruling of the trial court should be reversed and the case returned to Kitsap County Superior Court for trial. Ms. Black, and her spouse, Mr. Walker requests the appellate court enter such a ruling.

RESPECTFULLY SUBMITTED THIS 1<sup>ST</sup> DAY OF JUNE 2006.



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**CERTIFICATE OF SERVICE:**

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Cause No. 034458-1-II

I, Angela Delivuk, hereby certify that the following documents: *Brief of Appellants, Title page, Table of Contents and Table of Authorities*, were mailed by First Class US Mail or ABC Legal Messenger, as identified below, to the following individuals:

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