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COURT OF APPEALS

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STATE OF WASHINGTON

BY CMH
Clerk

No. 34458-1-II

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

SUSAN BLACK and DAVID WALKER

Appellants,

v.

DEPARTMENT OF SOCIAL and HEALTH SERVICES,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY

RESPONSIVE BRIEF

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I.

SUMMARY OF REPLY

The agency has sought to convey that the Appellant has not met the burden of proof necessary to establish a *prima facie* case and to overcome a Motion for Summary Judgment. In order to make this assertion, the Respondent has reviewed what it considers to be the applicable law and has argued from the facts it claims are uncontroverted in support of the summary ruling that was entered by the lower court.

The argument of the Respondent is not well-taken. Indeed, chief among the deficiencies is the clear conclusion that the trial court resolved the conflicting evidence proffered by the parties. Specifically, 1) the scope of the interaction between the Appellant and a registered nurse at the facility concerning directions given by the registered nurse [CP 110-15]; 2) the fact that the Appellant continued to provide daily care for the resident in question for nine months during the period when the Superintendent of the facility was conducting an “investigation” at the conclusion of which the Superintendent determined to transfer the Appellant because she was incapable of provide the requisite care for the resident [CP 111-12]; and 3) the delay in the formal disciplinary action,

that showed a nexus to the challenges the Appellant had made under the collective bargaining agreement.

These sets of facts and circumstances support the countervailing proposition that either there were material facts at issue or the Appellant did meet her burden in the shifting burdens analysis to show that the adverse action taken against her was pretextual.

Therefore, the resignation of the Appellant was not voluntary but was a constructive discharge.

II.

ARGUMENT IN REPLY

Appellants rely on their original argument in the Appellants' brief to support their contention that the entry of a Summary Judgment Ruling was in error.

A. Voluntary Resignation

In its Responsive Brief, the agency has cited to Christie v. United States, 518 F.2d 584 (1975) in support of the voluntary resignation argument. However, the facts in Christie are inapposite to those here before the court. In the Christie matter, the federal Civil Service Commission had entered a finding that the resignation of Ms. Christie was

voluntary. At page 587. That finding was made prior to the summary ruling by the federal court on the action. Further, in her situation, Ms. Christie who had claimed retaliation for a disciplinary action as the reason for her resignation, recanted a denial and admitted that she had “inadvertently touched” her supervisor which was a basis for the discharge disciplinary action that Ms. Christie asserted was the reason she had quit. At page 587. The case is distinguishable on its facts and holding because the predetermination by the Commission of a voluntary quit.

B. Exhaustion of Remedies

The agency asserts that the Appellant has mischaracterized the holding in the case of Christiansen v. Grant County Hospital District No. 1, 152 Wn2d. 299, 96 P.3d 957 (2004). The Respondent miscomprehends the purpose for which the holding in that case was cited. The case is cited for the proposition, which is not rebutted by the agency, that a public employee is not required to exhaust administrative remedies in a wrongful termination civil matter. At page 311. This conclusion by Division III of the Court of Appeals limits the ability of the agency to contend that the doctrine of primary jurisdiction applies in the facts in this appeal.

The ruling in Molsness v. Walla Walla, 84 Wn.App. 393, 928 P.2d 1108 (1996), relied upon by the Respondent, was decided eight years before the ruling in Christiansen. Appellant cited the case to demonstrate

that an administrative remedy is not required to be exhausted under the applicable case. The Respondent likes the Molsness case because of the “stand pat and fight” language which it believes supports its contention that the resignation of the Appellant was voluntary.

The Moslness case can be cited as precedent concerning the subjective belief of a public employee and the impact of that belief on the voluntariness of a resignation because it was cited in the Travis v. Tacoma Public School District case, 120 Wn.2 App. 542, 85 P.3d 959 (2004). In that case, Division II held that the subjective belief of the employee is of no consequence when determining the voluntariness of a resignation. At page 551. Judge Armstrong relied on the ruling in Molsness when addressing the issue of subjective belief. Mr. Travis had contended that he was coerced into resignation. In this case, the Appellant does not contend that she was coerced into resignation.

C. Wrongful Transfer Contention

Appellants concede that there is presently no cause of action for a “wrongful transfer” as the Respondent has termed it. What is true that the administrative actions of a public employer are subject to scrutiny if they form, in pertinent part, a stream of events and circumstances which demonstrate adverse conduct which becomes intolerable. The Respondent

fails to deny the rule that whether the conditions of employment are objectively intolerable is a factual question.¹

Further the rule in Bulaich v. AT&T Information Systems, 113 Wn.2d 354, 258-61, 778 P.2d 1031 (1989), provides that an employee may show a deliberate act of the employer creating the intolerable condition such that a reasonable person would be compelled to leave. This is a basis for establishing a *prima facie* showing of constructive discharge. Here, the reassignment or transfer is the straw that broke the camel's back for the Appellant. Since the case-law requires that the determination of whether that administrative action, in concert with the other named actions, demonstrate intolerable conditions as a question of fact, Appellant contends that the trial court exceeded the scope of his ability to rule on a summary motion. That is, questions of fact are to be decided by a trier of fact and a trial court is not a trier of fact in a summary judgment proceeding unless the facts are uncontroverted. Since the trial court did not advise the parties of which facts it found were not controverted and those which were, it would be speculative to argue. However, the rule in Neilson is not an asserted fact, it is a limitation on the ability of the trial court to find facts.

D. Wrongful Termination

¹ See Neilson v. ArgiNorthwest, 95 Wn.App. 561, 478, 977 P.2d 613 (1999).

The Appellants have argued that the sequence of events leading to the issuance of the Personal Conduct Reports in the fall of 1999 when viewed in the sequence of earlier administrative actions which were found to be not valid, constituted a concerted effort on the part of the Superintendent at Francis Hadden Morgan Center to make working conditions for the Appellant intolerable. The reviewing court needs to keep in mind that although Ms. Black was alleged to have acted in such a harmful manner toward the Resident, Johnny H., when discipline was imposed it was a five day suspension and reassignment elsewhere. This transpired after the Superintendent was “very concerned” and “decided to personally investigate”² the circumstances beginning in August 25 1999.³

The disciplinary decision made by the same “very concerned” Superintendent in May of the following year [CP 116-17], some nine months later. Johnny H. remained assigned to Ms. Black as one of four residents during the entire nine month period until she was suspended and reassigned. [CP 111-12] One could rhetorically ask why, if the Superintendent was “very concerned” about the alleged action of Ms. Black, she permitted nine months to elapse as she personally investigated the circumstance. Even the Respondent notes that all of the interviews of witnesses to the alleged incident had been interviewed by 19 October

² Respondent’s Brief, page 6.

³ Respondent’s Brief, page 7.

1999.⁴ There was no evidence offered by the Respondent that any further interviews or investigative action was undertaken by the Superintendent between October 1999 and May 2000, except to issue the suspension and reassignment letter.

Appellants contend that they have demonstrated compliance with the Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 941, 913 P.2d 377 (1996), line of cases which require the showing of elements of clarity, jeopardy, causation and absence of justification. Appellants contend that her union activity establishes the clarity element; that discouraging the enforcement of the collective bargaining agreement would jeopardize the bargained for rights of employment, that the sequence of events demonstrates the link between the actions of Ms. Black and the adverse action of the Superintendent, and that the justification for the adverse action by the Superintendent was pretextual.

Appellants have provided both direct and circumstantial evidence that, at the least, establishes there were material facts at issue which required submission to the trier of fact; thereby precluding a summary ruling. The trial court could not resolve the attestation of facts about the incident for which Ms. Black was subjected to suspension and reassignment. A comparison of the declarations submitted by the

⁴ Respondent's Brief, page 7.

Appellant in her support⁵ and those of the Respondent⁶ in its support shows a clear contradiction of observations and expression of fact reflected by those witnesses. The assertions about communications among the parties involved with Johnny H. and the subsequent interactions described by the declarants all show contradiction in the basic facts used to support the disciplinary action and the Respondent's Motion for Summary Judgment at the trial level.

III.

CONCLUSION

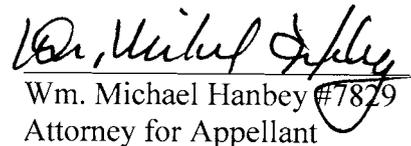
Appellants contend that the trial court erred in the fashion set forth in the initial brief of the Appellants. Further, the Responsive brief of the agency fails to identify and validate the actual uncontested facts upon which a summary ruling can be made. The legal basis for the ruling is contested by the Appellants. In regard to the significant case law cited by the agency in its support, the Appellants have demonstrated that the cases cited are either distinguishable on their facts or that the ruling actually supports a different purpose than that for which the Respondent has claimed support.

⁵ CP 80, et seq.; CP 90, et seq.; CP 87 et seq.; and CP 109 et seq.

⁶ CP 39 et seq.; CP 46, et seq.

The dismissal of this cause of action should be reversed and the case remanded back to the trial court for further proceedings and trial.

RESPECTFULLY SUBMITTED THIS 21st DAY OF
SEPTEMBER 2006.


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CERTIFICATE OF SERVICE:

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I, Kelsy Hull, hereby certify that the following documents: *Responsive Brie and Certificate of Service*, were mailed by First Class US Mail or ABC Legal Messenger, as identified below, to the following individuals:

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