

NO. 35201-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

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DASH POINT FAMILY DENTAL CLINIC, INC. AND  
DON S. MOORE, Appellant

vs.

CANDACE WAHL, Respondent

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**APPELLANT'S OPENING BRIEF**

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>I. ASSIGNMENTS OF ERROR .....</b>	<b>II</b>
<b>II. STATEMENT OF THE ISSUES.....</b>	<b>1</b>
<b>III. STATEMENT OF FACTS.....</b>	<b>2</b>
<b>IV. SUMMARY OF ARGUMENT.....</b>	<b>9</b>
<b>V. ARGUMENT.....</b>	<b>11</b>
A. WASHINGTON COURTS HAVE DECLINED TO CREATE A COMMON LAW CAUSE OF ACTION FOR GENDER DISCRIMINATION; THEREFORE, THE TRIAL COURT ERRED BY CONCLUDING THAT MS. WAHL HAD PROVEN COMMON LAW CLAIMS FOR SEXUAL HARASSMENT AND/OR HOSTILE WORK ENVIRONMENT .....	11
B. WASHINGTON DOES NOT RECOGNIZE A CAUSE OF ACTION FOR CONSTRUCTIVE DISCHARGE; IN ANY EVENT, MS. WAHL FAILED TO PROVE THAT SHE WAS CONSTRUCTIVELY DISCHARGED.....	12
C. MS. WAHL DID NOT PROVE THE COMMON LAW TORT OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY.....	15
D. THE TRIAL COURT ERRED BY AWARDING EMOTIONAL DISTRESS DAMAGES.....	22
E. THE TRIAL COURT ERRED BY FINDING THAT, AFTER THE ALLEGED DARK ROOM INCIDENT, MS. WAHL “DID NOT WORK THE REST OF THE DAY.” .....	24
<b>VI. CONCLUSION .....</b>	<b>25</b>

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Allstot v. Edwards</i> , 116 Wn. App. 424, 65 P.3d 696 (2003).....	15
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	23
<i>Bishop v. State</i> , 77 Wn. App. 228, 234, 889 P.2d 959 (1995).....	25
<i>Brower v. Ackerley</i> , 88 Wn. App. 87, 92, 943 P.3d 1141 (1997) .....	25
<i>Cagle v. Burns &amp; Roe, Inc.</i> , 106 Wn.2d 911, 916, 726 P.2d 434 (1986).....	18, 24
<i>Cherberg v. Peoples Nat'l Bank</i> , 88 Wn.2d 595, 606-607, 564 P.2d 1137 (1977).....	25
<i>Consolidated Rail Corp. v. Gottshall</i> , 512 U.S. 532, 556-557, 114 S. Ct. 2396, 2411, 129 L. Ed.2d 427 (1994).....	25
<i>Ellis v. Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2001).....	passim
<i>Gardner v. Loomis Armored, Inc.</i> , 128 Wn.2d 931, 913 P.2d 377 (1996).....	17, 18, 19, 21
<i>Gaspar v. Peshastin Hi-Up Growers</i> , 131 Wn. App. 630, 128 P.3d 627 (2006).....	17
<i>Haubry v. Snow</i> , 106 Wn. App. 666, 677, 31 P.3d 1186 (2001) .....	12, 16
<i>Havens v. C&amp;D Plastics, Inc.</i> , 124 Wn.2d 148, 876 P.2d 435 (1994).....	18
<i>Hegel v. McMahon</i> , 136 Wn.2d 122, 135, 960 P.2d 424 (1998).....	26
<i>Hubbard v. Spokane</i> , 146 Wn.2d 699, 707-08, 50 P.3d 602 (2002).....	18, 19, 20
<i>Hunsley v. Giard</i> , 87 Wn.2d 424, 433, 436, 553 P.2d 1096 (1976) .....	25
<i>Jenkins v. Palmer</i> , 116 Wn. App. 671, 677, 66 P. 3d 1119 (2003) ....	11, 14
<i>Korslund v. Dyncorp Tri-Cities Services, Inc.</i> , 156 Wn.2d 168, 125 P.3d 119 (2005).....	18, 19, 20, 22
<i>Nord v. Shoreline Savings Associations</i> , 116 Wn.2d 477, 485, 805 P.2d 800 (1991) .....	24
<i>Riccobono v. Pierce County</i> , 92 Wn. App. 254, 263, 966 P.2d 327 (1998).....	12, 14, 15

*Roberts v. Dudley*, 140 Wn.2d 58, 76, n. 14, 993 P.2d 901 (2000) ... passim

*Snyder v. Medical Service Corporation*, 145 Wn.2d 233, 238, 35  
P.3d 1158 (2001)..... 12, 14, 23, 25

*Thompson v. St Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d  
1081 (1984)..... 18

*Washington v. Boeing*, 105 Wn. App. 1, 116, 9 P.3d 104 (2000)..... 16

## **I. ASSIGNMENTS OF ERROR**

- 1. The trial court erred when it concluded that Candace Wahl had a legally cognizable cause of action against Dr. Moore for *common law* sexual harassment and hostile work environment. (See Conclusions of Law Nos. 5 and 6).**
- 2. The trial court erred when it apparently concluded that Candace Wahl had a legally cognizable cause of action for “constructive discharge.” (See Conclusion of Law No. 8)**
- 3. The trial court erred when it concluded that there was sufficient evidence to prove emotional distress damages (Conclusion of Law No. 13)**
- 4. The trial court erred when it awarded Candace Wahl \$20,000 in damages (Conclusion of Law No. 14)**
- 5. The trial court erred by finding that, after the alleged darkroom incident, Ms. Wahl “did not work the rest of the day.” Finding of Fact No. 17.**

## **II. STATEMENT OF THE ISSUES**

- 1. Does the State of Washington recognize a common law cause of action for sexual harassment and/or hostile work environment?**
- 2. Does the State of Washington recognize a claim of wrongful discharge in violation of public policy where an employee quits her job based upon allegedly intolerable sexual harassment but does not engage in conduct protected by the public policy against gender discrimination?**
- 3. Do the trial court’s findings of fact and conclusions of law support the ultimate conclusion that Ms. Wahl was wrongfully discharged in violation of public policy?**
- 4. Did the trial court err by awarding emotional distress damages where Ms. Wahl failed to prove any legally cognizable cause of**

**action against Dr. Moore and did not present medical evidence to prove her alleged emotional distress?**

- 5. Did the trial court err by finding that, after the alleged darkroom incident, Ms. Wahl “did not work the rest of the day.”**

### **III. STATEMENT OF FACTS**<sup>1</sup>

The respondent Candace Wahl was employed as a dental assistant by appellant, Don Moore, D.D.S. from late September of 2003 through March 1, 2004, when Ms. Wahl quit her job. CP 19. Upon leaving Dr. Moore’s employment, Ms. Wahl immediately obtained another job. CP 24.

Ms. Wahl filed this lawsuit against Dr. Moore on September 29, 2004. She alleged that during her employment Dr. Moore frequently used inappropriate language of a sexual nature, and that on or about February 20, 2004, Dr. Moore followed her into a small darkroom and asked her to watch him masturbate. CP 2. Ms. Wahl claimed that she kept her back turned to Dr. Moore but was not able to leave the darkroom. She alleges that based upon a sexual hostile work environment she was “constructively discharged” on or about March 1, 2004.

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<sup>1</sup> A copy of the trial court’s findings of fact and conclusions of law are included as an appendix to Appellant’s Opening Brief.

Ms. Wahl alleged the following causes of action: assault, intentional infliction of emotional distress, negligent infliction of emotional distress, outrage, sexual harassment, and constructive discharge/wrongful termination in violation of public policy. CP 2-3. She alleged that she had suffered serious and painful emotional injury, medical and counseling expenses, both past and future, loss of earnings to date, and loss of future earning capacity. CP 3-4.

Dr. Moore denied all of Ms. Wahl's allegations and asserted that she had failed to state a cause of action for which relief may be granted. Dr. Moore further asserted that Ms. Wahl's complaint was frivolous. CP 6-7.

Trial occurred from October 3, 2005 through October 13, 2005. The following witnesses testified on behalf of plaintiff: Candace Wahl, RP 31-74, 83-93, 98-136, 215-218, 375-379, 400-405, Janice Pernell, Dr. Moore's office manager during Ms. Wahl's employment, who was later terminated, RP 138-189, Connie Simmons, Ms. Wahl's mother, RP 189-199, 205-214, Keyosha Anderson, a friend of Ms. Wahl, and Lisa Thaves, an employee of Dr. Moore, RP 425-435. The following witnesses testified on behalf of defendant: Dr. Moore, RP 223-288, 436-441, his wife Felicia Moore, RP 318-373, Arnisha Davis, RP 442-445, Haley Bolam, RP 446-451, and Andriana Olmos, RP 451-455, all employees of Dr. Moore.

Ms. Wahl testified that she began her work as a dental assistant for Dr. Moore as an intern from Bryman College in August of 2003. RP 34. Dr. Moore hired Ms. Wahl as an employee after her internship. RP 37-38. Ms. Wahl admitted that while working for Dr. Moore she was counseled about discussing inappropriate matters in front of patients, RP 38-39, about punctuality, RP 41-42, about pretending that she didn't hear Dr. Moore when he called her name, RP 42, and about HIPPA regulations. RP 44.

Ms. Wahl testified that initially she was happy working for Dr. Moore, RP 40, 47, but within a couple months, she started to feel uncomfortable because Dr. Moore began talking about sexual issues. RP 47. She testified that as time progressed, these discussion became more frequent. Ms. Wahl testified that she was offended by Dr. Moore's comments but tried to ignore them. RP 47-49. Ms. Wahl testified that, Janice Pernell, told her that she had had an affair with Dr. Moore. RP 51.

Ms. Wahl testified that she decided to quit after an alleged incident in the dark room. RP 55. Ms. Wahl claimed that on Monday morning, February 23, 2004, Dr. Moore told her that he wanted to masturbate in front of her. RP 56. She testified that later that day he told her he wanted to show her how to duplicate a film and that they went into the dark room together. RP 57, 87-88. Ms. Wahl claimed that, while in the darkroom,

Dr. Moore told her that he wanted her to watch him masturbate. Although Ms. Wahl had her back to Dr. Moore and did not turn around, she claimed that she could smell lotion and “hear the lotion moving back and forth.” RP 59, 111. She said this took place for “60 seconds or so” until his wife knocked on the door. RP 59.

Ms. Wahl testified that she worked the rest of that day, and that her younger sister came in for treatment later in the day. RP 60, 113. Ms. Wahl testified that she continued to work the rest of the week. She testified that she told her mother about this incident on Friday, February 27<sup>th</sup>. RP 63. She testified that on the next Monday, she decided to quit and told Janice Pernell about the alleged darkroom incident. RP 64-65.

Ms. Wahl testified that she reported Dr. Moore’s alleged conduct to the police and to Bryman College. Neither the police or the college did anything because what Dr. Moore allegedly did was not criminal and, as a result of its investigation, Bryman found that what Ms. Wahl said was false. RP 70, 120, 244-246.

Ms. Wahl claims that she saw a therapist “maybe two or three times,” but did not feel the sessions were helpful. RP 68. Ms. Wahl testified that she is claustrophobic because of the incident and that when she sees a car like Dr. Moore’s her stomach clenches and she gets nervous. RP 67-68. Ms. Wahl’s mother testified that the last few months of her

daughter's employment with Dr. Moore she was upset and distraught. RP 191. She testified that he daughter would spend more time in her room and was not hanging out with her friends. RP 192. Ms. Wahl did not present any medical evidence of her alleged emotional distress damages, and did not make any claim for economic damages.

Dr. Moore testified that Ms. Wahl's job performance was substandard but that initially he gave her a lot of leniency because she was still learning. RP 230-234, 239-240. Dr. Moore testified that he never made any sexually explicit comments to Ms. Wahl or to anyone else. RP 241-243. Dr. Moore denied having any sexual relationship with Ms. Pernell, and testified that Ms. Pernell denied such conduct to the investigators from Bryman. RP 246. Dr. Moore denied masturbating while in the darkroom with Ms. Wahl. RP 244-248; CP 6.

Mrs. Moore was a hygienist in Dr. Moore's practice and also helped manage the business. RP 325, 331. Mrs. Moore testified that she had a comfortable working relationship with Ms. Wahl, and that Ms. Wahl would discuss personal matters with her. RP 327-329, 332. At no time during Ms. Wahls' employment, however did Ms. Wahl ever express any concern to Mrs. Moore about her husband's comments or conduct toward her. RP 330. At no time during Ms. Wahl's employment did Mrs. Moore

know or have any suspicion that her husband was engaging in inappropriate conversations or conduct with any employees. RP 333-334 During the entire time that Mrs. Moore had known her husband, she had never heard him use lewd language. RP 334-336.

On the day of the alleged dark room incident, Mrs. Moore was in the office the whole day. RP 339. Prior to Dr. Moore and Ms. Wahl entering the dark room, Mrs. Moore was talking to Ms. Wahl about ordering some new scrubs for her. RP 340. Dr. Moore approached them and told them that he has just spoken on the telephone with an oral surgeon and indicated that he needed to duplicate a patient's panoramic x-ray. CP 341. Dr. Moore wanted to show Ms. Wahl how to duplicate the x-ray. Mrs. Moore was standing outside the darkroom when they entered. RP 341. The darkroom did not have a lock on the door. RP 245.

Mrs. Moore proceeded to get on the telephone to order new scrubs for Ms. Wahl, but need the business credit card to do so. She knocked on the darkroom door and asked Dr. Moore where the business credit card was. He told her it was in his truck, but she could not find it there. When she came back in the office, she knocked on the door again to let Dr. Moore know she couldn't find the credit card in his truck and to let Ms. Wahl know that she needed to set up for a patient who had just arrived. RP 342.

When Ms. Wahl exited the dark room, Mrs. Moore told her about the uniforms that she had ordered. Mrs. Moore did not notice anything unusual about Ms. Wahl. She did not appear upset, embarrassed or nervous. RP 345. Mrs. Moore did not learn about the alleged masturbation by Dr. Moore in the darkroom until March 1, 2004 when Ms. Pernell informed Dr. Moore that Ms. Wahl had approached her and said that she did not know what Dr. Moore could possibly want to discuss in her evaluation and that she would not be there for it because she was quitting and that she would get unemployment. RP 337-388. Ms. Pernell told Dr. Moore that she had informed Candace that she would not get unemployment if she quit, and that Ms. Wahl had responded, “well, what if I say sexual harassment” and then walked out the door. RP 338.

Arnisha Davis, Haley Bolam, and Andrianna Olmos, who are all employees of Dr. Moore, testified that had never observed any inappropriate conduct by Dr. Moore. RP 444 (Ms. Davis), RP 448-450 (Ms. Bolam), and RP 453-454 (Ms. Olmos).

The trial court concluded that Ms. Wahl did not plead or establish any statutory causes of action and that although the court believed Ms. Wahl’s testimony about the alleged darkroom incident, it did not constitute an assault. CP 24-25 at Conclusions of Law Nos. 2 and 4. The trial court concluded that (1) “there was sufficient evidence to prove a

common law claim of sexual harassment against Dr. Moore;” (2) “there was a hostile working environment created by Dr. Moore;” and (3) “Candace Wahl was constructively discharged as the working conditions and environment were so intolerable that a reasonable person would have quit”: and (4) “there was sufficient evidence to prove emotional distress damages.” *See* Conclusions of Law Nos. 5, 6, and 8 and 13. The trial court did not specifically state whether or not it found a claim for intentional or negligent infliction of emotional distress or wrongful discharge in violation of public policy.

#### **IV. SUMMARY OF ARGUMENT**

None of the three claims that the trial court concluded that Ms. Wahl had proven are legally cognizable in the State of Washington. Therefore, the award of damages in the amount of \$20,000 must be reversed.

Washington courts have declined to create a common law cause of action for gender discrimination. *See Roberts v. Dudley*, 140 Wn.2d 58, 76, n. 14, 993 P.2d 901 (2000); *Jenkins v. Palmer*, 116 Wn. App. 671, 677, 66 P. 3d 1119 (2003). Therefore, the trial court erred by concluding that Ms. Wahl had proven a common law claim of sexual harassment and/or hostile work environment. *See* Conclusions of Law Nos. 5 and 6.

“Washington does not recognize a cause of action for constructive discharge; rather the law recognizes an action for wrongful discharge which may be either express or constructive.” *Snyder v. Medical Service Corporation*, 145 Wn.2d 233, 238, 35 P.3d 1158 (2001) (citing *Riccobono v. Pierce County*, 92 Wn. App. 254, 263, 966 P.2d 327 (1998)). The trial court did not conclude that Ms. Wahl had proven a claim for wrongful termination in violation of public policy; rather it concluded only that she had been “constructively discharged.” *See* CP 25 at Conclusion of Law No. 8.

The conclusion that Ms. Wahl had been constructively discharged was erroneous because Ms. Wahl did not prove that Dr. Moore “deliberately” made the working conditions intolerable, and did not prove that the working conditions were the “sole reason” that she quit. *See Haubry v. Snow*, 106 Wn. App. 666, 677, 31 P.3d 1186 (2001). More importantly, the evidence at trial did not support a claim for wrongful discharge in violation of public policy. Specially, Ms. Wahl did not present evidence to prove the *jeopardy* or *causation* elements of the intentional tort of wrongful discharge in violation of public policy.

## V. ARGUMENT

### A. WASHINGTON COURTS HAVE DECLINED TO CREATE A COMMON LAW CAUSE OF ACTION FOR GENDER DISCRIMINATION; THEREFORE, THE TRIAL COURT ERRED BY CONCLUDING THAT MS. WAHL HAD PROVEN COMMON LAW CLAIMS FOR SEXUAL HARASSMENT AND/OR HOSTILE WORK ENVIRONMENT

In the 2000 case of *Roberts v. Dudley*, our supreme court held that the common law tort of wrongful discharge in violation of public policy can be predicated upon the public policy against sex discrimination that is at the core of Washington's Law Against Discrimination. *Roberts v. Dudley*, 140 Wn.2d 58, 77, 993 P.2d 901 (2000). In so holding, the supreme court stated: "The tort of wrongful discharge in violation of public policy clearly applies only in a situation where an employee has been discharged." *Roberts*, 140 Wn.2d at 76. The *Roberts* court did not discuss whether such "discharge" can be either "express" or "constructive." The *Roberts* court, however did state:

We do not recognize a tort of gender discrimination. *Cf.* Dissent at 916. Rather we recognize the long-established tort of wrongful *discharge* may be established when the discharge is wrongfully accomplished on account of gender.

*Roberts*, 140 Wn.2d at 76, n. 14. In 2003, Division II of the Court of Appeals declined to create a new common law cause of action for sexual harassment and gender discrimination. *See Jenkins v. Palmer*, 116 Wn.

App. 671, 66 P.3d 1119 (2003). Appellant finds no authority for a separate tort of gender discrimination that is distinct from the tort of wrongful discharge in violation of public policy. Thus, to the extent the trial court concluded that Ms. Wahl had proven common law claims for sexual harassment and hostile working environment, its decision was erroneous. This erroneous decision was prejudicial to Dr. Moore because it is impossible to determine from the court's decision whether or not it would have awarded any damages if it had not made this erroneous decision. Therefore, reversal is required.

**B. WASHINGTON DOES NOT RECOGNIZE A CAUSE OF ACTION FOR CONSTRUCTIVE DISCHARGE; IN ANY EVENT, MS. WAHL FAILED TO PROVE THAT SHE WAS CONSTRUCTIVELY DISCHARGED**

“Washington law does not recognize an action for constructive discharge; rather the law recognizes an action for wrongful discharge which may be either express or constructive.” *Snyder*, 145 Wn.2d at 238 (citing *Riccobono*, 92 Wn. App. at 263). A discharge whether express or constructive will support a cause of action only if it was *wrongful*. A discharge may be wrongful for any of the following reasons: (1) it may breach an underlying employment contract; (2) it may be a violation of a statute; or (3) it may be a tort. *Riccobono*, 92 Wn. App. at 263.

Here, there was no employment contract, and the trial court concluded that Ms. Wahl did not plead or establish any statutory causes of action. *See* Conclusion of Law No. 2. Thus, the alleged constructive discharge was wrongful here only if Ms. Wahl prove each of the elements for the intentional tort of wrongful discharge. The trial court, however, did not ultimately conclude that Ms. Wahl had established the tort of wrongful discharge in violation of public policy. *See* CP 24-26. Nor did it make the factual findings necessary to support such a conclusion of law. *See* CP 19-22 and Section C below. Thus, the trial court erred when it apparently concluded that Ms. Wahl had established a claim for constructive discharge. *See* CP 25 at Conclusion of Law No. 8.

In any event, Ms. Wahl did not prove that she was constructively discharged. To establish constructive discharge, a claimant must show (1) that the employer deliberately made the working conditions intolerable for the claimant; (2) that a reasonable person in the claimant's position would be forced to resign; (3) that the claimant resigned *solely* because of the intolerable conditions; and (4) that the claimant suffered damages as a result of being forced to quit. *Allstot v. Edwards*, 116 Wn. App. 424, 65 P.3d 696 (2003) (citing *Haubry v. Snow*, 106 Wn. App. 666, 677, 31 P.3d 1186 (2001)). A resignation is presumed to be voluntary, and the

employee must introduce evidence to rebut the presumption. *Washington v. Boeing*, 105 Wn. App. 1, 116, 9 P.3d 104 (2000).

Here, the trial court did not make factual findings sufficient to establish that Ms. Wahl was constructively discharged. More specifically, the trial court did not find that Dr. Moore “deliberately” made Ms. Wahl’s working conditions intolerable. The trial court did not find that the “sole” reason that Ms. Wahl quit was Dr. Moore’s alleged sexual harassment. The trial court did not find that Ms. Wahl had rebutted the presumption that her decision to quit was voluntary. The trial court did not find that Ms. Wahl suffered damages “as a result of being forced to quit.”

More importantly, there was not sufficient evidence for the trial court to make these findings. The evidence at trial showed that there were other reasons that Ms. Wahl *may* have been emotionally distressed during her employment. Ms. Wahl had confided in Dr. and Mrs. Moore that she might be pregnant. RP 101, 328-329. Ms. Wahl was also dealing with a drug related arrest at Ft. Lewis. RP 168-172, Exhibit 27. She had received frequent feedback from Dr. and Mrs. Moore, and Ms. Pernel that she had substandard performance issues. RP 38, 41, (HIPPA concerns), RP 41, 232-233, 355 (attendance and punctuality), RP 42-43 (ignoring Dr. Moore), RP 61, 158-159, 230-232, 353-355, 359-361 (clinical mistakes and general inefficiency); RP 154-155 (inappropriate conversations

around patients), RP 233 (literacy problems). A very likely reason that Ms. Wahl's decided to quit was her concerns about an imminent performance evaluation that Ms. Wahl had reason to know would not be favorable. RP 62, 117-118, 233-234, 239-241, 337-338. After leaving Dr. Moore's employment, Ms. Wahl immediately obtained another job for higher pay. RP 65-67. Under these circumstances, Ms. Wahl did not prove a constructive discharge.

**C. MS. WAHL DID NOT PROVE THE COMMON LAW TORT OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY**

To establish the tort of wrongful discharge in violation of public policy, the plaintiff must prove the following four elements: (1) the existence of a clear public policy (the *clarity* element); (2) that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy (the *jeopardy element*); (3) that the public-policy-linked conduct of the plaintiff caused the dismissal (the *causation* element) and (4) the defendant cannot offer an overriding justification for the dismissal (the *absence of justification* element). *Ellis v. Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2001); *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996); *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 128 P.3d 627 (2006). These elements are conjunctive and thus the

plaintiff must prove each element. *Ellis*, 142 Wn.2d at 459 (citing *Gardner*, 128 Wn.2d at 942).

The plaintiff must establish a “wrongful intent” to discharge in violation of public policy. *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005) (citing *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 148, 876 P.2d 435 (1994)); *Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 916, 726 P.2d 434 (1986). The tort of wrongful discharge in violation of public policy “applies *only* in a situation where an employee has been discharged.” *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000).

The *clarity* element requires the court to inquire whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. *Ellis*, 142 Wn.2d at 459 (citing *Thompson v. St Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)). The *jeopardy* element requires the plaintiff to prove that he or she “engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy.” *Korlund*, 156 Wn.2d at 181 (quoting *Hubbard v. Spokane*, 146 Wn.2d 699, 707-08, 50 P.3d 602 (2002)). The plaintiff must prove that “discouraging the conduct in which [she] engaged would

jeopardize the public policy” against gender discrimination. *Ellis*, 142 Wn.2d at 460.

The purpose of the *jeopardy* element is to guarantee “an employer’s personnel management *decisions* will not be challenged unless a public policy is genuinely threatened.” *Gardner*, 128 Wn.2d at 941-942 (emphasis added). The plaintiff must also show that other means of promoting the public policy are inadequate. *Hubbard*, 146 Wn.2d at 707-08. The “other means of promoting the public policy” need not be available to the person seeking to bring the tort claim “so long as the other means are adequate to safeguard the public policy.” *Korslund*, 156 Wn.2d at 183 (citing *Hubbard*, 146 Wn.2d at 717). The *absence of justification* element acknowledges that some public policies, even if clearly mandated, are not strong enough to warrant interfering with employers’ personnel management decisions. *Gardner*, 128 Wn.2d at 947.

Here, Dr. Moore does not dispute that the law against discrimination, provides a “clear statement of public policy upon which a common law cause of action for wrongful discharge may be predicated.” *See Roberts*, 140 Wn.2d at 77. Dr. Moore contends, however, that Ms. Wahl failed to prove the *jeopardy* and *causation* elements of the tort of wrongful discharge in violation of public policy. Notably, the trial court did not enter findings of fact of sufficient to support the conclusion that

Ms. Wahl proved all four elements of the intentional tort of wrongful discharge in violation of public policy. *See* CP 19-24.

The trial court did not find that Ms. Wahl engaged in any particular conduct that relates to the public policy against gender discrimination, or was necessary for the effective enforcement of such public policy. *See Korslund*, 156 Wn.2d at 181. The trial court did not find that discouraging the conduct in which Ms. Wahls engaged would jeopardize the public policy against gender discrimination. *See Ellis*, 142 Wn.2d at 460. The trial court did not find that other means of promoting the public policy against gender discrimination were inadequate. *See Hubbard*, 146 Wn.2d at 707-08. Nor did the trial court enter a *conclusion of law* that Ms. Wahl had proven the intentional tort of wrongful discharge in violation of public policy. *See* CP 24-26.

More importantly, the evidence that Ms. Wahl introduced at trial was not sufficient to establish the *jeopardy* and *causation* elements. There was no evidence that Ms. Wahl engaged in particular conduct that relates to the public policy against gender discrimination, or was necessary for the effective enforcement of such public policy. *See Korslund*, 156 Wn.2d at 181. Because Ms. Wahl did not engage in any conduct that relates to the public policy against gender discrimination or his “necessary for the effective enforcement of such policy,” she could not as a matter of logic,

establish that discouraging her conduct would jeopardize the public policy against gender discrimination. *See Ellis*, 142 Wn.2d at 460. Thus, Ms. Wahl failed to prove the *jeopardy* element.

Similarly, Ms. Wahl failed to prove the *causation* element. Because she did not engaged in any conduct protected by the public policy against gender discrimination, she could not prove that her public-policy-linked conduct caused her dismissal. This would defy logic. Dr. Moore did not make the *decision* to terminate Ms. Wahl based upon her gender or upon any conduct protected by the public policy against gender discrimination; rather, Ms. Wahl made the decision to quit. CP 22. There was no personnel management *decision* by Dr. Moore at issue and no personnel management decision *caused* the termination. *See Ellis*, 142 Wn.2d at 460; *Gardner*, 128 Wn.2d at 941-942.

Where Ms. Wahl did not prove the *jeopardy* or *causation* elements of the tort of wrongful discharge, the burden did not shift to Dr. Moore to prove an overriding justification for Ms. Wahl's alleged discharge. In any event, the trial testimony established adequate grounds for terminating Ms. Wahl that were not based upon gender. *See RP 38*, 41-43, 61, 154-155, 158-159, 230-233, 353-355 359-361. Notably, the trial court found that "Dr. Moore's testimony about Candace Wahl's violation of HIPPA was a legitimate complaint along with the reprimand pertaining to comments

made to one of his patients about her hair.” CP 23 (Finding of Fact No. 30). The trial court further found that some of Dr. Moore’s defense of poor work performance were “valid.” CP 23 (Finding of Fact No. 35).

There do not appear to be any Washington cases in which an appellate court has held that the intentional tort of wrongful discharge in violation of public policy can be established where an employee quits or resigns based upon an alleged hostile work environment. In *Korlund*, our supreme court stated in dicta that “a claim of constructive wrongful discharge in violation of public policy may, *under some circumstances*, be brought where an employer *deliberately* creates intolerable working conditions and thus forces the employee to permanently leave the workplace *on medical leave*. *Korlund*, 156 Wn.2d at 191. Nonetheless, in *Korlund*, the supreme court declined to find a constructive discharge in violation of public policy because the public policy at issue, protection of the public health and safety against waste and fraud in nuclear industry operations, was adequately protected by remedies available under the Energy Reorganization Act. *Korlund*, 156 Wn.2d at 191.

In *Dudley*, our supreme court found that a small private employer could be liable for the common law tort of wrongful discharge in violation of the public policy against gender discrimination. The facts in *Dudley*, however, did not involve a “constructive discharge.” There, an employer

discharged a pregnant woman who was on unpaid maternity leave claiming her position was no longer available due to a business slowdown, but when the position was re-advertised, the employee was refused employment. *Dudley*, 140 Wn.2d at 51; *see also Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990) (allegation that employer terminated employees based upon ages and in retaliation for employee's opposition to employer's discriminatory practices was sufficient to state a tort claim for wrongful discharge in violation of public policy).

In *Snyder*, our supreme court stated "Washington law does not recognize a cause of action for constructive discharge; rather the law recognizes an action for wrongful discharge which may be either express or constructive." *Snyder*, 145 Wn.2d at 238. In *Snyder*, however, the employee did not assert that the alleged constructive discharge contravened a recognized public policy, and, therefore, she failed to state a claim for which relief may be granted. *Snyder*, 145 Wn.2d at 239. In *Snyder*, our supreme court never analyzed how the four elements of the intentional tort of wrongful discharge could be established when the alleged discharge is "constructive" rather than "express."

In short, there does not appear to be any Washington case that analyzes whether a claim for wrongful discharge in violation of the public policy against discrimination can be proven when the alleged discharge is

constructive rather than express, and when the employee has not engaged in any particular conduct that is protected by the public policy. The language in *Roberts* suggests that the “discharge” must be express as opposed to constructive. *See Roberts*, 140 Wn.2d at 76, n. 14. Logically, the *justification* and *causation* elements of the tort of wrongful discharge cannot be shown merely by a hostile work environment that causes an employee to quit his or her job. In such situations, the employee does not “engage in conduct protected by public policy” that leads to the employee’s dismissal.

**D. THE TRIAL COURT ERRED BY AWARDING EMOTIONAL DISTRESS DAMAGES**

As discussed above, Ms. Wahl has failed to establish any legally cognizable cause of action. Therefore, there was no legal basis to award damages of any kind.

Dr. Moore acknowledges that *if* Ms. Wahl had established the intentional tort of wrongful discharge in violation of public policy, emotional distress damages may have been recoverable as a “part of” or a “component of” or an “element of” compensable damages. *See Nord v. Shoreline Savings Associations*, 116 Wn.2d 477, 485, 805 P.2d 800 (1991) *Cagle v. Burns & Roe*, 106 Wn.2d 911, 919, 726 P.2d 434 (1986);

*Cherberg v. Peoples Nat'l Bank*, 88 Wn.2d 595, 606-607, 564 P.2d 1137 (1977); *Brower v. Ackerley*, 88 Wn. App. 87, 92, 943 P.3d 1141 (1997).

But, because Ms. Wahl attempted to recover emotional distress damages in the absence of any economic damages and in the absence of an independent basis of tort liability there were “special requirements” that she was required to show to recover emotional distress damages. *See Brower*, 88 Wn. App. at 97. As stated by the *Brower* court:

A great deal of human conduct not otherwise tortious will cause emotional distress to other persons sometimes by accident and sometimes by intention. . . . Requirements that the damage suffered be somehow extraordinary operates as a check against a flood of civil suit arising from nothing more than petty feuds and hurt feelings.

*Brower*, 88 Wn. App. at 97 (citing *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 556-557, 114 S. Ct. 2396, 2411, 129 L. Ed.2d 427 (1994)). Some degree of emotional distress is a fact of life, and “the courts cannot guarantee a stress-free workplace.” *Snyder*, 145 Wn.2d at 251 (quoting *Bishop v. State*, 77 Wn. App. 228, 234, 889 P.2d 959 (1995)).

When there is no independent basis of tort liability, i.e. when the plaintiff is claiming negligent infliction of emotional distress, the plaintiff must show that that his or her emotional distress is manifested by physical symptoms that are susceptible of medical diagnosis. *Hunsley v. Giard*, 87 Wn.2d 424, 433, 436, 553 P.2d 1096 (1976). The objective symptoms

must be proven through medical evidence. *Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998).

Here, Ms. Wahl did not present any medical evidence of her alleged emotional distress. As a result, the trial court's award of solely emotional distress damages could not have been properly based upon a claim for negligent infliction of emotional distress. As discussed above, Ms. Wahl did not establish the intentional tort of wrongful discharge in violation of public policy, and there is no legally cognizable claim for common law gender discrimination. Therefore, the trial court erred by awarding emotional distress damages.

**E. THE TRIAL COURT ERRED BY FINDING THAT, AFTER THE ALLEGED DARK ROOM INCIDENT, MS. WAHL "DID NOT WORK THE REST OF THE DAY."**

The trial court found as part of Finding of Fact No. 17, that after the alleged darkroom incident, Ms. Wahl "did not work the rest of the day." *See* CP 21 at Finding of Fact No. 17. Contrary to this finding, however, Ms. Wahl testified herself that she "did" work the rest of the day. RP 60. The trial court erred by entering this factual finding because there was no evidence to support it.

This error was prejudicial to Mr. Moore because it supports the court's conclusion that the disputed darkroom incident did occur and that Ms. Wahl was so upset by the incident that she suffered emotional distress

damages. The fact that Ms. Wahl actually did work the rest of the day, in conjunction with the fact that she did not tell her mother about the alleged incident for several days, supports Dr. Moore's position that Ms. Wahl made up the incident. Thus, this erroneous factual finding was prejudicial.

## **VI. CONCLUSION**

Based upon the foregoing, Dr. Moore respectfully requests that this Court reverse the trial court's conclusions that Ms. Wahl established common law claims for sexual harassment, hostile work environment, and constructive discharge. Accordingly, Dr. Moore requests that this court reverse the trial court's award of emotional distress damages.

DATED this 15<sup>th</sup> day of February, 2007.

  
CAROL J. COOPER, WSB #26791  
Attorneys for Appellant

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
FILED \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of February, 2007, I caused a copy of the original of **Appellant's Opening Brief** to be delivered to the below listed at their respective addresses:

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\_\_\_\_\_  
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Legal Assistant to Carol J. Cooper

# APPENDIX



04-2-12097-2 25011637 FNFL 02-23-06

Honorable Beverly G. Grant

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

CANDACE WAHL,

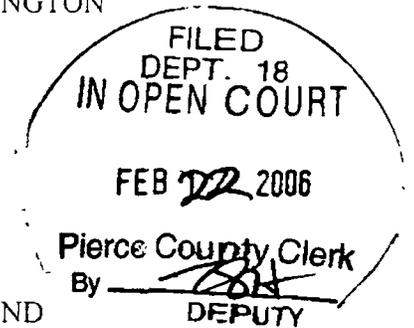
Plaintiff, NO. 04 2 12097 2

Vs.

DASH POINT FAMILY DENTAL CLINIC, INC. a Washington Corporation, and DON S. MOORE,

Defendants.

COURT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW



THIS MATTER having come on regularly before the undersigned judge of the above entitled court upon: (1) The complaint of Plaintiff for damages resulting from alleged assault, intentional and/or negligent infliction of emotional distress, sexual harassment, and constructive discharge/wrongful termination in violation of public policy, and (2) The Defendant's counterclaim for frivolous action, and the Plaintiff having appeared through her attorneys, and the Defendants having appeared through their attorney and the court having heard the case without a jury, enters the following findings of Fact and Conclusions of Law:

FINDINGS OF FACT

- 1. The Plaintiff, Candace Wahl, was employed by Defendant, Dr. Don S. Moore from approximately late September 2003 through March 1, 2004. At the time of her initial employment with Dr. Moore, she was 19 years old.
2. During Candace Wahl's employment by Dr. Moore, he operated his dental practice as a sole proprietor. He testified that he was generally involved with patient interaction and his wife, Felicia Moore, supervised the employees.

3. Dashpoint Family Dental, INC. was incorporated in June, 2004 after Candace Wahl had left Dr. Moore's employment.
4. Dr. Moore was the employer of Candace Wahl. He also was the only male at the workplace among his employees
5. Dr. Moore testified during trial that he had eight or more full-time or part-time employees during Candace Wahl's employment. There was no testimony as to how many employees were employed at any given time. Dr. Moore testified that during the tenure of Ms. Wahl's employment there were "about eight or more employees."
6. Janice Pernell was employed on February 2, 2003 as an Office Manager at Dashpoint Dental Clinic until she was terminated for theft on September 29, 2004. Her job duties included scheduling patients, preparing clinical payments, answering the telephone, and typing letters. She worked at the front desk.
7. Janice Pernell testified that she had an affair with Dr. Moore on two occasions. She would perform oral sex on him throughout her employment, Dr. Moore would make her feel uncomfortable by making sexual comments about her female anatomy and the bodies of some of his patients
8. On September 18, 2003 Janice Pernell prepared a Dental Assisting Externship Evaluation Report in which she evaluated Candace Wahl's performance as "outstanding" while Candace Wahl worked as an extern from September 8, 2003 through September 19, 2003. See Ex. 12.
9. Janice Pernell testified that Dr. Moore said to her that as of September 8<sup>th</sup> through September 19, 2003, Candace Wahl was doing a pretty good job. Dr. Moore denied that he made such a statement.
10. Candace Wahl testified that Dr. Moore made comments of a sexual nature (e.g. oral sex, preferences of wife when having sex, size of penis, graphic details of his sex life, references to the physical anatomies of female employees and patients) that in particular during the last few months of employment they became more graphic. Janice Pernell also testified that she heard Dr. Moore make similar sexual comments. Although the frequency of the alleged sexual harassment during her entire tenure of employment was unclear, Candace Wahl testified that during the last two or three months sexual comments by Dr. Moore occurred a few times a week.

11. Candace Wahl testified regarding an incident of inappropriate sexual conduct by Dr. Moore in the darkroom. According to her testimony, she claimed that earlier that day Dr. Moore had made statements to her that he wanted her to watch him masturbate, and that made references to his and that of his wife's sexual life. Mrs. Moore was eight months pregnant at the time. Trying to distract his interest, Candace Wahl did not consent to his request.
12. Dr. Moore told Candace Wahl in front of a patient that "he was glad that she had decided to let him do that." At the time, Candace Wahl did not understand what he meant.
13. Later, Dr. Moore brought her into the dark room to show her how to duplicate a film. A red light was on during entire incident but that light did not completely illuminate the room. During the dark room incident Candace Wahl had her back to Dr. Moore and although she saw the lotion in his hand, she did not see, but heard the actions described in Paragraph 14.
14. Dr. Moore asked her to quit what she was doing and said to her to "let me do this real quick". Candace Wahl believed Dr. Moore was masturbating. Candace Wahl testified that he had lotion in his hand and that she could hear the lotion moving back and forth. She expressed her contempt for his acts and told him he was wrong, particularly since he was the boss and that he should not have been acting in that way. At that time, Mrs. Moore knocked on the door and he stopped.
15. Mrs. Moore testified that at no time did Candace Wahl look as if there was anything that had occurred that would cause anyone any concern. She did not scream or, cry for help while in the darkroom with Dr. Moore.
16. Candace Wahl testified that she told Janice Pernell about the darkroom incident. Janice Pernell also testified that she was being asked to give sexual favors at work to Dr. Moore.
17. The darkroom incident made Candace Wahl feel very disgusted, used and violated. She did not work the rest of the day. This fact is disputed by Dr. Moore.
18. She tried to ignore Dr. Moore who also testified that Candace Wahl was reprimanded for not responding to him when he called for her
19. Both Dr. Moore and his wife testified that Candace Wahl had been comfortable in confiding in them about other personal matters or concerns. However, Ms. Wahl indicated that due to the treatment of her by Mrs. Moore in prior situations, she did not feel comfortable approaching Mrs. Moore about the sexual harassment. Candace Wahl denied talking to either Dr

Moore or Mrs. Moore about personal things. The Moores contradicted her statement.

20. Later that day, her sister, age 17 was escorted into the office to receive treatment by Dr. Moore. Candace Wahl did not tell her sister, mother or boyfriend of the dark room occurrence until several days after the incident. Candace Wahl did not stop her relatives from receiving services from Dr. Moore even after the dark room incident. Candace Wahl told her mother about the dark room incident.
21. Candace Wahl testified that the reason she waited to tell anyone in particular about the dark room incident was because she was scared and didn't know who to tell. She felt uncomfortable and no longer wanted to be in the same room with Mr. Moore. Further, when she reported it to the police, she was interviewed by a male police officer and investigators from Bryman College which made her feel very uncomfortable.
22. Candace Wahl tried to avoid Dr. Moore and he continued to make sexual comments which made her feel uncomfortable. She testified that he harassment by Dr. Moore occurred a few times a week for a three month period.
23. After the darkroom incident, Dr. Moore became more critical of Candace Wahl's work. Shortly, thereafter, for the first time, she was informed that week that an employment review would be conducted of her.
24. Candace Wahl quit due to the working environment and Dr. Moore's sexual overtures towards her. She further testified that she could not work for another dentist again and did not plan on going back. The effects of her having worked for Dr. Moore, manifested themselves in different ways. For instance, when she drives down the road and sees a car like his, her stomach clinches. She feels claustrophobic at times. She makes sure that she is never alone with anyone and works only in warehouse open spaces.
25. Ms. Simmons testified that her daughter, Candace Wahl, told her that Dr. Moore made her feel uncomfortable. She noticed that her daughter's mood changed half way through her employment. Candace Wahl began to spend more time in her bedroom and would no longer hang out with her friends. Connie Marie Simmons encouraged her daughter to write everything down. They talked about Candace Wahl's need to make money and whether or not she should stay.
26. Candace Wahl reported the dark room incident to the police department and Bryman College.

27. Candace Wahl testified that she saw a therapist two or three times but did not feel the process was helpful. Upon cross examination of Candace Wahl, she admitted that there was only one visit to the therapist. However, no testimony or documentary evidence from the therapist was admitted.
28. Dr. Moore's employee manual contained a section on sexual harassment. The policy required employees who felt that they were being harassed to report the harassment to either Dr. Moore or his wife. Candace Wahl did not report the sexual harassment to Dr. Moore or his wife, as she felt uncomfortable to do so.
29. In defense to these allegations, Dr. Moore testified that Dr Moore testified that, as an extern Candace Wahl's job performance as an extern had been substandard but he showed her leniency because she was still in transition and learning. He also testified that there were problems with Candace Wahl's job performance because of her attendance and tardiness. Pernell testified that Ms.Wahl did not have tardiness issues. Further Janice Pernell testified that .
30. Dr. Moore's testimony about Candace Wahl's violation of HIPPA was a legitimate complaint along with the reprimand pertaining to comments made to one of his patients about her hair.
31. Prior to Candace Wahl leaving the employment of Dr. Moore, Candace Wahl was given oral reprimands by him and Mrs. Moore.
32. Janice. Pernell testified that Dr. Moore did not like to give raises and therefore , it was unlikely that he would not give Candace Wahl a good evaluation.
33. Dr. Moore testified that his employees would only receive an annual raise if warranted and that not everyone would get one just because they were employees. The policy manual stated that equitable salaries were based of merit evaluation on performance.
34. The letters of reprimand regarding Candace Wahl's performance, however, were not written until after she filed a claim for unemployment with the Employment Security Department. Ms. Pernell's testimony regarding the backdating of these documents at the direction of Dr. Moore was credible.
35. Although some of Dr Moore's defenses of poor work performance (including her violation of HIPPA regulations regarding patient confidentiality and improper comments were valid, the majority of the letters of reprimands drafted by Janice Pernell at Dr. Moore's direction were falsified. Dr. Moore knew that he had Janice Pernell falsified facts.

36. Dr. Moore denies that he directed that these letters of reprimand be placed in Candace Wahl's file after she left his employment to prevent Candace Wahl from getting unemployment benefits. Rather, Dr. Moore claims that throughout Candace Wahl's employment she should have received written performance evaluations.
37. He claims that the task of writing performance evaluations was left to Janice Pernell but that she had failed to follow through in a timely fashion. Further, Dr. Moore testified that the letters of reprimand were written after Candace Wahl had left his employment because Janice Pernell failed to prepare and place them in Candace Wahl's personnel file at the time the oral reprimands were given.
38. Candace Wahl acknowledged that she violated HIPPA laws and made an inappropriate comment to a patient. As to the other letters of reprimand, Janice Pernell testified that the subject matters were untrue. Further, Pernell testified that Dr. Moore dictated to her what to type and that she didn't know some of the words because they were not a part of her vocabulary.
39. After Candace Wahl had left the employment of Dr. Moore, Mrs. Moore started an investigation, but did not talk with Candace Wahl because she was no longer employed by her husband, Dr. Moore.
40. Candace Wahl testified that after leaving Dr. Moore's employment, she immediately obtained another job for higher pay. She further testified that she was not seeking lost wages.
41. The court found that: Candace Wahl's testimony about the working environment, sexual comments and overtures was more credible than that of Dr. Moore; the explanation given by Dr. Moore as to why he directed Janice Pernell to backdate the reprimands was not credible particularly since at the time, there was an unemployment compensation matter pending between Candace Wahl and Dr. Moore.

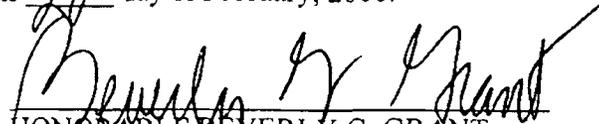
#### **CONCLUSIONS OF LAW**

1. The court has jurisdiction over the subject matter and parties to the complaint and Pierce County is the proper venue to litigate the Plaintiff's claims.
2. Plaintiff did not plead or establish any statutory causes of action.

3. It is a violation of public policy in the State of Washington for an employer to sexually harass an employee.
4. The darkroom incident did not constitute an assault upon the person of Candace Wahl, as there was no testimony that she was in apprehension of reasonable fear that she would be harmed.
5. It is a violation of the common law of the State of Washington to sexually harass an employee. There was sufficient evidence to prove a common law claim of sexual harassment against Dr. Moore.
6. Furthermore, there was a hostile working environment created by Dr. Moore. When the person you are to report a sexual harassment claim to is the harasser and there is no higher person, there is no requirement to complain. Were Candace Wahl to have complained to either Dr. Moore or Mrs. Moore, it would not have any benefit and thus would have been an exercise in futility. *Ellerth v. Burlington Northern, Inc.*
7. Candace Wahl did report the incident to her immediate supervisor, Janice Pernell. The reasons given by Dr. Moore in backdating letters of reprimand were pretextual in that there was a pending Employment Security claim filed by Candace Wahl against him.
8. Candace Wahl was constructively discharged as the working conditions and environment were so intolerable that a reasonable person would have quit. Further Candace Wahl quit in response to Dr. Moore's sexually harassing conduct.
9. The Plaintiff had the burden of proof to prove damages resulting from sexual harassment claim.
10. Plaintiff was able to immediately obtain another job and did not make a claim for lost wages. Therefore, there is not award for past or future wages.
11. The award of damages is only against Defendant Dr. Moore. Candace Wahl is the prevailing party
12. Defendant Dash Point Family Dental Clinic is entitled to an award of statutory attorney fees and statutory costs pursuant to R.C.W. Title 4.84.185 if it can show that the action was frivolous and advanced without reasonable cause. The court declines to find that Defendant has met this burden, since there was a finding of sexual harassment the Defendant's counterclaim for frivolous action is dismissed.

- 13. There was sufficient evidence to prove emotional distress damages.
- 14. The court concludes that a reasonable award to Plaintiff, Candace Wahl is \$20,000.
- 15. Plaintiff is not entitled to statutory attorney fees under RCW 49.60.

DONE IN OPEN COURT this 22<sup>nd</sup> day of February, 2006.

  
HONORABLE BEVERLY G. GRANT  
Superior Court Judge

FILED  
DEPT. 18  
IN OPEN COURT  
FEB 22 2006  
Pierce County Clerk  
By [Signature]  
DEPUTY

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of February, 2007, I caused a copy of the original of **Appellant's Opening Brief** to be delivered to the below listed at their respective addresses:

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DATED this 20<sup>th</sup> day of February, 2007.

  
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FILED  
COURT OF APPEALS  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
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