

No. 35201-0-II

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

CANDACE WAHL,
Respondent,

vs.

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

BRIEF OF RESPONDENT CANDACE WAHL

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I. ISSUES

A. Was there substantial evidence to support a claim for wrongful termination in violation of public policy where the employer Dr. Moore repeatedly sexually harassed employee Candace Wahl over several months, culminating with Dr. Moore masturbating in front of Candace which actions led to her constructive discharge? (Appellant's Assignment of Error 1.)

B. Do the trial court's findings support the conclusion of law that Candace was constructively discharged when those findings demonstrate that Candace was the subject of continued sexual harassment over several months, culminating with Dr. Moore masturbating in front of Candace? (Appellant's Assignment of Error 2.)

C. Are emotional distress damages available to employees who are subject to a continued course of sexual harassment and prove a wrongful termination in violation of public policy claim? (Appellant's Assignments of Error 3 and 4.)

D. Is the fact Candace worked following the masturbation incident harmless to any conclusion of law? (Appellant's Assignment of Error 5.)

II. STATEMENT OF THE CASE

A. Bryman College Dental Assistant Program and Internship

The Respondent, Candace Wahl, then 19 years old, enrolled in the Dental Assistant program at Bryman College. RP 31. The program started in December, 2002 and lasted eight months. RP 32. As a pre-requisite to successful completion, Candace was required to participate as an intern at a local dental clinic. RP 33. In August 2003, the extern coordinator at Bryman College told Candace to do her unpaid internship at the Dash Point Family Dental Clinic in Federal Way, WA. RP 33-34.

The Dash Point Family Dental Clinic was owned and operated by the Appellant, Don S. Moore, D.D.S. RP 35. Her duties as a dental assistant intern were to assist the dentist with procedures, including putting X-rays together and supplying him with the various dental tools before, during and after dental procedures. RP 35.

During the first weeks of her internship, Candace was excited to work for Dash Point Family Dental Clinic. RP 36. She felt that working there was a fun experience and that her fellow employees were really nice and helpful in showing her the dental procedures. RP 36. She enjoyed the “hands on” work experience while working at the dental clinic. RP 36.

B. Evaluation Forms

Candace was required to submit weekly reports to Bryman College to monitor her progress while working at the clinic. RP 36-37. The “evaluation forms” were filled out by the dental clinic’s office manager, Janice Pernell. RP 37. Candace testified that Janice Pernell told her that she was doing very well and that Dr. Moore liked having her as an assistant. RP 37. Moreover, 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 worked at the clinic from September 8 through September 19, 2003. CP 20; Ex. 12. Candace also testified that, apart from the evaluation forms

that were submitted to Bryman College, she did not receive any other verbal or written evaluations. RP 37. Following successful completion of the dental assistant program and obtaining good performance evaluations by Janice Pernell, Candace was offered a full time dental assistant position at the Dash Point Family Dental clinic. RP 37-38.

C. Full Time Employment

During the first months of her employment Candace testified that she was not verbally reprimanded or warned about her job performance, nor were any written letters of reprimand provided to her. RP 38. Shortly thereafter, Candace was subjected to sexual explicit comments made by Dr. Moore (e.g. oral sex, preference of wife when having sex, size of penis, graphic details of his sex life, references to the physical anatomies of female employees and patients). CP 20. During the last few months of employment Dr. Moore's sexual comments became more frequent and increasingly graphic. CP 20. Janice Pernell testified that she also heard Dr. Moore make similar sexual comments. CP 20. Candace testified that these sexual comments occurred a few times a week. CP 20. At first, Candace coped by ignoring Dr. Moore's sexual comments and continued to do her work as if nothing had happened. RP 47. During one such incident, Candace testified that, while she was changing her uniform, Dr. Moore made a sexual comment about Candace's breasts, about him having

sex with his wife, as well as the various sexual preferences he had with his wife. RP 48-49. In addition, Candace testified that Dr. Moore made inappropriate comments about Candace's mother to the effect that "if he wasn't married that he would be [her] boss and [her] daddy". RP 49.

During another incident while Candace was on lunch break, Dr. Moore came into the break room and interrupted a telephone conversation Candace was having with her friend, Keyosha Anderson. RP 50. Candace testified that Dr. Moore went into the bathroom, came out with a ruler and put the ruler on the table. RP 50. Candace then testified that Dr. Moore told her to tell Keyosha Anderson what the size of his penis was. RP 50.

D. Darkroom Incident

On February 23, 2004, Dr. Moore's inappropriate behavior reached a new level. RP 55-56. Dr. Moore approached Candace with the pretense of teaching her how to duplicate x-ray film. RP 56. Both Candace and Dr. Moore went into the dark room and shut the door whereupon, Dr. Moore handed Candace a box of film to start to get the film prepared. RP 57.

The size of the dark room was "not very big", approximately the size as a "small walk-in closet". RP 58. The room contained both a red light and a white light and the door was to be kept shut when developing x-ray film. RP 58. When there was a worker who was developing film,

the door was supposed to remain shut and a red light would turn on. RP 58.

As Candace was preparing the film in the darkroom, Dr. Moore told her to quit what she was doing and turn around. RP 59. Candace smelled lotion and realized that by the smell and the sounds that Dr. Moore was masturbating behind her. RP 59. Candace testified that Dr. Moore asked her to turn around so that he could “finish faster”. RP 59. Candace testified that Dr. Moore had “lotion in his hands” and that she could hear the lotion moving “back and forth”. RP 59. While Dr. Moore repeatedly told Candace to turn around, Candace testified that she told Dr. Moore that what he was doing was wrong, that he was her boss and that he should not be doing that. RP 59. Candace testified that this whole incident lasted for approximately 60 seconds and ended abruptly when Dr. Moore’s wife, Felicia Moore knocked on the door. RP 59.

Candace testified that she felt very violated and disgusted. RP 60. However, she continued to work for the remainder of the day and the rest of the week. RP 60. Candace told no one about the dark room incident and was uncomfortable working there for the remainder of the week. RP 60-61.

Candace sensed that, although Dr. Moore refrained from making any more offensive comments to her, she noticed that Dr. Moore had been

more critical of her work. RP 61. Candace testified that Dr. Moore was very quick to tell her if she did something wrong or if she was not getting something done fast enough. RP 61.

Four days later Candace decided to tell her mother, Connie Simmons, what had happened in the darkroom. RP 63. The next day Candace called her mother crying and saying that she could not look at Dr. Moore anymore and could not take it any longer. Her mother told her to quit. RP 194. Candace had enough of Dr. Moore's sexual harassing conduct and she quit on March 1, 2004, one week after the dark room incident. RP 64.

E. The Police Report and the Bryman Investigation

As soon as Candace quit, Candace went to the police department. CP 22. Candace proceeded to tell the police officer exactly what happened regarding the darkroom incident. RP 194. The officer said that because Candace did not actually see him, because she did not turn around, there was nothing that they could do. RP 194.

F. Consequences of Quitting Dash Point

Shortly after quitting Dash Point Family Dental, Candace applied for unemployment compensation. RP 65. Ultimately her application for benefits was denied because Dr. Moore had reported that Candace's work was substandard. RP 66. However, Candace testified that she received no

written letters of reprimand or any evaluations, apart from the good performance evaluations written by Janice Pernell, in her employment file. RP 37.

Janice Pernell testified that Dr. Moore instructed her to fabricate letters of reprimand to place into Candace's file to make it appear that Candace was a poor employee and that she would have been fired in any event. RP 145-146. The letters of reprimand were back dated in order to make it look like Candace had a poor work history at the clinic. RP 146. Candace testified that she never received or reviewed any letters of reprimand during her entire time at the clinic. RP 37.

The trial court found that Candace's Wahl's testimony about the working environment; sexual comments and overtures was more credible than that of Dr. Moore. CP 26. The court also found that the letters of reprimand regarding Candace's job performance were not written until after she filed a claim for unemployment with the Employment Security Department. CP 23. Moreover, the trial court found that the explanation as to why Dr. Moore directed his office manager, Janice Pernell to back date the reprimands was not credible. CP 26.

III. SUMMARY OF ARGUMENT

Candace asserted and proved at trial below that she was wrongfully terminated in violation of public policy. Dr. Moore assigns no error to any

of the findings related to his sexual harassment of Candace or masturbating in her presence. Instead, he argues that these verities on appeal are not actionable. He is suggesting to this court that an employer can legally sexually harass his employee for months and even masturbate with her in the same room. He is suggesting there is no civil remedy for such despicable acts. Washington law, however, does recognize a claim for wrongful termination based upon the public policy against sexual discrimination in the workplace. The findings of fact and conclusion of law entered by the trial court support each element of such a claim. The trial court found that Candace did prove her claim for wrongful termination and the damages award should be affirmed.

IV. ARGUMENT

A. STANDARD OF REVIEW

Following a trial to the bench, the standard of review by the appellate courts is not simply de novo, as is implied throughout parts of Dr. Moore's Opening Brief. When a trial court has viewed and weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of law. Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 555, 132 P.3d 789 (2006); Keever & Assocs., Inc. v. Randall, 129 Wn. App. 733, 737, 119 P.3d 926

(2005), review denied 157 Wn.2d 1009 (2006). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that a finding is true. Hegwine, 132 Wn. App. at 555-556. If that threshold is met, the appellate court will not substitute its judgment for that of the trial court even though the appellate court may have resolved factual disputes differently. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). The appellate court reviews only those findings to which error has been assigned; unchallenged findings are verities on appeal. Hegwine, 132 Wn. App. at 556.

The appellate court must view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony. Hegwine, 132 Wn. App. at 556. The trial court's findings are presumed correct and the party claiming error has the burden of demonstrating that a factual finding is not supported by substantial evidence. Fisher Properties, Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

The appellate court reviews questions of law and conclusions of law de novo. Hegwine, 132 Wn. App. at 556 (citing Sunnyside Valley, 149 Wn.2d at 880).

Here, Dr. Moore has only challenged Finding of Fact No. 17. Thus, all other findings are verities on appeal. See Hegwine, 132 Wn.

App. at 556. Dr. Moore has assigned error to Conclusions of Law Nos. 5, 6, 8, 13 and 14. Whether those conclusions are correct is reviewed de novo.

B. CANDACE PRESENTED SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT SHE WAS WRONGFULLY TERMINATED IN VIOLATION OF WASHINGTON'S PUBLIC POLICY AGAINST SEX DISCRIMINATION IN THE WORKPLACE.

Candace asserted and proved at trial below that she was wrongfully terminated in violation of public policy.

Washington has long recognized the tort of wrongful discharge in violation of public policy. Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 231-33, 685 P.2d 1081 (1984). In 2000, the Washington State Supreme Court held that a claim for wrongful discharge in violation of public policy could be “based on the clearly articulated public policy against sex discrimination in employment.” Roberts v. Dudley, 140 Wn.2d 58, 77, 993 P.2d 901 (2000).

The Washington courts require the plaintiff to satisfy four elements to prove a claim for wrongful termination in violation of public policy:

- (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 caused the dismissal (the *causation* element); and

(4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element).

Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 941, 913 P.2d 377 (1996).

Here, Candace presented evidence sufficient to satisfy, and the court found, all elements of a claim for wrongful termination in violation of public policy.

1. *There is a clear public policy in Washington against sex discrimination in the workplace.*

The *clarity* element is a question of law. Roberts, 140 Wn.2d at 65. There can be no dispute after the court's decision in *Roberts* that there is a clear public policy against sex discrimination in the workplace. Dr. Moore concedes as much. See also CP 25 (Conclusions of Law No. 3).

2. *Candace engaged in conduct that would jeopardize the public policy by being female and being employed by an employer who sexually harassed her over several months.*

Candace also satisfied the *jeopardy* element. Dr. Moore contends that Candace did not satisfy the *jeopardy* element because there was no evidence that Candace engaged in any conduct that relates to the public policy against sex discrimination in the workplace. Such an argument flies in the face of what the public policy against sex discrimination represents, and *as a matter of logic*, is flawed. Candace did all she had to,

or could do, to “engage” in conduct that relates to the public policy against sex-discrimination: she was a female employed in Washington state. Nothing else is required. These facts, though obviously never disputed, are existent in the court’s findings where the court found that Candace was employed by Dr. Moore and that Dr. Moore was the only male in the workplace. See CP 20 (Finding of Fact No. 4).

Obviously, the language of the *jeopardy* element formulated in *Gardner* is applicable to claims where the plaintiff engages in certain conduct, such as rescuing another in peril as Gardner did, and then is retaliated against for that conduct. In cases similar to the one at bar, a more reasonable formulation of the *jeopardy* element may be “that encouraging (or allowing) the conduct in which the *defendant* engaged would jeopardize the public policy.” That is, allowing a male employer to sexually harass a female employee would jeopardize the public policy against sex discrimination in the workplace. Here, Dr. Moore sexually harassed Candace over a period of months by continually making comments of a sexual nature that became more graphic over time and culminated with him masturbating in front of her in the darkroom. See CP 20-21 (Findings of Fact No. 10, 11, 13, and 14). Encouraging this conduct would jeopardize the public policy against sex discrimination.

3. ***Candace's constructive discharge was directly a result of and caused by the sexually harassing conduct.***

Candace also satisfied the *causation* element. Dr. Moore contends that it would defy logic to suggest that Candace proved her *causation* element when she did not engage in any conduct that jeopardized the public policy. But as discussed above, she did so by the mere fact of being female and being employed by a male employer who sexually harassed her. The issue under this element is whether the sexual harassment caused the dismissal¹. Here, the trial court found that Dr. Moore sexually harassed Candace for several months by making sexual and graphic comments which culminated with him masturbating in front of her in the darkroom. See CP 20-21(Findings of Fact No. 10, 11, 13, and 14). The trial court found in specific terms that “Candace Wahl quit due to the working environment and Dr. Moore’s sexual overtures towards her.” See CP 22 (Finding of Fact No. 24) (no error has been assigned to this finding and therefore it is a verity on appeal). The trial court concluded that these findings necessitated the legal conclusion that “Candace Wahl quit in response to Dr. Moore’s sexually harassing conduct.” See CR 25 (Conclusion of Law No. 8).

¹ The issue of whether the discharge can be constructive and whether the evidence was sufficient to support the finding of constructive discharge is discussed in the next section.

4. ***Dr. Moore cannot possibly offer any justification for his conduct in sexually harassing Candace, which was the impetus for her constructive dismissal.***

As Dr. Moore never terminated Candace, it is difficult to imagine how he could ever offer any justification for the dismissal. Quite frankly, this element does not fit well where the dismissal was constructive and not express, unless the court looks at the actions that were the basis for the constructive discharge. Here, those actions are the persistent sexual harassment and then ultimately the dark room incident where Dr. Moore exposed himself and masturbated in Candace's presence. If the court looks to those actions, what possible justification could Dr. Moore offer? Certainly, there is no evidence of consent—not surprising considering Dr. Moore denied the conduct but just was not believed by the trial court. There is no other possible justification for the actions that led to Candace's dismissal.

Even though Dr. Moore did not terminate Candace expressly, he suggests that there were other, adequate grounds for terminating Candace's employment and then proceeds to cite several pages of the record that contain *alleged* actions that the trial court did not find credible. See Appellant's Opening Brief at 19. For instance, Dr. Moore references parts of the record that deal with alleged letters of reprimand. Of the

multiple issues dealt with in the letters, he notes that the court found *two* items credible—one regarding a HIPPA issue where Candace discussed a patient’s treatment in front of another patient and the other where Candace made a comment about a patient’s hair. Id. While the court found these two instances did occur (one of reasons may be because Candace actually admitted it—see CP 24 (Conclusion of Law No. 38)), the court also found:

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[sic] facts.

See CP 23 (Findings of Fact No. 35) (emphasis added). Even though “other grounds” for termination are irrelevant to the issue of justification for the harassment, the fact is that the court found that the majority of those reasons were falsified by Dr. Moore—created in an attempt to deny Candace’s claim for unemployment compensation.

There is no justification for Candace’s dismissal—a dismissal that was the result of Dr. Moore’s sexual overtures towards her. See CP 22 (Finding of Fact No. 24).

5. *The Court's conclusions that Dr. Moore sexually harassed and created a hostile work environment are not error because those conclusions are mere elements of Candace's overall claim for wrongful termination in violation of the public policy against sex discrimination in the workplace.*

Dr. Moore attempts to create an error of law by parsing the trial court's conclusions of law and comparing it to dicta or catch phrases in case law. In Part V, Section A of Appellant's Opening Brief at pp. 11-12, Dr. Moore argues that Conclusions of Law Nos. 5 and 6, which speak to a sexual harassment claim, are in error because Washington does not recognize a common law claim for sexual harassment. What Dr. Moore fails to mention is that those conclusions of law are elements of Candace's overall claim for wrongful termination of public policy. Dr. Moore further contends the court never concluded that Candace had established the tort of wrongful discharge in violation of public policy. See Appellant's Opening Brief at 13. This statement is incorrect and a misinterpretation of the trial court's conclusions. The court did not in one conclusion of law declare "Candace established a claim for wrongful discharge in violation of public policy" but over several conclusions of law laid out the elements of a claim for wrongful discharge in violation of public policy:

First the court concluded that Candace had identified and there was at issue a clear public policy:

3. It is a violation of public policy in the State of Washington for an employer to sexually harass an employee.

Second the court concluded that Dr. Moore had violated this policy and thus, had committed a common law claim for wrongful discharge in violation of public policy:

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.

Third, the court concluded that the sexual harassment caused the constructive discharge:

8. . . . Further Candace Wahl quit in response to Dr. Moore's sexually harassing conduct.

CP 25. Thus, the conclusions of law taken as a whole establish a claim for wrongful termination in violation of the public policy against sexual harassment in the workplace.

This case was never about whether there was sufficient evidence that Dr. Moore's continued sexual comments and masturbating in front of Candace "jeopardized" the policy against sexual harassment. There was no issue about whether Candace engaged in "protected conduct" or whether her public policy linked conduct "caused" her dismissal.

This case was about the credibility of Candace and Dr. Moore. Candace claimed that Dr. Moore repeatedly made sexual comments that

gradually grew more frequent and more graphic overtime. As this was her first job in her chose field of being a dental assistant, she tried to withstand the onslaught of harassment. However, when Dr. Moore brought her into the darkroom and began masturbating in her presence, she could withstand the harassment any longer and was forced to leave employment. Dr. Moore denied these allegations. But the trial court resolved this factual dispute in favor of Candace:

The court found that: Candace Wahl’s testimony about the working environment, sexual comments and overtures was more credible than that of Dr. Moore. . . .

See CP 24 (Finding of Fact No. 41).

Candace proved a wrongful termination in violation of public policy by proving that Dr. Moore sexually harassed her over several months to such a degree that it led to her constructive discharge.

C. THE TRIAL COURT’S CONCLUSION THAT CANDACE WAS CONSTRUCTIVELY DISCHARGED IS SUPPORTED BY THE FINDINGS THAT DR. MOORE MADE REPEATED COMMENTS OF A SEXUAL NATURE THAT BECAME MORE GRAPHIC OVER TIME CULMINATING WITH DR. MOORE MASTURBATING IN FRONT OF MS. WAHL.

Dr. Moore argues 1) that there is no case law authority that allows a claim for wrongful discharge in violation of public policy where the discharge was constructive and 2) that Candace did not prove she was

constructively discharged. Both assertions are wrong based upon Washington precedent and based upon the facts in the record and the uncontested findings of fact.

1. ***Under Washington law, a claim for wrongful termination in violation of public policy can be based upon a constructive discharge.***

A claim for wrongful termination in violation of public policy can be predicated upon a constructive discharge. In *Snyder v. Med. Serv. Corp.*, the court stated that Washington “law recognizes an action for wrongful discharge which may be either express or constructive.” Snyder v. Med. Serv. Corp. of E. Wash., 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)). In *Korslund v. DynCorp Tri-Cities Servs., Inc.*, the employer argued to the court that constructive discharge should not support a claim for wrongful discharge in violation of public policy. In response, the Supreme Court stated:

While we have not analyzed this issue, we have stated that a cause of action for wrongful discharge in violation of public policy may be based on either express or constructive discharge. Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn.2d 233, 238, 35 P.3d 1158 (2001). DynCorp offers no reason why the theory of constructive discharge should not apply in the context of the tort of wrongful discharge in violation of public policy, and **we find no compelling reason why the tort cannot be based on constructive discharge.**

Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 177 n. 1, 125 P.3d 119 (2005)(emphasis added).

This case is especially appropriate for allowing a constructive discharge to apply to a claim for wrongful discharge in violation of public policy. Here, the public policy violation is subjecting Candace to months of sexual harassment that culminated with her being trapped in the dark room while her employer masturbated. Those same acts that constituted the violation also constitute the constructive discharge. If this court were to say that Candace had to wait until she was fired, then there would never be any recourse for her as there is no reason a harasser would terminate an employee who is the subject of the harassment. Such a ruling would be tantamount to giving employers a license to harass so long as they never expressly terminated the employee. A claim for wrongful discharge in violation of public policy can be based upon a constructive discharge.

In addition to arguing that constructive discharge does not apply to a violation of public policy discharge, Dr. Moore dedicates a section of his brief claiming that Washington does not recognize a cause of action for constructive discharge, separate and apart from wrongful discharge in violation of public policy. Candace has never asserted any claim solely for constructive discharge—one of her claims has always and only been a claim for wrongful discharge in violation of public policy, of which it was

alleged that her discharge was constructive. The trial court never concluded that Candace satisfied a “claim” or “cause of action” for constructive discharge, as Dr. Moore contends at page 13 of his opening brief. There is no claim for constructive discharge in Conclusion of Law No. 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.

CP 25. This statement concludes that Candace met the legal standard for constructive discharge, i.e., that she proved that *element* of her claim. It does not say that she is being awarded damages for a *claim* for constructive discharge—as Dr. Moore suggests. Thus, this conclusion satisfies one element of Candace’s claim for wrongful discharge in violation of public policy.

2. ***Candace was constructively discharged when she was faced with months of repeated sexual comments ending with Dr. Moore masturbating in her presence in the dark room.***

To establish a constructive discharge, the employee must show that the employer deliberately made working conditions so intolerable that a reasonable person would quit and that the employee resigned because of the conditions and not for other reasons. Washington v. Boeing Co., 105

Wn. App. 1, 15, 19 P.3d 1041 (2000); see also Martini v. Boeing Co., 137 Wn.2d 357, 366 n.3, 971 P.2d 45 (1999); Bulaich v. AT&T Info. Sys., 113 Wn.2d 254, 261, 778 P.2d 1031 (1989); Haubry v. Snow, 106 Wn. App. 666, 677, 31 P.3d 1186 (2001). The question of whether the working conditions were intolerable is a question of fact. Washington, 105 Wn. App. at 15; Haubry, 106 Wn. App. at 677.

Candace proved at trial that she was constructively discharged and the court specifically found that she was constructively discharged. The intolerable element of constructive discharge may be proved by aggravating circumstances or by a continuous pattern of discriminatory treatment. Washington, 105 Wn. App. at 16; Haubry, 106 Wn. App. at 677. Candace proved it by both. Candace showed a continuous pattern of sexual harassment arising from Dr. Moore's comments regarding "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." CP20 (Finding of Fact 10). The sexual comments occurred a few times a week for a period of three months. CP 20, 22 (Finding of Fact 10 and 22). Candace also proved aggravating circumstances: Dr. Moore trapping her into the dark room and proceeding to masturbate in her presence. CP 21 (Findings of Fact Nos. 11-14). Even without the months of harassment, the act of masturbating in front of your employee is

sufficient alone to constitute a constructive discharge. The court found Candace's testimony regarding Dr. Moore's sexual harassment more credible than Dr. Moore's denial. CP 24 (Finding of Fact No. 41). Further, the court specifically found that "Candace Wahl quit due to the working environment and Dr. Moore's sexual overtures towards her." CP 22 (Finding of Fact No. 24). From these findings, the court concluded that Candace was constructively discharged and that her discharge was a result of the sexually harassing conduct. CP 25 (Conclusion of Law No. 8).

Dr. Moore argues that the court did not enter findings *specific* enough to establish a constructive discharge. Dr. Moore suggests that the court did not find that he "deliberately" made Candace's working conditions intolerable. The court did specifically find that Candace's working conditions were intolerable due to the sexual harassment. CP 25 (Conclusion of Law No. 8). Is Dr. Moore suggesting that he did not *deliberately* make repeated sexual comments to Candace over a three month period? Is he suggesting that he did not *deliberately* masturbate in front of her? Dr. Moore also argues the court did not find that the "sole" reason that Ms. Wahl quit was due to the sexual harassment. This is incorrect. The court specifically found "Candace Wahl quit due to the working environment and Dr. Moore's sexual overtures towards her." CP 22 (Finding of Fact No. 24).

Dr. Moore also suggests that there was not sufficient evidence to support a finding that Candace quit due to the sexual harassment. However, he does not dispute on appeal or assign error to any of the evidence of the harassment. That evidence included: comments about Candace's breasts made while she was changing, comments about sex with his wife, sexual preferences he had with his wife, comments about Candace's mother to the effect that he would be Candace's "boss" *and* her "daddy", comments about directing her to tell her friend the size of his penis after he pointed on a ruler, etc. RP48-50. The record is replete with such instances of continuous sexual comments. These comments do not even include the act of masturbating in front of her, which could stand alone to justify the constructive discharge.

Considering that the court found Candace's testimony with respect to the sexual comments/masturbation truthful and did not believe Dr. Moore's denial, Dr. Moore does not dispute these findings but instead lists several other reasons why Candace *may* have quit. Aside from repeating the character assassination against Candace that was done at trial (i.e., she thought she was pregnant and she was arrested for possession), there is no legal basis for pointing out other reasons she "may" have quit. The trier of fact was presented with reasons why Candace said she quit, i.e., the sexual harassment culminating in the masturbation incident, and presented with

arguments from Dr. Moore on why she may have quit, i.e., the alleged substandard performance issues.² And the trier of fact found that she quit because of the sexual harassment not the reasons proffered by Dr. Moore. CP 22 (Finding of Fact No. 24). Dr. Moore has not assigned error to this finding and it is therefore, a verity on appeal. Even if error was properly preserved on this finding, the finding was supported by the substantial evidence cited above and the reviewing court should not substitute its judgment for that of the trial court on issues of credibility and conflicting testimony. See Hegwine, 132 Wn. App. at 556.

The findings that Candace quit in response to Dr. Moore's months of sexual harassment and in response to the dark room incident is supported by substantial evidence; and that evidence supports the finding that she was constructively discharged.

D. THE TRIAL COURT PROPERLY AWARDED EMOTIONAL DISTRESS DAMAGES AS A RESULT OF MS. WAHL'S WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY CLAIM.

Dr. Moore argues that the court erred in awarding emotional distress damages apparently solely because Candace did not prove a wrongful termination in violation of public policy claim. In fact, he

² Dr. Moore lists several alleged performance issues as possible reasons Candace may have quit even though the court only found that two of those issues were actually true. With respect to the other issues, the court found that Dr. Moore fabricated them. CP 23 (Finding of Fact No. 35).

admits that if such a claim was proved, then the damage award was proper. As stated above, Candace *did* prove such a claim. Therefore, the damage award must stand.

E. THE COURT’S FINDING THAT CANDACE WORKED THE REST OF THE DAY FOLLOWING THE MASTURBATION INCIDENT IS IMMATERIAL TO THE ULTIMATE CONCLUSION THAT CANDACE WAS CONSTRUCTIVELY DISCHARGED IN VIOLATION OF PUBLIC POLICY.

Dr. Moore has assigned error to the trial court’s Finding of Fact No. 17, which found that Candace “did not work the rest of the day” after the darkroom incident. This statement is not prejudicial and is harmless to the court’s overall findings and conclusions of law.

Dr. Moore contends that the finding of Candace working the rest of the day is prejudicial because it supports the conclusion that the darkroom incident did occur and that Candace suffered emotional distress as a result—implying that without this finding the court would not have found emotional distress damages. However, this is not accurate as it is obvious from the other findings that the trial court was well aware, and found, that Candace did work the rest of the day after the darkroom incident and the court still found that the masturbation incident did occur and that Candace did suffer emotional distress. Specifically, in Finding of Fact No. 20, the court finds:

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 darkroom occurrence until several days after the incident.

CP 22. Also, the court specifically found that Candace did not quit until the following week, until after she discussed the matter with her mother. CP 22; RP 60; RP 63-64. Thus, when the court found that Candace suffered emotional distress as a result of Dr. Moore's actions, the court was well aware that Candace worked for some short period of time following the masturbation incident. Any error in finding that Candace worked the rest of the *day* following the darkroom incident could not have influenced the court's other findings when the court knew and found that Candace worked for *one week* after the incident.

Not only is the finding harmless, but it is also superfluous to the ultimate finding that Candace suffered emotional distress. The court found that Candace could not work for another dentist again, despite this being her chosen field. CP 22. The court found that when Candace is driving and she sees a car like Dr. Moore's, her stomach clinches. CP 22. The court found that Candace has issues with claustrophobia and that she refuses to work in small office spaces; choosing instead to work in warehouses where people are always around. CP 22. So not only is the finding harmless, it is superfluous as well considering there was

substantial evidence without the alleged erroneous finding to support a finding of emotional distress.

V. CONCLUSION

Candace respectfully requests this Court to affirm the trial court in all respects. Candace asserted and proved a claim for wrongful termination in violation of this state's clear public policy against sex discrimination in the workplace. Candace proved that she suffered months of sexual harassment that culminated in being subject to Dr. Moore masturbating in her presence. These intolerable acts led to her constructive discharge. As a result of Dr. Moore's sexual acts towards her, she suffered emotional distress. The court's findings are supported by substantial evidence, which is not in dispute on this appeal except for one finding that is harmless and superfluous. Those findings support the conclusions of law entered by the trial court. This Court should affirm.

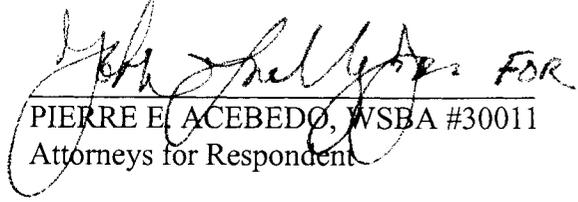
DATED this 23rd day of April 2007.

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DIVISION II

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STATE OF WASHINGTON
BY _____
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COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

35201-0-4

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

No. ~~31907-1-H~~

AFFIDAVIT OF SERVICE

Appellants,

vs

CANDACE WAHL,

Respondent.

STATE OF WASHINGTON)

) ss.

COUNTY OF PIERCE)

FERESHITA ZAFAR, being first duly sworn on oath, deposes and
says:

1. I am the legal assistant to John W. Ladenburg, Jr., one of
the attorneys for respondent Candace Wahl.

ORIGINAL

