



NO. 29206-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SARAH R. LITTLE,

Respondent/Cross Appellant.

v.

ROBERT RANDALL BAKER, and
BAKER INVESTMENT GROUP, LLC,
a Washington limited liability corporation,

Appellants,

RESPONDENT'S / CROSS APPELLANT'S BRIEF

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I. INTRODUCTION

Following a bench trial in Spokane County Superior Court, the Honorable Annette F. Plese rendered a written opinion in favor of Sarah Little and against Robert Randall Baker and Baker Investment LLC for sexual harassment. Findings and Conclusions and a Judgment were entered which included an award of attorney fees to Little.

Mr. Baker and Baker Investment LLC appealed the determination of sexual harassment and the resulting monetary award. Ms. Little cross-appealed the amount of the fee award and the ruling that Little was not assaulted or battered.

II. CROSS APPELLANT'S ASSIGNMENTS OF ERROR

Assignments of Error

1. Finding of Fact Nos. 30 and 31 are not supported by substantial evidence.
2. The trial court failed to use the lodestar formula and did not consider the hours expended on unsuccessful claims having a common core of facts and related legal theories when awarding attorney fees.
3. The trial court erred when it found some of Baker's touching was offensive and unwanted but also ruled Baker did not assault

or batter Little.

Issues Pertaining to Assignments of Error

1. Are Finding of Facts Nos. 30 and 31 supported by substantial evidence?
2. Does a trial court err when it does not use the lodestar formula to award fees?
3. Has a trial court erred when it finds offensive and unwanted touching took place and then rules no assault or battery occurred?

III. STATEMENT OF THE CASE

The Defendant Randy Baker (Baker) owned and operated a real estate development company in Spokane named Baker Investment LLC (Baker Investment). *RP 38,41,170*. Baker Investment was also a defendant in this case. The Plaintiff Sarah Little (Little) was employed by the defendants as an executive assistant. *RP 24; 106, line 25*. When Little was hired, the company had an office in the Hutton Building in Spokane and she worked there for about three and a half years. *RP 26*. Then, the business moved its office to the basement in Baker's residence where Little continued to work. *RP 36*.

Contrary to defendants' claim that Baker Investment had a limited

number of employees, most of the witnesses in the case were employees of Baker Investment during Little's tenure. Little worked at Baker Investment for almost five years beginning in February of 2005 and ending on December 6, 2008. *CP 154, 253; RP 54-55.* Baker was an employee of Baker Investment. *RP 170, lines 18-21.* Elondrus Lee (Lee) worked at Baker Investment from December 2006 to May of 2007. *RP 154, Line 18.* Tim Franz (Franz) worked for Baker Investment from September 2003 to June of 2007. *RP 325, Line 1.* Kevin Burgess (Burgess) worked for Baker Investment in 2007, part of 2008 and 2009. *RP 261, line 25-262, lines 1-3.* Yvette Burgess was an employee of Baker Investment in 2007 and 2008. *RP 296, line 14-17.* Lauren Braley (Braley) worked at Baker Investment from 2005 to 2007. *RP 27, 362, line 1-4.* Susan Trumbull was an employee of Baker Investment for three months in 2008. *RP 130.* Staci Hardee (Hardee) worked for Baker Investment from January 2008 when she took over the bookkeeping work from Little. *RP 384-385.*

Ty Hardin did not testify, but he was an employee of Baker Investment in 2007 and 2008 when the Burgesses was there. *RP 299, line 6-8; RP 327, line 13-23.* There also were two other employees named Freddy and Ned who did not testify, but who also worked in 2007 with the

Burgesses. *RP 262, line 10-12; 327, line 13-23.*

When Little began work for Baker, most of his attention was focused on the female co-worker Braley. *RP 105.* However as time passed, Baker began to pay more attention to Little. Soon the terms and conditions of Little's employment required Little to endure unwanted physical contact with Baker.

Baker hugged Little almost every morning. *RP 30, line 8.* Baker would come up behind Little at her desk and wrap his arms around Little's chest cupping her breast. At times Baker's hand would slip inside Little's shirt and even in her bra during these hugs. *RP 33 line 4.* He referred to these hugs as "boobie hugs." *CP 252, uncontested Finding of Fact No. 9; RP 30, lines 3-16; 365, lines 11-12.* Baker admitted that the term "boobie" was a reference to a female breast. *RP 240, lines 23-25, 241, lines 1-2.* Trumbull, a female co-worker, testified Baker did "a lot of hugging" of Little. *RP 133, lines 5-12.* She described Baker trying to reach over and hug Little while she was seated at her desk working. *RP 134, lines 7-9.* When Little knew Baker was coming up behind her, she would cross her arms across her chest or she would try to stand up to give him a platonic hug. *RP 30, lines 3-16.*

While Baker denied inappropriate hugging, he did admit that he hugged Little and that she got more hugs than male employees. *RP 241, lines 13-14; 242, lines 21-24.* Once a week or more Baker used the mandatory phrase, “Sarah give me a hug...” *RP 242, lines 4-9; 195, line 8; 196, lines 1-2.* It was normal for Baker as Little’s supervisor to tell Little to give him a hug. *RP 281, lines 13-24.* He also admitted in his deposition to coming up behind Little when she was sitting down and giving her a hug “as a friend.” *RP 241, lines 20-22.* On one occasion, Trumbull saw Baker touch Little’s cleavage during a lunch meeting. *RP 134, lines 14.* The trial court found in Finding of Fact No. 5 that Baker hugged Little on a daily basis and that some of Baker’s touching was unwanted and offensive.

Little was also required to submit to Baker’s kisses some mornings. He would kiss her on the neck, ear or cheek. *RP 31.* These kisses made Little “extremely uncomfortable.” *Id.* Baker admits he kissed Little on the cheek one time. *RP 196, lines 1-2.* All of the foregoing conduct was unacceptable to Little and she told Baker that on various occasions. *RP 32, lines 19-25, 33, lines 1-10.*

When Baker and Little were in public, Baker would place his hand

on the small of her back and then move his hand down lower, sometimes reaching her buttocks. Many times Baker did this in situations where Little could not make a scene about Baker's behavior, but she would tell him later that it was inappropriate. *Id.*

At times, Baker would also put his arm around Little or put his arm through hers. He liked to give people the impression he was in a relationship with Little. *Id.*; 366, line 25, 367, lines 1-6. Baker admitted he put his arm around Little and his hand around her waist. *RP 232, lines 5-12, 368, line 8.*

Testimony from a male co-worker Lee established the fact that sexual innuendo and physical contact with Baker was "part of the job" for Little. *RP 155, line 13.* Lee not only confirmed Baker engaged in "hugging or touching," he saw Baker come up from behind Little and hug her. *RP 156, line 3-5.* Baker rubbed Little's shoulders and patted her buttocks. *Id. at lines 18-24.* Baker did not touch Lee the same way he touched Little. *RP 157.* Lee confirmed the fact that Baker made comments about Little's appearance using words like "sexy," "hot" and testified Baker said "most of the stuff guys say to women." Baker did not say similar things to Lee. *RP 159, lines 4-9.* Referring to Little's breasts,

Baker said the “sisters” look good today. *Id. at lines 12-22.*

Baker admitted there was sexual joking and innuendo in the office. *RP 233, lines 3-4.* Braley confirmed that sexual joking frequently occurred in the office. *RP 370, 11-23.* The sexual innuendo and hugging was so pervasive Staci Hardee, Baker’s bookkeeper hired in 2008 and who worked mostly from her home, was able to testify about Baker’s sexually suggestive behavior. *RP 384, lines 17-18; 385, line 10.* Hardee testified she was in the office about 24 times in a year’s time for an hour or less. *RP 399.* During those 24 visits to Baker’s office, Hardee not only heard the term “boobie hug” being used, (*RP 400, lines 6-8*) she was asked for boobie hugs by Baker and another employee Kevin Burgess. *RP 401.* This behavior occurred even though she was a new employee for the business.

Baker also asked Little and Braley to dress sexy when they were at conventions because it would get the company more attention if they were dressed in revealing clothing. *RP 30.* Baker used the words “leather and lace look” to describe what he wanted. *RP 30, line 6; 371, lines 1-4.* Baker tried to select sexy clothing for Little by taking her shopping. On one shopping trip, Baker came into the dressing room when Little was

partially undressed and looked over the fitting room door. *RP 35.*

Baker referred to Little as “sexy Sarah” and often would tell her she “looked hot.” *CP 252, uncontested Finding of Fact No. 9.* Some mornings before work, Baker would call Little and ask if she was going to dress sexy for him. *RP 35.* Baker was infatuated with Little’s chest and he made frequent comments referring to her breasts and pointing them out to friends. *RP 133, lines 10-15.*

Baker also referred to lunch as a “nooner” (*CP 252, uncontested Finding of Fact 10*) and he knew the term had a sexual connotation. *RP 239, lines 13-21.* This term was not offensive to Little when the office was located in the Hutton building, but once the office was in the basement of Baker’s house, his use of the word changed. *RP 31, 13-22.* He began to ask Little to go upstairs to his bedroom for a nooner. *Id.* This conduct was offensive to Little. He made similar requests in a “suggestive tone” to one of Little’s female co-workers, Trumbull. *RP 132, lines 1-13.* Little did not use the term “nooner.” *RP 164, line 6.*

Also offensive was Baker’s description of Little and Trumbull as “my bitches.” *RP 132, line 20.* At times Baker would refer to the women as his bitches. *Uncontested Finding of Fact No. 11; RP 33, 145, line 15.*

Finding of Fact No. 31 states that Trumbull testified she was the first person to use the phrase “his bitches” when she asked if he was taking his bitches to lunch. There was no such testimony and the finding is unsupported.

The term “bitches” appears at pages 131, 132, and 145 in Trumbull’s testimony. She never testified she used the term or was the first to use the term. She did not recall the term being used in connection with lunch, but rather recalled being introduced to other people as “his bitches.” *RP 145, lines 15-16.* The Finding of Fact is not supported by any evidence.

Finding of Fact No. 30 states that Little may have referred to herself as one of the “bitches.” Little testified she did not use the term in the workplace. *RP 34, line 25- 35, lines 1-2; 90, lines 14-25, 91 lines 1-12.* The finding regarding Little’s use of the term “bitches” is not supported by the evidence.

Little’s job also required her to intervene in an effort to assist and protect Braley more than once. Braley also worked for defendants when the company’s office was in the Hutton building. *RP 26.*

On one occasion, while Baker and Braley were on a business trip to

Portland, it became apparent Baker and Braley would have to spend the night in Portland. Braley became very distraught when Baker rented only one hotel room for both of them and claimed he wanted to save money.

RP 27. Braley was in tears and called Little seeking help. *RP 369, lines 14-25.* Little rented another hotel room for Braley and then called Baker to tell him what she had done.

In approximately 2006, Baker took Little and Braley on a business trip to Palm Springs. *RP 70, line 2.* During a social gathering hosted by a client that Little and Braley attended, Baker made inappropriate comments about how Braley looked and suggested that he would like to have a sexual relationship with her. *RP 28-29.* Later, as the group sat around a table Baker grabbed inside Braley's blouse and pulled it exposing Braley's breast. *RP 27. RP 366, lines 1-9.* Both women expressed their shock and asked permission to leave. *Uncontested Finding of Fact No. 22; RP 28.*

Baker's treatment of Braley was distressing to Little. When Baker attempted to force Braley to share a hotel room with him, Little was angry and scared for Braley. She worried about Braley and she was concerned she could be put in the same position. *RP 29.* When Baker exposed Braley's breast, Little was embarrassed, humiliated and angry.

Little was also expected to do personal domestic tasks for Baker that were not part of her typical job duties. *RP 36*. These tasks included washing Baker's underwear and other laundry. *RP 36, line 16*.

None of Baker's conduct described above was accidental and Little told him his behavior was upsetting on more than one occasion. *RP 44, line 18*. She clearly told him it was unwanted attention. *RP 48, line 16*. Sometimes Baker would respond to Little's complaints by buying a gift or by reminding her of something he had done for her. *RP 48, line 25*.

Little felt like she was constantly being humiliated in public and in front of co-workers. *RP 57, line 25*. While at work she was on edge all the time and constantly had to look over her shoulder because she was afraid of Baker's conduct. *RP 58, line 9*. Little was so afraid of Baker that she wanted Trumbull to be hired because she felt safer with a co-worker in the office. *RP 108, line 11*. She suffered from stress and anxiety. *RP 44, line 23*. She found it difficult to communicate with her family and would go home crying. *RP 45, line 4*. Little was not as patient as she should have been with her pre-teen daughter and there was more conflict. *RP 58*.

Little's mother Carol Calhoun testified that her daughter

complained that Baker was humiliating her by asking for boobie hugs. *RP 113, line 4.* Little also reported that she did not like being called a bitch. *Id. at 17.* Calhoun saw the clothing that had been purchased for Little for use on business trips. Calhoun thought the clothing was inappropriate and she testified Little was uncomfortable wearing it. *RP 114, line 7-10.*

After going on her first business trip, Little's outlook about business trips with Baker changed from excitement to dread. Little told her mother she did not want to go because of some of the things that happened on the previous trip. *RP 114, line 24.* Little was afraid she would lose her job if she did not go on the trips. *RP 115, line 5.* Calhoun testified that Little was anxious and very nervous and lost 40 pounds because of Baker's behavior. Little's mother urged her to quit her job several times because she should not have to deal with Baker. *RP 116, line 19.*

Lee also testified that Little was upset and frustrated about the way Baker treated her. *RP 166, lines 6-20.* Little often complained to Lee as they traveled home after work. Braley also testified that Little was upset a lot and expressed frustration and anger to her about the way Baker treated Little. *RP 382, lines 22-25, 383, line 1.*

After leaving the job, Little experienced intestinal problems, digestion problems, loss of appetite and she lost weight. *RP 45, line 13.*

This evidence lead the trial court to specifically find that Baker's "harassment did cause [Little] some form of emotional distress, but not to the level that the Court would consider severe." *CP 231.*

In spite of the emotional distress Baker inflicted on Little, she continued to work because she felt trapped in her job. *RP 46.* Little was well paid and made \$50,000 during her last year of employment at Baker Investment. *RP 38, line 11.* As a single mother of two (*RP 22*), Little became dependent on the income Baker paid her. *RP 39.* She had purchased a home and did not feel that she could leave her job and continue to support her family. *RP 39; 47, line 17; 167 lines 11-13.*

The fact that Little was convicted of theft and forgery in 1996 (*RP 23.*), also limited Little's options. Little told Baker about the convictions and Baker periodically reminded Little that she would not get another job with similar pay and benefits because of her convictions. *Uncontested Finding of Fact No. 14; RP 37, line 18.* Little was fearful Baker was correct that she could not find another similar job. *RP 47, line 10.*

As the economy began to worsen, Baker became increasingly

hostile, accusing Little of causing his business to fail. *RP 50, line 21.*

Baker and Little met to discuss his concerns and he ultimately gave Little a bonus. *RP 51, line 1.* When Little returned from a short leave to care for her mother, a dispute between Little and Trumbull lead to a disagreement between Little and Baker. Little left her job with an agreement that she was being laid off . *RP 54-55.*

Contrary to the defendants' claims, Little did not routinely hug Baker or other people. *RP 83, lines 7-11;142, lines 10-12; 162, lines 21-23; 163, 1-8.*

IV. SUMMARY OF ARGUMENT

Defendants' assignments of error challenge two of the trial court's findings of fact and the factual basis for three elements of proof for sexual harassment. On appeal, challenges to findings of fact and fact based issues can only succeed where there is insufficient evidence to support the trial court's decision. Defendants do not contend there are any errors of law. Instead, they urge this appellate court to reverse the trial court because there is conflicting testimony, issues of witness credibility and they ask the court to weigh the evidence a second time. Substantial evidence supports each of the essential findings below and reversal would be improper.

V. ARGUMENT

Standard of Review

Appellate review is limited to whether the findings are supported by "substantial evidence" and whether the trial court's findings support the conclusions of law and judgment. Substantial evidence is evidence sufficient to persuade a rational fair minded person of the truth of the asserted premise. *Price v. Kitsap Transit*, 125 Wn.2d 456, 464 (1994).

Appellate courts defer to the trial court's determinations on the persuasiveness of the evidence, witness credibility, and conflicting testimony. *Snyder v. Haynes*, 152 Wn. App. 774, 779 (2009).

"Unchallenged findings are verities on appeal." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42 (2002).

These principles dictate the resolution of defendants' challenges to Findings of Fact Nos. 5 and 16 and the issues on appeal. Since there is substantial evidence in the record supporting the challenged findings and all of the elements of sexual harassment, the trial court must be affirmed. Any doubt about conflicting evidence or issues of witness credibility must be resolved in favor of the trial court determination.

The Elements of Sexual Harassment.

The elements of a prima facie hostile work environment claim are (1) the harassment was unwelcome, (2) the harassment was because of sex, (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer. The third element requires that the harassment be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment in like of the totality of the circumstances. *Antonius v. King County*, 153 Wn.2d 256, 261 (2004). Defendants base their appeal on the claim that Baker's behavior was not unwelcome, Little was not treated differently because of her sex and the harassment was not pervasive. These three elements are questions of fact to be determined by the trial court or a jury.

The Harassment Was Unwelcome.

This Court's function is to review the record for sufficient or substantial evidence of unwelcome harassment, taking the record in the light most favorable to Little. An appellate court cannot re-weigh or re-balance the competing testimony and inferences, or reevaluate the burden of persuasion. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, (2002).

Unwelcome harassment is conduct that Little regarded as undesirable or offensive and that she did not incite or solicit. *Campbell v. State*, 129 Wn. App. 10, 19 (2005).

Baker's Conduct Was Undesirable and Offensive.

Finding of Fact No. 5 squarely addressed one aspect of Baker's offensive conduct. It established that Baker hugged Little frequently and some of his touching was offensive. Defendants challenged this finding for obvious reasons.

The fact is that Baker hugged Little on a daily basis. Little's testimony alone provided substantial evidence supporting this finding when she testified Baker hugged her almost every morning. *RP 30, line 8*. However, there is more. Trumbull testified Baker did a lot of hugging of Little and Lee stated that Baker hugged Little. Yvette Burgess testified hugs were "a common thing" and hugs were like a handshake. *RP 301, lines 20-22*. Another witness said Baker hugs everybody and is a huggy kind of person. *RP 349, lines 7-8; 356, line 18*. Baker's testimony is only slightly different than Little's. He admitted he hugged Little "once or maybe a couple of times a week" (*RP 242, lines 14-16*), and he admitted he directed Little to give him a hug one or more times a week. *RP 242,*

lines 4-9; 195, line 8; 196, lines 1-2. There was more than enough evidence for the court to accept Little's testimony that Baker hugged her on a daily basis.

The second and most important part of Finding No. 5, that some of Baker's touching was unwanted and offensive, is also supported by substantial evidence from Little and other witnesses. Little told Baker on various occasions that his touching was unacceptable. *RP 32, lines 19-25, 33, lines 1-10.* Little also described how she attempted to protect herself from the touching. *RP 30.* Lee and Braley also testified that Little complained about Baker's treatment of her. *RP 166, lines 6-20; RP 382, lines 22-25, 383, line 1.* Little's mother also testified that Little found Baker's behavior unacceptable at the time it was occurring. *RP 382, lines 22-25, 383, line 1.* These contemporaneous complaints about Baker's behavior were indicative of the offensive nature of Baker's conduct and of its adverse effect on Little.

In addition to Baker's repeated hugs, his touches on or near the breasts, waist and buttocks were offensive and undesirable. The evidence of offensive touching came from Little and other witnesses. Little described offensive unwanted kissing, touching on her breasts, waist,

lower back and buttocks. Lee saw Baker pat Little on the buttocks. Trumbull saw Baker touch Little's cleavage. Baker admitted that he hugged Little from behind when she could not see him coming and defend herself. Baker also admitted he kissed Little one time. He also used his status as the owner of the company to direct Little to give him hugs once a week or more.

The personal and intimate nature of the touching together with the circumstances of conduct also supported the finding of offensive behavior. Frequent hugging and touching of a subordinate by a business owner while at work, is consistent with a finding of unwanted and offensive touching. Baker, as the owner of the business, touched his subordinate employee Little unnecessarily and even directed her to participate in the touching by giving him a hug. Baker's admission that he came up behind Little when she was sitting down and gave her a hug "as a friend" was damning evidence. *RP 241, lines 20-22*. Hugging an employee from behind when she cannot protect herself is clearly offensive.

Likewise, Baker's testimony that he kissed Little at work bolsters Finding No. 5 and the evidence of offensive conduct. The trial court had more than enough evidence to find that Baker's hugging, kissing and

touching of his subordinate Little was unwanted and offensive.

This was not a romantic relationship gone bad where there was a real issue about consensual touching. Baker denied any romantic relationship with Little and saw himself as “a father figure” to her, (*RP 191, lines 8-9*) so there was no reason to for Baker to believe Little found his touching desirable.

The proof of offensive conduct was not limited to hugging and touching. Baker’s use of terms like “sexy Sarah,” “boobie hugs,” “nooner,” “wear leather and lace,” “you look hot,” “the sisters look good,” and other offensive language is sufficient evidence of unwanted offensive conduct in the workplace. The evidence of this kind of behavior on Baker’s part is detailed and comes from multiple witnesses. Uncontested Findings of Fact Nos. 9, 10, and 11 conclusively establish Baker’s use of offensive terms. Use of these insults and denigrating terms constitute unwanted and offensive conduct, even in the absence of improper touching. *Campbell, supra.*

Finally, conduct is unwelcome if the plaintiff did not solicit or incite it. *Id.* Defendants claimed Little incited Baker to engage in his bad behavior because she used the terms “boogie hug,” “nooner” and

“bitches.” This argument fails because it depends on contested evidence about Little’s use of the terms “boobie hug” and “bitches” and it invites this Court to re-evaluate the evidence regarding “nooners.” Little denied use of the terms “boobie hug” and “bitches” at work and Baker disagreed. Contested evidence is not enough to overcome a finding of fact. A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. *Merriman v. Cokeley*, 168 Wn.2d 627, 631 (2010).

As for the term “nooner,” Little testified its use became offensive at the point when Baker began to suggest the two of them go upstairs to his bedroom for a “nooner.” Baker argued this is an inappropriate interpretation of the evidence, but weighing and interpreting the evidence was the province of the trial court and its determination cannot be disturbed on appeal.

Baker also argued that Little’s complaints about his hugging should not be believed because of other evidence in the record undercuts Little’s credibility. Little’s credibility was a determination for the trial court and an appellate court will not reevaluate issues of credibility.

Even if this Court were to weigh the evidence and review issues of

credibility, defendants' arguments would fail. Defendants have conveniently ignored many aspects of Baker's behavior that were offensive and clearly were not incited by Little. Baker's use of "sexy Sarah," "wear leather and lace," "you look hot," "the sisters look good," and other offensive language were not incited by Little. Little did not invite the fondling of her chest, pats on the buttocks, hugs from behind, and so on. Remember, Baker claimed Little was like a daughter to him so this was not a sexually charged relationship where he might get the wrong idea about Little's interest in him.

Defendants also challenged Finding of Fact No. 16 to the effect that Little told Baker his behavior was unwanted on more than one occasion. *Finding No. 16*. That challenge is also without merit because after the trial court heard and weighed the evidence, it believed Little. That determination may not be overturned just because Baker disagrees.

The Harassment Was Because of Sex.

The argument that Baker's conduct directed at Little was not because of her sex is easily dispensed with because the evidence must be viewed in the light most favorable to Little. *Harrison Mem'l Hosp. supra*. It is clear that Baker treated Little differently than male employees. Baker

admitted that he hugged Little more than male employees. *RP 242, lines 21-24*. When Baker hugged Little, sometimes sexual touching of the breast inside her bra was involved. Hugs were called “boobie hugs” and were an offensive reference to the female breast.

Baker touched Little’s buttocks, waist and back. Testimony established the fact that Baker did not touch male co-workers the same way he touched Little. *RP 157*. Baker made comments about Little’s appearance using words like “sexy” and “hot” and he did not “compliment” male employees in the same way. Some mornings, Baker called Little to ask if she was going to dress sexy for him. *RP 35*. Baker did not say similar things to male employees. *RP 159, lines 4-9*.

Little and Trumbull as female employees were expected to perform domestic tasks in Baker’s home. There is no evidence male employees were expected to perform the same tasks.

Little experienced adverse treatment because of her sex. Evidence that Baker used language and engaged in behavior that was particularly offensive to women in the presence of males and females does not mean the behavior was not motivated by sex. On the contrary, the fact that female employees had to endure offensive conduct in the workplace that

had little or no effect on men, indicates women were intentionally put at a disadvantage.

The Harassment Affected the Terms and Conditions of Employment.

Whether or not offensive conduct is so pervasive as to affect the terms and conditions of employment is a question of fact to be determined in the totality of the circumstances. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-407 (1985). The conduct need not be outrageous or severe.

In *Campbell v. State, supra*, at 19, the Court ruled that offensive e-mails sent to several people and being yelled at by a supervisor was sufficient evidence of offensive conduct to support a finding that harassment affected the employee's terms and conditions of employment.

In this case, the evidence goes far beyond that standard. Baker used demeaning terms like "bitches" and "sexy Sarah" in the workplace and in public. He engaged in daily hugging and other touching during most of the time Little was employed. The trial court properly considered the frequency of Baker's discriminatory conduct to find that the harassment affected the terms and condition of employment. *Haubry v. Snow*, 106 Wn. App. 666, 675-676 (2001). "The required showing of

severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.” *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

The fact that Little testified she was constantly on guard at work and did not want to be alone with Baker, gave added strength to the finding of pervasive conduct. She suffered from anxiety and felt humiliated by Baker’s actions. That evidence linking the offensive conduct to a decrease in Little’s “emotional or psychological well being” is a factor to be considered with regard to the totality of the circumstances impacting the terms and conditions of employment. *Glasgow, supra*.

Obviously, the fact that Little was constantly on guard at work to protect herself from regular inappropriate touching prevented her from performing her work. Unexpected hugs from behind while working obviously interfered with her work. The psychological impact from the humiliation and anxiety was equally disruptive.

Once again, defendants’ arguments depend on a selective examination of the evidence and a willingness to weigh the evidence in their favor. That exercise is improper at this stage of the proceedings. Defendants cannot successfully claim Baker’s conduct did not alter the

terms and condition of employment.

The Trial Court Found Little Suffered Emotional Distress.

The trial court's written opinion expressly found that Little suffered emotional distress. *CP 231*. That finding is supported by Little's testimony and that of her mother, establishing that she suffered from anxiety, stress, weigh loss and humiliation at Baker's hands. The finding of the existence of emotional distress is supported by Little's contemporaneous complaints about Baker's conduct and by the unpleasant nature of the conduct itself.

Defendants did not and do not agree. Their disagreement is of no consequence because the trial court has ruled and the time for weighing and evaluating evidence has passed. Baker's conduct was too unseemly, too frequent, too varied and too sexually charged not to be distressing. Really bad behavior perpetuated from a position of power over a long period of time was and always will be distressing.

Defendants Are Not Entitled to Attorney Fees.

Defendants' request for attorney fees under RCW 49.62.030(2) [sic] is without merit. If the defendants intended to refer to RCW 49.60.030(2), the statute clearly does not apply. "Recovery of attorney

fees requires a showing of injury by an "act in violation of this chapter".
RCW 49.60.030(2)." *Fahn v. Civil Serv. Com*, 95 Wn.2d 679, 682 (1981).
Since defendants were not plaintiffs in the action and were not injured by
a violation of the law against discrimination, they may not recover attorney
fees. *Dezell v. Day Island Yacht Club*, 796 F.2d 324, 329 (9th Cir. 1986).

Day v. Santorsola, 118 Wn. App. 746 (2003) does not apply
because fees were awarded under the terms of restrictive covenants. *Riehl*
v. Foodmaker, Inc., 152 Wn.2d 138 (2004) does not apply because a
plaintiff under 49.60 was seeking fees pursuant to the terms of the statute.

**Little Requests Attorney Fees and Expenses on Appeal
Pursuant to RCW 49.60.030(2) and RAP 18.1.**

When the judgment of the trial court in favor of the plaintiff is
affirmed on appeal in a discrimination case, the plaintiff is entitled to
attorney fees on appeal. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App.
783, 809 (2004). Little requests an award of fees and expenses on appeal.

VI. CROSS APPEAL

**The Trial Court Failed to Use the Lode Star Formula and Did
Not Consider the Hours Expended on Claims Having a Common Core
of Facts and Related Legal Theories.**

RCW 49.60.030(2) states that a victim of discrimination shall have
the right to recover attorney fees and costs in a successful suit under the

law. “The legislative purpose in authorizing attorney fee awards in employment discrimination claims is to enable vigorous enforcement of laws against discrimination.” *Minger v. Reinhard Dist. Co.*, 87 Wn. App. 941, 948 (1997). “Failure to fully compensate attorneys who represent plaintiffs in discrimination claims will discourage actions whose primary effects are vindication of citizens' right to be free of discrimination and the deterrence of unlawful discriminatory conduct.” *Id.*

Here the trial court awarded fees, but calculated the amount of the fee award by using a percentage based on the fact that Little was successful on one of four claims. The trial court awarded 25 percent of the total fee request. *CP 261*, ¶ 8. This mechanical approach to determining a fee award is contrary to the law.

In *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538 (2007), The Supreme Court prescribed the method to be used in discrimination cases. The Court described the process as follows:

The WLAD entitles prevailing plaintiffs to “reasonable attorneys' fees.” RCW 49.60.030(2). To calculate a lodestar amount, a court multiplies the number of hours reasonably expended by the reasonable hourly rate. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). The hours reasonably expended must be spent on claims having a “common core of facts and related legal theories.” *Martinez v. City of Tacoma*, 81 Wn. App. 228,

242-43, 914 P.2d 86 (1996). The court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time.

The problem in this case is not the trial court's desire to take into account unsuccessful claims, but rather the failure to use the lode star calculation method. The *Chuong Van Pham* case and others before make it clear that the way to determine a fee is to multiply the number of hours reasonably expended by a reasonable rate. Here, the trial court did not use this method when it awarded fees or when it denied reconsideration. Instead, the trial court simply granted a percentage of the requested fee.

The failure to follow the lodestar method lead to another error. That error was a failure to consider the hours "spent on claims having a common core of facts and related legal theories." In this case that error was a serious one. For instance, Little's claim for assault and battery was unsuccessful, but the evidence and legal theories pertaining to Baker's physical harassment is indistinguishable from the evidence of assault and battery. Nonetheless, the trial court reduced the fee award by one quarter for the assault and battery claim even though the discovery, trial preparation and testimony all arose out of the same facts. The same is true to some degree for the other unsuccessful causes of action.

The Trial Court Erred When It Found Some of Baker's Touching Was Offensive and Unwanted, But Also Ruled Baker Did Not Assault or Batter Little.

Finding of Fact No. 5 established that "[s]ome of Baker's touching of Little was unwanted and offensive to Little" (*CP 252*), Conclusion of Law No. 4 stated that Baker did not assault Little. The two propositions are inconsistent.

A battery is "harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent[.]" *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 9, at 39 (5th ed. 1984); *Garratt v. Dailey*, 46 Wn.2d 197, 279 P.2d 1091 (1955). An assault is any act that causes apprehension of a battery. *Brower v. Ackerley*, 88 Wn. App. 87, 943 P.2d 1141 (1997), review denied, 134 Wn.2d 1021, 958 P.2d 315 (1998); *KEETON* § 10, at 43.

The evidence is overwhelming that some of Baker's touching was unwanted and the failure to grant a judgment for assault and battery is significant to the case. If the trial court's method of setting the fee award is upheld and a determination that a battery or an assault occurred, the fee award would double because Little would be successful on two causes of

action. In the alternative, if for any reason Little lost the sexual harassment claim, she should still have a recovery against Baker for his offensive touching and the fear of such touching.

VII. CONCLUSION

The judgment of the trial court regarding sexual harassment must be affirmed because there is no allegation the decision is based on an error of law and the trial court's findings of fact are supported by substantial evidence. The existence of conflicting evidence or other possible interpretations of the evidence is not a basis for reversal on appeal.

The trial court's award of attorney fees should be reversed with direction to use the lodestar formula to set the fee award and to properly allow fees on claims arising out of a common core of facts. The portion of the judgment of the trial court regarding assault and battery should also be reversed.

Respectfully submitted March 2, 2011.

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CERTIFICATE OF SERVICE

I, LORIE MATTHEWS, hereby certify that I mailed a true and correct copy of the above document by depositing such copy in the United States mail, postage prepaid, at Spokane, Washington, on March 2, 2011, to the following counsel for Appellants at said address:

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LORIE MATTHEWS