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No. 367355

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LEANNE LEVNO,

Appellant,

v.

ADDUS HEALTHCARE, INC.,

Respondent.

BRIEF OF APPELLANT

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INTRODUCTION

This is a wrongful discharge case. Appellant Leanne Levno (“Levno”) says she was fired after she reported her employer, Defendant Addus Healthcare, Inc. (“Addus”) for abusing her patient. Addus says she was not fired, only disciplined, and then voluntarily abandoned her job. The trial court nonetheless found no question of material fact and dismissed the plaintiff’s claim on summary judgment. The trial court should be reversed because the trier of fact must resolve fact questions.

In more extended summary, Levno brings the instant appeal of the summary dismissal of her claims against Addus, for retaliatory discharge in violation of Washington’s vulnerable adult whistleblower statute (RCW 74.34.180), and wrongful discharge in violation of public policy. Issues of material fact exist whether Levno was temporarily placed on leave and then discharged in retaliation for reporting Addus to Adult Protective Services (“APS”), where the proffered reasons for her adverse employment action and discharge were alleged insubordination and performance issues. Those issues were raised for the first time, as well as Levno being placed on leave, just two days after Levno informed Addus of her report to APS.

Under Washington law, summary dismissal of public policy employment claims is generally disfavored. Additionally, where a close proximity in time between the protected activity and adverse employment

action exists, an inference of retaliation arises, necessitating a determination by the trier of fact of the employer's true motivations for the adverse action and discharge. Levno respectfully requests this court reverse summary dismissal of her claims for RCW 74.34 retaliatory discharge and wrongful discharge in violation of public policy.

This case presents a novel issue. It is undisputed by Addus that Levno worked for Addus with perfect performance evaluations and without any reprimands for eight years. Then, on August 29, 2016, Levno reported Addus' abuse of patient Loujean Dady ("Loujean") to APS. Loujean was Levno's only patient at the time, was severely disabled, and Levno was required by law to make the report. Following that report, Addus, on September 2, 2016, immediately removed Levno from Loujean's care, placed Levno on leave pending disciplinary review, and dropped Loujean as a patient. Six days later, on September 8, 2016, Levno attended her disciplinary review but refused to sign the "disciplinary warning notice and action taken", writing "I don't agree", and never again worked for Addus. In the "action taken" document, Addus accused Levno, for the first time ever, of employee misconduct and insubordination.

In addition to the above, the parties dispute the following material facts: 1) Levno alleges she was orally terminated during the September 8, 2016 meeting, while Addus alleges she was only terminated from providing

care to Loujean; and 2) Levno alleges she was never provided or offered new patient assignments after the September 8, 2016 meeting, while Addus alleges it offered new patient assignments by telephone and U.S. mail, and thus Levno voluntarily resigned by turning down work and abandoning her job.

Levno demonstrated a prima facie case of retaliatory discharge in violation of RCW 74.34, as well as a prima facie case of wrongful discharge in violation of public policy under both express and constructive discharge theories. Addus' proffered legitimate reasons for the termination, allegations against Levno that she was insubordinate and out of compliance with company policy, were not alleged until immediately following Levno's report to APS, which she provided to Addus the following day. Addus' proffered reason was pretext and at best a substantial factor in its decision to discharge Levno. Under Washington law, particularly under its summary judgment standard for public policy employment claims, summary judgment was inappropriate, and a finder of fact is required to discover Addus' true reason for the discharge.

The trial court dismissed Levno's claim for RCW 74.34 retaliatory discharge and express wrongful discharge, ruling that the only admissible evidence offered by Levno, to support her allegation of express termination at the September 8, 2016 meeting, was a self-serving declaration, and

inadmissible hearsay contained in the declaration of Loujean's daughter Ms. Holly Dady. However, the undisputed circumstantial evidence, as well as the timing and sequence of events, strongly supports Levno's testimony of being expressly terminated. Additionally, Ms. Holly Dady's declaration is admissible as an admission by a party opponent and then existing mental condition, as well as for non-hearsay purposes such as notice, effect on the listener, and state of mind. It was error by the court to conclude that as a matter of law, no trier of fact could believe that Ms. Levno was expressly discharged by Addus.

Finally, the trial court ruled that it would not consider Ms. Levno's claim for constructive discharge on reconsideration. However, issues may be raised for the first time on reconsideration and are properly preserved for appeal. The Court's holding contravenes long standing Washington policy of deciding cases on the merits rather than on procedural grounds.

In moving for summary judgment of the express discharge claim, Addus alleged that Levno resigned voluntarily. The trial court, in granting summary judgment, ruled that because Levno alleged in her complaint, declaration, and deposition, that she was officially terminated by her supervisor Dawn Taylor during the September 8, 2016 meeting, that she failed to allege constructive discharge. However, as stated repeatedly by the Washington Supreme Court, neither express wrongful discharge nor

constructive wrongful discharge are a separate or distinct claim, but are subsumed within wrongful discharge.

Addus put constructive discharge at issue by alleging resignation. Addus cannot rely on a defense that Levno resigned rather than being fired, while simultaneously arguing that she is foreclosed from proceeding under constructive discharge theory. If Levno cannot prove what was said during the September 8, 2016 meeting, then she is entitled to say that her “resignation” was not voluntary as Addus alleges. Levno’s version of events is that she was told she was terminated. Addus version is that she resigned. Both amount to wrongful discharge.

For these reasons, and as set forth more fully below, the trial court erred in summarily dismissing Levno’s claims for retaliatory discharge in violation of RCW 74.34 and wrongful discharge in violation of public policy.

ASSIGNMENTS OF ERROR

1. Error is assigned to the trial court’s summary dismissal of Levno’s claims for Wrongful Termination in Violation of Public Policy and Retaliatory Discharge in Violation of RCW 74.34.
2. Error is assigned to the trial court’s denial of reconsideration of its summary dismissal of Levno’s claims for Wrongful Termination in

Violation of Public Policy and Retaliatory Discharge in Violation of RCW 74.34.

3. Error is assigned to the trial court's striking of the Declaration of Holly Dady.

STATEMENT OF THE CASE

A. Levno Works for Addus as Loujean Dady, A Vulnerable Adult's, Primary Caregiver.

Levno worked as a caregiver for Addus for eight (8) years in Spokane, Washington. (Compare CP at 10 ¶¶ 2.1, 2.2 with CP at 19 ¶¶ 2.1, 2.2) Addus provides care to vulnerable adults. (Compare CP at 10 ¶ 2.3 with CP at 19 ¶ 2.3) Levno was Loujean's caregiver from August 2007 to August 2016, (CP at 293 ¶ 3) and from 2012 to 2016, Levno was Loujean's primary day and night caregiver. (CP at 409 ¶ 6) From 2012 to 2016, Loujean was Levno's only patient. (CP at 409 ¶ 6) During this time, Levno was Loujean's weekday caregiver, and another Addus employee was Loujean's weekend caregiver. (CP at 288 ¶ 5)

B. In 2015, Levno Makes her First Report to APS. Addus Threatens Levno with Termination.

Between 2012 to 2015, Levno reported to Addus, other Addus caregivers' abuse of Loujean. (CP at 287 ¶¶ 2, 3) Then in early 2015, Levno reported Addus' abuse of Loujean to APS. (CP at 10 ¶ 2.6; 164) Levno was a mandated reporter under then RCW 74.34.020(14) and 74.34.035(1). (CP

at 10 ¶ 2.5) After Levno's 2015 report, Addus reported Levno for abuse to the Department of Social and Health Services. (CP at 10 ¶ 2.9) APS conducted an investigation and determined that the allegation was unsubstantiated. (CP at 10 ¶ 2.9; 148) Addus told Levno that if she made any further reports of abuse to APS, that she would be fired. (CP at 10 ¶ 2.8)

C. On August 29, 2016, Levno Again Reports Addus to APS for its Abuse of Loujean Dady. Addus suspends Levno Three Days Later.

On August 29, 2016, Levno reported an Addus employee's abuse of Loujean to APS. (CP at 10 ¶ 2.11; 169-70) The following day, on August 30, 2016, Levno submitted the report to Addus. (CP at 169-70) Two days later, on September 1, 2016, Addus informed Levno that she was subject to a disciplinary review, and that she could not return to work unless and until she attended the disciplinary review. (CP at 172:8-13) The disciplinary warning notice lists the date of violation as September 2, 2016. (CP at 47) The next day, September 2, 2016, Addus terminated Levno's care of Dady. (CP 172:16-25; 174:1-7; 31:18-21)

D. Addus Terminates Levno on September 8, 2016, Nine Days After Learning of Levno's Report to APS.

Levno attended her disciplinary hearing on September 8, 2016, but refused to sign the "DISCIPLINARY WARNING NOTICE AND ACTION

TAKEN” document, writing only “I don’t agree – I refuse to sign.” (CP at 47) During that hearing, Levno’s supervisor Dawn Taylor told Levno that she “was being terminated from [] Addus.” (CP at 183:3-5)

In late August 2016, an Addus supervisor had called Loujean’s daughter Holly Dady, telling her that Addus had terminated Levno. (CP at 294 ¶ 8) Holly Dady, upset by the news, then relayed this information to Levno. (CP at 294 ¶ 9)

Following the September 8, 2016 meeting where Addus terminated Levno, Addus never reached out to Levno, or offered her any work or other assignments. (CP at 288 ¶¶ 13, 14, 15)

E. Immediately Following Levno’s 2016 Report to APS, Addus Drops Loujean Dady as a Patient. Loujean, Who Required Levno’s Specialized Care, Died Less Than Two Months Later.

Shortly after terminating Levno, Addus dropped Loujean as a patient. (CP at 294 ¶ 11; 31-18-21) Loujean required highly specialized care which Levno provided. (CP at 409 ¶¶ 7-9). Loujean passed away on or about October 30, 2016, less than two months after being removed from Levno’s care. (CP at 409 ¶¶ 7-9).

F. The Trial Court Granted Summary Dismissal To Addus.

Levno brought suit for damages sustained as a result of her discharge from Addus in Spokane County Superior Court on August 11, 2017. (CP at 1-8) Levno brought her Amended Complaint on September 22, 2017. (CP

at 9-17) Addus answered on October 23, 2017. (CP at 18-28) Addus then moved for summary dismissal of Levno's claims on December 20, 2018. (CP at 29-42) Levno responded. (CP at 296-299) Addus replied to Levno's response on January 14, 2019. (CP at 300-309)

The Spokane County Superior Court granted Addus' motion for summary judgment on February 4, 2019 in a letter ruling. (CP 376-382) Levno timely filed a motion for reconsideration on February 21, 2019. (CP at 383-390) Upon the trial court's request, Addus responded. (CP at 391-401) Levno replied to Addus' response on March 7, 2019. (CP at 402-407) The trial denied Levno's motion for reconsideration in a letter ruling on March 8, 2019. (CP at 416-417) The trial court ordered all of Levno's claims summarily dismissed on March 29, 2019. (CP at 418-425) Notice of appeal to this court was filed on April 11, 2019. (CP at 426-443)

ARGUMENT

A. Summary Judgment Standard.

A trial court's grant of summary judgment is reviewed *de novo*. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). All fact rulings and all other trial court rulings made in conjunction with a summary judgment motion are reversed under the *de novo* standard. *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 231, 393 P.3d 776 (2017).

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Rublee v. Carrier Corp.*, 192 Wn.2d 190, 198, 428 P.3d 1207 (2018). All facts and all reasonable factual inferences are considered in the light most favorable to the nonmoving party. *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 410, 430 P.3d 229 (2018).

B. Summary Judgment is Inappropriate for Discharge Claims Arising Under RCW 74.34.180, Where Facts Surrounding The Discharge are Disputed.

Caregivers are mandated reporters and have a duty to report suspected abuse. RCW 74.34.035; RCW 74.34.020(2), (14). Failure to report subjects a caregiver to criminal, RCW 74.34.053, and civil liability. *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 544, 374 P.3d 121 (2016). The Washington Supreme Court has compared reporting abuse of vulnerable adults to reporting abuse of children. *Id.* at 543 (citing *Beggs v. State, Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 78, 247 P.3d 421 (2011) (“Governmental authorities must give the prevention, treatment, and punishment of child abuse the highest priority, and all instances of child abuse must be reported The AVAA is similar to the ACA, and thus *Beggs* is persuasive.”)).

“An employee or contractor who is a whistleblower and who as a result of being a whistleblower has been subjected to workplace reprisal or

retaliatory action, has the remedies provided under chapter 49.60 RCW.” RCW 74.34.180; *see also* Laws of 1999, ch. 176, § 1 (“The purpose of chapter 74.34 RCW is ... to provide protective services and legal remedies to protect these vulnerable adults.”). Thus, cases analyzing retaliation for opposing practices forbidden under RCW 49.60 are applicable to the case at bar.

RCW 49.60 remedies are to be liberally construed. RCW 49.60.020; *see Jin Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171*, 189 Wn.2d 607, 614, 404 P.3d 504 (2017). Because of factual issues concerning retaliatory motive, “[s]ummary judgment for an employer is seldom appropriate.” *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 410, 430 P.3d 229 (2018); *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 526, 404 P.3d 464 (2017) (plaintiffs may rely on “circumstantial, indirect, and inferential evidence” because “direct smoking gun evidence ... is rare”, and “it will seldom be otherwise.”)

In *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988)¹ the Washington Supreme Court stated that summary judgment is inappropriate if the facts surrounding the discharge are disputed:

¹ Addus cited *Grimwood* in its Reply in Support of Summary Judgment Motion, (CP at 301:13-21) and in its Response to the Motion for Reconsideration. (CP at 391:4-6)

It would be different if plaintiff had claimed the incidents did not occur; for example, had he said that he had, in fact, completed all employee evaluation forms when defendant said he did not, **an issue of fact would have existed.**

Id. at 360 (emphasis added).

Here, material facts concerning the discharge are disputed. Levno testified she was orally discharged during the September 8, 2016 meeting. (CP at 12 ¶ 2.24; 183:3-5; 288-89; 405 ¶ 5) Addus alleges Levno is being untruthful was not discharged until January 2017. (CP at 44 ¶ 7) Levno testified that she was not offered any more work following the September 8, 2016 meeting. (CP at 288 ¶ 13) Addus alleges that she was offered more work. (CP at 44 ¶ 3) These factual disputes must be resolved by a jury.

C. Under the Washington Framework for Analyzing Statutory Retaliatory Discharge Claims and Wrongful Discharge in Violation of Public Policy Claims, Levno Has Set Forth A Prima Facie Case Requiring a Finder of Fact.

As set forth above, RCW 49.60 remedies are applied to RCW 74.34.180 claims.

Washington applies the burden shifting analysis prescribed by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), to retaliation and wrongful discharge claims where the plaintiff lacks “direct evidence” of retaliatory motive. *Muhl v. Davies Pearson*, *P.Cnot published at* 190 Wn. App. 1038, 2015 WL 6441849 at *5 (Oct. 20,

2015) (citing *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001) *overruled on other grounds*, *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006)).

Levno offers the direct evidence of retaliation in that she was told in 2015 that she would be fired for making another APS report. However, in the alternative, the *McDonnell Douglas* test applies to the circumstantial evidence Levno offers regarding the circumstances of, and leading up to, her discharge.

Under *McDonnell Douglas*, the plaintiff bears the initial burden of making out a prima facie case of wrongful termination or retaliation. *Hill*, 144 Wn.2d at 181. If the plaintiff makes this showing, a rebuttable presumption of retaliation arises. *Id.* (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). If the plaintiff makes out a prima facie case, a burden of production shifts to the employer where, “the employer must articulate a legitimate, nondiscriminatory reason for termination ... [t]o go forward.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d at 363–64. If the employer fails to produce a legitimate reason for the termination, the plaintiff is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 181–82.

If, however, the employer carries its burden of production, it successfully rebuts the presumption created by the plaintiff's prima facie

case, *Id.* at 182, and the plaintiff then bears the burden of producing evidence that retaliation was a “substantial factor” in the termination. *Scrivener v. Clark Coll.*, 181 Wn.2d at 446–47. The employee may carry this burden by offering evidence that creates a material issue of fact either that the employer's reasons were pretextual or that, although the stated reasons were legitimate, retaliation was nonetheless a substantial factor motivating the discharge. *Scrivener*, 181 Wn.2d at 446–47; *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 73, 821 P.2d 18 (1991).

Where the employee makes out a prima facie case and offers evidence of pretext “sufficient to disbelieve the employer's proffered explanation,” a fact finder generally must determine the “true reason for the adverse employment action ... in the context of a full trial.” *Hill*, 144 Wn.2d at 185.

Here, as set forth fully below, Levno has made a prima facie case for retaliatory discharge under RCW 74.34.180, and for wrongful discharge in violation of public policy. The timing of Addus’ disciplinary notice and review, immediately following Levno’s report to APS and submission of that report to Addus, is strong evidence demonstrating that Addus’ proffered reason for her discharge was pretextual and/or nonetheless retaliation was a substantial factor in her discharge. Determining Addus’

“true reason for the adverse employment action” must be done by the finder of fact “in the context of a full trial.”

D. Levno Established a Claim for Retaliatory Discharge Under RCW 74.34.180.

To establish a prima facie case of retaliation, an employee must show three things: (1) the employee took a statutorily protected action, (2) the employee suffered an adverse employment action, and (3) a causal link between the employee’s protected activity and the adverse employment action. *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 411, 430 P.3d 229 (2018).

In *Cornwell*, the plaintiff was given a poor performance review following a lawsuit she filed for opposing sex discrimination. *Id.* The Washington Supreme Court noted, that the reviewing supervisors had knowledge that the plaintiff filed a previous lawsuit against the company for discrimination, that other evaluators at the company rated the plaintiff highly, and that poor review followed shortly after the reviewing supervisors learned of the previous lawsuit. *Id.* at 412-20. The Court held that when an adverse employment action and termination follow shortly after a protected activity, that “it is a reasonable inference that these actions were in retaliation for [the protected activity].” *Id.* at 416 (citing *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003)

(“That an employer’s actions were caused by an employee’s engagement in protected activities may be inferred from proximity in time between the protected action and the allegedly retaliatory employment decision.” (internal quotation marks omitted)); *see also Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d at 68 (internal quotation marks omitted) (“Proximity in time between the claim and the firing is a typical beginning point” for proving retaliation.).

Here, Levno had made reports about Loujean’s care directly to Addus in the past. (CP at 287 ¶¶ 2, 3) Levno then reported Addus’ care of Loujean to APS in early 2015. (CP at 10 ¶ 2.6; 164) Following that report, Addus told Levno that she would be fired for making another report. (CP at 10 ¶ 2.8) Subsequently, on August 29, 2016, Levno again reported abuse of Loujean Dady to APS. (CP at 10 ¶ 2.11; 169-70) On August 30, 2016, Levno provided that report to Addus. (CP at 169-70) On September 1, 2016, Levno was suspended pending her disciplinary review of September 8, 2016. (CP at 172:8-13) On September 2, 2016, Levno was removed from the care of her only patient Loujean Dady. (CP 172:16-25, 174:1-7; 31:18-21) On September 8, 2016, Levno was orally terminated by her supervisor

Dawn Taylor, with Dawn Taylor alleging insubordination. Addus also discharged Loujean Dady as a patient.²

Just as in *Cornwell*, but under far more compelling circumstances, the proximity in time between the protected activity and the discharge create an inference that the suspension, removal from care for Loujean, and discharge, were in retaliation for the report made to APS.

In sum, Leanne Levno made a statutorily mandated report of abuse and never again worked for Addus. Addus alleges she was not orally terminated, citing a lack of documentary evidence of discharge (CP at 35:14-15), but resigned voluntarily following the September 8, 2016 meeting. (CP at 94:11) As set forth below, to the degree Addus raises the defense of voluntary resignation, Levno's resignation was not voluntary but amounts to constructive discharge.

E. Levno Established Wrongful Termination in Violation of Public Policy.

“The tort for wrongful discharge in violation of public policy is a narrow exception to the at-will doctrine”, that is recognized “as a means of encouraging employees to follow the law and preventing employers from using the at-will doctrine to subvert those efforts to promote public policy.”

² Loujean Dady, who had severe medical issues requiring specialized care, died shortly after Levno was removed as her caretaker and discharged as a patient by Addus. (CP at 409 ¶¶ 7-9)

Becker v. Cmty. Health Sys., Inc., 184 Wn.2d 252, 258, 359 P.3d 746 (2015).

To prove wrongful discharge in violation of public policy, first the plaintiff must demonstrate that the “discharge may have been motivated by reasons that contravene a clear mandate of public policy.” *Id.* The violation must be legislatively or judicially recognized. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984).

Courts typically look at four general areas for a clear mandate of public policy: (1) where the discharge was a result of refusing to commit an illegal act; (2) where the discharge resulted due to the employee performing a public duty or obligation; (3) where the termination resulted because the employee exercised a legal right or privilege; and (4) where the discharge was premised on employee “whistleblowing” activity. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, 425 P.3d 837 (2018).

Second, the plaintiff must show that the public-policy-linked conduct was a “significant factor” in the decision to discharge the worker. *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d at 75. This can be shown by circumstantial evidence. *Id.* Even if the employer asserts a nonretaliatory reason for the discharge, the employee overcomes summary judgment by showing that the proffered reason is pretextual, or by showing

that the public-policy-linked conduct was nevertheless a substantial factor motivating the employer to discharge the worker. *Id.* at 73.

A cause of action for wrongful discharge in violation of public policy may be based on “either express or constructive” discharge. *Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn. App. 34, 43, 181 P.3d 864 (2008) (quoting *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 238, 35 P.3d 1158 (2001)).

1. The Trial Court Incorrectly Ruled That There Was No Question Of Material Fact That Levno Was Expressly Discharged.

In *Muhl*, 2015 WL 6441849, at **5-9, the court ruled that the plaintiff made out a prima facie case of retaliation and wrongful termination where she had expressed the “dearth of female attorneys and shareholders at the firm” to her supervisor, and then was later terminated for alleged performance issues that arose prior to expressing her gender concerns. The court ruled that the timing and circumstances of her termination created genuine issues of material fact regarding pretext and wrongful termination and that summary judgment of her claim was granted in error. *Id.* at *9.

Here, Addus has conceded that Levno engaged in a pattern of protected activities and that her prior performance evaluations were “excellent in every category.” (CP at 31:5-8) Addus concedes that it was

aware that Levno reported abuse of Loujean to APS on August 29, 2016. (CP at 31:9-11)

Also undisputed are that within ten days of Levno's August 2016 report, she was removed from that patient's care, (CP at 31:18-21) suspended pending review, (CP at 31:16-18) given her first ever negative performance evaluation, (CP at 31:12-15) and never again provided with patient assignments. (CP at 32:13-15) Addus admits that no further assignments were ever actually provided to Levno. (CP at 44) Addus alleges, which Levno disputes as false, that it offered new assignments which Levno declined. (Compare CP at 44 ¶¶ 3-7 with CP at 288-89 ¶¶ 13-18)

Levno alleges that she was told, following her 2015 report to APS, that she would be fired if she made another such report, and that she was indeed orally terminated by Dawn Taylor on September 8, 2016, following and in retaliation for her August 29, 2016 report.

Levno has demonstrated a prima facie case of wrongful discharge based on express discharge. It is up to the jury who to believe. The circumstantial evidence strongly supports Levno's version of events.

2. The Trial Court Incorrectly Ruled That There Was No Question of Fact That Levno Was Constructively Discharged.

Constructive discharge occurs when an employer engages in a deliberate act that makes working conditions so intolerable that a reasonable person would have felt compelled to resign. *Sneed v. Barna*, 80 Wn. App. 843, 849, 912 P.2d 1035, *review denied*, 129 Wn.2d 1023 (1996).

The elements of constructive discharge are: (1) the employer deliberately made working conditions intolerable, (2) a reasonable person in the employee's position would be forced to resign, (3) the employee resigned because of the intolerable condition and not for any other reason, and (4) the employee suffered damages as a result of being forced to resign. *Barnett v. Sequim Valley Ranch, LLC*, 174 Wn. App. 475, 489, 302 P.3d 500 (2013).

“Generally, whether working conditions have risen to an ‘intolerable’ level is a factual question for the jury.” *Sneed v. Barna*, 80 Wn. App. at 849; *Bulaich v. AT & T Info. Sys.*, 113 Wn.2d 254, 261–62, 778 P.2d 1031 (1989). Courts “usually look for evidence of either ‘aggravating circumstances’ or a ‘continuous pattern of discriminatory treatment’ to support a constructive discharge claim.” *Id.* at 850.

Here, 1) Addus deliberately made working conditions intolerable by removing Levno from her only patient's care and accusing her of

misconduct, following her statutorily mandated report of abuse; and 2) Anyone in Levno's position would feel compelled to resign in that situation; 3) Levno was a model employee prior to the events following her report; 4) Levno has suffered both financial damages, and extreme emotional distress including attempted suicide following her discharge from Addus.

Levno has made a prima facie case of wrongful discharge based on constructive discharge.

F. Addus' Defense That Levno "Voluntarily Resigned" Fails as a Matter of Washington Law.

Assuming Levno was not expressly discharged, and "resigned" as Addus claims (intrinsicly a fact question), then that resignation was a product of constructive discharge.

Addus claims Levno voluntarily resigned, citing *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 638, 700 P.2d 338 (1985). (CP at 94:11) However, under *Barrett*, voluntary resignation occurs only if the discharge "was not prompted by the employer's oppressive actions." 40 Wn. App. at 633, 638. (finding "no evidence [of] ... retaliation" where plaintiff alleged that additional job duties she was given following corporate restructuring were "unreasonable").

Mrs. Barrett's resignation was voluntary....
Mrs. Barrett resigned after only 3 days at her new position. Substantial evidence supports the trial court's findings that Mrs. Barrett's

experience with the new position was too limited to justify her conclusion that the new duties were unreasonable, and that her reassignment was voluntary.

G. Levno Was Not Required To Plead Constructive Discharge In Her Complaint.

Wrongful discharge in violation of public policy may be based on either an express or constructive discharge. *Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn. App. at 43; *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d at 238. The Washington Supreme Court stated in *Snyder*: “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.” 145 Wn.2d at 238.

Here, Levno was not required to plead constructive discharge. She plead wrongful discharge in violation of public policy, (CP at 4) and thus constructive discharge was properly plead. Although she alleged that she was expressly terminated during the September 8, 2016 meeting (CP at 4; 288-89) Addus disputed that fact and alleged that Levno resigned voluntarily. Addus raised job abandonment. (CP at 43-44) Addus allegation of voluntary resignation entitles Levno to proceed in the alternative under Constructive Discharge, as any resignation was not, and could not have been voluntary.

To hold otherwise would entitle employers to immunize themselves by orally discharging employees without providing a notice of termination, raise job abandonments as a defense and then arguing that constructive discharge is foreclosed because the employee alleged oral termination.

H. The Trial Court Erred in Ruling that the Declaration of Holly Dady Contains Hearsay.

A statement is not hearsay if it is an admission by a party opponent. ER 801(d)(2). To qualify as a statement of a party opponent, it must be “offered against a party and [be] ...a statement by a person authorized by the party to make a statement concerning the subject, or ... a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party.” ER 801(d)(2)(iii), (iv). The court may determine if a party is authorized to speak on a matter by examining “the overall nature of his authority to act for the party.” *Farah v. Hertz Transporting, Inc.*, 196 Wn. App. 171, 182, 383 P.3d 552 (2016) (ruling shuttle efficiency statement by Hertz shuttle efficiency supervisor, constituted admission by a party opponent).

An out of court statement offered to prove the truth of the matter asserted may be admitted to prove the declarant's state of mind. ER 803(a)(3) (“A statement of the declarant's then existing state of mind,

emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)[.]”)

Statements not offered to prove the truth of the matter asserted are not hearsay and thus admissible. ER 801(c); *see State v. Edwards*, 131 Wn.App. 611, 613–14, 128 P.3d 631 (2006) (effect on listener); *State v. Horn*, 3 Wn. App. 2d 302, 313, 415 P.3d 1225 (2018) (“Impeachment evidence is relevant if: (1) it tends to cast doubt on the credibility of the person being impeached and (2) the credibility of the person being impeached is a fact of consequence to the action.”)

Here, Ms. Holly Dady stated in her declaration that in late August 2016, an Addus supervisor called [her] and told her that Ms. Levno had been terminated.” (CP at 294 ¶ 8) Ms. Holly Dady then communicated that information to Levno. (CP at 294 ¶ 9) During late August 2016, Dawn Taylor was Levno’s supervisor. (CP 43 ¶ 1) Dawn Taylor prepared Levno’s “Disciplinary Warning Notice and Action Taken” (CP at 43 ¶ 2) Dawn Taylor was the Addus representative that told Levno that she “was being terminated from [] Addus.” (CP at 183:3-5). Dawn Taylor had the authority to, and actually did, discipline Levno. (CP at 43 ¶ 2)

Ms. Holly Dady’s statement that an Addus supervisor called and informed her of Levno’s termination is an admission by a party opponent. It also speaks to Addus’ state of mind and the effect the information had

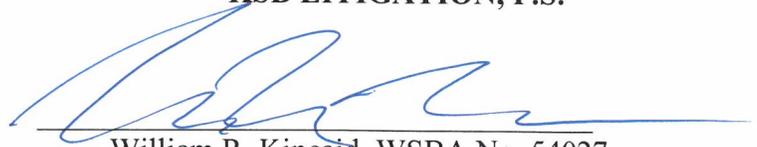
upon Ms. Holly Dady and Levno. Moreover, it contradicts and creates a fact question as to the credibility of Dawn Taylor's testimony. The trial court erred in ruling that the declaration of Holly Dady contains hearsay.

CONCLUSION

For the foregoing reasons, of law, precedent, and public policy, the trial court erred in granting summary dismissal of Levno's claims for retaliatory discharge in violation of RCW 74.34 and wrongful discharge in violation of public policy.

Dated this 1st day of July, 2019.

KSB LITIGATION, P.S.



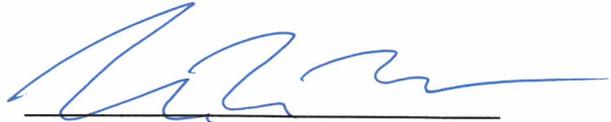
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