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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

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KAREN SHANNON,
Appellant,

vs.

THE PAIN CENTER OF WESTERN WASHINGTON, PLLC

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

Plaintiff/Appellant Karen Shannon filed suit against Defendant/Respondent Pain Center of Western Washington, PLLC, for discrimination pursuant to RCW 49.60. Defendant reported to the state of Washington that it had seven (7) employees during Ms. Shannon's employment, not counting Dr. David Velling, the sole owner/member of The Pain Center of Western Washington, PLLC. Despite WAC 162-16-220 "Jurisdiction - Counting the Number of Persons Employed" which provides that "officers" of a "private artificial legal entity" are to be counted as employees for the purposes of RCW 49.60, the trial court ruled the Defendant did not employ eight (8) employees and granted partial summary judgment dismissing the Plaintiff's statutory claim for discrimination.

Karen Shannon assigns the following error:

The trial court erred in entering the Amended Order Granting Defendant Pain Center of Western Washington's Motion for Partial Summary Judgment dated May 12, 2009 (filed May 20, 2009), dismissing Plaintiff's statutory claim under RCW 49.60.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Is the sole owner\member of a professional limited liability company an "employee" for purposes of RCW 49.60 in light of WAC 162-16-220 which provides that officers of a private artificial legal entity, and owners of a professional service corporation who provide professional services, are employees for purposes of RCW 49.60?

II. STATEMENT OF THE CASE

According to the Washington Secretary of State, Defendant Pain Center of Western Washington, PLLC's date of incorporation was April 30, 2004. CP 63. Plaintiff Karen Shannon was hired by Defendant Pain Center of Western Washington, PLLC, in November, 2006. CP 65. Shortly after being hired, Ms. Shannon was subjected to a hostile work environment. Ms. Shannon witnessed or was subjected to repeated acts of sexual harassment, including her supervisor, the office manager, repeatedly claiming that he was suffering from "S.R.H.", which he explained was an acronym for "Semen Retention Headache". CP 66. Ms. Shannon's declaration contains numerous instances of sexual harassment.

CP 65-67. Despite her complaints about the conduct, the hostile work environment continued until May, 2007, when Ms. Shannon, and another female employee, could no longer tolerate the sexual harassment and they did not return to work. CP 67.

During her employment with Defendant Pain Center, Plaintiff was one of **eight** persons who worked in the office. CP 67. Shortly after service of the summons and complaint, Defendant filed a Motion to Dismiss or for Partial Summary Judgment Re: Statutory Claims asking the Court to dismiss Ms. Shannon's claims under RCW 49.60 on the basis that the Defendant did not "employ" eight people as required by RCW 49.60. CP 6-14.

Defendant conceded in its Motion that it reported to the State of Washington Employment Security Department that it had seven (7) employees during each month that Plaintiff was employed by Defendant. CP 12, 44-46, 48. Although admitting that it had seven (7) employees at all times during Ms. Shannon's employment, Defendant did not include Dr. David Velling, who is the Medical Director and sole "member" of The Pain Center of Western Wash-

ington, PLLC, in the number of employees. As the sole "member" of the professional limited liability company, Dr. Velling also manages and provides professional services for the company.

Notwithstanding Dr. Velling's role with the company, the trial court granted Defendant's motion to dismiss Ms. Shannon's statutory claims under RCW 49.60. Upon motion for reconsideration, the trial court entered an Amended Order expressly declaring that it found that the Defendant did not have eight (8) employees. The trial court then entered findings pursuant to CR 54(b) and this appeal followed.

III. ARGUMENT

A. The Standard of Review is De Novo

The trial court granted partial summary judgment in favor of the Defendant, dismissing Plaintiff Karen Shannon's claims for discrimination under RCW 49.60 on the basis that the Defendant did not employ eight (8) persons. The standard of review is de novo and the Court of Appeals engages in the same inquiry as the trial court. *Beaupre v. Pierce County*, 161 Wn. 2d 568, 166 P.3d 712 (2007).

B. RCW 49.60 Prohibits Sexual Harassment

Plaintiff Karen Shannon filed suit on the basis that she was subjected to a hostile work environment, including sexual harassment on the part of her supervisor, Office Manager Richard Sabin. Ms. Shannon included a claim for damages under RCW 49.60 in her complaint. CP 4.

RCW 49.60.180 prohibits employers from discriminating against employees in the terms or conditions of their employment on the basis of sex:

It is an unfair practice for any employer:

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability....

Sexual harassment which creates a hostile work environment constitutes a violation of RCW 49.60.180. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn. 2d 401, 693 P.2d 708 (1985). The United States Supreme Court has held that a hostile work environment leading to a constructive discharge, as in the present case before the Court, is a form of

discrimination. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed 2d 633 (1998).

The Washington Legislature has declared that discrimination in the workplace "menaces the institutions and foundation of a free democratic state." RCW 49.60.010. As a result, RCW 49.60.020 requires that the Law Against Discrimination be liberally construed to accomplish the goal of eradicating unlawful discrimination in employment. *McCarty v. Totem Elec.*, 157 Wn. 2d 214, 226, 137 P.3d 844 (2006), *Blaney v. International Association of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn. 2d 203, 214, 87 P.3d 757 (2004); *Allison v. Housing Authority*, 118 Wn. 2d 79, 85-86, 821 P.2d 34 (1991).

Plaintiff's claim of sexual harassment creating a hostile work environment falls squarely within the conduct prohibited by RCW 49.60.180.

C. RCW 49.60 Applies to Employers With Eight or More Employees

Although sexual harassment in the workplace is actionable regardless of the number of employees employed by a defendant-employer, *Wahl v. Dash*

the Revised Code of Washington. However, this argument was directly contradicted and completely undermined by Defendant's sole "member", Dr. David Velling, at his subsequent deposition when he admitted that he is not in a partnership and has never claimed to be in a partnership:

Q Are you the only member of The Pain Center of Western Washington, PLLC?

A Yes.

Q Have there ever been any other members of The Pain Center of Western Washington, PLLC?

A No.¹

* * *

Q Are you aware of any documents that refer to The Pain Center of Western Washington, PLLC, as a partnership?

A No.

Q Have you ever represented to anyone that The Pain Center of Western Washington, PLLC, is a partnership?

1

Deposition of Dr. David Velling at page 9, line 25; page 10, lines 1-5. CP 94.

A No.²

Plaintiff also hired an expert witness, Certified Public Accountant P. Curtis Stebbins, who submitted a declaration to the trial court confirming that the Defendant is not a partnership:

I have been a Certified Public Accountant since 1980 and I have had my own practice in the state of Washington for the past 25 years.

Based upon my review of records from THE PAIN CENTER OF WASHINGTON, PLLC, and the testimony of Dr. David Velling, THE PAIN CENTER OF WASHINGTON, PLLC, is not a partnership, nor has it ever been a partnership. THE PAIN CENTER OF WESTERN WASHINGTON is a professional limited liability company. A limited liability company can be treated like a partnership for federal tax purposes if there is more than one member. As a limited liability company with only one member, THE PAIN CENTER OF WESTERN WASHINGTON, PLLC, does not constitute a partnership for federal tax purposes.

In this regard, I noted that Article XVII of the Operating Protocol of THE PAIN CENTER OF WESTERN WASHINGTON, PLLC, states that, "The Member has formed the Company under the Washington Limited Liability Act, **and expressly denies any intent hereby to form a partnership under either the Washington Revised Uniform Partnership Act or the Washington Uniform Limited Partnership Act....**" [Emphasis added.] CP 104-105.

2

Deposition of Dr. David Velling at page 24, line 25; page 25, lines 1-5. CP 94.

The record establishes that the Defendant is a Professional Limited Liability Company with a sole "member" providing professional services and not a partnership.

E. WAC 162-16-220 Defines "Employees" For Purposes of RCW 49.60

Washington Administrative Code 162-16-220 "Jurisdiction - Counting the Number of Persons Employed" contains the standards for determining the number of "employees" for purposes of a claim brought under RCW 49.60:³

(1) Purpose and scope. RCW 49.60.040 defines "employer" for purposes of the law against discrimination in part as "any person...who employs eight or more persons." This section establishes standards for determining who is counted as employed when deciding whether a person is an employer. The standards in this section do not define who is entitled to the protection of the law against discrimination.

Washington Administrative Code 162-16-220 also sets forth the relevant time for the calculation of eight or more employees:

3

See Sedlacek v. Hillis, 104 Wn. App. 1, 13-16, 3 P.3d 767 (2000) (citing predecessor Washington Administrative Code provisions 162-16-160 and 162-16-170 to determine the number of "employees" for purposes of RCW 49.60), *rev'd on other grounds*, 145 Wn. 2d 379, 36 P.3d 1014 (2001).

(2) Time of calculation. A person will be considered to have employed eight if the person either:

(a) Had an employment relationship with eight or more persons for any part of the day on which the unfair practice is alleged to have occurred, or did occur;....

With respect to the number of employees,

Plaintiff Karen Shannon asserted that the Defendant had eight (8) employees including both Dr. David Velling and his wife, Deanna Velling, a Registered Nurse, who worked at the Pain Center. Dr. Velling provided medical services to patients on a daily basis. CP 67. However, in Defendant's list of employees to the state of Washington Employment Security Department, it listed only one employee with the name of "D. Velling" (Nurse Deanna Velling) and simultaneously indicated "1" for "Number of Exempt Corporate Officers" (referring to Dr. David Velling).⁴ CP 44-48.

4

Before the trial court, Defendant tried to argue that Deanna Velling should not be counted as an employee, despite being listed as an employee to the Department of Employment Security, because WAC 162-12-220(12) and RCW 49.60.040(4) exclude individuals employed by their "spouse" as employees. CP 71. This argument erroneously ignores the fact that Deanna Velling is employed by The Pain Center of Western Washington, PLLC, not David Velling.

Thus, the Defendant admits that it had seven (7) employees every month that Plaintiff was employed by the Defendant, *without* counting Dr. David Velling, Medical Director, as an employee. For purposes of this appeal, the issue is whether Dr. David Velling should be counted as an employee. WAC 162-16-220 answers that question in the affirmative.

F. WAC 162-16-220(15) Requires Dr. David Velling to Be Counted as the Eighth Employee

In setting forth the standards for counting employees for the purpose of the Law Against Discrimination (RCW 49.60), WAC 162-16-220 clearly distinguishes between the following forms of businesses:

1. Partnerships:

"Partners will not be counted as employed by the partnership or by each other."

WAC 162-16-220(16);

2. Professional Service Corporations:

"All persons who render professional services for a professional service corporation will be counted as employees of the corporation."

WAC 162-16-220(17); and

3. Private or Public Artificial Legal Entities:

"Officers of corporations, and officers of other private or public artificial legal entities, will be counted unless:

(a) They receive no pay from the corporation or other entity; and

(b) They do not participate in the management of the corporation or other entity beyond participation in formal meetings of the officers.

WAC 162-16-220(15).

"Officers" of both of the latter types of businesses are considered employees for purposes of RCW 49.60 if, in the case of professional service corporations, they perform professional services for the business or, in the case of private artificial legal entities, they:

1. Receive pay; and
2. Participate in the management of the company beyond participation in formal meetings of the officers.

WAC 162-16-220(15).

Both criteria are met in the case of Dr. David Velling. Dr. Velling admitted at his deposition that he performs professional services for Defendant Pain Center of Western Washington, PLLC:

Q Would it be fair to say on a daily basis you perform professional services for the patients who come to The Pain Center of Western Washington, PLLC, seeking medical services?

MS. LUHN: Objection; asked and answered.

A Yes.⁵

The Operating Protocol of The Pain Center of Western Washington, PLLC, specifically provides that Dr. David Velling is the manager of The Pain Center of Western Washington, PLLC:

ARTICLE VI

MANAGEMENT OF THE COMPANY

6.1 Manager

The Manager shall be David A. Velling, M.D. The Manager shall serve as Manager until his resignation, incapacity or death.

5

Deposition of Dr. David Velling at page 11, lines 1-7. CP 95.

Dr. Velling also testified that he receives pay for the services he renders to The Pain Center of Western Washington, PLLC:

Q Well, let's start with you personally. Do you get some document issued by The Pain Center of Western Washington, PLLC, that indicates the amount of compensation or earnings or income you've received from The Pain Center of Western Washington, PLLC?

A I do.

Q What is that document?

A I get a W-2.⁶

* * *

Q How often do you receive pay from The Pain Center of Western Washington, PLLC?

MS. LUHN: Objection to form.

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Deposition of Dr. David Velling at page 18, lines 4-11. CP 95-96. Dr. Velling later testified that he wasn't sure if he received a W-2 or a 1099. Following the deposition, counsel for Plaintiff requested copies of the W-2's or 1099's issued by the Defendant to Dr. Velling but counsel for Defendant refused to provide the documentation. CP 87.

A Monthly.⁷

Plaintiff's expert witness confirmed that Dr. Velling meets the criteria to be counted as an employee in his declaration:

I have reviewed WAC 162-16-220 with regard to counting the number of persons employed for purposes of RCW 49.60. WAC 162-16-220(15) provides that officers of *private artificial legal entities* will be counted as employees unless:

(a) They receive no pay from the corporation or other entity; and

(b) They do not participate in the management of the corporation or other entity.

A limited liability company is a "private artificial legal entity" and the "members" of such entities are the functional equivalent of "officers".

According to his testimony in his deposition, Dr. David Velling performs professional services on a daily basis for THE PAIN CENTER OF WESTERN WASHINGTON, PLLC, and is compensated in a fixed amount on a monthly basis for those services. Under Article 6.1 of the Operating Protocol of THE PAIN CENTER OF WESTERN WASHINGTON, PLLC, Dr. Velling is the sole manager of the PLLC. Therefore, his relationship with the PLLC is consistent with that of an employee as defined in WAC 162-16-220(15). [Emphasis added.] CP 106.

Defendant argued to the trial court that WAC

7

Deposition of Dr. David Velling at page 19, lines 11-14. CP 96.

162-16-220 does not use the term "professional limited liability company" so the intent must have been to exclude members of professional limited liability companies as employees. This argument is erroneous on two grounds. First, it is clear that the use of the term "private artificial legal entity" in WAC 162-16-220(15) is a catch-all descriptive term intended to apply to numerous types of entities that can be legally created. There is no legal form of ownership in Washington denominated "private artificial legal entity". One cannot incorporate or register with the state as a "private artificial legal entity".

Second, the absence of a specific reference to professional limited liability companies (apart from the catch-all reference to "private artificial legal entities") does not lead to the conclusion that members of professional limited liability companies were meant to be excluded as employees. WAC 162-16-220 does not purport to list only those entities in which members or officers are included as employees. Instead, WAC 162-16-220 contains provisions that set forth when a particu-

lar person should be counted as an employee (e.g. an individual who practices as a professional service corporation, as set forth in WAC 162-16-220(17)) and when a particular person should not be counted as an employee (e.g. directors of a corporation merely because they serve in that capacity, as set forth in WAC 162-16-220(14)).

Therefore, the failure to specifically reference professional limited liability companies (apart from the catch-all reference to "private artificial legal entities"), at worst, requires resort to the statutory scheme and the courts' direction that RCW 49.60 is to be liberally construed in favor of its application.

For purposes of RCW 49.60, and in accordance with the standards set forth in WAC 162-16-220(15), Dr. David Velling should be counted as an employee.

G. Dr. David Velling Is Also Analogous to an Employee of a Professional Service Corporation Under WAC 162-16-220(17)

In addition to being counted as the eighth employee by virtue of WAC 162-16-220(15), Dr. David Velling should also be counted as an em-

ployee under the analysis adopted in WAC 162-16-220(17) which counts sole members of professional service corporations:

(17) Members of a professional service corporation. All persons who render professional services for a professional service corporation will be counted as employees of the corporation.

One who forms a professional service corporation and performs services is deemed to be an employee of the entity created. The situation is really no different for a professional limited liability company with a sole "member".

RCW 25.15.045 defines professional limited liability companies as companies organized to render professional services and they are subject to all provisions of RCW 18.100 Professional Service Corporations:

(1) A person or group of persons licensed or otherwise legally authorized to render professional services within this or any other state may organize and become a member or members of a professional limited liability company under the provisions of this chapter for the purposes of rendering professional service. A "professional limited liability company" is subject to all the provisions of chapter 18.100 RCW [Professional Service Corporations] that apply to a

professional corporation, and its managers, members, agents, and employees shall be subject to all the provisions of chapter 18.100 RCW that apply to the directors, officers, shareholders, agents, or employees of a professional corporation, except as provided otherwise in this section. Nothing in this section prohibits a person duly licensed or otherwise legally authorized to render professional services in any jurisdiction other than this state from becoming a member of a professional limited liability company organized for the purpose of rendering the same professional services. [Emphasis added.]

For purposes of RCW 49.60 and WAC 162-16-220, there is no meaningful distinction between a sole member of a professional limited liability company who renders professional services, and the sole officer of a professional services corporation, both of whom are paid by, and provide professional services for the benefit of, the legal entity that "employs" them. Under either circumstances, WAC 162-16-220(15) and WAC 162-16-220(17) mandate that the sole member or officer be counted as an employee.

The lack of any meaningful distinction between a sole member of a professional limited liability company and the sole owner of a professional services corporation was noted by Plaintiff's expert in his declaration to the trial

court:

Dr. Velling testified at his deposition that he renders professional services to THE PAIN CENTER OF WESTERN WASHINGTON, PLLC. As a practical matter, a professional limited liability company with one member who renders professional services to the company is essentially the same as a one-person professional services corporation with the sole owner rendering professional services to the corporation. As with a corporation, the limited liability form of the business limits Dr. Velling's personal liability and his assets are distinct from those of the limited liability company. CP 105-106.

IV. CONCLUSION

RCW 49.60 and WAC 162-16-220 require that Dr. David Velling be counted as the eighth employee of Defendant Pain Center of Western Washington, PLLC and Plaintiff Karen Shannon requests that this Court reverse the trial court's Amended Order Granting Defendant Pain Center of Western Washington's Motion for Partial Summary Judgment.

Respectfully submitted this 2nd day of November, 2009.

ALBERTSON LAW OFFICES

By:



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APPENDIX

WAC 162-16-220

WACs > Title 162 > Chapter 162-16 > Section 162-16-220

162-16-210 << 162-16-220 >> 162-16-230

WAC 162-16-220

No agency filings affecting this section since 2003

Jurisdiction — Counting the number of persons employed.

(1) **Purpose and scope.** RCW 49.60.040 defines "employer" for purposes of the law against discrimination in part as "any person. . . who employs eight or more persons." This section establishes standards for determining who is counted as employed when deciding whether a person is an employer. The standards in this section do not define who is entitled to the protection of the law against discrimination.

(2) **Time of calculation.** A person will be considered to have employed eight if the person either:

(a) Had an employment relationship with eight or more persons for any part of the day on which the unfair practice is alleged to have occurred, or did occur; or

(b) Had an employment relationship with an average of eight or more persons over a representative period of time including the time when the unfair practice is alleged to have occurred.

An employment relationship is most readily demonstrated by a person's appearance on the employer's payroll. The representative period of time for (b) of this subsection will ordinarily be the twenty weeks prior to and including the date on which the unfair practice is alleged to have occurred. However, where this period will not accurately reflect the overall employment level, as in a seasonal industry, we will use the month during which the unfair practice is alleged to have occurred plus the preceding eleven months.

(3) **Part-time employees.** A person working part time will be counted the same as a person working full-time. Persons subject to call to work (such as volunteer firefighters) will be considered to be employed at all times when they are subject to call.

(4) **Area of calculation.** A person who employs eight or more persons is an "employer" for purposes of the law against discrimination even though less than eight of the employees are located in the state of Washington.

(5) **Multiple places of employment.** The count will include all persons employed by the same legal entity, whether or not the persons work in the same place of business or line of business.

(6) **Connected corporations.** Corporations and other artificial persons that are in common ownership or are in a parent-subsiary relationship will be treated as separate employers unless the entities are managed in common in the area of employment policy and personnel management. In determining whether there is management in common we will consider whether the same individual or individuals do the managing, whether employees are transferred from one entity to another, whether hiring is done centrally for all corporations, and similar evidence of common or separate management.

(7) **Persons on layoff.** Persons on layoff will not be counted.

(8) **Persons on leave.** Persons on paid leave will be counted. Persons on unpaid leave will not be counted.

(9) **Employee or independent contractor.** Independent contractors will not be counted. In determining whether a person is employed or is an independent contractor for the jurisdictional count we will use the same standards that we use for the purpose of determining whether a person comes within the protection of the law against discrimination. These standards are set out in WAC 162-16-230.

(10) **Pay.** Anyone who is paid for work and who otherwise meets the standards in this section will be counted. This includes paid interns and work study program participants. Pay includes compensation for work by the hour, by commission, by piecework, or by any other measure. For the treatment of unpaid persons, see subsection (11) of this section.

(11) **Unpaid persons.** An unpaid person will be counted if he or she is generally treated in the manner that employers treat employees. That is, if management selects the person (particularly if selected in competition with other persons), assigns work hours, disciplines the unpaid person like an employee, or provides employment benefits such as industrial insurance, then the person will be counted as an employee. The typical volunteer firefighter would be counted. A person who comes into the food bank when he or she pleases, is put to work if there is anything to do, who leaves when he or she pleases, who has no expectation of paid employment, and who receives no employment benefits, would not be counted.

(12) **Family members.** Because of the definition of "employee" in RCW 49.60.040, we will not count "any individual employed by his or her parents, spouse, or child." Other family members will be counted.

(13) **Domestic help.** Because of the definition of "employee" in RCW 49.60.040, we will not count a person in the domestic service of the employing person.

(14) **Directors.** Directors of corporations, and similar officers of other private or public artificial legal entities, will not be counted simply because they serve in that capacity.

(15) **Officers.** Officers of corporations, and officers of other private or public artificial legal entities, will be counted unless:

(a) They receive no pay from the corporation or other entity; and

(b) They do not participate in the management of the corporation or other entity beyond participation in formal meetings of the officers.

(16) **Partners.** Partners will not be counted as employed by the partnership or by each other.

(17) **Members of a professional service corporation.** All persons who render professional services for a professional service corporation will be counted as employees of the corporation.

(18) **Temporary employee placement services.** Persons placed with an on-site employer by a temporary employee placement service:

(a) Will be counted as employees of the temporary placement service; and

(b) Will also be counted as employees of the on-site employer if the on-site employer generally treated them in the manner that employers treat employees (please see the factors listed in WAC 162-16-230).

[Statutory Authority: RCW 49.60.120(3). 99-15-025, § 162-16-220, filed 7/12/99, effective 8/12/99.]