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Court of Appeals

Division I

State of Washington

No. 74260-4-I

(Appeal from Snohomish County Court No. 14-2-07161-1)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RHONDA MOEN, a married individual,

Respondent,

v.

NORTHWEST EDUCATIONAL SERVICE DISTRICT NO. 189,
a municipal corporation,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

To establish a claim for the wrongful discharge in violation of public policy, a plaintiff must prove the existence of a clear and relevant public policy. The existence of this public policy is a question of law that requires the employer's conduct to contradict the letter or purpose of a constitutional, statutory or regulatory scheme.

Also, when an employee voluntarily resigns her job, the employee must show objectively intolerable working conditions that would compel a reasonable person to resign. A constructive discharge claim can be determined as a matter of law when no reasonable jury would conclude that the employer created objectively intolerable working conditions.

This case concerns Rhonda Moen, a former employee of the Northwest Educational Service District No. 189 ("NWESD"), who was hired by the NWESD to implement a drug and alcohol prevention/intervention curriculum at a middle school. Complaining primarily about the principal of the middle school, who was not an employee of NWESD, Moen resigned her position because she was not allowed to implement the curriculum in a manner that she thought was appropriate. Moen then filed suit, claiming wrongful constructive discharge in violation of public policy, negligent infliction of emotional distress, defamation, and false light.

Following the NWESD's summary judgment motion, the trial court dismissed all of Moen's claims except for the wrongful constructive discharge in violation of public policy claim. The trial court erred in allowing this claim to go forward because Moen failed to identify a clear mandate of public policy and because no reasonable jury would find that the NWESD created objectively intolerable working conditions that would compel a reasonable employee to resign. For these reasons, the NWESD requests that this Court reverse the trial court and order that Moen's claim for wrongful constructive discharge in violation of public policy be dismissed as a matter of law.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied NWESD's motion for summary judgment dismissal of Moen's wrongful constructive discharge in violation of public policy claim.

2. The trial court erred when it denied NWESD's motion for reconsideration of the order denying NWESD's motion for summary judgment dismissal of Moen's wrongful constructive discharge in violation of public policy claim.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Moen's claim for wrongful constructive discharge in violation of public policy fails as a matter of law because she has not

identified a clear mandate of public policy, which is a required element of the claim. (Assignments of Error No. 1, 2)

2. Whether Moen's claim for wrongful constructive discharge in violation of public policy fails as a matter of law because no reasonable jury would find that the working conditions created by NWESD were so intolerable as to force a reasonable person to resign. (Assignments of Error No. 1, 2)

IV. STATEMENT OF THE CASE

Educational service districts (ESDs) are regional subdivisions of the State of Washington that were established by the Legislature to provide services to local school districts when those functions are more effectively and efficiently performed at the regional level. RCW 28A.310.010, RCW 28A.310.340; Clerk's Papers (CP) at 147. These services include "[c]ooperative curriculum services such as health promotion and health education services." RCW 28A.310.350. As a regional agency, NWESD serves 35 school districts in Island, San Juan, Skagit, Snohomish, and Whatcom counties. CP at 147.

One of the services offered by NWESD involved a drug and alcohol prevention/intervention service, and an implementation of the curriculum called Project Success. CP at 147-48. Funded through the NWESD, this program employed specialists to be placed in the various

schools in the NWESD area to implement the Project Success curriculum and to provide counseling to students. CP at 148.

In November 2012, the NWESD hired Moen as a prevention/intervention specialist and assigned her to the Marysville Middle School (“MMS”) in the Marysville School District. CP at 148. Moen was hired in part to implement the Project Success curriculum in the middle school. Her supervisors were Jodie DesBiens and Wendi Thomas, both employees of NWESD. *Id.*

After being assigned to MMS, Moen received training on the Project Success curriculum. CP at 148. Because Moen was hired in November and received her training in January 2013, the program’s implementation was delayed until spring. CP at 148.

When it became apparent that MMS could not fully implement Project Success during the 2012-13 school year, the Office of the Superintendent of Public Instruction (OSPI) granted NWESD the authority to scale back the program. CP at 144. OSPI is the state agency overseeing Project Success. CP at 148.

In late March 2013, Moen complained to her supervisors at NWESD about the Principal at MMS, Susan Hegeberg, and the slow implementation of the Project Success curriculum. CP at 144. Moen informed her supervisors at NWESD that she could not work with

Principal Hegeberg. CP at 144. Hegeberg, in turn, complained that Moen did not respect her authority and that Moen had argued with her in front of MMS staff. *Id.* Moen's supervisors at NWESD met with Moen and Hegeberg in an attempt to resolve these problems. CP at 144.

Moen's supervisors at the NWESD also instructed Moen that she must follow directives given by Principal Hegeberg. CP 144. They told Moen that she should let them know if there were any more problems with the Principal and that Moen needed to refrain from discussing Hegeberg with the MMS staff. CP at 144-45.

Nevertheless, when Hegeberg instructed Moen on March 29, 2013 to implement Project Success in its scaled back form, Moen refused. CP at 135. Instead of discussing this matter with her supervisors at NWESD, Moen attempted to contact the program director of Project Success in New York. CP at 145, 149. Failing in this attempt, Moen contacted the program coordinator for Community Wellness and Prevention in Snohomish County to complain about Hegeberg. CP at 136, 145, 149.

Faced with Moen's refusal to follow the directions of her NWESD supervisors and her principal, the NWESD placed Moen on administrative leave, with pay, pending investigation. CP at 148, 185. A meeting with Moen, DesBiens, and Buckley Evans, Assistant Superintendent at NWESD, was set for April 1, 2013. CP at 148.

At the meeting, Moen informed Evans and DesBiens that she could not implement Project Success with three months left in the school year. CP at 149. Evans responded that if Moen was refusing to teach Project Success, then she was not fulfilling the requirements of her job. CP at 149. Evans and DesBiens also stressed that Moen would have to work with her building principal, but Moen did not consider working with Hegeberg to be “a viable option.” CP at 137-38, 149. Moen admitted that by refusing to implement Project Success, she was engaging in insubordination. CP at 149. Moen then hand-delivered her letter of resignation in the meeting. CP at 149.

On November 10, 2014, Moen filed this lawsuit. In her Complaint, she alleged: constructive discharge in violation of public policy, negligent infliction of emotional distress, defamation, and false light. CP at 210-11. The NWESD moved for summary judgment dismissal of all claims and the trial court partially granted the motion on October 9, 2015. CP at 23-25. The court dismissed Moen’s claims for negligent infliction of emotional distress, defamation, and false light, but allowed her claim for wrongful constructive discharge in violation of public policy to go forward. After NWESD’s motion for reconsideration was denied, the NWESD petitioned this Court for discretionary review. CP 1-3, 4,

On February 2, 2016, Commissioner Masako Kanazawa granted discretionary review. In her ruling, the Commissioner held that the statutes cited by Moen did not establish the clear mandate of public policy necessary to sustain a wrongful discharge in violation of public policy claim. Ruling at 12-13. Thus, the Commissioner concluded that the trial court committed an “obvious error” that warranted discretionary review under RAP 2.3(b)(1). Ruling at 1, 7.

The Commissioner also questioned whether Moen could establish the intolerable working conditions necessary to establish a constructive discharge. Ruling at 13-14. The Commissioner concluded that “the combination of the public policy and constructive discharge issues raised by NWESD warrants review.” Ruling at 14.

After deciding to not file a report of proceedings, the NWESD filed its designation of clerk’s papers on February 8, 2016. Under RAP 10.2, the brief of appellant NWESD is due on March 25, 2016.

On March 2, 2016, Moen filed her motion to modify the Commissioner’s ruling granting discretionary review. The NWESD filed its response on March 14, 2016. Moen’s motion to modify is currently pending before this Court.

V. ARGUMENT

A. Standard for Reviewing Summary Judgment Orders

An appellate court reviews a summary judgment order de novo and engages in the same inquiry as the trial court. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001). Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005). To defeat summary judgment, the nonmoving party must come forward with admissible evidence to sufficiently rebut the moving party’s contentions and support all necessary elements of the party’s claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Where reasonable minds could reach only one conclusion, summary judgment should be granted. *Id.*

B. The Trial Court Erred by Failing To Dismiss Moen’s Claim for Wrongful Constructive Discharge in Violation of Public Policy.

Moen’s wrongful discharge in violation of public policy claim requires that she prove the existence of a clear and relevant public policy that was allegedly violated by NWESD. Because she resigned her position, she must also prove that she was constructively discharged,

which means that she must show that the NWESD deliberately made working conditions so intolerable that a reasonable person would be compelled to resign. Because Moen cannot satisfy either requirement as a matter of law, the trial court erred in failing to dismiss her claim.

1. Because Moen cannot identify a clear and relevant mandate of public policy, her wrongful discharge claim fails as a matter of law.

When she was hired, Moen reviewed the NWESD's employee handbook. CP at 134, 148, 151-52. The handbook stated that classified employees, such as Moen, were employees at will subject to be terminated with or without cause. CP at 155. Thus, Moen was an at-will employee of the NWESD, a fact that Moen has never disputed.

In Washington, an at-will employee may be discharged "for any reason or for no reason at all." *Roe v. TeleTech Customer Care Mgmt. (Colorado), LLC*, 152 Wn. App. 388, 399, 216 P.3d 1055 (2009), *aff'd*, 171 Wn.2d 736 (2011). An at-will employee, however, may not be discharged when doing so would violate "a clear mandate of public policy." *Dicomes v. State of Washington*, 113 Wn.2d 612, 617, 782 P.2d 1022 (1989); *see also Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn. 2d 233, 238, 35 P.3d 1158 (2001) ("We recognize an exception to the terminable-at-will doctrine by permitting a cause of action for wrongful

discharge only ‘where the discharge contravenes a ‘clear mandate of public policy.’”) Washington courts have characterized a wrongful discharge in violation of public policy claim as “a narrow exception to the employment at-will doctrine in Washington State.” *Sedlacek v. Hillis*, 145 Wn.2d 379, 385, 36 P.3d 1014 (2001).

To state a claim for wrongful termination in violation of public policy, a plaintiff must prove:

(1) the existence of a clear public policy (the *clarity* element); (2) discouraging the conduct in which she engaged would jeopardize the public policy (the *jeopardy* element); (3) the public policy linked conduct caused her dismissal (the *causation* element); and (4) [defendant] cannot offer an overriding justification for her dismissal (the *absence of justification* element).

Roe, 152 Wn. App. at 400 (italics added). *See also Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). In addition, the public policy identified by the plaintiff must be relevant to the case at hand. *Becker v. Cashman*, 128 Wn. App. 79, 87, 114 P.3d 1210 (2005) (“To create a prima facie case, the plaintiff must first prove the existence of a clear, relevant public policy.”)

Whether a clear public policy—the clarity element—exists is a question of law to be determined by the court. *Dicomes*, 113 Wn.2d at 617. Because the tort is a narrow exception to the at-will doctrine, the public policy at issue must be “judicially or legislatively recognized.”

Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 276, 358 P.3d 1139 (2015). A court must be careful to “recognize clearly existing public policy,” but not to create it. *Sedlacek*, 145 Wn.2d at 390 (“[W]e should not create public policy but instead only recognize clearly existing public policy under Washington law.”)

The wrongful discharge in violation of public policy tort has been recognized in only four situations:

- (1) where employees are fired for refusing to commit an illegal act;
- (2) where employees are fired for performing a public duty or obligation, such as serving jury duty;
- (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and
- (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.

Rose, 184 Wn.2d at 276 (citations omitted). The *Rose* court added that “Under each scenario, the plaintiff is required to identify the recognized public policy and demonstrate that the employer contravened that policy by terminating the employee.” *Rose*, 184 Wn.2d at 276.

In determining whether a discharge violates public policy, a court should focus on “whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.” *Dicomes*, 113 Wn.2d at 617 (quoting *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)). Thus, the

emphasis is whether the employer's conduct contravened the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.

On September 17, 2015, the Washington Supreme Court issued three opinions that addressed claims for wrongful discharge in violation of public policy. *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 359 P.3d 746 (2015); *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015); and *Rose*, 184 Wn.2d at 272. These three cases, which specifically address the jeopardy element of a wrongful discharge claim, also demonstrate the importance of establishing a clear public policy that was relevant to the plaintiff's termination. *Becker*, for example, concerned alleged violations of the Sarbanes-Oxley Act, while *Rickman* concerned violations of HIPAA. *Rickman* at 306. Similarly, the plaintiff in *Rose* alleged that the defendant ordered him to falsify his truck-driving records so that he could drive in excess of federally-mandated levels, a clear violation of federal law. *Rose*, 184 Wn.2d at 286-87.

In all three cases, the plaintiffs established the existence of a clear public policy that was relevant to the plaintiff's termination. *See, e.g., Rose* at 287 ("Rose has met his burden in establishing his termination for refusing to break the law contravenes a legislatively recognized public policy.") Indeed, these decisions stressed the importance of adhering to a strict clarity requirement. The *Becker* court, for example, noted that a

plaintiff “must plead and prove that his or her termination was motivated by reasons that contravene an important mandate of public policy. We maintain a strict clarity requirement in which the plaintiff must establish that the public policy is clearly legislatively or judicially recognized.” *Becker v. Cmty. Health Sys., Inc*, 184 Wn.2d at 258.

The *Rose* court added that a strict clarity requirement protects employers from “amorphous” claims:

[The] requirement that the policy be judicially or legislatively recognized protects employers from having to defend against amorphous claims of public policy violations and addresses the employers' legitimate concern that a broad common law tort would considerably abridge their ability to exercise discretion in managing and terminating employees. **This strict clarity requirement ensures that only clear violations of important, recognized public policies could expose employers to liability.**

Rose, 184 Wn.2d at 276 (emphasis added).

In this case, the key issue concerns the first, or clarity, element of a wrongful discharge in violation of a public policy claim: whether a clear and relevant public policy exists that requires the Project Success curriculum to be taught in the manner advocated by Moen and that requires the NWESD to support Moen in her disagreement with her building principal. Because NWESD’s conduct did not contravene the

letter or purpose of a constitutional, statutory, or regulatory provision or scheme, Moen cannot satisfy the clarity element of her claim.¹

An examination of two supreme court cases, *Farnam v. CRISTA Ministries*, 116 Wn. 2d 659, 807 P.2d 830 (1991) and *Dicomes*, illustrates why, as a matter of law, Moen cannot establish the existence of a clear public policy. In *Farnam*, for example, the court held that the plaintiff failed to state a claim for wrongful discharge because the employer acted lawfully. The plaintiff alleged that she was wrongfully discharged in violation of public policy because she objected to the removal of feeding tubes from terminally ill patients and she voiced her objections to her supervisors and to the state. *Farnam*, 116 Wn.2d at 667. The employer in *Farnam*, however, had the legal right to remove the feeding tubes. *Id.* at 670. Because the employer had acted legally, the *Farnam* court held that

¹ In her response to the petition for discretionary review, Moen incorrectly claimed that the NWESD has “conceded the jeopardy, causation and absence of justification elements.” Moen’s Resp. at 4, 9. This statement is wrong: the NWESD has never conceded these elements. In its summary judgment motion, for example, the NWESD contended that Moen could not satisfy either the clarity or jeopardy elements of a wrongful discharge claim. CP at 197-98. As the NWESD stated in its summary judgment motion, Moen cannot “show that requiring her to present Project Success in an abridged format jeopardizes a public policy.” CP at 198. Moreover, Moen’s response to NWESD’s summary judgment motion acknowledged that “The Defendant argues Ms. Moen is incapable of establishing the first (clarity) and second (jeopardy) elements.” CP at 120.

the employee had failed to state a claim for wrongful discharge in violation of public policy. *Id.*

Similarly the employer in *Dicomes* did not violate the law. The plaintiff in *Dicomes* was a state employee who was discharged after she released budget data, having previously been told not to do so by her supervisors at the Department of Licensing (“DOL”). *Id.* at 615-16. The plaintiff released this budgetary data because she believed that DOL’s failure to include the data violated state law. *Id.* at 619-20. According to the plaintiff, a state statute embodied “a sufficiently clear legislative intent prohibiting [DOL’s] conduct so as to protect her against retaliatory discharge for releasing the budget data.” *Id.* at 620.

The Supreme Court, however, rejected that argument because the actions of the DOL did not violate any state law. *Id.* at 622-23. Noting that the DOL had discretion to not include the data, the *Dicomes* court held that there was no “clearly articulated legislative intent to abrogate this necessary element of discretion.” *Id.* at 623.

Finally, the Supreme Court stated that the good intentions of a plaintiff and the plaintiff’s difference of opinion with her superior’s course of action would not suffice:

[P]laintiff was not confronted with the choice of violating the law or sacrificing her job. She was faced with a difference of opinion as to her superior’s chosen course of

action. In the arena of discretionary political decisionmaking, plaintiff's arguably good faith belief in the righteousness of her conduct is too tenuous a ground upon which to base a claim for wrongful discharge.

Dicomes, 113 Wn.2d at 624. Noting the need to avoid frivolous lawsuits, the Supreme Court affirmed the summary judgment dismissal of the plaintiff's wrongful discharge claim because the plaintiff failed to present a contravention of a clear mandate of public policy:

We conclude that the facts of this case present no contravention of a clear mandate of public policy under the principles articulated above. Therefore, plaintiff has failed to state a cause of action for wrongful discharge under the public policy exception, and the trial court's dismissal of this claim on summary judgment is affirmed.

Dicomes, 113 Wn.2d at 624.

The *Dicomes* case is similar to the case at hand. Like the plaintiff in *Dicomes*, Moen had a disagreement with her supervisor. Like the plaintiff in *Dicomes*, Moen has looked to state law in an attempt to find a mandatory duty or policy allegedly violated by her supervisors. Like the plaintiff in *Dicomes*, Moen has failed to identify a violation of law or a contravention of a clear mandate of public policy by the NWESD.

2. The statutes cited by Moen do not prove the existence of a clear and relevant public policy.

In *Gardner*, the court stated "it is significant that most Washington cases finding a public policy violation have identified a single statute that

clearly sets forth the relevant policy.” *Gardner*, 128 Wn.2d at 953. In addition, the Washington Supreme Court has noted that merely pointing to a potential source of public policy is not sufficient. *Sedlacek*, 145 Wn.2d at 389 (“[W]e cannot conclude that a clear mandate of public policy exists merely because the plaintiff can point to a potential source of public policy”). Instead, the public policy must be clear and relevant. *Id.*; *Becker v. Cashman*, 128 Wn. App. at 87.

Here, however, Moen has pointed to *six* statutes that have little bearing on this case and that do not impose a duty upon the NWESD to support Moen in her dispute with her building principal. *See* Plaintiff’s Resp. in Opp. to Summary Judgment, CP at 120-24. For example, Moen cited RCW 28A.310.010, which merely states that the purpose of educational service districts is to provide cooperative and informational services to school districts, to assist the superintendent of public instruction and the state board of education in the performance of duties, and to provide services to schools for the deaf and blind. *See* RCW 28A.310.010. This statute does not impose a duty upon the NWESD to support Moen in her quest to teach the Project Success curriculum in a manner favored by Moen.

Moen’s summary judgment response also cited RCW 28A.320.1271, which directs OSPI to create a model school district

plan for recognizing, screening, and responding to emotional or behavioral distress in students, and RCW 28A.320.127 which directs school districts to adopt a plan for recognizing, screening, and responding to emotional or behavioral distress in students. In her ruling, the Commissioner correctly noted that RCW 28A.320.1271 and .127 were not even in effect when Moen resigned her position. Ruling at 10. Moen also points to RCW 28A.310.500, a statute requiring educational service districts to offer suicide screening and referral training to school districts.

In her motion to modify the Commissioner's ruling, Moen cited two statutes—RCW 28A.300.2851 and 28A.320.125—that were not argued to the trial court nor cited in her response to NWESD's petition for discretionary review. Moen's Motion to Modify at 5-7. Like the other statutes previously cited by Moen, RCW 28A.300.2851 and 28A.320.125 do not apply to the case at hand.

RCW 28A.300.2851, for example, requires the office of the superintendent of public instruction and the office of the education ombuds to convene a work group on school bullying and harassment prevention. RCW 28A.320.125 requires schools to have safe school plans in place to assist schools in responding to emergencies.

None of the statutes cited by Moen require the NWESD to offer the Project Success curriculum to school districts. Instead, like the statute

in *Dicomes*, the statutes cited by Moen give educational service districts discretion to provide cooperative and informational services to school districts.

Furthermore, none of the statutes cited by Moen impose a duty upon the NWESD to support Moen in her dispute with her building principal and none of these statutes impose a duty upon NWESD to support Moen in her attempts to teach the Project Success class in a manner that she finds acceptable. These statutes do not constitute a clear mandate of public policy requiring Project Success to be taught in a manner favored by Moen, nor do they even require NWESD to offer the Project Success curriculum. Thus, the statutes cited by Moen do not support her wrongful discharge claim.

Like the plaintiff in *Dicomes*, Moen may be well-intentioned in her belief that her way is the best way to implement the Project Success curriculum. In *Dicomes*, however, the court rejected the good intentions of a plaintiff, stating that *Dicomes's* “arguably good faith belief in the righteousness of her conduct is too tenuous a ground upon which to base a claim for wrongful discharge.” *Dicomes*, 113 Wn.2d at 624. For the same reason, Moen has failed to articulate the clear mandate of public policy violated by the NWESD.

Moen claims that she need only show that a public policy exists and that she does not have to show that the public policy was actually violated. CP at 122. Moen's argument, however, misstates the position of the NWESD. The NWESD has never claimed that the clarity element requires a plaintiff to prove that public policy was actually violated.

The public policy identified by the plaintiff, however, must be relevant to the case at hand. *Becker v. Cashman*, 128 Wn. App. at 87 ("To create a prima facie case, the plaintiff must first prove the existence of a clear, relevant public policy.") In the absence of relevancy, a plaintiff could point to any public policy in an attempt to contest her termination. That is what has happened here, as Moen has cited several statutes that have nothing to do with the case at hand.

Instead of identifying clear and relevant public policies, Moen has advanced only vague and amorphous assertions of public policy that are not relevant to the case at hand. Moen cannot satisfy the clarity element because NWESD's conduct did not contravene the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Because she cannot satisfy a required element, her claim for wrongful discharge in violation of public policy fails as a matter of law. To hold otherwise violates Washington law.

Moreover, allowing a wrongful discharge claim to go forward on such tenuous grounds would potentially have a disastrous effect upon education in Washington. For example, a teacher discharged for failing to follow the directives of school administrators in implementing a common core curriculum could file suit claiming wrongful discharge because the school district failed to implement the curriculum in a manner favored by the teacher. Or a football coach fired by the district for excessive discipline could file suit claiming wrongful discharge because his way is the best way to coach football. To allow Moen's wrongful discharge claim to go forward because the NWESD failed to support her attempt to teach Project Success in a manner favored by Moen—but not mandated by statute—would be an unprecedented expansion of Washington law.

Because the trial court erred in allowing Moen's wrongful constructive discharge claim in the absence of a clear mandate of public policy, this Court should reverse the decision of the trial court.

3. Moen's wrongful constructive discharge claim fails because no reasonable jury would find objectively intolerable working conditions that would compel a reasonable person to resign.

In Washington, an employee who resigns her position is presumed to have acted voluntarily. *Sneed v. Barna*, 80 Wn. App. 843, 849, 912 P.2d

1035 (1996). To overcome this presumption, a plaintiff must introduce evidence that the employee was constructively discharged, which occurs when “an employer deliberately makes an employee's working conditions intolerable, thereby forcing the employee to resign.” *Id.* at 849.

The constructive discharge standard is measured objectively and not subjectively: the employer must deliberately establish working conditions so intolerable that “a reasonable person in [the plaintiff's] position would have felt compelled to resign.” *Washington v. Boeing Co.*, 105 Wn. App. 1, 16, 19 P.3d 1041 (2000). While constructive discharge is often an issue of fact, a court may decide this claim as a matter of law if reasonable minds could reach only one conclusion. *Crownover v. State ex rel. Dept. of Transp.*, 165 Wn. App. 131, 265 P.3d 971 (2011), *rev. denied*, 173 Wn. 2d 1030 (2012) (plaintiffs failed to provide sufficient evidence to defeat summary judgment).

In *Crownover*, for example, the court noted that frustration or dissatisfaction with a job is not sufficient to show a constructive discharge: “A resignation will still be voluntary when an employee resigns because he or she is dissatisfied with the working conditions.” 165 Wn. App. at 149. Because working conditions were not intolerable, the court affirmed the summary judgment dismissal of the constructive discharge claims. *Id.* at 149-50.

Similarly, in *Washington v. Boeing Company*, this Court affirmed the summary judgment dismissal of the plaintiff's constructive discharge claim because the plaintiff could not establish, as a matter of law, the intolerable conditions that would force a reasonable person to resign. In *Washington*, co-workers' occasional use of inappropriate terms to address the plaintiff, their negative remarks about women, and a male co-worker's refusal to work with the female plaintiff did not amount to the intolerable conditions necessary to establish constructive discharge:

While the alleged negative remarks about women and a co-worker's refusal to assist her with certain tasks was frustrating, they do not rise to the level of being so difficult or unpleasant that a reasonable person in Washington's position would have felt compelled to resign. Accordingly, Washington's constructive discharge claim fails.

Washington, 105 Wn. App. at 16.

Conversely, constructive discharge has been found when an employer creates objectively intolerable working conditions. *See, e.g., Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn. App. 34, 43, 181 P.3d 864 (2008). In *Wahl*, the court found a constructive discharge after the employer engaged in a "continuous pattern of making sexually graphic comments," which culminated with the employer masturbating in the plaintiff's presence, thereby creating "working conditions so intolerable that [the plaintiff] reasonably felt compelled to resign." *Id.* at 44-45.

Contrast the truly intolerable conditions in *Wahl* with Moen's frustrations with her job. Moen primarily complains that the NWESD did not support her in her dispute with the building principal, who was not an employee of NWESD. To investigate the dispute, the NWESD placed Moen on paid administrative leave. Three days later, she resigned. CP at 149.

Moen's declaration in opposition to the NWESD's motion for summary judgment is most telling. CP at 33-42. In her declaration, Moen complains primarily about Principal Hegeberg. In the first seven pages of her declaration, Moen lodges only one complaint against the NWESD: that it failed to support her in the dispute with Hegeberg. CP at 38 ("[I]t was clear to me that I would receive no support from my employer" regarding a meeting with Hegeberg). Hegeberg, however, was not an employee of NWESD. CP at 139. Moen has acknowledged that NWESD employees were always "professional" towards her. CP at 139-40,

No reasonable trier of fact would conclude that the NWESD's alleged failure to support Moen in her dispute with Principal Hegeberg, combined with Moen being placed on paid administrative leave while the NWESD investigated her dispute with Hegeberg, constituted working conditions so intolerable that a reasonable person would be compelled to resign. Because Moen has not presented evidence of objectively

intolerable working conditions, the court erred in refusing to dismiss her constructive discharge in violation of public policy claim.

VI. CONCLUSION

Because Moen failed to identify a clear and relevant mandate of public policy and because no reasonable jury would find that the NWESD created objectively intolerable working conditions that would compel a reasonable employee to resign, the trial court erred in allowing Moen's wrongful constructive discharge in violation of public policy claim to go forward. For these reasons, the NWESD requests that this Court reverse the trial court and order that Moen's claim for wrongful constructive discharge in violation of public policy be dismissed as a matter of law.

RESPECTFULLY SUBMITTED this 5th day of April, 2016.

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CERTIFICATE OF SERVICE

The undersigned makes the following declaration under penalty of perjury under the laws of the State of Washington.

That on April 5, 2016, I caused to be delivered a true and correct copy of the following:

Brief of Appellant

to:

RODNEY R. MOODY
2825 COLBY AVE., SUITE 302
EVERETT, WA 98201
ATTORNEYS FOR RESPONDENT

by delivering a copy via regular mail to the same person(s) identified above, and by email to: rmoody@rodneymoodylaw.com.

DATED this 5th day of March, 2016, at Tacoma, Washington.

/S _____
Linda Cook