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COURT OF APPEALS
DIVISION II

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

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

vs.

CANDACE WAHL, Respondent

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Ms. Wahl argues essentially that she proved a claim a wrongful termination in violation of public policy and that the trial court so concluded. *See* Respondent's Brief at pp. 7, 10. To support this argument, Ms. Wahl proposes an entirely new formulation of the elements of the tort of wrongful discharge – a formulation that has no basis in Washington case law. Although Ms. Wahl acknowledges that the court did not enter a single conclusion of law stating that she had proven a claim for wrongful discharge in violation of public policy, she claims that “several” of the court’s conclusions of law “laid out the elements of a claim for wrongful discharge in violation of public policy.” Respondent's Brief at p. 16. She relies upon Conclusions of Law Nos. 3, 5, and 6. Respondent's Brief at p. 17.

These conclusions of law, however, do not “lay out” the four elements of the tort of wrongful discharge in violation of public policy. Furthermore, neither the evidence at trial nor the trial court’s factual findings and conclusions of law establish the jeopardy, causation, or absence of justification elements that are each required under Washington case law to prove the claim of wrongful discharge in violation of public policy.

II. REPLY ARGUMENT

A. MS. WAHL'S PROPOSED REFORMULATION OF THE TORT OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY IS NOT SUPPORTED BY ANY EXISTING AUTHORITY

Ms. Wahl properly sets forth the four elements required to prove the claim for tort of wrongful discharge in violation of public policy at the bottom of page 10 and top of page 11 of her brief. The *jeopardy* element required Ms. Wahl to prove that discouraging the “conduct” in which *she* engaged would jeopardize the public policy against sexual harassment. The *causation* element required Ms. Wahl to prove that *her* public policy linked “conduct” caused the dismissal. The *absence of justification* element required her to prove that Dr. Moore was not able to offer an overriding justification for a dismissal. See also Appellant’s Opening Brief at pp. 16-20.

Despite the clear formulation of these elements in the case law, Ms. Wahl suggests that this court should apply an entirely new formulation to the facts in *this* case. At page 12 of her brief, Ms. Wahl states: [i]n cases similar to the one at bar, a more reasonable formulation of the *jeopardy* element may be “that encouraging (or allowing) the conduct in which the *defendant* engaged would jeopardize the public policy.” At page 14 of her brief, Ms. Wahl asserts that the *absence of*

justification element does not “fit well” when the dismissal is constructive, and, therefore urges the court to instead consider whether there was any justification for Dr. Moore’s allegedly harassing conduct.

Ms. Wahl asserts that she satisfied the *jeopardy* element *solely* by being a female employee in the State of Washington. Respondent’s Brief at p. 12. She asserts that she satisfied the *causation* element by proving that *Dr. Moore’s* alleged conduct cause her to quit her job. Respondent’s Brief at p. 13. She asserts that she satisfied the *absence of justification element* because there was “no other possible justification” for Dr. Moore’s alleged sexual harassment. Notably, she did not prove, nor did the trial court conclude that Dr. Moore could not have offered an overriding justification for a termination in any event. Ms. Wahl cites no legal authority whatsoever to support her reformulation of the *jeopardy, causation, and absence of justification* elements of the tort of wrongful discharge in violation of public policy.

If this court were to accept Ms. Wahl’s reformulation of the tort of wrongful discharge in violation of public policy, it would effectively overrule *Jenkins v. Palmer*, in which this Court declined to create a common law cause of action for sexual harassment and gender discrimination. *See Jenkins v. Palmer*, 116 Wn. App. 671, 66 P.3d 119 (2003); *see also Roberts v. Dudley*, 140 Wn.2d 58, 76 n. 14, 993 P.2d 901

(2001) (“[w]e do not recognize a tort of gender discrimination). It would also effectively repeal RCW 49.60.040(3) which effectively limits statutory causes of action for gender discrimination to employers with eight or more employees.

B. THE TRIAL COURT’S CONCLUSIONS OF LAW DO NOT “LAY OUT” THE ELEMENTS OF THE TORT OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

Ms. Wahl relies upon Conclusions of Law Nos. 3, 5, and 8, for her argument that the trial court concluded that she had proven the tort of wrongful discharge in violation of public policy. These conclusion of law, however, state only that (1) it is a violation of public policy for an employer to sexually harass an employee (No. 3); (2) there was sufficient evidence to prove a common law claim of sexual harassment (No. 5); and (3) Ms. Wahl quit in response to Dr. Moore’s sexually harassing conduct No. 8). Notably, these conclusions of law cannot be interpreted to conclude that Ms. Wahl *engaged in conduct*, that if discouraged, would jeopardize the public policy against harassment. Nor can these conclusions of law be interpreted to conclude that *Ms. Wahl’s* public policy linked *conduct* caused her dismissal. Finally, these conclusion of law cannot be interpreted to conclude that Dr. Moore did not offer any

overriding justifications that would have supported a termination in any event.

C. **MS. WAHL FAILS TO CITE ANY CASE IN WHICH A WASHINGTON APPELLATE COURT HAS FOUND A PERSON TO HAVE BEEN CONSTRUCTIVELY DISCHARGED IN VIOLATION OF PUBLIC POLICY**

Ms. Wahl cites the *Snyder v. Medical Service Corporation*, 145 Wn.2d 233, 35 P.3d 1158 (2001) case and the *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177 n. 1, 125 P.3d 119 (2005) case for the proposition that the tort of wrongful discharge in violation of public policy may be predicated upon a constructive discharge. See Respondent's Brief at p. 19. In neither of these cases, however, did the court find a constructive discharge in violation of public policy.

In *Snyder*, the employee did not allege a wrongful termination in violation of public policy because the alleged constructive discharge based upon the rude, boorish, and overbearing behavior of her supervisor was not in contravention of a recognized public policy. In *Korlund*, the court declined to find a wrongful termination in violation of public policy because the public policy at issue – the protection of the public health and safety against waste and fraud in nuclear industry operations – was adequately protected by remedies available under the Energy Reorganization Act. *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156

Wn.2d 168, 177 n. 1, 125 P.3d 119 (2005). In other words, the jeopardy element was not satisfied. *Korslund*, 156 Wn.2d at 181.

Notably, the fact that the employer in *Korslund* may have created conditions so intolerable as to make the employees so ill that they were forced to leave work permanently was not sufficient to prove the jeopardy element. Nor was the fact that the plaintiff employees in *Korslund* affirmatively engaged in conduct protected by the public policy at issue, i.e., they reported their employers' safety violations, fraud, and mismanagement. *See Korslund*, 156 Wn. 2d at 172. Similarly here, the fact that Ms. Wahl may have quit in response to Dr. Moore's alleged harassment is not sufficient to satisfy the jeopardy element. Rather, Ms Wahl was required to show that she engaged in conduct that, if discouraged, would jeopardize the public policy against sexual harassment in the workplace, and that there are not other adequate means of protecting the public policy. This showing Ms. Wahl did not make.

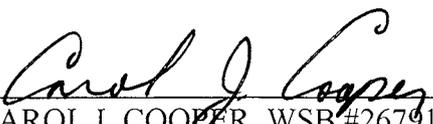
III. CONCLUSION

Based upon the foregoing, as well as Dr. Moore's opening brief, Dr. Moore respectfully requests that this Court reverse the trial court's conclusions that Ms. Wahl established common law *claims* for sexual harassment, hostile work environment, and/or constructive discharge.

Accordingly, Dr. Moore requests that this court reverse the trial court's award of emotional distress damages.

Dr. Moore further requests that this Court conclude that Ms. Wahl did not prove a claim for wrongful termination in violation of public policy and that the trial court did not so find. There is no legal authority for Ms. Wahl's wholesale reformulation of the elements of the tort of wrongful discharge in violation of public policy. Second, the trial court's conclusions of law that Ms. Wahl relies upon cannot be interpreted to imply that the tort of wrongful discharge in violation of policy was proven. Finally, no Washington appellate case has found that the tort of wrongful discharge in violation of public policy was proven based upon an alleged constructive discharge.

DATED this 22nd day of May, 2007.


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I hereby certify that on the 22 day of MAY, 2007, I caused a copy of the original of **Appellant's Reply Brief** to be delivered to the below listed at their respective addresses:

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