

COA NO. 292061

Lower Court No. 09-2-01639-3

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

SARAH R. LITTLE,

Respondent/Cross Appellant,

vs.

**ROBERT RANDALL BAKER, BAKER INVESTMENT GROUP, LLC, a
Washington Limited Liability Corporation,**

Appellant.

APPELLANT'S RESPONSE TO CROSS APPEAL

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I. SUMMARY OF THE ARGUMENT

The Trial Court's basis for finding that the Plaintiff was sexually harassed was that the words "nooner", "bitches," and "booby hugs" were used in the work place. Judge Plese stated that

Baker's statements about "nooners", "bitches", "booby hugs" and calling her "sexy Sarah" were unacceptable for an employer to make to a subordinate or employee. The fact that the person makes these comments on a regular basis to an employee, one that has the ability to hire or fire, is completely unacceptable in a work setting.

(CP 231); Court's Opinion, 8.

The use of those same words by Ms. Little would indicate that the use of those words by Mr. Baker were acceptable. Judge Plese stated that

Little testified that there were times when *she* used the term "nooner" when referring to going to lunch with Baker and may have referred to herself as one of the "bitches." However, if those terms were so offensive, as to cause Little severe emotional distress, why would she, in turn, then use these same phrases when talking to Baker? This would give Baker the false sense that these terms were acceptable.

(CP 226); Court's Opinion, 4.

The use of those words by Ms. Little would indicate that the use of those words was welcomed or solicited by Ms. Little. Mr. Baker's behavior was not unwelcome. Ms. Little was not treated differently because of her sex and the harassment was not pervasive.

The Trial Court did not properly apply the law. *See Glasgow v. Georgia Pacific*, 103 Wn.2d 401, 693 P.2d 708 (1985). The first three elements required to establish sexual harassment were not met.

II. RESTATEMENT OF THE CASE

The plaintiff in this case, Ms. Sarah Little, is a convicted felon. She was convicted of first degree theft and forgery in November 1996. (RP 23, line 9-18); Ex.103. Ms. Little did not reveal her criminal background to Mr. Baker at the time she was hired. (RP 177, line 1). Ms. Little's personnel file and the personnel file of Ms. Susan Trumbull both disappeared after they left employment with Baker Investment. (RP 203, line 22, RP 176, line 22). It was common for Randy Baker to hug employees. (RP 266, lines 10-25; RP 190, lines 19-25). Mr. Baker never touched Ms. Little inappropriately. (RP 192, lines 7-10). None of the witnesses testified to seeing any inappropriate hugs between Baker and Little; however, most witnesses heard Baker refer to these hugs as "booby hugs." (CP 252); Findings of Fact #8 - Court's Opinion, 2.

The Baker office was very relaxed. (RP 143, lines 18-25; RP 23, lines 5-24). Judge Plese stated in her opinion that

[a]ll the witnesses stated that when they observed Baker ask Little for a "booby hug," he would hug Little in a normal manner, as a friend would hug another, such as in greeting someone. From the witnesses' observations, these hugs appeared to be "harmless" touching. Most of the witnesses stated that a "booby hug" was just a name for a regular hug... Many of the witnesses, both employees and non-employees, testified that Baker would ask them for "booby hugs" and always in a joking manner.

(CP 228); Court's Opinion, 6.

The Plaintiff and Defendant, along with other employees in the office, used the term "nooner" to describe going out to lunch when the company paid. (RP 158, lines 12-17; RP 189, lines 6-12). The term, as used in the office, was never sexual; it was a joke. (RP 189, line 11; RP 190, line 9). Ms. Little used the

term “nooner.” (RP 21, line 13-22; RP 87, lines 13-22; RP 189, line 9). The employees and Mr. Baker did use the term “booby hug” to describe hugs between one another. (RP 220, lines 16-25). This was a phrase that was first used by Ms. Little. (RP 191, line 19). Hugging was a common form of greeting between employees, both men and women, at the office and outside the office. (RP 266, line 10). Ms. Little hugged Mr. Baker and others. (RP 81, lines 23-25; RP 190, lines 19-25). Ms. Little claimed Mr. Baker would touch her breasts when he hugged her, however, none of the witnesses saw that. (CP 252); Findings of Fact #7-8 – Court’s Opinion 2. The court never found that Mr. Baker did so.

The term “bitches” was also used in the office. This was a term that was first used after Ms. Trumbull started work with Mr. Baker. (RP 90, line 21). Ms. Trumbull and Ms. Little were friends. (RP 128, lines 8-27). Mr. Baker used the term “bitches” after it was used by Ms. Little and Ms. Trumbull. (RP 197, line 25; RP 190, line 2).

III. ARGUMENT

A. RESPONSE TO CROSS-APPEAL

1. Assuming Plaintiff Prevailed, The Trial Court Properly Awarded the Plaintiff Attorneys’ Fees.

Standard of Review.

In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons. *In RE Marriage*

Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

The trial court has broad discretion in fixing the amount of fees to be awarded. *Washington State Physicians v. Fisons*, 122 Wn.2d 299, 335, 858 P.2d 1054 (1993). The trial court did not abuse its discretion in this case.

Under RCW 49.60.030(2), a prevailing plaintiff can recover “the cost of the suit including *reasonable* attorney’s fees.” Wash. Rev. Code § 49.60.030(2) [emphasis added]. This statute does not provide guidance to the court to determine a reasonable fee. A court should provide the reasoning behind its fee award, but it is not required to follow the Lodestar method. *See Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 599, 675 P.2d 193 (1983).

Lodestar analysis requires two steps. First, a reasonable hourly rate is multiplied by the reasonable number of hours expended on the case. *Id.* at 593. The court must “limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.” *Id.* at 597. When an attorney has an established hourly rate, it will likely be considered the reasonable rate, but it is not conclusive and can be adjusted. *Id.* Factors to determine a reasonable fee may include: skill required by the case, time restraints on the litigation, amount of potential recovery, attorney reputation, and the undesirability of the case. *Id.*

The second step in a *Lodestar* analysis requires a determination as to whether

the “lodestar” [should be] adjusted up or down to reflect factors, such as the contingent nature of the success in the lawsuit or the quality of the representation, which have not *already* been taken into account in computing the “lodestar” and which are shown to warrant the adjustment by the party proposing it.

Id. at 593-94.

When an hourly rate incorporates the contingent nature of the case, no further adjustment should be assessed. *Id.* at 599. A Lodestar calculation is presumed reasonable and adjusting based upon a contingency multiplier will “likely duplicate in substantial part factors already subsumed in the lodestar.” *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).

When assessing attorney’s fees, the court is required to consider the relationship between the amount of the fee award and the level of success. The court must answer “the question of what is ‘reasonable’ in light of [the] level of success.” *Hensley v. Eckerhart*, 461 U.S. 424, 439 (1983). When the plaintiff has only had partial success, the court awarding attorney’s fees may specifically identify hours that should be eliminated or may reduce the amount to account for the limited success. *Id.* at 436-37.

In *Wynn v. Earin*, 163 Wn.2d 361, 181 P.3d 806 (2008), the Washington State Supreme Court explained that in that case the successful plaintiff in a claim for violation of the Health Care Information Act requested “\$119,432 in attorney fees and \$11,006 in costs pursuant to RCW 70.02.170(2). The trial court segregated the work it thought necessary on the successful claims estimating it was 10% of the total effort and awarded \$11,900 in fees and \$1,100 in costs.” *Id.* at 368-69. Ultimately, the Court held that

[a]ccordingly, the trial court’s award of fees is affirmed. The trial court was hampered, as the court indicated, by time sheets that were not very helpful. Nonetheless, the trial court’s conclusion that 10 percent of counsel’s time was spent on those statutory claims that were successful is

justified by the record.

Id. at 384.

In the present case, Judge Please went through the proper analysis as outlined in Findings For Award of Attorney Fees. (CP 260). None of the findings were objected to by the Cross-Appellant.

The court reviewed the hourly rate and hours expended and came to a lodestar amount. (CP 260); Findings of Fact #2 – Court’s Opinion, 1. The court then discussed the use of an upward multiplier of 1.25% based upon the contingent nature of the case. (CP 260); Findings of Fact #3 – Court’s Opinion, 1. The court then tried to limit the lodestar to hours reasonably expended and deleted hours spent on unsuccessful claims or duplicated effort. (CP 261); Findings of Fact #4-5 – Court’s Opinion, 2.

The court went to great lengths and requested counsel to segregate the work performed for each claim presented and counsel was unable to do so. (CP 261); Findings of Fact #5 – Court’s Opinion, 2. The court also attempted to do so and arrived at the same amount as was obtained by dividing the Lodestar amount with a 1.25 multiplier by one-quarter. (CP 261); Findings of Fact #7-8 – Court’s Opinion, 2.

The reasonable amount of attorney fees is a factual determination made by the trial court based upon its lengthy involvement in the case and the totality of the facts and claims. Thus, it is appropriate for this court to defer to the trial court’s factual determination regarding the fee award.

Here, the trial court made findings of fact and conclusions of law in

support of its attorney fees award and these are the best evidence of the trial court's reasoning. *Rhinehart v. Seattle Times*, 59 Wn.App. 332, 342, 798 P.2d 1155 (1990).

2. The Trial Court Did Not Err in Ruling Mr. Baker Did Not Assault Ms. Little.

On a daily basis, Mr. Baker would hug Ms. Little as well as other employees. Findings of Fact #5 – Court's Opinion, 2. Some of Mr. Baker's touching of Ms. Little was unwarranted and offensive to Ms. Little.

Finding of Fact 5 needs to be read in conjunction with Findings of Fact 6, 7, and 8 since they all deal with the same issue. *See* Findings of Fact #5-8 – Court's Opinion, 2. Finding of Fact 7 is: "Little claims that Baker would come up behind her, hug her from behind and touch her breasts." Court's Opinion, 2. The trial court did not find this happened. The *only* evidence or testimony of this supposed practice was Ms. Little's own assertion of it occurring. Ms. Little's claim was not corroborated by any other employees.

The court did not feel that Mr. Baker assaulted Ms. Little. Judge Plese made this clear in noting that

Little claims that the continued hugs and touching her breasts were similar to an assault on her person. She stated that she would tell Baker that his behavior was unacceptable, but Baker would comment back to her, that it was "no big deal" and try to pacify her by purchasing her items, such as a car. Little testified that there were times she told Baker what was offensive to her, but Baker would then remind her how much he did for her. Never did Little state that she rejected any of the gifts he provided her.

(CP 229-236); Court's Opinion, 7.

Consent is a defense to a claim of assault and battery and Mr. Baker had

no indication his hugs were offensive to Ms. Little. The Washington courts have defined an assault as “an attempt to commit a battery, which is an unlawful touching; a touching maybe unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive.” *State v. Humphries*, 21 Wn.App. 405, 408, 586 P.2d 130 (1978). The Washington State Supreme Court elaborated on this statement of the law in the case of *Hellriegel v. Tholl*, 69 Wn.2d 97, 417 P.2d 362 (1966). The *Hellriegel* case was based on an assault and battery charge that was brought after a boy suffered injures from a broken neck as a result of horseplay with three of his friends. *Id.* at 97-98. The court rejected the assault and battery claim because the record contained evidence that the boy had voluntarily engaged in similar horseplay with the defendants in the past on several occasions. *Id.* at 104. Due to this evidence of consent, coupled with arguable consent being given to engage in the horseplay that actually caused the injury, the *Hellriegel* court refused to look further into the elements of assault and battery. *Id.* at 106. The evidence of consent was sufficient to stifle the plaintiff’s claim. *Id.*

There are prominent similarities between the facts of the *Hellriegel* case and those in this case. Ms. Little participated in the hugs with Mr. Baker. Findings of Fact #5 – Court’s Opinion, 2. The hugs between Mr. Baker and Ms. Little were perceived by others as “normal” and “as a friend would hug another.” Court’s Opinion, 6. Ms. Little initiated hugs with Mr. Baker. (RP 81, lines 23-25; RP 190, lines 19-25). These facts all evidence Ms. Little’s consent to these hugs. Had Ms. Little objected to the hugs and refused to participate in them she may

have a viable case for an assault and battery claim. However, as held by *Hellriegel*, her consent and participation in this activity remove her ability to bring such a cause of action.

The elements of assault are defined in *Brower v. Ackerley*, 88 Wn.App. 87, 943 P.2d 1141 (1997), where the court uses the Restatement (Second) of Torts which defines assault, in relevant part as follows:

An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension.

Id. at 93.

In this case, Mr. Baker never intended to cause harm or have any offensive contact with Ms. Little. He hugged her and she hugged him.

3. Findings of Fact 30 and 31 Are Supported by The Evidence.

The court found that Ms. Little did use the same terminology she now claims is offensive. Little used the term “nooner.” (RP 87, line 12; RP 88, line 1-3; RP 247, line 13).

Ms. Little and Ms. Trumbull used the term “bitches” at work. (RP 192, line 19).

Little used the term “bitches” with friends. (RP 34, line 1).

Little testified Mr. Baker never called an employee a “bitch.” (RP 89, line 5). Mr. Baker testified he never called Ms. Little a bitch. (RP 193, line 5).

Ms. Little stated that the term “bitches” was first used when “Susie (Ms. Trumbull) started working for us.” (RP 90, line 21).

The term had never been used prior to Ms. Little's friend, Ms. Trumbull, coming to work at Baker Investment. (RP 91, lines 13-19).

Ms. Little testified that Mr. Baker believed that the use of the term "bitches" was a joke. (RP 33, line 23).

Ms. Little stated she did not recall specifically using "bitches" in the workplace. (RP 91, line 12).

Appellate courts defer to the trial court's determinations of the persuasiveness of the evidence, witness credibility, and conflicting testimony. *Snyder v. Haynes*, 152 Wn.App. 774, 779, 217 P.3d 787 (2009).

There is clearly substantial evidence to support Ms. Little's use of the word "nooner" and that she may have used the term "bitches" with her friend, Ms. Trumbull.

While Ms. Trumbull did not testify specifically regarding her use of the term "bitches" the court could conclude she and Ms. Little used the terms at work when referring to themselves.

B. APPELLANT'S RESPONSE IN SUPPORT OF BAKER'S APPEAL

1. The Unsatisfied Elements of Sexual Harassment.

The elements of a prima facie hostile work environment claim are: (1) the harassment was unwelcome; (2) the harassment was because of sex; (3) the harassment affected the terms or conditions of employment; and, (4) the harassment is imputable to the employer. *Glasgow*, 103 Wn.2d at 405, 693 P.2d 708. Ms. Little failed to prove the first three of these elements at trial.

i. The Harassment Was Unwelcome.

The harassment complained of must be unwelcome in the sense that the plaintiff employee did not solicit or entice it and in further sense that the employee regarded the conduct as undesirable or offensive. *Id.* at 406-07, 693 P.2d 708.

In this case, that element has not been established. Ms. Little voluntarily hugged Mr. Baker and other employees at Baker Investment. She used the language that she now claims is offensive. In *Reed v. Shepard*, 939 F.2d 484, 491 (7th Cir. 1991), the court held that conduct is not unwelcome if the employee participates in the conduct.

Ms. Burgess, a former employee testified hugs were “a common thing, hugs were like a handshake.” (RP 301 at lines 20-22). There is no question that Mr. Baker hugged Ms. Little and other employees, nor is there any question that Ms. Little hugged Mr. Baker and other employees and that this was a common occurrence. The question is whether the hugging was offensive to Ms. Little at the time. It is easy to be a Monday Morning Quarterback. It is important to consider Finding of Fact #16 in this light. **Little stated “she told Baker his behavior was unwanted on more than one occasion.”** Finding of Fact #16 – Court’s Opinion, 2. We do not know what behavior the court is talking about that was unwanted.

ii. The Harassment Was Because Of Sex.

Mr. Baker did not treat Ms. Little differently because of her sex. The term “booby hug” was not used only in application to Ms. Little, but also in application

to other employees and non-employees, men and women. The term “booby hugs” was coined and brought to the workplace by Ms. Little. Mr. Baker complimented all employees, both male and female. Ms. Little used the same terms as Mr. Baker and the other employees, both male and female, referring to “nooner,” “booby hugs,” and “bitches” in a joking manner. Hugs were also a common greeting between all sexes.

The dispositive question here is whether Ms. Little was treated any differently than male employees. *Payne v. Children’s Home Soc. of Washington, Inc.*, 77 Wn.App. 507, 574, 892 P.2d 402 (1995).

iii. The Harassment Affected The Terms Or Conditions Of Employment.

Whether the harassment at the workplace is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee is a question to be determined with regard to the totality of the circumstances. *Glasgow*, 103 Wn.2d at 406-407. In this case, the evidence did not affect the term or conditions of employment to a sufficient degree to violate the law. In this case, it is clear that the Plaintiff, Ms. Sarah Little, started using the term “booby hugs” and gave hugs to Mr. Baker and other people. Ms. Little used the term “bitches” in the office and Ms. Little used the term “nooner” when referring to lunch and would go to lunch when Mr. Baker or other employees used the term “nooner” when referring to an office paid lunch.

Ms. Little, at trial, was claiming that these items were all things that now bother her about her employment at Baker Investment. However, she brought that

vernacular to the work place and used that slang in the workplace. This was an informal office. There was no hostile environment. Judge Plese, in her opinion, found that the sexual harassment arose from the statements that were made by Mr. Baker. Judge Plese explained:

Little's claim for sexual harassment does have merit. The fact an employer with an authority to make employment decisions over a subordinate should subject that person to these types of remarks or statements on a continued basis does constitute a form of sexual harassment.

(CP 230); Court's Opinion, 8.

The statements that the court found were sexual harassment are terms the plaintiff used and she brought to the workplace. To constitute a hostile environment, the frequency and severity of the offensive conduct must be such as to affect the terms and conditions of employment. It is not sufficient if the conduct is merely offensive. *Washington v. Boeing Company*, 105 Wn.App. at 10, 19 P.3d 1041. In *Adams v. Able Building Supply*, 114 Wn.App. 291, 57 P.3d 280 (2002), the court stated:

But a civil rights code is not a "general civility code." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)... The conduct must be so extreme as to amount to a change in the terms and conditions of employment, *Id.* The conduct must be both objectively abusive (reasonable person test) and subjectively perceived as abusive by the victim." *Harris*, 510 U.S. at 21-22, 114 S.Ct. 367.

2. Attorneys' Fees

Pursuant to RCW 46.60.030(2) and RAP 18.1(a), "a plaintiff who prevails on a gender discrimination suit is entitled to reasonable attorney fees in the trial court and on appeal." *Collins v. Clark County Fire Dist. No. 5*, 155 Wn.App. 48,

104-05, 231 P.3d 1211 (2010)(citing *Blaney v. Int'l Ass'n of Machinists*, 151 Wn.2d 203, 217, 87 P.3d 757 (2004)). A party is entitled to attorney fees on appeal when that party “substantially prevails on appeal.” *Id.* (citing *Day v. Santorosola*, 118 Wn.App. 746, 7740-74, 76 P.3d 1190 (2003)). “Generally, the prevailing party is the party who receives an affirmative judgment in his or her favor. But if neither party wholly prevails, ‘then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded to the parties.’” *Id.*

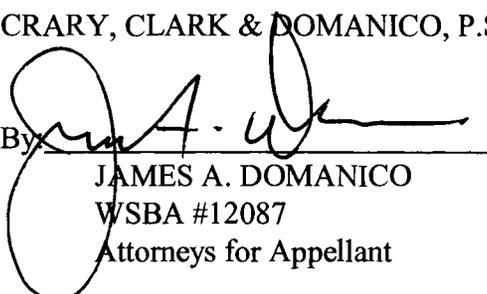
IV. CONCLUSION

Pursuant to the arguments above, and those contained in the Appellant’s Brief, the Appellant respectfully appeals the trial judge’s opinion as the trial judge erred by finding for Ms. Little on her sexual harassment claim and awarding her damages for emotional distress.

RESPECTFULLY SUBMITTED this 21 day of April, 2011.

CRARY, CLARK & DOMANICO, P.S.

By



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COA NO. 292061

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