

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.**

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APPELLANT'S BRIEF

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James A. Domanico

Attorney for Appellants

CRARY & CLARK & DOMANICO, P. S.

East 9417 Trent Avenue

Spokane, Washington 99206-4285

(509) 926-4900

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## I. INTRODUCTION

This is a direct appeal to the Court of Appeals from a decision of Spokane County Superior Court, Department 1, The Honorable, Annette F. Plese. (CP 295-310.) The Appellant, Mr. Robert Randall Baker, and Baker Investment Group, LLC, has requested this Court review the Trial Court's determination that Mr. Baker sexually harassed an employee, Ms. Sarah R. Little. (Conclusions of Law #3); (CP 254.) The Appellant also is appealing the monetary award to Ms. Little. (Conclusions of Law #5); (CP 254.)

The Plaintiff, Ms. Little, has filed a Cross-Appeal regarding the Trial Court's determination that the Defendant did not physically assault the Plaintiff, Sarah Little, and that the Judge erred in awarding attorney's fees to Ms. Little.

The Trial Court issued a written Opinion on May 12, 2010 (CP 223-231) and the Findings of Fact and Conclusions of Law were entered on June 10, 2010. (CP 251-255.)

## II. ASSIGNMENTS OF ERROR

- A. **The Trial Court Erred in Concluding that Ms. Little Was a Victim of Sexual Harassment in the Work Environment.**

- B. The Trial Court Erred in Determining that the Sexual Harassment Caused Ms. Little Some Form of Emotional Distress.**

### **III. ISSUES PRESENTED FOR REVIEW**

- A. Whether Mr. Baker Sexually Harassed Ms. Little.**
- B. Whether Ms. Little Suffered Damages as a Result of the Alleged Sexual Harassment by Mr. Baker.**

### **IV. STATEMENT OF THE CASE**

The case was tried to The Honorable Annette S. Plese.

Mr. Baker is the sole managing partner for Baker Investment Group, LLC. Baker Investment, LLC is a small real estate development company located in Spokane, Washington. (RP pg. 170, line 10-22.)

In 2005, the only employees of the business were Mr. Baker and Ms. Little. (RP pg. 170, line 18-25.) The company never had over five employees at one time. (RP pg. 171, line 4.) Mr. Baker's business declined with the economy, and in December of 2008, he only had two employees, Ms. Little and one, Ms. Susan Trumbull. Mr. Baker moved his business from an office in downtown Spokane to an office in the basement of his residence. Ms. Little was employed as Mr. Baker's personal assistant. (RP pg.

Ms. Little was employed as Mr. Baker's personal assistant. (RP pg. 24, line 18-19.) Ms. Little left employment from Baker Investment on December 6, 2008. (RP pg. 43, line 21-24.)

The atmosphere in the Baker Investment Office was casual and relaxed. (RP pg. 143, line 18-25; RP pg. 187, line 14-25; RP pg. 23, line 5-24.) The entire office staff would go to lunch, paid for by Baker Investment. (RP pg. 164, line 10-17; RP pg. 264, line 4-8.) The employees and Mr. Baker considered themselves friends. (RP pg. 179, line 2-17.) Mr. Baker went out of his way to help Ms. Little. He helped her get a car loan, purchased appliances for her home as a Christmas present and allowed her to charge personal items on her company credit card. (RP pg. 179, line 22-25; RP pg. 180, line 1-13.)

The Plaintiff and the Defendant, along with others in the office, used the term "nooner" to describe going out to lunch when the company paid. (RP pg. 158, line 12-17; RP pg. 189, line 6-12; RP pg. 264, line 9-20; RP pg. 189, line 8-18.) Ms. Little used the term "nooner." (RP pg. 87, line 9-25.) She did not find it offensive when the firm was downtown. (RP pg. 21, line 13-22.)

The office and the employees also used the term “boobie hug” to describe hugs between one another. (RP pg. 270, line 16-25.) Ms. Little coined the phrase. (RP pg. 191, line 19-24; RP pg. 247, line 14-18.) Hugging was a common form of greeting between the employees, both men and women, both at the office and outside the office. (RP pg. 266, line 10-25.) Ms. Little hugged Mr. Baker and others. (RP pg. 81, line 23-25; RP pg. 190, line 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.)

The term “bitches” was also used in the office. (RP pg. 192, line 11-25.) Ms. Trumbull referred to herself and Ms. Little as Mr. Baker’s bitches, (CP 254), and Mr. Baker then used that term in a joking manner with them. (RP pg. 33, line 22-24; RP pg. 197, line 25; RP pg. 198, line 2.) Mr. Baker also referred to Ms. Little as “sexy Sarah” and complimented her on her appearance. (RP pg. 197, line 11-25.) This was not done in a derogatory manner, but as a compliment. Other employees complimented Ms. Little and she did not object and seemed pleased. (RP pg. 165, line

3-22.) Mr. Baker never asked Ms. Little for sex or made any sexual advances towards her. (CP 252); (RP pg. 103, line 15-24.)

## V. ARGUMENT

### A. Scope of Review.

The scope of review of a decision made by the trial court following a bench trial is to determine whether the findings of fact are supported by substantial evidence and whether those findings support the conclusions of law. Dorsey v. King County, 51 Wn.App. 664, 668-69, 754 P.2d 1255 (Div. I 1998), review denied, 111 Wn.2d 1022 (1988).

Substantial evidence is evidence sufficient to persuade a rational and fair-minded person that a fact relevant to the elements of a cause of action is true. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

An appellate court must defer to the trial court in evaluating the persuasiveness of evidence and the credibility of witnesses. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. Jones, 152 Wn.2d at 8, 93 P.3d 147;

RAP 10.3(g).

The following Findings of Fact are not supported by

Substantial Evidence:

(5) On a daily basis Baker would hug Little as well as other employees. Some of Baker's touching was unwanted and offensive;

(16) Little stated she told Baker his behavior was unwanted one more than one occasion.

The standard of review for errors of law is de novo. Robel v. Roundup Corp., 148 Wn.2d 35, 43, 59 P.3d 611 (2002).

Conclusion of Law #3 that Baker sexually harassed Little is wrong. The Judge misapplied the law to the facts of this case.

**B. Mr. Baker did not Sexually Harass Ms. Little.**

RCW 49.60.180 provides that "it is an unfair practice for any employer: ... to discharge or... [otherwise] discriminate against any person in compensation or in other terms or conditions of employment because of... sex." Wash. Rev. Code §§ 49.60.180(2)-(3). This statute makes actionable hostile work environment, sexual harassment and quid pro quo sexual harassment. Glasgow v.

Georgia-Pacific Corp., 103 Wn.2d 401, 405, 693 P.2d 708 (1985). In

Schonauer v. DCR Entm't, Inc., 79 Wn.App. 808, 820, 905 P.2d 392

(Div. II 1995), the court stated:

To establish a claim for hostile work environment sexual harassment, an employee must initially identify and prove the conduct complained of. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 2402, 91 L.Ed.2d 49 (1986). ... Then, the employee must prove four elements, plus damages. See Delahunty v. Cahoon, 66 Wn.App. 829, 836, 823 P.2d 1378 (1992).

Glasgow, 103 Wn.2d 401, 693 P.2d 708, is the leading Washington case on hostile environment sexual harassment law.

Glasgow establishes four elements of a prima facie case:

- (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 imputed to the employer.

Id. at 406-07, 693 P.2d 708.

**1. The Harassment was Unwelcome.**

In order to constitute harassment, the complained of conduct must be unwelcome in the sense that the plaintiff-employee did not solicit or incite it, and in the further sense that the employee regarded the

conduct as undesirable or offensive.

Id. at 406, 693 P.2d 708. See also, Schonauer, 79 Wn.App. at 820, 905 P.2d 392.

In this case, that element has not been established. Ms. Little claimed that Mr. Baker would hug her inappropriately. Ms. Little also claimed that many people had witnessed the inappropriate hugging by Mr. Baker. None of the witnesses testified that they saw anything inappropriate in the hugs between Mr. Baker and Ms. Little. (CP 252); (Findings of Fact #8.) The witnesses testified that Mr. Baker not only hugged Ms. Little but he also hugged other male and female friends and employees when he greeted them. Ms. Little initiated some of the hugs. There is no evidence other than Ms. Little's statements that the hugs were inappropriate or were unwanted. None of the witnesses testified that they ever heard Ms. Little complain about any hugs or saw anything inappropriate.

Mr. Baker did use the term "boobie hug." The use of this term was started by Ms. Little, a term she used for hugs that she gave to others. (RP pg. 191, line 19-24.) Mr. Baker and Ms. Little would joke about the term.

It is this term which she now complains is inappropriate.

The term “nooner” was used in the office when referring to going out to lunch with the entire office. (RP pg. 181, line 6-12.) The term was used with all of the people in the office. Both male and female and Ms. Little testified there were times when she used the term “nooner” when referring to going to lunch with Mr. Baker. (RP pg. 189, line 8-25; RP pg. 87, line 9-15; RP pg. 21, line 13-22.)

Ms. Little now claims that use of the term “nooner” was offensive and inappropriate.

Use of the term “bitches” was said in the office. The first time the term was used was after Ms. Turnbull came to work at Baker Investment. (RP pg. 88, line 11-17.) Ms. Turnbull was the first person to start using the phrase, “his bitches,” when she asked Baker if he was taking “his bitches” to lunch, referring to Little and herself. (Findings of Fact #31); (CP 254.) Ms. Little may have referred to herself as one of the bitches when talking to Baker about herself and Ms. Turnbull. (CP 254); (Findings of Fact #30.) Mr. Baker indicated he did not use that phrase ever in a derogatory sense; however, he may have used the term in the same context as Ms. Little and Ms.

Turnbull in a joking manner. (RP pg. 192, line 11-25.) The conduct complained of by Ms. Little was all conduct that she participated in and initiated.

Mr. Baker also complimented Ms. Little. Telling her that she looked nice, sexy, hot and referred to her at times as “sexy Sarah.” (RP pg. 197, line 11-25.) Mr. Baker regularly tried to compliment his employees, both male and female. (RP pg. 197, line 25; RP pg. 198, line 2.) Ms. Little did not object to compliments. (RP pg. 165, line 3-22).

As Judge Plese stated in her decision:

Little testified that there were times when she had 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 these 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 these terms were acceptable.

(CP 276.)

Judge Plese clearly indicates that the use of these terms was not harassment by Mr. Baker, but Judge Plese then states:

Baker’s statements about ‘nooners,’ ‘bitches,’ ‘Boobie

hugs,' calling her 'sexy Sarah,' were unacceptable for an employer to make to a subordinate or employee. (CP 231.)

Mr. Baker's use of these terms may have been in bad taste. However, the terms were used by Ms. Little and, as a result, Mr. Baker felt they were acceptable to Ms. Little.

## **2. The Harassment was Because of Sex.**

The question to be answered here is: would the employee have been singled out and caused to suffer the harassment if the employee had been of a different sex? This statutory criterion requires that the gender of the plaintiff-employee be the motivating factor for the unlawful discrimination.

Glasgow, 103 Wn.2d at 406, 693 P.2d 708.

Mr. Baker did not treat Ms. Little differently because of her sex. The term "nooner" was used by Mr. Baker and other people in the office. The term "boobie hugs" was not used only in application to Ms. Little, but also in application to other people, employees and non-employees, men and women. A hug was a greeting commonly used in the workplace among friends. The questionable term was coined by Ms. Little, she brought it to the workplace. As Judge Plese stated in her decision:

It is clear from the testimony that Baker was not

saying or doing these things with some intent in mind to have a sexual relationship. In fact, both Little and Baker testified that there was never any request for sex or a sexual relationship.

(CP 226.)

In Adams v. Able Building Supply, Inc., the court stated:

That Title VII is not ‘a general civility code’ applies with equal force to the discrimination element of a hostile environment. It is not sufficient to show that the employee suffered embarrassment, humiliation, or mental anguish arising from the non-discriminatory harassment. [Payne v. Children’s Home Soc’y of Washington, Inc., 77 Wn.App. 507, 514, 892 P.2d 1102 (1995)]. The dispositive question is whether Ms. Adams would have been subjected to harassment if she had been a man.

114 Wn.App. 291, 298, 57 P.3d 281 (Div. III 2002).

In this case, Mr. Baker did not single out Ms. Little for different treatment. He treated male and female in the same manner. She freely participated in hugging Mr. Baker. She also personally used the terms “nooner” and “bitches.” She did not complain regarding the compliments that Mr. Baker gave to her regarding her appearance. While Mr. Baker’s joking with Ms. Little may have been in poor taste, it was not sexual harassment.

**3. The Harassment Affected the Terms or Conditions of Employment.**

Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law. The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether the harassment at the work place 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 406-07, 693 P.2d 708.

In this case, the harassment did not affect the terms or conditions of employment to a sufficiently significant degree to violate the law. As stated in Glasgow, “Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment.” Id. That is exactly what we are dealing with in this situation. As Judge Plese cited in her decision:

Most of the employees and witnesses stated they thought it was a joke ‘the term nooner’ and that the Baker Investment office was “that kind of atmosphere. The office was described as easy going, laid back and fun.

(CP 229.)

Whether harassment is sufficiently severe or

persuasive is a question of fact. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

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 that the conduct is merely offensive. Washington v. Boeing Co., 105 Wn.App. 1, 10, 19 P.3d 1041 (Div. I 2000); Adams, 114 Wn.App. at 296, 57 P.3d 280.

To determine whether the conduct was sufficiently persuasive so as to alter the conditions of employment and create an abusive work environment, we look at the totality of the circumstances. In addition to its frequency and severity, we look at whether the conduct involves words alone or also included physical intimidation or humiliation, and whether the conduct interfered with the employees work performance. ... The conduct must be so extreme as to amount to a change in the terms and conditions of employment. ... The conduct must be both objectively abusive (reasonable person test) and subjectively perceived as abusive by the victim.

Adams, 114 Wn.App. at 296-97, 57 P.3d 280.

In this case, there is no indication that there was a hostile work environment. Ms. Little was never penalized by Mr. Baker for not liking his jokes or hugs. Ms. Little was an active participant. Mr. Baker went out of his way to help Ms. Little and gave her gifts, helped her purchase a car and let her use her company credit card for

personal items. Judge Plese stated at page 8 of her decision:

Little's claim for sexual harassment does have merit. The fact an employer with 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. However, almost all sexual harassment cases involve an employer or supervisor who penalize that employee for not agreeing or going along with the harassment.

In this case, it appears that Little benefited greatly from her employment. She received a salary that was much higher than any other job she was qualified to perform. Little was able to use a company credit card for personal use and numerous times did not have to pay it back. All the other employees had their credit cards taken away if they used them for personal use. Little received many other benefits, such as appliances, help buying a home and a car, and a clothing allowance from her employer.

(CP 230.)

There was no evidence that the conduct of Mr. Baker created an abusive working environment for Ms. Little. It was the opposite.

**4. The Harassment is Imputed to the Employer.**

We are not contesting this factor. Mr. Baker's actions were those of the employer.

**C. Ms. Little did not Suffer Emotional Distress as a Result of the Alleged Sexual Harassment by Mr. Baker.**

Ms. Little used the same terms she now says caused her emotional distress:

-“Nooner” was a term used for lunch.

-“Boobie Hug” was a term used to describe a normal hug and a term she brought to the office.

-“Bitches” was a term she may have used and was used initially by a co-worker (her friend).

Mr. Baker’s use of the terms, even though Ms. Little used them, was naïve, but hardly the type of comments to cause emotional distress. There is no basis to find Ms. Little’s emotional distress was caused by Mr. Baker’s use of these terms. Mr. Baker’s compliments to her and the other employees are not the type of comments that would normally create emotional distress.

**VI. ATTORNEY FEES**

Pursuant to RAP 18.1, Mr. Baker requests an award of reasonable attorney fees on appeal if he is the prevailing party. WA R RAP 18.1. RCW 49.62.030 authorizes an award of attorney fees

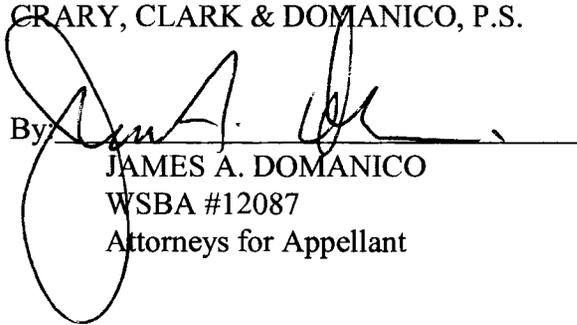
to the prevailing party on appeal. Wash. Rev. Code § 49.62.030(2).  
See also, Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 153, 94 P.3d 930  
(2004); Day v. Santorsola, 118 Wn.App. 746, 770-71, 76 P.3d 1190  
(Div. I 2003).

## VII. CONCLUSION

The trial judge erred by finding for Ms. Little on her sexual harassment claim and awarding her damages for emotional distress.

RESPECTFULLY SUBMITTED this 1 day of December, 2010.

CRARY, CLARK & DOMANICO, P.S.

By 

JAMES A. DOMANICO  
WSBA #12087  
Attorneys for Appellant

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James A. Domanico

Attorney for Appellants

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East 9417 Trent Avenue

Spokane, Washington 99206-4285

(509) 926-4900

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