

COPY

79615-7

RECEIVED

No. 244148-III

Washington Court of Appeals Division III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

KEN BRIGGS, JUDY ROBERTSON, MARK JOHNSON,
BEVERLY NUNN, JAMI SMITH, SHIRLEY BADER, PAM
ZELLER, MARGARET ("PEGGY") CLARK and VALERIE
BRUCK,

Plaintiffs/Appellants

v.

NOVA SERVICES, a Washington non-profit corporation, and
LINDA BRENNAN,

Defendants/Respondents.

BRIEF OF RESPONDENTS

LOUIS RUKAVINA
W.S.B.A. No. 10805
Attorney for Respondents

LOUIS RUKAVINA, P.S.
421 W. Riverside, Suite 1015
Spokane, WA 99201
(509) 459-3200

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii,iii

STATEMENT OF THE CASE.....1

ARGUMENT.....13

 A. The Trial Court Did Not Abuse Its Discretion In Denying
 Plaintiff’s Oral CR 56(f) Motion For Continuance.....13

 B. The Trial Court Did Not Abuse Its Discretion In Dismissing
 Plaintiffs’ Claims For Wrongful Termination, Retaliation and
 Negligent Supervision.....18

 C. Plaintiffs Have Failed To Allege A Clear Mandate Of Public
 Policy That Was Constravened By Their Termination Either
 Actual Or Constructive.....21

 D. Plaintiffs Have Failed To Provide The Necessary Evidence To
 Sustain A Claim For Negligent Supervision/Retention.....29

CONCLUSION.....31

TABLE OF AUTHORITIES

Cases

Bravo v. Dolsen, 125 Wn.2d 745, 888 P.2d 147 (1995).....27, 28

Butler v. Joy, 116 Wn.App. 291, 65 P.3rd 671 (2003).....14,16

Coggle v. Snow, 56 Wn.App. 499, 784 P.2d 554 (1990)...14, 15, 16, 18

Dicomes v. State of Washington, 113 Wn.2d 612, 782 P.2d 1002
(1989).....23, 24

Farnam v. CRISTA Ministries, 116 Wn.2d 659, 807 P.2d 830 (1991)
.....25

Francom v. Costco Wholesale, 98 Wn.App. 845, 862, 991 P.2d 1182
(2000).....28

Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 913 P.2d 377
(1996).....22, 23

Molsness v. City of Walla Walla, 84 Wn.App. 393, 928 P.2d 1108
(1996).....19

Niece v. Elmview Group Home, 131 Wn.2d 39, 48, 929 P.2d 420
(1997).....29

NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 576-77.....27

Palmateer v. International Harvester Co., 85 Ill.2d 124, 421 N.E.2d 876
(1981).....24

Parnar v. Americana Hotels, Inc., 65 Ha. 370, 652 P.2d 625 (1982)...22

Roberts v. Atlantic Richfield Co., 88 Wn.2d 887, 891, 568 P.2d 764
(1977).....21, 22

<i>Snyder v. Medical Service Corp.</i> , 145 Wn.2d 233, 239, 35 P.2d 1158 (2001).....	25, 26
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219 at 232, 685 P.2d 1081 (1984).....	22
<i>Washburn v. Beatt Equipment Co.</i> , 120 Wn.2d 246, 840 P.2d 860 (1992).....	26
<i>Washington v. Boeing Company</i> , 105 Wn.App. 1, at 15, 19 P.3rd 1041.	19, 20

Court Rules

CR 56(f).....	10, 11, 13, 16
---------------	----------------

Statutes

RCW 49.32.020.....	26, 27
RCW 50.32.070.....	10

I. STATEMENT OF THE CASE

Plaintiffs/Appellants are all former employees of Defendant Nova Services (hereinafter “Nova”) and subordinates of Defendant Linda Brennan, Nova’s Executive Director. Kenneth Briggs was hired as the Marketing Manager of Nova in July of 2003. Judy Robertson was the Associate Director of Nova. Mark Johnson was Nova’s Production Manager. Shirley Bader was the Pre-Vocational Services Coordinator. Beverly Nunn was the Group Support Employment Coordinator. Jami Smith was the Employment Coordinator (CP 60:2-10).

Those six Plaintiffs were part of the Nova’s management team. The remaining Plaintiffs, Pam Zeller, Margaret Clark and Valerie Bruck were non-management employees (CP 60:10-12). While not formally dismissed, Pam Zeller has abandoned her claim against Nova, as per representations of Plaintiffs’ counsel made on Page 6 of the Appellants’ Brief.

On April 6, 2004, the six managers (Briggs, Robertson, Smith, Bader, Nunn and Johnson) submitted a letter to Nova’s Board of

Directors criticizing the Executive Director's management of the company. That letter alleged deficiencies of the Executive Director's performance with regard to leadership, administration, financial management and planning, board development, corporate culture, and community and government relations. The letter did not allege any specific illegal conduct on the part of the Executive Director (CP 70:1-5) (CP 73-77).

Despite the managers' violation of company policy by directly appealing to the Board of Directors with their complaints, the Board took a number of steps in response to the April 6, 2004, letter. First, they hired attorney Michael Love, employment law specialist, of the firm of Paine, Hamblen, Coffin, Brooke & Miller, LLP, to perform a comprehensive investigation of the managers' allegations. Second, they retained the services of an independent human resource specialist, Ellen Flanigan, to examine the company's operation and to explore possible resolution of the managers' grievances. Third, they availed the complainants of an opportunity to personally meet with the Board and express their collective and individual grievances (CP 70:6-14).

The Love Investigation

Mr. Love was hired by the Board on April 22, 2004, to conduct an investigation of the Managers' complaints and to prepare a written investigative report. As part of the investigation, Mr. Love conducted extensive interviews with all of the complainants, the Executive Director, and over a dozen other employees and potential fact witnesses and reviewed and considered multiple documentary correspondence. On May 24, 2004, he submitted a 38-page written report summarizing his evaluation and conclusions (CP 81:2-22) (CP 84-221).

None of the individuals interviewed, including the ten Plaintiffs, cited a single instance of illegal activity on the part of the Executive Director. Additionally, despite allegations of harassment and retaliation, Mr. Love was unable to elicit any specific instance of harassment or retaliatory conduct on the part of Ms. Brennan. Mr. Love assisted the company in obtaining the services of a human resource specialist to attempt mediation or other resolution of the Plaintiffs' issues and complaints (CP 81:15-19, 23-24).

Ellen Flanigan's mediation attempts

Pursuant to Mr. Love's recommendation, the Board of Directors

hired Ellen Flanigan, an independent human resource consultant on June 3, 2004. Ms. Flanigan had over twenty years' experience in human resources and had been an independent consultant for approximately two years. Prior to her hiring by Nova, Ms. Flanigan had no contact, either personal or professional, with the company or its Executive Director, Linda Brennan (CP 123:25) (CP 124:1-8).

After additional meetings with the Managers, Ms. Flanigan proposed that the group meet with the Executive Director to air their complaints in a face-to-face setting. The Executive Director was reluctant to meet with the group as a whole based on their level of hostility and her fears of a collective brow beating. Ms. Flanigan decided that it would be unwise and unfair to the Executive Director to subject her to such a confrontational meeting (CP 124:4-22). After additional individual meetings over the next three weeks, Ms. Flanigan obtained the consent of the six Managers to prepare written statements and arranged for them to express their concerns directly to the Board of Directors at a non-scheduled special meeting on June 29, 2004 (CP 124).

The Board Meetings

The complainants met with Nova's Board of Directors, Ms. Flanigan and corporate counsel, Louis Rukavina, after work in the Nova conference room. Each of the complainants, as well as Ms. Brennan's personal secretary, Pam Zeller, submitted his or her written statement and orally summarized his or her position. At that meeting, none of the Plaintiffs either orally, or in writing, alleged any legal impropriety on the part of Ms. Brennan. The meeting lasted approximately one hour and fifteen minutes, after which the Board thanked the Managers and indicated they would seriously consider the questions raised by the complainants. The Board met in executive session and authorized Ms. Brennan to make any personnel decisions necessary to ensure the smooth operation of the company (CP 70,71:1-2).

On Monday, July 12, 2004, Ms. Brennan and Ms. Flanigan met individually with Plaintiffs Nunn, Johnson, Bader, Smith and Zeller. Each was informed that Ms. Brennan wished them to stay and asked them if they would be willing to put the past acrimony behind them and carry on with Nova's mission in a cooperative manner. All five indicated a willingness to continue working at Nova and working with

the Executive Director to make Nova a better, more effective workplace. Those commitments were memorialized in a letter that each received (CP 61:5-16) (CP 65).

Ms. Brennan and Ms. Flanigan then met with Mr. Briggs and Ms. Robertson and informed them that they were being discharged for insubordination and disloyalty. They, too, were provided with written confirmation (CP 61:2-4) (CP 67).

Later that day, Ms. Brennan and Ms. Flanigan met with the entire Nova work force and informed them that Mr. Briggs and Ms. Robertson were no longer with the company, but that the Executive Director was committed to working cooperatively with all of them and putting the past behind. Ms. Brennan also stated that she would be meeting individually with many of them over the next several days to discuss ways to better communicate within the organization and improve group performance (CP 61:17-21) (CP 125).

Over the next several days, Ms. Brennan met with several employees including Plaintiffs Nunn, Bader and Zeller. Ms. Brennan's and Ms. Flanigan's perception following the events of July 12th was that everyone seemed to be committed to moving forward and putting the

past acrimony behind them in the best interests of the company (CP 61:11-16) (CP 125:21-22).

On the morning of July 15th, Plaintiff Shirley Bader gave her two-week notice to Ms. Brennan, giving as her reason her commitment to the cause of the group, including the terminated Managers Briggs and Robertson. She indicated that “they” had started this together and had agreed that if anyone left or was fired all of them would leave. Ms. Brennan asked Ms. Bader if she could refrain from continued collaberative efforts against her during the next two weeks. Ms. Bader replied in the negative and Ms. Brennan indicated that that being the case, she would pay her for the next two weeks, but she was expected to leave after work that day (CP 61:21-22) (CP 62:1-5) (CP 125:15-16) (CP 126:1-2).

Later that afternoon, the Board of Directors received a letter by fax demanding the immediate removal of the Executive Director and the immediate reinstatement of Judy Robertson and Ken Briggs. The letter also required Board acknowledgment of the letter and the Board’s “full plan of action” by 4:30 P.M., Friday, July 16, 2004. Those requests were described as non-negotiable and if not met, the letter’s signatories

would walk out and not return until their “requests” had been met. The letter was signed by Plaintiffs Mark Johnson, Beverly Nunn, Jami Smith, Shirley Bader, Pam Zeller, Odalys Castillo, Margaret “Peggy” Clark and Valerie Bruck (CP 62:6-13) (CP 79).

The Board considered the letter to be one of resignation by the signatories, and when they did not report for work on Monday, July 19, 2004, the Executive Director began to interview and hire replacements for the eight signatories (CP 62:14-16).

Those eight signatories and Mr. Briggs and Ms. Robertson filed suit through their attorney, Mary Giannini, on September 17, 2004, alleging: 1) wrongful termination in violation of public policy; 2) unlawful retaliation-wrongful discharge; 3) negligent infliction of emotional distress; 4) intentional infliction of emotional distress/outrage; and 5) negligent supervision/retention (CP 3-10). Since that time, Ms. Castillo has been dismissed from the lawsuit and Ms. Zeller, as noted above, has apparently abandoned her claim.

Interrogatories and Requests for Production were served by the Plaintiffs on the Defendants on October 11, 2004, and returned to Plaintiffs on December 14, 2004, with certain objections made to several

requests for production that sought information the Defendants deemed irrelevant (CP 131). Defendants, in turn, served Interrogatories and Requests for Production on the Plaintiffs on November 2, 2004, and those were returned by the Plaintiffs on January 7, 2005.

A Civil Case Scheduling Order was entered on December 17, 2004, setting trial for July 11, 2004 (CP 28). From pre-litigation investigation and the parties' responses to Interrogatories and Requests for Production, both counsel agreed that there was insufficient time to complete the necessary discovery within the requirements of the Scheduling Order and on February 11, 2005, the Court granted Defendants' Motion for Continuance of the trial date. A new Civil Case Scheduling Order was entered on that date setting trial for November 28, 2005 (CP 40).

Based on the allegations in Plaintiffs' Complaint and upon their Answers to Interrogatories and Requests for Production, Defendants filed a Motion for Summary Judgment on March 17, 2005, seeking dismissal of all of Plaintiffs' causes of action (CP 42-43). Hearing on that Motion was set for April 22, 2005 (CP 127).

On March 21, 2005, Plaintiffs filed a Motion to Compel Answers

to their Interrogatories and Requests for Production and noted hearing on that Motion for the same day as Defendants' Motion for Summary Judgment (CP 129-130, 153). Prior to the date of the hearing, counsel for the Plaintiffs did not request, discuss or move for a Motion for Continuance of Defendants' Motion for Summary Judgment under CR 56(f) with either opposing counsel or the Court.

Defendants received Plaintiffs' Memorandum in Support of Its Opposition to Defendants' Motion for Summary Judgment with supporting affidavits on April 11, 2005. Defendants filed a Motion to Strike the Affidavits of Kenneth Briggs, Judy Robertson, Shirley Bader, Mark Johnson, Beverly Nunn and Jami Smith on the basis that those affidavits contained multiple hearsay assertions and references to decisions made by an Administrative Law Judge during the course of Employment Security hearings in violation of RCW 50.32.070 (CP 335-339). That Motion was noted for hearing on April 22, 2005, the same date on which the Court would be hearing Defendants' Motion for Summary Judgment (CP 344).

Oral argument on all of the above referenced motions was had before the Honorable Gregory Sybolt on April 22, 2005. Prior to

hearing argument on Defendants' Motion for Summary Judgment, Judge Sypolt heard argument on Defendants' Motion to Strike Plaintiffs' affidavits. At that time, he ruled that Plaintiffs' affidavits did, in fact, contain numerous instances of inadmissible hearsay and that the Court would not consider any such testimony in ruling on Defendants' Motion for Summary Judgment (RP 12:18-25).

The Court then turned to Defendants' Motion for Summary Judgment seeking dismissal of all five counts of Plaintiffs' Complaint. During argument, Plaintiffs' counsel maintained that granting the Defendants' Motion was inappropriate in light of the fact that there was still considerable discovery to be performed in order for Plaintiffs to adequately respond to Defendants' Motion (RP 10:4-5). At that time, the Court reminded counsel that she could have filed a Motion for Continuance under CR 56 (f) (RP 10:20-25, 11:1-3). It was only at that time that Plaintiffs' counsel made an oral Motion to Continue the proceedings in order for Plaintiffs to conduct additional discovery (RP 11:15-19). That Motion was denied on the basis that the Court had not been presented with any identification of specific items or materials which would be sought and obtained by Plaintiffs which, through

reasonable diligence, could not already have been obtained (RP 37:5-10).

At the conclusion of oral argument, the Court found in favor of the Defendants with regard to their causes of action for wrongful termination and violation of public policy, unlawful retaliation-wrongful discharge, negligent infliction of emotional distress and intentional infliction of emotional distress/outrage. Specifically, the Court dismissed the claims of Plaintiffs Bruck, Zeller and Clark because none of the three had submitted affidavits or interrogatory responses that would have created issues of material fact with regard to their claims (RP 37:11-16). Further, the Court found that all of the Plaintiffs, other than Briggs and Robertson, had voluntarily resigned and there was no evidence to rebut the voluntary nature of those resignations (RP 39:9-15). And finally, that the two terminated employees, Briggs and Robertson, had not identified or articulated a clear public policy that had been violated by either of the Defendants (RP 38:9-17).

The Court reserved ruling on Defendants' Motion to Dismiss Plaintiffs' cause of action for negligent supervision/retention (RP 42: 11-15). Subsequently, the Court issued a letter opinion dated April 27, 2005, dismissing Plaintiffs' claim for negligent supervision/retention (CP

350-51). Plaintiffs' now appeal the Court's ruling denying their Motion for Continuance, denying their Motion to Compel production and granting Defendants' Motion for Summary Judgment and dismissal of three of the initial five causes of action: wrongful termination in violation of public policy, unlawful retaliation-wrongful discharge and negligent supervision/retention, all on the basis that the Court abused its discretion. Defendants now respond.

II. ARGUMENT

A. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' ORAL CR 56(f) MOTION FOR CONTINUANCE.**

CR 56(f) provides as follows:

When affidavits are unavailable. Should it appear from the affidavits of a party opposing a motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be taken or discovery to be had or may make such other order as is just.

Plaintiffs assert that the trial Court abused its discretion when denying their Motion for Continuance under CR 56(f) because they had

not had sufficient time to complete their discovery, the discovery sought may have produced evidence sufficient to create issues of material fact, and the Defendants had not claimed they would be prejudiced by a continuance. In support of their position, they rely primarily on Coggle v. Snow, 56 Wn.App. 499, 784 P.2d 554 (1990); and Butler v. Joy, 116 Wn.App. 291, 65 P.3rd 671 (2003). The Coggle case, supra, in particular has an excellent discussion on both the appropriateness of continuances in motions for summary judgment and abuse of discretion as a standard of appellate review.

In Coggle, the appellate court reversed the trial court's denial of a plaintiff's motion for continuance and the granting of summary judgment in favor of a physician defendant in a medical negligence action. Mr. Coggle's first attorney had retired and substitute counsel had filed an affidavit in support of his motion for continuance in which he clearly set out the reasons for his inability to timely respond and the specific evidence that he intended to produce.

The court stated:

Where a party knows of the existence of a material witness and shows good reason why the witness' affidavit cannot be obtained in time for the summary judgment

proceeding, the court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case.

However, *the trial court may deny a motion for a continuance when (1) the moving party does not offer a good reason for the delay in obtaining the evidence; (2) the moving party does not state what evidence would be established through the additional discovery; or (3) the evidence sought will not raise a genuine issue of genuine fact.*

Emphasis added, citations omitted. Coggle, at 507.

The court found that the record in that case revealed the reason for plaintiff's inability to provide competent evidence in time for the summary judgment hearing, as well as specific identification of the evidence that would rebut the defense's expert testimony and create issues of material fact. The record in the instant case reveals nothing of the kind.

Plaintiffs do not claim that Defendants provided insufficient notice of their motion and hearing date. Six of the eight appellants, as well as their counsel, provided extensive affidavits in support of their Memorandum in Opposition to Defendants' Motion for Summary Judgment, albeit all of those affidavits contained multiple instances of inadmissible hearsay. They also submitted a 13-page legal

Memorandum in Support of their Opposition to Defendants' Motion for Summary Judgment. This is not a case of last minute withdrawal and substitution of counsel as in Cogle, supra, or Butler, supra.

Plaintiffs had ample opportunity and time to make a motion for a continuance prior to the date of hearing. It was only when the trial Court challenged the inclusion of multiple instances of hearsay in Plaintiff's supporting affidavits that Plaintiffs moved orally for a continuance.

Neither did the Plaintiffs provide with required specificity any competent relevant evidence that would have created issues of material fact. In attempting to justify the inclusion of inadmissible hearsay throughout their supporting affidavits, Plaintiffs' counsel made a motion under CR 56(f): "At this point, that we have the opportunity at least to determine what's out there..." (RP 11:17-18.) When Plaintiffs again made a motion under CR 56(f), Plaintiffs' counsel stated, "I believe that there are opportunities that—there is information and discovery that would be critical to my clients' position...the discovery cutoff date isn't even until mid-September and we have ample opportunity to flush out the information that we believe we may find, will find, if we have the

opportunity to make that effort.” (RP 31:4-11.)

The Court pressed her: “I think you have to specify what information it is that you expect you would find, rather than simply in the course of ordinary discovery come across something that later may have some purpose.” (RP 31:13-16.) Plaintiffs’ counsel responded, “I want to depose the Board of Directors. I want to know what the Board of Directors knew about the organization, knew about the mission of the organization, heard or didn’t hear from the Executive Director about what these employees were complaining about, whether they made any effort at all to find out if any of these things that these people said were true....those are the main things.” (RP 31:17-25, 32:1-5.) The Plaintiffs were not describing what evidence they would provide. They simply indicated what tasks they’d like to perform, what people they’d like to talk to and what they may or may not discover. Such general ambitions and activities do not constitute identification of actual evidence they would provide, if granted a continuance.

In the instant case, Plaintiffs did not offer a good reason for their delay in obtaining the evidence. They did not state what evidence would be established through additional discovery and, as will be seen below,

any evidence sought would not raise a genuine issue of fact with regard to the causes of action alleged in their Complaint.

In determining whether the trial court abused its discretion, the proper standard is whether discretion was exercised on untenable grounds or for untenable reasons. Coggle, at 507. Here, the trial Court gave the Plaintiffs every opportunity to provide the Court with a reason for their Motion for Continuance. The Court ruled appropriately; it did not abuse its discretion.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFFS CLAIMS FOR WRONGFUL TERMINATION, RETALIATION AND NEGLIGENT SUPERVISION.

Of the eight remaining Plaintiffs who have brought this appeal, six - Nunn, Johnson, Bader, Bruck, Clark and Smith voluntarily resigned on July 16, 2004, as per the terms of their letter of July 15, 2004. Consequently, they can have no claim for wrongful termination under either their "public policy" or "retaliatory discharge" theories.

The terms of that letter are quite clear. The signees demanded: 1) the immediate removal of the Executive Director; 2) the immediate reinstatement of Judy Robertson and Ken Briggs, who had been terminated on July 12, 2004; and 3) the Board of Directors'

acknowledgment and its full plan of action for the removal of Ms. Brennan and the reinstatement of Briggs and Robertson by 4:30 P.M. on Friday, July 16, 2004. The “requests” were described as non-negotiable and if the Board did not respond affirmatively, the signees would walk out on their jobs and not return until their conditions had been met.

The Board of Directors did not respond and none of the Plaintiffs ever reported for work on Monday, July 19, 2004. The Executive Director and the Board of Directors considered the letter and their actions to be a mass resignation and immediately took steps to interview and hire replacements. While Plaintiffs have argued that they did not resign, the letter speaks for itself. An employee’s resignation is presumed voluntary. Molsness v. City of Walla Walla, 84 Wn.App. 393, at 398; 928 P.2d 1108 (1996).

Plaintiffs have not pled constructive discharge and, even if they had, none have submitted evidence to meet the criteria necessary to support such a claim. In order to create issues of material fact to survive summary judgment on the issue of constructive discharge, the plaintiffs must submit evidence that the employer *deliberately* made working conditions so intolerable for the employee that a reasonable person would

have felt compelled to resign and that the employee resigned because of the conditions and *not for some other reason*. (Emphasis added)

Washington v. Boeing Company, 105 Wn.App. 2, at 15, 19 P.3rd 1041.

The “intolerable element can be shown by aggravated circumstances, or a continuous pattern of discriminatory treatment.

Washington, at 16.

Plaintiffs Bruck and Clark did not submit any affidavits on their own behalf at the time of the hearing. What survives of the affidavits of Plaintiffs Nunn, Johnson, Bader and Smith, after the Court’s striking of multiple hearsay assertions, does not contain any evidence that the employer deliberately made working conditions so intolerable as to compel a reasonable person to resign. To the contrary, all of the signees of the July 15, 2004, letter were retained and assured that their complaints would be addressed and that the company was willing to listen to, and work with them.

On two occasions during the hearing, the trial Court asked Plaintiffs’ counsel to identify the evidence that would indicate the existence of the requisite “intolerable conditions.” (RP 21:21-25, 22:1-4, 19-23.) The Plaintiffs’ only response was to point to the concerns the Plaintiffs expressed in their April 6, 2004, letter. That letter simply

asserted deficiencies of the Executive Director with regard to 1) leadership; 2) administration; 3) financial management and planning; 4) board development and 5) corporate culture and community and government relations. It did not speak to instances of harassment, intimidation or illegality. (RP 22:24-25, 23:24-25, 25:1-5.) Based on the record, it cannot be said that the trial Judge misunderstood or misapplied the law or failed to give Plaintiffs an opportunity to lay out their evidentiary bases.

Further, in addition to offering proof that the employer deliberately created intolerable working conditions, Plaintiffs must submit evidence that they resigned because of those intolerable conditions and not for some other reason. The July 15, 2004, letter specifically states that they were walking off the job because of the terminations of Briggs and Robertson, and the retention of the Executive Director.

C. PLAINTIFFS HAVE FAILED TO ALLEGE A CLEAR MANDATE OF PUBLIC POLICY THAT WAS CONTRAVENED BY THEIR TERMINATION EITHER ACTUAL OR CONSTRUCTIVE.

The general rule in Washington is: "...an employer has the right to discharge an employee, with or without cause, in the absence of a

contract for a specified period of time.” Roberts v. Atlantic Richfield Co., 88 Wn.2d 887, 891, 568 P.2d 764 (1977).

Washington courts now 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.’” Thompson v. St. Regis Paper Co., 102 Wn.2d 219 at 232, 685 P.2d 1081 (1984).

The Thompson court cited with approval language in the case of Parnar v. Americana Hotels, Inc., 65 Ha. 370, 652 P.2d 625 (1982):

In determining whether a clear mandate of public policy is violated the court should inquire whether the employer’s conduct contravenes the letter or purpose of a constitutional statutory or regulatory provision of scheme. Prior judicial decisions may also establish the relevant public policies. *However the court should proceed cautiously when called upon to declare public policy in the absence of prior legislative or judicial expression on the subject.* (Emphasis added) Thompson, at 232.

In Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 913 P.2d 377 (1996), our Supreme Court set out four elements to be considered in analyzing wrongful discharge claims involving violations of public

policy:

- (1) the plaintiffs must prove the existence of a clear public policy (the *clarity* element).
 - (2) the plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element).
 - (3) the plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the *causation* element).
 - (4) the defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element).
- Gardner, at 941.

Based on the Gardner analysis, it is the *clarity* element, the identification of a clear mandate of a public policy, that is the threshold determination. The question of what constitutes a clear mandate of public policy is one of law. Dicomes v. State of Washington, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989).

The Dicomes court held that contravention of a clear mandate of public policy has been found in four general areas:

- 1) where the discharge was the result of refusing to commit an illegal act...;
- 2) where the discharge resulted due to the employee performing a public duty or obligation...;
- 3) where the termination resulted where the employee exercised a legal right or privilege...; and
- 4) where the discharge was premised on employee "whistleblowing" activity. Dicomes, at 618.

Plaintiffs, in their Complaint, alleged that they “raised concerns about health and safety compliance, wage and hour violations, and other potential violations and poor practices.” They do not assert that they reported actual legal violations to an appropriate governmental agency, nor do they allege any specific public policy that is being contravened.

In their April 6, 2004, letter to the Board of Directors and in their personal statements, both written and oral, submitted to the Board of Directors on June 29, 2004, Plaintiffs’ complaints center on the Executive Director’s personality, her management style, her compensation and what they perceived to be their unduly burdensome work load. These are all personal complaints and not the subject of public policy.

In general, it can be said that public policy concerns what is right and just and what affects the citizens of the state collectively... although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other states involving retaliatory discharges shows that a matter must strike at the heart of a citizen’s social rights, duties, and responsibilities before the tort will be allowed. Palmateer v. International Harvester Co., 85 Ill.2d 124, 421 N.E.2d 876 (1981), as cited in Dicomes at 618.

In Farnam v. CRISTA Ministries, 116 Wn.2d 659, 807 P.2d 830

(1991), the court dealt with issues similar to those presented here. In that case, a nurse-employee claimed wrongful discharge because the employer permitted withdrawal of life support to terminally ill patients, conduct that was permitted under Washington law, but at odds with plaintiff's personal beliefs. The court stated:

...it does not appear that CRISTA's actions rose to the level of wrongdoing that would support a tort of wrongful discharge in violation of public policy. This conclusion is supported by the absence of finding of abuse or formal action by the Department of Social and Health Services. Farnam at page 671.

...to state a cause of action Farnam must have been seeking to "further the public good, and not merely private or proprietary interests"...conduct that may be praiseworthy from a subjective standpoint or may remotely benefit the public will not support a claim for wrongful discharge. Farnam at 671.

To avail themselves of the narrow exception to the terminable-at-will doctrine, the Plaintiffs must state what public policy has been contravened. Without pleading a legislatively or judicially recognized public policy, their Complaint fails on its face. Snyder v. Medical

Service Corp., 145 Wn.2d 233, 239, 35 P.3d 1158 (2001).

Although neither pled in their complaint, nor raised in their response to Defendants' Motion for Summary Judgment, Plaintiffs now, for the first time on appeal, claim the protection of RCW 49.32.020, which protects the rights of employees to engage in collective activity for the purpose of collective bargaining, or other mutual aid or protections. To raise such an issue for the first time on appeal is clearly improper. Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 291, 840 P.2d 860 (1992). However, even if considered, neither RCW 49.32.020, nor the National Labor Relations Act create a public policy applicable to the actions of the Plaintiffs herein.

RCW 49.32.020 states in relevant part,

“WHEREAS, Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self organization,

and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives, or in self organization, or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections;"

Plaintiffs maintain that their collective actions in voicing concerns about the Executive Director's management of Nova is protected under the public policy expressed in the statute, and cite Bravo v. Dolsen, 125 Wn.2d 745, 888 P.2d 147 (1995) in support. First of all, insofar as this has any application at all, it would apply only to Plaintiffs Briggs and Robertson as they were the only two employees who were terminated. Secondly, the statute speaks only to employees who engage in "self organization or other concerted activity for the purpose of collective bargaining or other mutual aid or protections." Briggs and Robertson were not unorganized employees. They were exempt, salaried managers to whom labor laws do not apply. NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 576-77. Further, their "activities" were not for the purpose of collective bargaining or the kind of mutual aid contemplated by State labor laws or the National Labor Relations Act.

Bravo, supra, is clearly distinguishable on its facts. In that case, the employees were non-union dairy workers who attempted to collectively fight for traditional labor benefits and protections, i.e., wages, benefits and hours. Complaints by the Plaintiffs in the instant case concerning finances and budgets for client care, treatment of their disabled clients and expenditure of the agency's public funds do not constitute concerns about their working conditions and Briggs and Robertson cannot shelter their insubordination behind the protection of a statute that speaks to vulnerable non-managerial employees. At no time, either in their initial pleadings, or in their responses to Defendants' Motion for Summary Judgment, or on appeal, have the Plaintiffs articulated a clear statement of public policy that would protect their activities.

With regard to Plaintiffs' claim for retaliatory discharge, Plaintiffs have failed to show that they were engaged in a statutorily protected activity, the threshold prerequisite for such a cause of action. See Francom v. Costco Wholesale, 98 Wn.App. 845, 862, 991 P.2d 1182 (2000). Again, only Briggs and Robertson, the terminated managers, have any standing to bring such a claim. Neither raised the

issue at time of Defendants' Motion for Summary Judgment. Neither, as managers, have the status to seek labor law protection. Neither were engaged in activities to enhance their working conditions.

The trial court certainly did not abuse its discretion in granting Defendants' Motion for Summary Judgment by requiring Plaintiffs to provide some evidence concerning the threshold issues of wrongful termination in violation of public policy and retaliatory discharge.

D. PLAINTIFFS HAVE FAILED TO PROVIDE THE NECESSARY EVIDENCE TO SUSTAIN A CLAIM FOR NEGLIGENT SUPERVISION/RETENTION.

Washington law recognizes a cause of action for negligent supervision/retention.

Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee, from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Niece v. Elmview Group Home, 131 Wn.2d 39, 48, 929 P.2d 420 (1997).

For the Plaintiffs in the instant case to establish a negligent supervision claim, Plaintiffs must establish, as set forth in the court's

letter ruling of April 27, 2005, that:

1) Brennan acted outside the scope of her employment; 2) she presented a risk of harm to one or more of the Plaintiffs, 3) the Board of Directors of Nova knew, or in the exercise of reasonable care, should have known that Brennan posed such a risk, and 4) that the Board of Directors' failure to supervise Brennan in an adequate manner was the proximate cause of one or more of the Plaintiffs' injuries (CP 350).

The threshold issue in such an analysis is whether the Executive Director posed a risk of harm to the Plaintiffs, or any of them. Plaintiffs have presented this Court with no evidence that such was the case. In their Brief, Plaintiffs argue that the hearsay statements in the Affidavits of Plaintiffs Nunn and Johnson, concerning their suspicion of misappropriation of funds and the effectiveness of the Board raise issues of material fact that would support a cause of action for negligent supervision. First, the trial court ruled that such statements are clearly inadmissible hearsay and would not be considered by the court in ruling on Defendants' Motion for Summary Judgment for that cause of action. Second, neither assertion in any way constitutes evidence that the Executive Director posed a risk of bodily harm to any of the Plaintiffs.

As the trial court correctly noted, there was an absence of

competent evidence on any of the elements of a claim for negligent supervision/retention. Having failed to provide the trial court with any such evidence, it can hardly be said the trial court abused its discretion in dismissing Plaintiffs' claim.

Finally, Plaintiffs' Motion to Compel Discovery was rendered moot by the trial court's dismissal of all of Plaintiffs' Causes of Action. (CP 351).

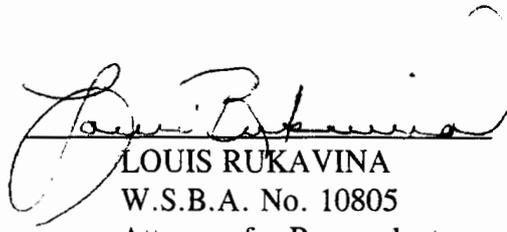
CONCLUSION

1. In making a belated and procedurally defective Motion for Continuance on Defendants' Motion for Summary Judgment, the Plaintiffs failed to identify any actual evidence they would provide the court if given additional time. The trial court did not abuse its discretion in denying that Motion.
2. Plaintiffs did not provide the trial court with a clear expression of public policy upon which to base a cause of action for wrongful termination in violation thereof. The court did not abuse its discretion in dismissing such a

claim.

3. Plaintiffs failed to identify any illegal acts on the part of either Defendant that would support a claim for retaliatory discharge. The Court did not abuse its discretion in dismissing that claim.
4. Plaintiffs failed to allege any facts that would establish that the Executive Director presented an unreasonable risk of harm to the Plaintiffs. Having failed to provide such evidence on the threshold issue for a cause of action for negligent supervision/retention, it can hardly be said the trial court abused its discretion in dismissing said claim.
5. Plaintiffs Nunn, Johnson, Bader, Smith, Bruck and Clark have failed to produce any evidence that their employer deliberately created working conditions so unreasonable as to compel resignation and, therefore, have no claim for constructive discharge.

Respectfully submitted this 23rd day of February, 2006.

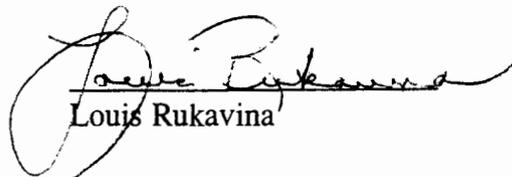

LOUIS RUKAVINA
W.S.B.A. No. 10805
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on February 23, 2005, the foregoing document was delivered in person to attorney Mary R. Giannini, Attorney for the Appellant.

Mary R. Giannini
Witherspoon, Kelley, Davenport
& Toole, P.S.
422 W. Riverside, Suite 1100
Spokane, WA 99201


Louis Rukavina