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2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 LAURA THOMPSON, a single woman;) )  
JUSTINE COX, a single woman; VICKIE) )  
10 LUTZ, a married woman; LACEY) )  
CHAINHALT, a single woman; and) )  
11 NICOLE MORGESON, a single woman,) )

No. CV-08-991-PHX-GMS

**ORDER**

12 Plaintiffs, )

13 vs. )

14 )  
15 STEVEN H. WIENER, M.D., and )  
LAUREN WIENER, husband and wife;) )  
16 STEVEN H. WIENER, MD, P.C., an )  
Arizona Professional Corporation;) )  
17 PAMELA S. HENDERSON, M.D., a )  
single woman; PAMELA S.) )  
18 HENDERSON, MD, P.C., an Arizona )  
Professional Corporation; NEW IMAGE) )  
19 PLASTIC SURGERY, L.L.C., an Arizona )  
limited liability company; DOES I-X; and) )  
20 CORPORATIONS A-Z, )

21 Defendants. )

22 )

23 Pending before the Court is Defendants’ Motion for Partial Summary Judgment. (Dkt.  
24 # 128.) The Motion seeks summary judgment with respect to all Defendants on Count I  
25 (Title VII of the Civil Rights Act of 1964) or, alternatively, in favor of Steven Wiener, M.D.  
26 (“Dr. Wiener”), Lauren Wiener, and Pamela Henderson, M.D. (“Dr. Henderson”) on Count  
27 I and Count II (Arizona Civil Rights Act). The Motion also seeks summary judgment against  
28 all Plaintiffs on Count IV (constructive discharge) and against Nicole Morgeson only for

1 three other claims (Sexual Harassment, Intentional Infliction of Emotional Distress,  
2 Negligence Per Se). For the following reasons, the Court grants the Motion in part and  
3 denies it in part.

#### 4 **BACKGROUND**

5 Dr. Wiener is a plastic surgeon and the sole member of Steven H. Wiener M.D., P.C.  
6 (“Wiener P.C.”), a professional corporation. Dr. Henderson is also a plastic surgeon and the  
7 sole member of Pamela S. Henderson, M.D., P.C. (“Henderson P.C.”). Wiener P.C. and  
8 Henderson P.C. are the sole members of New Image Plastic Surgery, L.L.C. (“NIPS”).  
9 Wiener P.C. and Henderson P.C. are also allegedly the sole members of New Image Skin  
10 Spa, L.L.C. (“NISS”), which Ms. Wiener manages. Plaintiffs contend NISS and NIPS,  
11 which do business in nearby suites of the same building, share a joint trademark, events,  
12 marketing, and employment control. The employees who work at the NIPS office are  
13 employed by NIPS, not by either of the P.C.’s. NIPS employees also sometimes perform  
14 work for NISS, while still remaining on the NIPS payroll.

15 Plaintiffs Laura Thompson, Justine Cox, Vickie Lutz, Lacey Chainhalt, and Nicole  
16 Morgeson each worked at the NIPS office in some capacity. Ms. Lutz was the office  
17 manager, and Ms. Morgeson was her daughter. Ms. Morgeson was seventeen-years-old  
18 when she began employment.

19 Sometime in 2003 or 2004, Ms. Lutz posted a large poster concerning sexual  
20 harassment in the kitchen. The poster explained that the company does not tolerate sexual  
21 harassment. NIPS also distributed to all employees a handbook that addresses  
22 discrimination. This handbook, however, does not expressly address sexual harassment or  
23 define what discrimination includes. The handbook states the following:

24 Any employees with questions or concerns about any type of discrimination  
25 in the workplace are encouraged to bring these issues to the attention of their  
26 immediate supervisor or the office administrator. Employees can raise  
27 concerns and make reports without fear of reprisal. Anyone found to be  
28 engaging in any type of unlawful discrimination will be subject to disciplinary  
action, up to and including termination of employment.

1 (Dkt. # 29, Ex. 11.) Ms. Morgeson read and understood the poster and the handbook.

2           Conversations of a sexual nature occurred at the NIPS office, and although the parties  
3 dispute the extent of those conversations, the conversations are alleged to have included at  
4 least the following. Dr. Wiener told sexual jokes and made sexual comments, including, in  
5 2005, discussing Astro-Glide lubricant and telling others that he had a “bigger” penis than  
6 Ms. Thompson’s boyfriend did. Dr. Wiener also sent sexually-explicit emails to various  
7 employees and called employees into his office to watch hardcore pornography, including  
8 bestiality.<sup>1</sup> At some point, Ms. Morgeson went into Dr. Wiener’s office to tell him it was  
9 time for an oral examination in one of the patient rooms, to which Dr. Wiener responded,  
10 “Only if it was from [Ms. Morgeson].” In 2007, Dr. Wiener told Ms. Morgeson that he  
11 would pay her and her friend twice as much to clean the office if they did so in their bathing  
12 suits. All this occurred while Ms. Morgeson was still a minor. Ms. Morgeson turned  
13 eighteen in March 2007, and the conversations continued. Later that year, Dr. Wiener told  
14 Ms. Morgeson that he would pay to fix her truck if she would wear a bikini. He also told her  
15 that she should get breast implants. He told her several more times to get breast implants,  
16 even after she showed no interest in receiving them. Dr. Wiener also held up large implants  
17 from the office, shook them around, and told coworkers, including Ms. Morgeson’s mother,  
18 Ms. Lutz, that he was going to put the implants in Ms. Morgeson.<sup>2</sup>

19           Ms. Morgeson laughed at some of these jokes, but she explains that this was only to  
20 fit in. Plaintiffs also concede that Ms. Morgeson never heard Dr. Wiener make any  
21 inappropriate comments to patients, never saw any pornography in the NIPS office, never  
22 saw Dr. Wiener engage in any sexual acts, and never saw him touch anyone inappropriately.

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24           <sup>1</sup> Plaintiffs do not point to any evidence that Ms. Morgeson personally viewed  
25 pornographic materials at the office, although the other Plaintiffs claim to have been  
26 regularly subjected to it.

27           <sup>2</sup> Defendants note that NIPS allowed employees to receive free or low-cost breast  
28 augmentations and that other employees had done so. But Defendants do not allege that Ms.  
Morgeson ever indicated an interest in receiving implants.

1 Ms. Morgeson initially did not complain to anyone. After she quit working for NIPS  
2 (which was one month after Ms. Lutz quit), she finally told Ms. Lutz that the comments  
3 bothered her.<sup>3</sup> Ms. Morgeson asserts she laughed at the jokes and did not tell anyone because  
4 she was embarrassed.

5 Ms. Chainhalt's employment was terminated in May 2007, and Ms. Cox was  
6 terminated in July 2007. Ms. Thompson reduced her hours to part-time in September 2006,  
7 and she was terminated in July 2007. Ms. Lutz resigned in July 2007, and Ms. Morgeson  
8 resigned in August 2007.

9 This lawsuit ensued. The Court previously dismissed several claims, leaving eight  
10 others. Defendants now move for summary judgment on several of the remaining claims.

## 11 DISCUSSION

12 Defendants first contend they are not an "employer" under Title VII because they did  
13 not employ a sufficient number of employees. In response to Plaintiffs' assertion that various  
14 entities associated with Defendants constitute an "integrated enterprise" with more than  
15 fifteen aggregate employees, Defendants further dispute that such an integrated enterprise  
16 would have employed the requisite number of employees at any rate. Defendants also argue  
17 that none of the individual Defendants are liable under either Title VII or ACRA and that  
18 summary judgment is appropriate against Ms. Morgeson on her claims for sexual harassment,  
19 intentional infliction of emotional distress, and negligence per se. Finally, the parties dispute  
20 whether any of the Plaintiffs were constructively discharged.

### 21 I. Summary Judgment Standard

22 Summary judgment is appropriate if the evidence, viewed in the light most favorable  
23 to the nonmoving party, shows "that there is no genuine issue as to any material fact and that  
24 the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Substantive

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26 <sup>3</sup> Plaintiffs assert that it is unclear when Ms. Morgeson told Ms. Lutz about these  
27 events because Ms. Lutz testified that she thought she knew of them before she left NIPS,  
28 but that she was not sure. In any event, Ms. Lutz learned of at least some of the conduct from  
other sources while she was still working there.

1 law determines which facts are material, and “[o]nly disputes over facts that might affect the  
2 outcome of the suit under the governing law will properly preclude the entry of summary  
3 judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see Jesinger v. Nev.*  
4 *Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

5 The moving party “bears the initial responsibility of informing the district court of the  
6 basis for its motion, and identifying those portions of [the record] which it believes  
7 demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477  
8 U.S. 317, 322 (1986). However, the moving party need not disprove matters on which the  
9 opponent has the burden of proof at trial. *Id.* at 323. Then, the burden is on the nonmoving  
10 party to establish a genuine issue of material fact. *Id.* at 322–23. The nonmoving party “may  
11 not rest upon the mere allegations or denials of [the party’s] pleadings, but . . . must set forth  
12 specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); *see*  
13 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

14 In addition, the dispute must be genuine, that is, the evidence must be “such that a  
15 reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.  
16 Because “[c]redibility determinations, the weighing of the evidence, and the drawing of  
17 legitimate inferences from the facts are jury functions, not those of a judge, . . . [t]he  
18 evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn  
19 in his favor” at the summary judgment stage. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*,  
20 398 U.S. 144, 158-59 (1970)); *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) (“Issues  
21 of credibility, including questions of intent, should be left to the jury.”) (citations omitted).

## 22 **II. Employer Liability Under Title VII**

### 23 **A. Integrated Enterprise**

24 The threshold issue for Title VII liability is whether the Defendants are “employers”  
25 under Title VII, which requires, at a minimum, that Defendants employed fifteen or more  
26 employees for a certain period of time. *See* 42 U.S.C. § 2000e(b). “[T]he threshold number  
27 of employees . . . is an element of a plaintiff’s claim for relief . . . .” *Arbaugh v. Y&H Corp.*,  
28 546 U.S. 500, 516 (2006). Title VII defines an employer as “a person engaged in an industry

1 affecting commerce who has fifteen or more employees for each working day in each of  
2 twenty or more calendar weeks in the current or preceding calendar year.”<sup>4</sup> 42 U.S.C. §  
3 2000e(b). A “person” includes “one *or more* individuals, . . . partnerships, associations,  
4 corporations, legal representatives, mutual companies, joint-stock companies, trusts,  
5 unincorporated organizations[.]” *Id.* § 2000e(a) (emphasis added).

6 Thus, a group of smaller entities can form a single employer under Title VII. “A  
7 plaintiff with an otherwise cognizable Title VII claim against an [entity] with less than  
8 [fifteen] employees may assert that the [entity] is so interconnected with another [entity] that  
9 the two form an integrated enterprise, and that collectively this enterprise meets the [fifteen]-  
10 employee minimum standard.” *Anderson v. Pac. Mar. Ass’n*, 336 F.3d 924, 929 (9th Cir.  
11 2003). Courts consider the entities’ “(1) interrelation of operations, (2) common  
12 management, (3) centralized control of labor relations, and (4) common ownership or  
13 financial control.” *N.L.R.B. v. Transcontinental Theaters, Inc.*, 568 F.2d 125, 129 (9th Cir.  
14 1978); *see Herman v. United Bhd. of Carpenters and Joiners of Am., Local Union No. 971*,  
15 60 F.3d 1375, 1383 (9th Cir. 1995) (same). “The third factor, centralized control of labor  
16 relations, is the ‘most critical.’” *Kang v. U. Lim. Am., Inc.*, 296 F.3d 810, 815 (9th Cir. 2002).  
17 But these factors are not dispositive, and the issue “ultimately depends on all the  
18 circumstances of the case.” *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486 (3d Cir.  
19 2001); *Royer v. CNF Transp. Inc.*, 2004 WL 1592561 at \*4 (D. Or. July 15, 2004). A court  
20 might also consider, for example, common offices, interchange of employees, customer  
21 supervision, common bank accounts, and payroll. *See NLRB*, 568 F.2d 125, 129 (9th Cir.  
22 1978); *Royer*, 2004 WL 1592561 at \*4.

23 Here, the parties agree that NIPS,<sup>5</sup> not Henderson P.C. or Wiener P.C., employed  
24 Plaintiffs. But Plaintiffs contend that all Defendants, including NIPS and NISS, formed an  
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26 <sup>4</sup> The statute also includes exceptions not relevant to this case. 42 U.S.C. § 2000e(b).

27 <sup>5</sup> For convenience, “NIPS” may refer either to the LLC or to the general plastic  
28 surgery business and office, depending on the context.

1 integrated enterprise. According to employment charts offered by Plaintiff, NIPS and NISS  
2 in the aggregate employed at least fifteen employees for the requisite period. (*See* Dkt. # 155,  
3 Ex. 1.)

4 A reasonable jury could find that NIPS is integrated with Henderson P.C., Wiener  
5 P.C., and Drs. Henderson and Wiener. Drs. Henderson and Wiener are the sole members of  
6 their respective P.C.'s, and those P.C.'s are the sole members of NIPS. Moreover, Dr.  
7 Henderson explained that NIPS was created to have centralized labor—NIPS is an “overhead  
8 paying entity” that allows Wiener P.C. and Henderson P.C. to share expenses and to pay  
9 employees. (Dkt. # 155, Ex. 7.) The two P.C.'s contribute only enough money into NIPS  
10 each week to cover expenses, but NIPS never maintains any assets. Thus, NIPS, both P.C.'s,  
11 and the individual physicians involve interrelated operations and common management,  
12 ownership, and control. Drs. Henderson and Wiener manage and control the entire process,  
13 and NIPS exists solely to manage overhead costs.

14 After determining the connection between NIPS, the P.C.s, and the individual  
15 physicians, a reasonable jury could further conclude that NIPS is integrated with NISS. First,  
16 the two entities have interrelated operations. Although NIPS and NISS do not share the same  
17 suite, their offices are down the hall from each other in the same building, and the two  
18 entities share a common trademark. Moreover, Plaintiffs present evidence that some NISS  
19 employees performed services for NIPS.<sup>6</sup> Ms. Morgeson and Ms. Lutz provided translation  
20 services for Spanish-speaking NISS customers. Ms. Thompson supplied medical or cosmetic  
21 services to NISS, but she was paid exclusively by NIPS. After expressing displeasure with  
22 working at NIPS, Ms. Cox was instead allowed to work at NISS for a few days. However,  
23 she remained on the NIPS payroll and received payment from NIPS for her work at NISS.

24 NIPS and NISS also jointly organize events and advertisements. For example, NIPS  
25 and NISS held an event for NISS's grand opening, during which NIPS employees were  
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27 <sup>6</sup>Defendants dispute this fact, but the Court takes all factual inferences in favor of the  
28 nonmoving party. *Anderson*, 477 U.S. at 248.

1 identified as NISS “staff,” and the two businesses held joint business parties. The two  
2 entities also sent out marketing pieces advertising both businesses. The two entities  
3 advertised in each others’ offices, and NIPS gave its patients coupons to attend NISS. While  
4 these events were limited, a jury could find these joint activities evidence an integrated  
5 enterprise.

6 The two entities also have common management, ownership, and financial control.  
7 Drs. Henderson and Wiener, as the sole members of the P.C.s, are de facto owners and  
8 managers of both NIPS and NISS. With this control, the individual doctors can control all  
9 business and personnel aspects of both NIPS and NISS. For example, NIPS exists solely to  
10 share payroll and other expenses, and individuals employed by NIPS may work at either the  
11 NIPS or NISS office. Although Lauren Wiener manages NISS, evidence does not clearly  
12 establish her degree of control;<sup>7</sup> having separate office managers, while a factor, does not  
13 negate the connection between the entities.

14 Defendants assert that NIPS and NISS do not have centralized control of labor  
15 relations. Although Plaintiffs do not present evidence that NIPS, as an entity, controls  
16 NISS’s labor relations, analogous cases have found that joint ownership and substantial  
17 control can suffice. *See, e.g., Westphal v. Catch Ball Prods. Corp.*, 953 F. Supp. 475, 479  
18 (S.D.N.Y. 1997) (submitting issue to jury where the same person ran multiple small  
19 companies with the same function, where the companies coordinated commissions and  
20 deliveries, and where the companies jointly discussed business matters); *E.E.O.C. v.*  
21 *Arlington Transit Mix Inc.*, 734 F. Supp. 804, 807 (E.D. Mich. 1990), *reversed and remanded*  
22 *on other grounds*, 957 F.2d 219 (6th Cir. 1991) (finding two companies were interrelated  
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24 <sup>7</sup> Defendants point to Plaintiffs’ depositions, which describe how Ms. Cox returned  
25 to work at NIPS after Ms. Wiener indicated she did not want Ms. Cox to continue working  
26 at NISS. Contrary to Defendants’ assertion, this alone does not mean that “Mrs. Wiener  
27 could overrule employment decisions made by Dr. Wiener and Vickie Lutz.” Dr. Henderson  
28 even testified that Ms. Wiener is “supervisor, but . . . not the boss.” Especially in light of  
Drs. Wiener and Lutz’s overall control of both businesses, a reasonable jury could find that  
Ms. Wiener does not have complete employment power.

1 where the same person owned both companies, and where the companies shared letterhead,  
2 corporate officers, employees, equipment, and accounting); *E.E.O.C. v. McLemore Food*  
3 *Stores, Inc.*, 25 FEP 1356 at \*7 (W.D. Tenn. 1978) (finding single enterprise where same  
4 group of family owners hired employees for any of their multiple corporations and would  
5 then loan and transfer employees between the corporations). Just like the companies in the  
6 above-cited cases, the relevant entities here are commonly owned and operated. Henderson  
7 P.C. and Wiener P.C. own both NIPS and NISS. As such, Drs. Henderson and Wiener have  
8 the ability to control each entity. The other evidence of interrelation of employees,  
9 infrastructure, advertising, and events between the entities further creates an issue of fact as  
10 to what level of centralized-labor-control existed.

#### 11 **B. Number of Employees**

12 Even assuming Defendants form an integrated enterprise with NISS, Defendants do  
13 not come within Title VII's scope unless the integrated enterprise employed fifteen or more  
14 employees for each working day in each of twenty or more calendar weeks in the current or  
15 preceding year. 42 U.S.C. § 2000e(b). Plaintiffs offer a chart showing that NIPS and NISS  
16 collectively employed at least fifteen employees from April 2006 through July 2007. (Dkt.  
17 # 155, Ex. 1.) Ms. Thompson and Ms. Lutz also declared that the charts accurately listed the  
18 employment dates for the listed employees and that there were even other employees who  
19 worked for either NISS or NIPS, but for whom Ms. Thompson and Ms. Lutz were "unsure"  
20 of their exact dates of employment. (Dkt. # 155, Exs. 1-2.)

21 Defendants first contend these declarations are inadmissible because Ms. Thompson  
22 and Ms. Lutz do not have personal knowledge of who worked at NISS and NIPS from 2006  
23 to 2007. "Affidavit[s] must be made on personal knowledge, set out facts that would be  
24 admissible in evidence, and show that the affiant is competent to testify on the matters  
25 stated." Fed. R. Civ. P. 56(e). These requirements, however, "may be inferred from the  
26 affidavits themselves." *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir.  
27 1990). Ms. Lutz's declaration states that she was the office administrator for NIPS from  
28 2001 until June 2007 and that she supervised employees. (Dkt. # 155, Ex. 3.) Thus, she was

1 in a position where she both observed and monitored employees. Likewise, although Ms.  
2 Thompson's declaration does not state her dates of employment (the Complaint alleges  
3 employment began in 1998), it is clear from the declaration that she was a NIPS employee;  
4 as such, she also could observe which employees worked for the two small companies.  
5 Moreover, the fact that the chart states that some employees' last names were unknown goes  
6 to the weight of the evidence only; it does not negate personal knowledge. Therefore, the  
7 declarations constitute valid evidence of the number of employees.

8 Defendants also contend that Plaintiffs' chart is incorrect in the following ways: (1)  
9 Lauren Wiener did not work at NISS during all applicable times, (2) NISS never employed  
10 anyone named Leeanne LaMonte, but that a Leanne Wilmot worked at NISS beginning on  
11 March 5, 2007, (3) Ms. Morgeson did not begin working at NIPS until the summer of 2006,  
12 (4) Lyn Borman did not work at NISS in 2007, (5) Marie Desarthe did not work at NISS on  
13 the dates alleged, and (6) Lisa Maness was only employed from January 27 to February 9,  
14 2007.

15 Defendants present an affidavit by Ms. Wiener and payroll records, but this evidence  
16 does not negate a genuine issue of fact.<sup>8</sup> First, it is unclear why Ms. Morgeson's start date  
17 in the summer of 2006, or Marie Desarthe's or Lisa Maness's end dates are relevant.  
18 Plaintiffs' employment chart begins in April 2006 and covers each week from January 1,  
19 2007 through July 14, 2007. Even if Ms. Morgeson was not an employee until the summer  
20 of 2006, Plaintiffs can still show another twenty or more weeks with at least fifteen

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22 <sup>8</sup> Plaintiffs assert Defendants are precluded from using the payroll records under  
23 Federal Rule of Civil Procedure 37(c), which states, "If a party fails to provide information  
24 . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to  
25 supply evidence on a motion, at a hearing, or at trial . . ." Plaintiffs requested production  
26 of "all of [Defendants'] payroll accounts and records from the period of January 2001 to  
27 present reflecting all full-time and part-time employees hired, employed or who were  
28 suffered to work for Defendants." (Dkt. # 155, Ex. 4 at 8.) Defendants objected based on  
relevance, undue burden, third-party privacy rights, confidentiality, and vagueness. (Dkt. #  
155, Ex. 6 at 11.) The Court reserves judgment on this discovery issue because Plaintiffs  
have created a genuine issue of material fact regardless.

1 employees in either 2006 or 2007. *See* 42 U.S.C. § 2000e(b). Likewise, the case is the same  
2 even if Ms. Maness left NISS on February 9, 2007 because fifteen employees could have  
3 worked for the enterprise during 2006. And in 2007, the charts asserts that both Ms. Maness  
4 and Ms. Desarthe worked during many weeks where *more* than fifteen people allegedly were  
5 employed; their absences would not necessarily bring the total below fifteen employees.

6 Additionally, there is an issue of fact as to the employment periods for the other  
7 employees Defendants contend did not work at New Image during the relevant times.  
8 Plaintiffs offer signed and notarized affidavits from Ms. Thompson, Ms. Lutz, Ms. Cox, and  
9 Sheron Turas, who worked at NISS from its inception until June 2007, which state that Ms.  
10 Wiener worked at NISS during their entire times of their employment. Ms. Turas also  
11 asserted that Leanne Wilmot (apparently referred to as Leeanne LaMonte on Plaintiffs' chart)  
12 worked at NISS in 2006<sup>9</sup> and from January 1 through March 3, 2007. Ms. Turas also stated  
13 that when Lyn Borman left NISS, another receptionist (whose name is unclear) replaced her  
14 to maintain the fifteen-employee threshold.

15 Defendants next argue that Margarita Sargent and Judith Jones were independent  
16 contractors, rather than employees.<sup>10</sup> According to Plaintiffs' employment chart, the New  
17 Image integrated enterprise would not reach the fifteen-employee threshold if either is an  
18 independent contractor. Title VII protects employees, 42 U.S.C. § 2000e, but it does not  
19 protect independent contractors. *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir.  
20 1999). Whether an employee is an independent contractor is a "fact-specific inquiry which  
21 depends on the economic realities of the situation." *Id.* (internal quotations omitted). "The  
22 primary factor is the extent of the employer's right to control the means and manner of the  
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24 <sup>9</sup> At oral argument, Defendants' counsel asserted that Ms. Turas's statement that Ms.  
25 Wilmot worked "in 2006" was insufficient evidence because it does not specify which weeks  
26 she worked. It is not strong evidence. However, it is sufficient for a jury to conclude that  
the enterprise reached the fifteen-employee threshold in 2006.

27 <sup>10</sup> Defendants do not address Plaintiff's assertion that Ms. Thompson was not an  
28 independent contractor.

1 worker's performance[,]" but other factors may include the type of occupation, whether the  
2 position is typically supervised, whether the employer provided equipment and workspace,  
3 the length of employment, method of payment, tax arrangements, the manner in which the  
4 work relationship is terminated, and the parties' intent. *Id.*

5 Here, there is an issue of fact as to whether Ms. Sargent and Ms. Jones were  
6 independent contractors or employees. Ms. Sargent is a surgical technician, and Ms. Jones  
7 is a nurse anesthetist, both of whom work with either Dr. Henderson or Dr. Wiener on  
8 surgeries. On the one hand, both refer to themselves as independent contractors. They are  
9 not paid salary by NIPS, but rather are paid separately by each doctor for each procedure  
10 with which they assist. And at oral argument, Plaintiffs' counsel acknowledged that Ms.  
11 Sargent and Ms. Jones also reported their income on 1099 independent contractor tax forms.

12  
13 Payment procedures, however, are not dispositive, and there is evidence suggesting  
14 that Ms. Sargent and Ms. Jones were employees. Both have worked extensively with Dr.  
15 Wiener and Dr. Henderson. For example, Ms. Sargent began as an employee of NIPS in  
16 2000, before her pay structure changed. Plaintiffs explain that the only reasons Ms. Sargent  
17 changed her payment structure were because she wanted to work exclusively with Dr.  
18 Wiener (since NIPS is a vehicle for both doctors to share expenses, NIPS could not pay Ms.  
19 Sargent for working exclusively with Dr. Wiener) and because the hospitals required a  
20 special contract to assist in surgeries. Meanwhile, Ms. Jones has provided services  
21 exclusively to Dr. Wiener and Dr. Henderson for thirteen years. Neither Ms. Sargent nor Ms.  
22 Jones appear to provide free-floating services-for-hire. Both Ms. Sargent and Ms. Jones use  
23 equipment and facilities that NIPS owns or operates. Although Ms. Sargent uses her own  
24 scrubs and liability insurance,<sup>11</sup> Defendants provide the vast majority of her infrastructure,  
25 including materials, equipment, and buildings. Moreover, neither Ms. Sargent nor Ms. Jones

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26  
27 <sup>11</sup> Defendants do not assert whether Ms. Jones provides her own equipment or  
28 insurance.

1 have control over their own hours, but rather they work according to the doctors' schedules.  
2 Contrary to Defendants' suggestion, the fact that Ms. Sargent and Ms. Jones have  
3 nontraditional schedules does not mean they could not be employees. Ms. Sargent and Ms.  
4 Jones were under sufficient control for a reasonable factfinder to determine they are  
5 employees. Despite Defendants' evidence regarding these employees, the Court does not  
6 weigh evidence or credibility on summary judgment, and an issue of fact exists.

7 Defendants cite several out-of-circuit cases that determined plaintiffs were  
8 independent contractors, but these cases are distinguishable. In *Vakharia v. Swedish*  
9 *Covenant Hosp*, an anesthesiologist was an independent contractor where she was self-  
10 employed for tax purposes, paid her own malpractice insurance, and received no employee  
11 benefits. 190 F.3d 799, 805 (7th Cir. 1999). However, the *Vakharia* court noted that the  
12 plaintiff had no specific evidence that the hospital exercised close control over her to  
13 establish an employment relationship, whereas Ms. Sargent and Ms. Jones have submitted  
14 evidence that they had little control over their working lives. The same distinction makes  
15 *Moebus v. OB-GYN Assocs., Inc.* inapplicable because the plaintiffs in that case, unlike Ms.  
16 Sargent and Ms. Jones, had broad discretion over their hours and work-product. 937 F. Supp.  
17 867, 869 (E. D. Mo. 1996).

### 18 **III. Individual Liability Under Title VII and ACRA**

19 Title VII and ACRA do not impose liability on individuals who are not themselves  
20 "employers." See 42 U.S.C. § 2000e(b) (establishing Title VII liability against "employers");  
21 *Miller v. Maxwell's Intern. Inc.*, 991 F.2d 583, 587–88 (9th Cir. 1993) ("[I]ndividual  
22 defendants cannot be held liable under Title VII . . . There is no reason to stretch the liability  
23 of individual employees beyond the respondeat superior principle intended by Congress.");  
24 Ariz. Rev. Stat. § 41-1461(4) (defining "employer" under ACRA); *Ransom v. State of Ariz.*  
25 *Bd. of Regents*, 983 F. Supp. 895, 904 (D. Ariz. 1997) (finding ACRA applies only to  
26 employers with fifteen employees or more, not to individual employees). Plaintiffs do not  
27 respond to this argument except to acknowledge *Miller* and to "preserve" the issue for  
28 appeal. Accordingly, the Court grants summary judgment in favor of Dr. Henderson, Dr.

1 Wiener, and Ms. Wiener in their individual capacities on the Title VII and ACRA claims  
2 against them.

#### 3 **IV. Exhaustion of Administrative Remedies**

4 After Plaintiffs provided evidence in their Response that all Plaintiffs received right-  
5 to-sue letters, Defendants withdrew their argument that Plaintiffs failed to exhaust their  
6 administrative remedies. Thus, Defendants' Motion is denied on this issue.

#### 7 **V. Sexual Harassment (Count I) as to Ms. Morgeson**

##### 8 **A. Hostile Work Environment**

9 Title VII prohibits discrimination based on sex, and this includes sexual harassment.  
10 *See* 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination based on sex); *Meritor Sav. Bank*  
11 *v. Vinson*, 477 U.S. 57, 66 (1986) (interpreting discrimination to include sexual harassment).  
12 A plaintiff may establish a sex discrimination claim under Title VII by proving that sexual  
13 harassment created a hostile work environment. *See Meritor*, 477 U.S. at 66-67. To  
14 establish a prima facie case of a hostile work environment under Title VII, a plaintiff must  
15 show (1) she was “subjected to verbal or physical conduct of a . . . sexual nature; (2) that the  
16 conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter  
17 the conditions of the plaintiff’s employment and create an abusive work environment.”  
18 *Vasquez v. County of L.A.*, 349 F.3d 634, 642 (9th Cir. 2003). The work environment “must  
19 be both objectively and subjectively offensive, one that a reasonable [woman] would find  
20 hostile or abusive, and one that the [plaintiff] in fact did perceive to be so.” *Faragher v. City*  
21 *of Boca Raton*, 524 U.S. 775, 787 (1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17,  
22 21–22 (1993))

23 As for the subjective element, Ms. Morgeson must show that the alleged harassment  
24 was “unwelcome.” *See Meritor*, 477 U.S. at 68; *Nichols v. Azteca Restaurant Enter., Inc.*,  
25 256 F.3d 864, 873 (9th Cir. 2001). Defendants do not argue that Ms. Morgeson welcomed  
26 Dr. Wiener’s conduct, and Plaintiffs presented evidence that the conduct bothered Ms.  
27 Morgeson.

28

1           The question presented here is whether the conduct was objectively offensive.  
2 To determine whether conduct was sufficiently severe or pervasive to violate Title VII,  
3 courts look at all the circumstances, including, but not limited to “the frequency of the  
4 discriminatory conduct; its severity; whether it is physically threatening or humiliating, or  
5 a mere offensive utterance; and whether it unreasonably interferes with an employee’s work  
6 performance.” *Faragher*, 524 U.S. at 787-88 (quoting *Harris*, 510 U.S. at 23). “The  
7 required level of severity or seriousness ‘varies inversely with the pervasiveness or frequency  
8 of the conduct.’” *Nichols*, 256 F.3d at 872 (quoting *Ellison*, 924 F.2d at 878). However,  
9 “while frequency and severity of conduct are important factors to consider when assessing  
10 whether a hostile environment was created, ultimately it is the effect or consequences of  
11 conduct on the working environment that must be evaluated.” *Canada v. Boyd Group, Inc.*,  
12 809 F. Supp. 771, 776 (D. Nev. 1992) (citing *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir.  
13 1991)). “Simple teasing, offhand comments, and isolated incidents (unless extremely serious)  
14 will not amount to discriminatory changes in the terms and conditions of employment.”  
15 *Faragher*, 524 U.S. at 788. But the objective severity is judged “from the perspective of a  
16 reasonable person in the *plaintiff’s* position,” *Nichols*, 256 F.3d at 872 (emphasis added), and  
17 “[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and  
18 juries to distinguish between simple teasing . . . and conduct which a reasonable person in  
19 the plaintiff’s position would find severely hostile or abusive.” *Oncale v. Sundowner*  
20 *Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

21           Although physical contact and conduct that occurs constantly are more likely to  
22 constitute hostile work environments, these factors are not prerequisites, especially given that  
23 the conduct’s effect and consequences are the key factors. *See Ellison*, 924 F.2d at 880 (9th  
24 Cir. 1991) (finding summary judgment inappropriate where female worker received  
25 “bizarre,” but infrequent, love letters from male co-worker); *Newtown v. Shell Oil Co.*, 52  
26 F. Supp.2d 366, 372 (D. Conn. 1999) (holding a jury could determine whether a hostile work  
27 environment existed, where plaintiff was subjected to *two* incidents of offensive name-  
28 calling, one of which was outside her presence, and where employee frequently called the

1 plaintiff “woman” in a derogatory manner); *see generally Burlington Indus., Inc. v. Ellerth*,  
2 524 U.S. 742, (1998) (impliedly finding a hostile work environment when plaintiff was  
3 subjected to three incidents of sex-related job threats). In addition to comments directed at  
4 a plaintiff, courts may also consider comments made generally in the work environment. *See*  
5 *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008) (finding a hostile work  
6 environment where some derogatory comments were made about women generally, rather  
7 than about the plaintiff herself, and noting that “[o]ffensive comments do not all need to be  
8 made directly to an employee for a work environment to be considered hostile.”).

9         Here, Dr. Wiener subjected Ms. Morgeson to unwelcome verbal conduct of a sexual  
10 nature, and this conduct was severe and pervasive enough that a reasonable jury could  
11 conclude it altered her working environment. Like the plaintiffs in *Ellison*, 924 F.2d at 880,  
12 *Newtown*, 52 F. Supp.2d at 372, and *Ellerth*, 524 U.S. 742, Ms. Morgeson was subjected to  
13 several incidents of verbally-offensive conduct directed at her. On at least two occasions,  
14 Dr. Wiener told her that he would pay her if she did her work in a bikini, and at least one of  
15 these incidents was in front of other people. Dr. Wiener also allegedly propositioned Ms.  
16 Morgeson, stating that he would only go to an oral examination “if it was from [Ms.  
17 Morgeson].” Ms. Morgeson testified that she understood this as a sexual proposition.  
18 Furthermore, on multiple occasions, Dr. Wiener told Ms. Morgeson that she should get breast  
19 implants, even after Ms. Morgeson had not given any indication she wanted to do so. Like  
20 the unwelcome love letters in *Ellison* and the offensive name-calling in *Newtown*, the verbal  
21 conduct against Ms. Morgeson was more than simple teasing. It is the type that a reasonable  
22 jury could determine would make a reasonable woman in her situation feel as though her  
23 working conditions were altered. In addition to conduct directed at her, Ms. Morgeson also  
24 repeatedly heard Dr. Wiener make inappropriate sexual comments to others. Like the  
25 offensive comments made about women in *Davis*, 520 F.3d at 1096, Ms. Morgeson’s  
26 exposure to a sexually-charged environment could alter her working conditions. In addition,  
27 much of this conduct occurred while Ms. Morgeson was still a minor, which magnifies the  
28 conduct she experienced.

1 Defendants cite several cases that did not find hostile work environments, but they are  
2 distinguishable. For example, in *Sprague v. Thorn Americas, Inc.*, the Tenth Circuit held that  
3 no hostile work environment existed where several inappropriate comments were made. The  
4 comments in *Sprague*, however, were not as overtly sexual nor as closely-related to the  
5 employment relationship. 129 F.3d 1355, 1366 (10th Cir. 1997). Several of the comments  
6 occurred outside the workplace. *Id.* Other comments made at the workplace related to  
7 undoing a top button, PMS, “kinky” neck chains, and stating that “you can’t call [employees]  
8 girls[,] [y]ou have to call them ladies.” None of these comments is as direct as telling Ms.  
9 Morgeson to get breast implants or to wear a bikini multiple times, requesting an “oral”  
10 examination, or the pervasive showing of pornography and sexual jokes at the office. The  
11 defendants in *Sprague* also did not tie any of their comments to the employment relationship;  
12 in contrast, Dr. Wiener told Ms. Morgeson that she could make more money if she wore a  
13 bikini. *Rosario v. Dep’t of Army* is another out-of-circuit opinion that this Court declines to  
14 follow. 573 F. Supp.2d 524, 530 (D. P.R. 2008). *Rosario* granted summary judgment in  
15 favor of employer where an employee told sexually-oriented jokes, told people in the office  
16 that the plaintiff dressed like a whore and a prostitute, called the plaintiff fat, and threw away  
17 her food and personal items. *Id.* Despite *Rosario*, a jury could conclude the repeated conduct  
18 in this case constituted a hostile work environment, especially given that Ms. Morgeson was  
19 seventeen-years-old during part of the employment relationship. Likewise, in *Brooks v. City*  
20 *of San Mateo*, a coworker placed his hands on the plaintiff’s stomach, commented on its  
21 sexiness, and touched her bare breast. 229 F.3d 917, 921–22 (9th Cir. 2000). That case,  
22 however, dismissed the case against the *city* because the city took quick remedial measures  
23 against the employee and because the incident occurred only one time. *Id.* Here, there was  
24 no similar remedial action; rather, Plaintiffs allege Dr. Wiener continued the harassment.

### 25 **B. Faragher/ Ellerth Defense**

26 Even if Ms. Morgeson could otherwise survive summary judgment, Defendants  
27 contend they are entitled to summary judgment on an affirmative defense. Although the  
28 Defendants may raise the defense, summary judgment is inappropriate. “An employer is

1 subject to vicarious liability . . . for an actionable hostile environment created by a supervisor  
2 with immediate (or successively higher) authority over the employee.” However, if “no  
3 tangible employment action is taken, a defending employer may raise an affirmative defense”  
4 by satisfying two elements: (1) “the employer exercised reasonable care to prevent and  
5 correct promptly any sexually harassing behavior,” and (2) “the plaintiff employee  
6 unreasonably failed to take advantage of any preventive or corrective opportunities provided  
7 by the employer.” *Faragher*, 524 U.S. at 807.

8         The mere existence of a harassment policy does not necessarily establish that an  
9 employer acted reasonably, *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005).  
10 Defendants cite *Kohler v. Inter-Tel Techs.*, which upheld summary judgment in favor of the  
11 defendant-employer because the employer exercised reasonable care to prevent sexual  
12 harassment and the employee unreasonably failed to utilize the employer’s anti-  
13 discrimination policies. 244 F.3d 1167, 1180–81 (9th Cir. 2001). The court in *Kohler*  
14 considered that the employer distributed a sexual harassment policy, which provided a  
15 definition of sexual harassment, identified whom employees should contact, ensured that  
16 supervisors could be bypassed in complaint procedures, described disciplinary measures, and  
17 provided a statement that the company did not tolerate retaliation. *Id.* at 1180. The court also  
18 noted that the defendant-employer immediately took corrective action against the harasser,  
19 which was critical because the “first prong of the affirmative defense also requires [the  
20 employer] to demonstrate that it exercised reasonable care to promptly correct sexually  
21 harassing behavior.” *Id.* at 1181.

22         By contrast, in this case, Defendants did not have a detailed policy. Rather, they had  
23 one paragraph in a handbook and a poster. The poster merely stated that the office did not  
24 tolerate sexual harassment, but it did not explain what sexual harassment was, what remedy  
25 employees should seek, or any other instructions. Meanwhile, the handbook addressed only  
26 “discrimination,” but it did not address harassment or define what discrimination would  
27 include. Although Ms. Morgeson testified that she understood that she could report the  
28 misconduct to someone, an issue of fact exists as to whether the handbook and poster alone

1 constituted “reasonable care” by NIPS. Moreover, Defendants offer no evidence that they  
2 took any corrective action as occurred in *Kohler*. Dr. Wiener never stopped any of his  
3 conduct, nor did anyone else direct him to stop. Although it is difficult to take corrective  
4 action when an employee has not reported the conduct, the parties do not dispute that Dr.  
5 Wiener made at least some of his comments in the presence of multiple people in the office.<sup>12</sup>

6 Even if the handbook and poster constituted reasonable care to prevent sexual  
7 harassment, the defense does not apply where the sexual harasser is a controlling figure that  
8 cannot reasonably be separated from the employer-entity for purposes of liability. *See*  
9 *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000)  
10 (“[A]n individual sufficiently senior in the corporation must be treated as the corporation’s  
11 proxy for purposes of liability.”); *E.E.O.C. v. Sunfire Glass, Inc.*, 2009 WL 976495 at \*10  
12 (D. Ariz. Apr. 10, 2009) (finding corporation liable for owner-president’s sexual harassment  
13 because he was the corporation’s alter-ego) (citing *Passantino*, 212 F.3d at 516, *Faragher*,  
14 524 U.S. at 789). Here, Dr. Wiener committed the alleged harassment, and as discussed  
15 above, a jury could find that he is one of the controlling individuals in the integrated  
16 enterprise. It is not necessary that the Court determine whether the two P.C.s and two  
17 L.L.C.’s are Dr. Wiener’s alter-ego. It is sufficiently analogous that the companies are part  
18 of one integrated enterprise and that Dr. Wiener was a key player in continuing this practice.  
19 The Court cannot conclude as a matter of law that Dr. Wiener’s employer-entities took  
20 reasonable care to prevent harassment where Dr. Wiener committed and continued the  
21 alleged harassment. Because the Court concludes summary judgment is inappropriate  
22 because of the first element of the defense, the Court need not address the second element.

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27 <sup>12</sup> These included, for example, telling Ms. Morgeson and her friend to wear bikinis  
28 and flaunting large breast implants around the office in front of Ms. Lutz while saying he was  
going to put the implants in Ms. Morgeson.

1 **VI. Intentional Infliction of Emotional Distress (Count III) as to Ms. Morgeson**

2 Intentional infliction of emotional distress exists if the defendant commits “extreme  
3 and outrageous” conduct, the defendant “either intend[ed] to cause emotional distress or  
4 recklessly disregard[ed] the near certainty that such distress will result from [his or her]  
5 conduct[,]” and “severe emotional distress . . . occur[s][.]” *Watts v. Golden Age Nursing*  
6 *Home*, 127 Ariz. 255, 257, 619 P.2d 1032, 1035 (1980). Liability exists only when the  
7 conduct goes “beyond all possible bounds of decency” and is “regarded as atrocious[] and  
8 utterly intolerable in a civilized community.” *Id.*, 619 P.2d at 1035. Moreover, not all Title  
9 VII harassment constitutes intentional infliction of emotional distress because Title VII  
10 discrimination “occurs at a much lower threshold of inappropriate conduct than the threshold  
11 required for the tort of intentional infliction of emotional distress.” *Stingley v. Arizona*, 796  
12 F. Supp. 424, 431 (D. Ariz. 1992.) “Only when reasonable minds could differ in determining  
13 whether conduct is sufficiently extreme or outrageous does the issue go to the jury.” *Mintz*  
14 *v. Bell Atl. Sys. Leasing Intern., Inc.*, 183 Ariz. 550, 554, 905 P.2d 559, 563 (Ct. App. 1995).

15 Defendant’s Motion argues only that Dr. Wiener’s comments to Ms. Morgeson were  
16 not extreme and outrageous.<sup>13</sup> Sexual harassment by a supervisor may be extreme and  
17 outrageous because “an employer owes his or her employees a greater degree of respect  
18 because of the employment relationship.” *See Steiner v. Showboat Operating Co.*, 25 F.3d  
19 1459, 1466 (9th Cir. 1994) (applying Nevada law, but citing Restatement (Second) of Torts  
20 § 46, cmt. e, which *Mintz* cites with approval, 183 Ariz. at 554, 905 P.2d at 563). Defendants  
21 assert it is rare to find extreme and outrageous conduct in the employment context, but the  
22 cases so holding dealt not with sexual harassment, but rather with discriminatory hiring. *See,*  
23 *e.g., Mintz*, 183 Ariz. at 554, 905 P.2d at 563 (finding conduct was not extreme and  
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25 <sup>13</sup> Defendants make a new argument in their Reply, contending Plaintiffs could not  
26 demonstrate the other element of the tort, severe emotional distress. The Court does not  
27 address this argument because Defendants did not raise it in their Motion. *Cuevas-Gaspar*  
28 *v. Gonzales*, 430 F.3d 1013, 1021 n. 4 (9th Cir. 2005) (finding issued not waived in opening  
materials are waived).

1 outrageous when employer made a gender-based position reassignment and informed the  
2 employee of the change while she was in the hospital).

3 Here, a reasonable jury could conclude Dr. Wiener's conduct was extreme and  
4 outrageous. As discussed above, Dr. Wiener made unwanted sexual advances toward Ms.  
5 Morgeson on multiple occasions. These included telling her multiple times to wear a bikini  
6 to work, telling her multiple times to get breast implants, and suggesting she should give him  
7 an "oral examination". Some of these comments occurred in front of others, where they  
8 would likely be more embarrassing and thus more extreme and outrageous. Even assuming  
9 *arguendo* that each of these incidents is not extreme and outrageous alone, a reasonable jury  
10 could determine that the events in the aggregate were extreme and outrageous.

11 **VII. Negligence Per Se (Count VI) as to Ms. Morgeson**

12 Plaintiffs' Complaint alleges Dr. Wiener violated Arizona's public indecency statute.  
13 Ariz. Rev. Stat. § 13-403. Section 13-1403(A) provides:

14 A person commits public sexual indecency by intentionally or knowingly  
15 engaging in any of the following acts, if another person is present, and the  
16 defendant is reckless about whether such other person, as a reasonable person,  
17 would be offended or alarmed by the act:

- 18 1. An act of sexual contact.
- 19 2. An act of oral sexual contact.
- 20 3. An act of sexual intercourse.
- 21 4. An act of bestiality.

22 Plaintiffs present no evidence of any sexual contact, oral sexual contact, sexual intercourse,  
23 or bestiality occurring with Ms. Morgeson. The Court thus finds summary judgment  
24 appropriate on this issue.

25 **VIII. Constructive Discharge (Count IV) as to All Plaintiffs**

26 Constructive discharge exists if "working conditions are so intolerable that a  
27 reasonable person would have felt compelled to resign." *Id.* at 147; *see also Steiner*, 25 F.3d  
28 1459, 1465 (9th Cir. 1994) (requiring showing that "a reasonable person in [her] position  
would have felt that [she] was forced to quit because of intolerable and discriminatory  
working conditions") (internal quotations omitted). It involves "something more" than

1 normal harassment, and constructive discharge does not lie “[u]nless conditions are beyond  
2 ‘ordinary’ discrimination[.]” *Suders*, 542 U.S. at 142 (quoting *Perry v. Harris Chernin, Inc.*,  
3 126 F.3d 1010, 1015 (7th Cir. 1997). “‘Constructive discharge is not a cause of action in its  
4 own right[.]’” but instead can be maintained only if “there is another legally cognizable  
5 injury present.” 2008 WL 5068945 at \*8 (D. Ariz. Nov., 25, 2008) (quoting *Anderson v.*  
6 *Arizona*, 2007 WL 1461623 at \*16 (D. Ariz. May 16, 2007)). The parties do not brief the  
7 issue in-depth, but it appears that the other legally-cognizable injury must be an employment  
8 law cause of action.

9       Because the Court grants summary judgment on both Title VII and ACRA against the  
10 individual Defendants, the Court likewise grants summary judgment on the Constructive  
11 Discharge claim against the individual Defendants. On the other hand, as against the  
12 employer-entities, at least one underlying claim, Title VII, can serve as the basis for  
13 Plaintiffs’ constructive discharge claims. Defendants, however, contend Plaintiffs’  
14 constructive discharge claims fail for other reasons.

15       **A. Ms. Cox, Ms. Chainhalt, and Ms. Thompson**

16       An employee must resign to prove a constructive discharge claim. *See Suders*, 542  
17 U.S. at 147 (requiring that a person “felt compelled to resign”); *Ross v. Ariz. State Personnel*  
18 *Bd.*, 185 Ariz. 430, 432 n. 1, 916 P.2d 1146, 1148 n. 1 (Ct. App. 1995) (“The doctrine of  
19 constructive dismissal is inapplicable [where the plaintiff] does not claim that her employer  
20 forced her to resign . . .”). Plaintiffs agree that Ms. Cox and Ms. Chainhalt did not  
21 voluntarily resign, but instead were terminated. Thus, they cannot argue they were  
22 constructively discharged.

23       Plaintiffs also admit in their Response that Ms. Thompson did not resign. Plaintiffs  
24 assert that “Ms. Thompson . . . decreased her hours to part-time[.]” in February 2007, but that  
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1 “the ultimate decision to terminate the employment relationship was that of Dr. Wiener” in  
2 June 2007. (Dkt. # 154 at 10.) Thus, Ms. Thompson’s constructive discharge claim fails.<sup>14</sup>

3 **B. Ms. Lutz**

4 In contrast, Ms. Lutz’s constructive discharge claim survives as against the entity  
5 Defendants. Ms. Lutz alleges two main reasons for her constructive discharge: first, the  
6 comments to her daughter upset her, and second, the sexual jokes and pornography were  
7 inappropriate. Ms. Lutz testified that the sexually-charged environment was “getting out of  
8 control” and “inappropriate.” A reasonable jury could find that a reasonable mother in Ms  
9 Lutz’s position would feel compelled to quit after hearing that her seventeen-year-old  
10 daughter was being subjected to a sexual environment. Although Ms. Lutz also testified that  
11 she wanted to quit for other reasons besides the sexual work environment and wanted to wait  
12 to quit until she had another job, this is evidence only of her subjective feelings.  
13 Constructive discharge, however, is an “objective” test: whether a reasonable person in the  
14 employee’s position would have felt compelled to resign. *Poland v. Chertoff*, 494 F.3d 1174,  
15 1184 (9th Cir. 2007). Defendants also point out that Ms. Lutz testified that she was not sure  
16 when Ms. Morgeson told her about Dr. Wiener’s comments; Defendants reason that if Ms.  
17 Lutz was unaware of the comments, they could not form the basis for her alleged  
18 constructive discharge. However, Ms. Lutz also testified that she “believed” she knew about  
19 some of the comments before she quit, and she knew about the breast implant comments  
20 from an independent source. Accordingly, this is a factual dispute about Ms. Lutz’s  
21 knowledge, and summary judgment is inappropriate.

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23 <sup>14</sup> Defendants’ Motion originally argued that Ms. Thompson resigned in February  
24 2007, became an independent contractor through June 2007, and eventually was fired.  
25 Defendants assert that the fact that Ms. Thompson worked for four more months  
26 demonstrates that she was not compelled to resign. In response to this argument, Plaintiffs  
27 state that Ms. Thompson never became an independent contractor, but instead reduced her  
28 hours before she was eventually fired. Plaintiffs thus acknowledge that Ms. Thompson did  
not resign. At oral argument, Plaintiffs’ counsel again admitted that Ms. Thompson  
ultimately left NIPS after her termination, and Plaintiffs’ counsel did not offer any authority  
that simply reducing one’s hours establishes a constructive discharge claim.

1           **C. Ms. Morgeson**

2           As discussed in Section V, Ms. Morgeson has provided facts sufficient for a  
3 reasonable jury to find a hostile work environment. Thus, the only remaining question is  
4 whether a jury could find she suffered “something more” than ordinary harassment. A jury  
5 could so find. Plaintiffs contend she experienced multiple comments telling her she could  
6 get paid more for wearing a bikini, multiple comments telling her to get breast implants, a  
7 request for an “oral” examination, and other sexually-inappropriate material while she was  
8 a minor. Although Ms. Morgeson testified that other factors also influenced her decision to  
9 quit, including the new office manager and the driving distance, she indicated her main  
10 reason for leaving (in contrast to Ms. Lutz) was the direct sexual harassment. (Dkt. # 129,  
11 Ex. 2.) Ms. Morgeson also said she would have quit even if there had not been a new office  
12 manager. *Id.* It is also not dispositive that Ms. Morgeson wrote a professional resignation  
13 letter and gave two weeks’ notice. A jury could find that she did so to remain professional  
14 and to increase her chances at future employment elsewhere. Given these facts, a reasonable  
15 young woman in her situation could feel compelled to resign.

16           **IT IS THEREFORE ORDERED** that Defendants’ Motion for Partial Summary  
17 Judgment is **GRANTED IN PART** and **DENIED IN PART**. The Court grants the Motion  
18 in the following respects:

- 19           1.       Grants summary judgment on counts I (Sexual Harassment), II (ACRA), and  
20                   IV (Constructive Discharge) against the individual Defendants.
- 21           2.       Grants summary judgment on the constructive discharge claims by Ms.  
22                   Thompson, Ms. Cox, and Ms. Chainhalt against all Defendants.
- 23           3.       Grants summary judgment on Count VI (Negligence Per Se) against all  
24                   Defendants.

25       The Court denies the Motion in all other respects.

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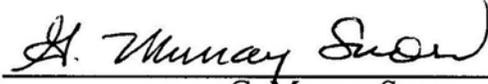
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**IT IS FURTHER ORDERED** directing the Clerk of the Court **TERMINATE**  
Defendant Pamela S. Henderson, M.D., individually, from this action.

DATED this 17th day of December, 2009.

  
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G. Murray Snow  
United States District Judge