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IN THE
COURT OF APPEALS OF INDIANA

JENNIFER WRIGHT HOBBS, individually and as parent and legal guardian of S. H., a minor	)	
Appellants-Respondents,	)	
vs.	)	No. 27A04-0703-CV-172
BRIAN KWIATEK[1] and S&A SERVICES OF MARION, LTD d/b/a S&A SERVICES, LTD,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Natalie R. Conn, Judge
Cause No. 27D03-0210-PL-423

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

[1] Defendant Kwiatek is not seeking relief on appeal and has not filed a brief. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

VAIDIK, Judge

Case Summary

Jennifer Wright Hobbs ("Hobbs") appeals the trial court's judgment in favor of S&A Services of Marion, LTD ("S&A"). Specifically, Hobbs maintains that the trial court's determination that she was not wrongfully terminated from her employment with S&A and that the increased pain she experienced by way of migraines, anxiety, and high blood pressure was not caused by S&A's negligence was clearly erroneous. Finding that the trial court's judgment is not clearly erroneous, we affirm.

Facts and Procedural History

In February 2002, Hobbs began working as a debt collector for S&A. After being employed for approximately five months, Hobbs, then pregnant, complained to Norman Cheek ("Cheek"), one of several S&A managers, regarding preferential treatment she perceived other employees were receiving from managers in return for sexual favors. In particular, Hobbs complained of a relationship between employee Anna Monjiovi ("Monjiovi") and manager Brian Kwiatek ("Kwiatek"). On July 30, 2002, S&A discharged Hobbs due to her "conduct." *See* Appellant's App. p. 148. On that same day, Hobbs was rehired and instructed to take a couple of days off and then return to work.

After returning to work on August 1, 2002, Hobbs approached Monjiovi and began conversing with her at her desk about the comments she made regarding Monjiovi and Kwiatek's relationship. Sensing that the conversation between Hobbs and Monjiovi might escalate into a confrontation, Cheek approached Hobbs and asked her to leave the premises and go to lunch. Hobbs did not leave the premises, and thereafter Kwiatek

approached Hobbs and "physically moved her out the door of the building." *Id*. at 10. Hobbs went back inside the building to find the general manager but did not see him, so she left to have lunch and to locate her husband. After lunch, Hobbs, her husband, and her brother met with two other managers to discuss the incident. During the meeting, Hobbs was told that Kwiatek was just doing his job. After the meeting, Hobbs quit her employment with S&A, claiming that she could not work in that type of environment. Thereafter, Hobbs filed criminal charges against Kwiatek, alleging assault and battery.

On October 11, 2002, Hobbs filed a lawsuit against Kwiatek and S&A alleging negligence as to her and her child, S.H., born on March 19, 2003,[2] and wrongful termination. On September 29, 2006, a bench trial commenced and neither Kwiatek nor any counsel on his behalf appeared.[3] During the bench trial, Hobbs testified that she suffered significant pain and increased migraines, anxiety, and high blood pressure as a result of Kwiatek's actions. At the conclusion of the bench trial, the trial court entered judgment in favor of S&A, finding that "[t]here was no evidence presented to support any claim of negligence as to [Hobbs'] child [S.H.] or that [S.H.] suffered any injuries as a result of [S&A's] actions, therefore, any negligence claim filed on behalf on [sic] [S.H.] is dismissed." *Id*. at 11. The trial court additionally found that "[t]he evidence was not compelling in and of itself to prove any causation of what took place between [Hobbs] and Defendant Kwiatek as to injuries complained of by [Hobbs] in light of the fact that

[2] Regarding S.H., Hobbs alleged in her amended complaint "[t]hat KWIATEK'S conduct and actions further resulted in injury to [S.H.], necessitating treatment for medical bills for permanent injury, as well as loss of earning capacity." *See* Appellant's App. p. 113.

[3] A default judgment was ultimately entered against Kwiatek awarding Hobbs $25,000.00 in compensatory damages and $25,000.00 in punitive damages. *See* Appellant's App. p. 8, 9.

she was pregnant and said problems are also common occurrences with pregnancy." *Id*. Finally, the trial court held that Hobbs failed to state a claim for wrongful discharge because

> [i]t is clear that [Hobbs] was an employee at will and could be discharged at any time without cause. Further, [Hobbs] failed to show evidence that she fell within an exception to this general rule. In addition, the evidence presented showed [Hobbs] quit her job and was not terminated by S&A Services or any of its managers.

Id. Hobbs now appeals.

Discussion and Decision

Hobbs raises two issues on appeal, which we restate as: (1) whether the trial court's judgment that Hobbs was not wrongfully terminated was clearly erroneous and (2) whether the trial court's judgment that S&A was not negligent was clearly erroneous.

I. Wrongful Termination

Hobbs first contends that the trial court's determination that she was not wrongfully terminated was in clear error. Where, as here, the trial court *sua sponte* issues specific findings of fact and conclusions of law in its order, the reviewing court examines whether the evidence supports the findings and the findings support the judgment. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005) (citing *Learman v. Auto Owners Ins. Co.*, 769 N.E.2d 1171, 1174 (Ind. Ct. App. 2002), *trans. denied*). We will set aside the trial court's findings and conclusions only if they are clearly erroneous. *Id*. Findings of fact are clearly erroneous where there is no substantial evidence of probative value supporting them. *In re A.H.*, 751 N.E.2d 690, 695 (Ind. Ct. App. 2001), *trans. denied*. In deference to the trial court, we will neither reweigh the evidence nor

assess the credibility of witnesses but will only consider the evidence most favorable to the judgment. *Fowler*, 830 N.E.2d at 102 (citing *Clark v. Crowe*, 778 N.E.2d 835, 839-40 (Ind. Ct. App. 2002)). Finally, we note that Hobbs is appealing from a negative judgment. Thus, Hobbs must

> demonstrate that the trial court's judgment is contrary to law. A judgment is contrary to law only if the evidence in the record, along with all reasonable inferences, is without conflict and leads unerringly to a conclusion opposite that reached by the trial court.

Infinity Prods., Inc. v. Quandt, 810 N.E.2d 1028, 1032 (Ind. 2004), *reh'g denied*.

Hobbs asserts that she "did not quit voluntarily, and that she was fired for exercising both federal and state rights, some of which are statutorily conferred upon her, to complain of not only sexual harassment, but a crime against her personally." Appellant's Br. p. 10, 11. We disagree. First, although Hobbs argues that she did not voluntarily quit, the evidence reflects that Hobbs resigned from S&A, *see* Appellant's App. p 147, and that Hobbs testified that she quit. *See* Tr. p. 56. Nevertheless, Hobbs alleges that she "felt like I was made to quit." *Id*. at 45. In other words, Hobbs contends that her complaints to management led to a hostile work environment that resulted in her being constructively discharged.

Before addressing whether Hobbs was constructively discharged, it is important to address whether an employee in Indiana can ever be wrongfully "discharged" through constructive, rather than actual, discharge. This has been the subject of some debate among panels of this Court. *See Tony v. Elkhart County*, 851 N.E.2d 1032, 1039 (Ind. Ct. App. 2006) (Friedlander, J., dissenting) (expressing "that when an employee is discharged, whether expressly or constructively, solely for exercising a statutorily

conferred right, an exception to the general rule of at will employment is recognized and a cause of action exists in the employee as a result of the retaliatory discharge"); *but see Cripe, Inc. v. Clark*, 834 N.E.2d 731, 735 (Ind. Ct. App. 2005) (Robb, J., dissenting) ("[W]e are not convinced that a constructive retaliatory discharge fits within the ambit of the narrowly-drawn exceptions to the employee-at-will doctrine. Rather, it seems that, were we to apply the doctrine of constructive discharge to demonstrate a retaliatory discharge, we would be overly extending that which was intended by the narrowly-defined exceptions."). For the purpose of this opinion, assuming that a constructive discharge constitutes a discharge such that the merits of Hobbs' termination claim can be addressed, we nonetheless conclude that she has failed to show that she was constructively discharged by S&A.

"A constructive discharge occurs when an employer purposefully creates working conditions, which are so intolerable that an employee has no other option but to resign." *Cripe*, 834 N.E.2d at 735. The "constructive discharge doctrine . . . transforms what is ostensibly a resignation into a firing[.]" *Id*. Before an employment situation will be deemed intolerable, however, the adverse working conditions must be unusually "aggravated" or amount to a "continuous pattern" of negative treatment. *Id*. (quoting *Haubry v. Snow*, 31 P.3d 1186, 1192-93 (Wash. Ct. App. 2001)).

In the present case, the evidence is susceptible to two reasonable inferences. One supports Hobbs' theory that she had no choice but to resign, but the second supports S&A's contention that she voluntarily quit. Hobbs maintains that on July 30, 2002, she was discharged for reporting inappropriate sexual encounters involving certain managers

and employees. However, Hobbs was rehired the same day she was discharged and suffered no damages as a result of the incident. Additionally, Hobbs maintains that after filing a criminal assault and battery complaint against Kwiatek she endured a hostile work environment, which included receiving threatening telephone calls from an employee of S&A. However, because the complaint filed against Kwiatek and the alleged threatening telephone calls occurred *after* Hobbs had already quit, these two incidents could not have led to a hostile work environment and therefore could not have led to her being constructively discharged.

Hobbs also maintains that Kwiatek's physical removal of her from S&A's building amounted to a constructive discharge. Again, we disagree. The trial court weighed this evidence against other evidence indicating that Kwiatek escorted Hobbs out of the building only after she refused a direct order from another manager to leave and go to lunch and determined that Hobbs "quit her job and was not terminated by [S&A] Services or any of its managers." Appellant's App. p. 11. Indeed, Hobbs returned to the building twice and even had a meeting with two managers, during which they indicated that Kwiatek was merely doing his job. The circumstances surrounding her removal from the building could be understood as an attempt by management to dispel a tense moment. As such, the evidence does not lead unerringly to the conclusion opposite that reached by the trial court. We cannot say that the trial court's finding was clearly erroneous.

II. Negligence

Finally, Hobbs argues that the trial court clearly erred in its determination that the increased pain she experienced with migraines, anxiety, and high blood pressure was not

caused by S&A's negligence. "The tort of negligence consists of three elements: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty by the defendant; and (3) injury to the plaintiff proximately caused by that breach." *Kincade v. MAC Corp.*, 773 N.E.2d 909, 911 (Ind. Ct. App. 2002).

Here, the trial court found that

> [Hobbs] testified as to the pain she suffered immediately caused by Defendant's actions and to the increased problems she had with migraines, anxiety and high blood pressure as a later result of his actions. The evidence was not compelling in and of itself to prove any causation of what took place between [Hobbs] and Defendant Kwiatek as to injuries complained of by [Hobbs] in light of the fact that she was pregnant and said problems are also common occurrences with pregnancy.

Appellant's App. p. 11. "An essential element in a cause of action for negligence is the requirement of a reasonable connection between a defendant's conduct and the damages which a plaintiff has suffered." *Daub v. Daub*, 629 N.E.2d 873, 877 (Ind. Ct. App. 1994), *trans. denied*. "The element of causation requires that the harm would not have occurred but for the defendant's conduct." *City of East Chicago v. Litera*, 692 N.E.2d 898, 901 (Ind. Ct. App. 1998), *reh'g denied*, *trans. denied*. "The 'but for' analysis presupposes that, absent the tortious conduct, a plaintiff would have been spared suffering the claimed harm." *Daub*, 629 N.E.2d at 877.

Hobbs appears to argue that the trial court clearly erred by concluding that Hobbs did not carry her burden with regard to the element of causation because no expert witness testified to a reasonable medical certainty that Kwiatek's actions caused Hobbs' post-incident pain. Hobbs is incorrect in her assertion. The trial court did not base its conclusion that a causal link between Hobbs' pain and Kwiatek's actions was insufficient

due to a lack of expert medical testimony. Rather, the trial court heard evidence via Hobbs' testimony that she was suffering from increased pain (migraines, anxiety, and high blood pressure) due to Kwiatek's actions but chose not to believe it. Instead, the trial court determined that Hobbs' increased pain was consistent with pain endured during a pregnancy, that Hobbs had experienced these symptoms before the incident, and that it was not convinced that these symptoms were caused by the incident as opposed to the pregnancy. The evidence does not lead unerringly to a conclusion opposite that reached by the trial court. The trial court's judgment is not clearly erroneous.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.