

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</p> <p>1437 Bannock Street Denver, Colorado 80202</p>	
<p><b>PLAINTIFF:</b> INGER CHRISTINE KRSTOFIK</p> <p>v.</p> <p><b>DEFENDANTS:</b> GREAT WESTERN FLORAL EXCHANGE, INC.; and GAILS WATERS, individually.</p>	<p>Case No. 07cv11734</p> <p>COURTROOM: 19</p>
<p style="text-align: center;"><b>ORDER GRANTING SUMMARY JUDGMENT</b></p>	

THIS MATTER comes before the Court on Plaintiff Inger Christine Krystofik’s Motion for Summary Judgment filed on February 2, 2009. Defendants Great Western Floral Exchange (“Great Western”) and Gails Waters did not file a Response to the Motion. The Court, being fully advised in the premises herein, Finds and Orders as follows:

**BACKGROUND**

Plaintiff Krystofik brings this action arising out of her employment with Defendant Great Western and its sole owner, Defendant Waters. This action is under the Colorado Anti-Discrimination Act (“CADA”) for unlawful employment practices on the basis of sex and tort law for intrusion upon seclusion and intentional infliction of emotional distress.

Krystofik was employed by Defendants from October 3, 2005 until March 22, 2006. During this time Waters was the sole owner and manager of Great Western, and as her supervisor, Waters had the authority to control the terms of Krystofik’s employment. Krystofik maintains that, while employed, Waters repeatedly harassed her by showing

Krystofik a pornographic video, making a variety of inappropriate and sexual comments, inappropriately touching Krystofik, inappropriately remarking on Krystofik's physical features, and inappropriately commenting on Krystofik's medical procedures. After each incident of harassment, Krystofik made a formal or informal complaint to Waters.

As a result of this harassment, Krystofik was forced to rearrange her office furniture and office hours to avoid interaction with Waters. Krystofik maintains that she was inappropriately denied a salary increase because of her complaints to Waters. Further, Krystofik claims she was forced to resign because she could no longer tolerate Waters' sexual harassment. These allegations are supported by affidavits and exhibits attached to her Motion for Summary Judgment and have not been contested by Defendants, as Defendants did not file a Response to the Motion.

### **STANDARD OF REVIEW**

Pursuant to C.R.C.P. 56(c), summary judgment is only appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Aspen Wilderness Workshop v. Colorado Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995). *See also Hyden v. Farmers Ins. Exch.*, 20 P.3d 1222 (Colo. App. 2000); and *Aler v. Diversified Management, Inc.*, 534 P.2d 645, 646 (Colo. App. 1975). All evidence properly before the court is viewed in a light most favorable to the nonmoving party, “giving the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the evidence, and resolv[ing] all doubts as to the existence of a material fact against the moving party.”

*Wilson v. Prentiss*, 140 P.3d 288, 290 (Colo. App. 2006) (citing *Luttgen v. Fischer*, 107 P.3d 1152 (Colo. App. 2005)).

## ANALYSIS

The facts of this case are not in dispute. Plaintiff has supported her allegations with affidavits and exhibits; however, Defendants failed to file a Response or present the Court with any conflicting evidence. Accordingly, the Court discerns no genuine issues of material fact that remain, and the question of whether Krystofik is entitled to judgment as a matter of law for each of her claims will be addressed in turn.

### *1. Sexual Harassment in Violation of the Colorado Anti-Discrimination Act*

Krystofik is entitled to summary judgment as a matter of law on her sexual harassment CADA claim because she was an employee of Great Western, Great Western created a hostile work environment based on Krystofik's sex, Krystofik lodged appropriate complaints regarding this treatment to Waters, her sole supervisor, and these complaints failed to initiate a reasonable investigation and prompt remedial action. To prevail on a sexual harassment claim, a plaintiff must establish that the plaintiff was an employee of the defendant, the defendant was an employer of the plaintiff, the defendant created a hostile work environment based on the plaintiff's sex, the plaintiff filed a complaint with the appropriate authority in the workplace, and such authority failed to initiate a reasonable investigation and take prompt remedial action. *See* C.R.S. § 24-34-402(a).

Here, Krystofik sufficiently established her sexual harassment claim. Krystofik was an employee of Great Western, and Great Western employed Krystofik. Further, Great Western Created a hostile work environment based on Krystofik's sex by Waters' repeated

sexual harassment of Krystofik. Krystofik filed a complaint with Waters, her only supervisor and the sole manager and owner of Great Western. However, Waters failed to initiate a reasonable investigation or take remedial action. To the contrary, Waters continued to harass Krystofik after her complaints. Accordingly, Krystofik has sufficiently established her sexual harassment claim and is entitled to summary judgment as a matter of law.

2. *Constructive Discharge in Violation of the Colorado Anti-Discrimination Act*

Krystofik is entitled to summary judgment as a matter of law on her constructive discharge CADA claim because Defendants' actions were deliberate, and these deliberate actions made working conditions so intolerable that a reasonable person in her situation would have resigned. To sustain a claim of constructive discharge, a plaintiff "must present sufficient evidence establishing deliberate action on the part of the employer which makes or allows an employee's working conditions to become so difficult or intolerable that the employee has no other choice but to resign." *Montemayor v. Jacor Comm's, Inc.*, 64 P.13d 916, 921 (Colo. App. 2002) (citing *Wilson v. Bd. of Co. Comm'rs*, 703 P.2d 1257, 1259 (Colo. 1985)). Working conditions are intolerable where a reasonable person in the same circumstance would view the working conditions as intolerable. *Id.* (citing *Boulder Valley Sch. Dist. R-2 v. Price*, 805 P.2d 1085, 1088 (Colo. 1991)).

Here, Krystofik presented evidence establishing Waters' deliberate actions of harassment. Through affidavits and exhibits, Krystofik established that Waters repeatedly and intentionally harassed Krystofik due to her sex, and as a result of this harassment, Krystofik's work environment was so hostile she was forced to resign. Because a reasonable person placed in the same circumstance as Krystofik would view Waters'

conduct towards Krystofik as intolerable, Krystofik is entitled to summary judgment as a matter of law on her constructive discharge claim.

3. *Retaliation in Violation of the Colorado Anti-Discrimination Act*

Krystofik is entitled to summary judgment as a matter of law on her CADA retaliation claim because she made complaints regarding discrimination, her complaints resulted in her not receiving a raise, and a reasonable person would find that not receiving a raise was materially adverse to her complaints. A plaintiff has established a retaliation claim where it is shown she engaged in protected opposition to discrimination, a reasonable employee would have found the challenged action materially adverse, and there exists a causal connection between the protected action and the materially adverse action. *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1212 (10th Cir. 2008) (citing *Argo v. Blue Cross & Blue Shield of Kansas*, 452 F.3d 1193, 1202 (10th Cir. 2006)).

Here, Krystofik sufficiently established her retaliation claim. First, Krystofik engaged in protected opposition by complaining informally and/or formally to Waters after each sexual harassment incident. *See Hertz v. Luzenac America, Inc.*, 370 F.3d 1014, 1015 (10th Cir. 2004) (stating that protected opposition includes both formal and informal complaints). Next, Defendants took materially adverse employment action when Defendants denied Krystofik a raise. Finally, there exists a causal connection between Krystofik's complaints and Defendants' failure to give Krystofik a raise. Accordingly, Krystofik is entitled to summary judgment as a matter of law on her retaliation claim.

4. *Intrusion Upon Seclusion by Defendants*

Krystofik is entitled to summary judgment as a matter of law on her intrusion upon seclusion claim because Defendants intruded upon Krystofik's seclusion by commenting

on a medical procedure Waters suspected Krystofik received, and this intrusion would be considered highly offensive to a reasonable person. A claim for intrusion of seclusion is established where the plaintiff shows that the defendant intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another in her private affairs or concerns if the intrusion would be highly offensive to a reasonable person. *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060, 1067 (Colo. App. 1998). Specifically, Colorado courts recognize a privacy interest in one's personal health and medical information. *See id.* at 1068.

Here, Krystofik established that Waters intentionally intruded upon her solitude by his inappropriate inquiries and comments regarding the nature of a medical procedure Krystofik underwent. Prior to her hiring, Krystofik requested leave for a surgical procedure. However, Krystofik intentionally did not inform Waters of the nature of the procedure because she wanted to keep this information private. Later, while Krystofik was employed by Defendants, Waters informed Krystofik that he figured out what kind of surgery Krystofik had, opined she received breast augmentation, and extensively and inappropriately commented and gestured on the outcome of the surgery and post-operative care.

Waters' actions would be considered highly offensive by a reasonable person. There was no reason Defendants needed to know details of the surgical procedure, nor was there reason or justification for the extensive and inappropriate comments and gestures that followed. Accordingly, Krystofik is entitled to summary judgment as a matter of law on her intrusion upon seclusion claim.

5. *Intentional Infliction of Emotional Distress*

Krystofik is entitled to summary judgment as a matter of law on her intentional infliction of emotional distress claim because Defendants engaged in extreme and outrageous conduct with the intent of causing severe emotional distress, and as a result of this conduct, Krystofik suffered severe emotional distress. A claim for intentional infliction of emotional distress is established where the plaintiff shows the defendant engaged in extreme and outrageous conduct, the defendant engaged in such conduct recklessly or with the intent of causing the plaintiff severe emotional distress, and the defendant's conduct caused the plaintiff to suffer severe emotional distress.<sup>1</sup> *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 882 (Colo. 1992). Otherwise permissible conduct may become extreme and outrageous if the conduct is from a person who is in a position of actual or apparent authority over the other. *Zalnis v. Thoroughbred Datsun Car Co.*, 645 P.2d 292, 294 (Colo. App. 1982) (citing Restatement (Second) of Torts § 46 (1965)). Further, Colorado courts are more likely to find extreme and outrageous conduct in a series of incidents rather than a single act. *See id.*

Normally, the question of whether a defendant's conduct is extreme and outrageous is a question for the jury. *Culpepper*, 877 P.2d at 882. However, the trial court is responsible for determining whether reasonable persons could differ on the question of whether the conduct in question is extreme and outrageous. *Id.* Here, based on the affidavits and exhibits presented and not contested, reasonable persons could not differ on the question of whether Waters' conduct is extreme and outrageous. Waters was in a

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<sup>1</sup> Unlike its sister claim of negligent infliction of emotional distress, *see, e.g., Deming v. Kellog*, 583 P.2d 944, 945 (Colo. App. 1978), claims for intentional infliction of emotional distress do not require a showing of physical manifestations of injury, *Culpepper*, 877 P.2d at 882 (citing *Rugg v. McCarty*, 476 P.2d 753, 756 (Colo. 1970)).

position of authority over Krystofik, and Waters repeatedly harassed Krystofik based on her sex. Waters' series of conduct of showing Krystofik a pornographic video, making a variety of inappropriate and sexual comments to Krystofik, inappropriately touching Krystofik, and inappropriately commenting on Krystofik's physical features is so outrageous that reasonable persons could not differ on the question of whether Waters' conduct was extreme and outrageous. Accordingly, the Court finds that Waters' actions constitute extreme and outrageous conduct.

Next, Waters conducted extreme and outrageous acts with the intent to cause Krystofik severe emotional distress. A person acts with the intent to cause severe emotional distress when he knows that his conduct is certain or reasonably certain to have that result. *Id.* Here, Krystofik informed Waters that his conduct made her uncomfortable and requested that he stop treating her in that manner. However, Waters continued to harass Krystofik knowing his conduct made her upset. Accordingly, Waters acted with intent to cause severe emotional distress because he knew it resulted in Krystofik's severe emotional distress.

Finally, as a result of Waters intentional, extreme, and outrageous conduct, Krystofik suffered severe emotional distress, including depression, loss of self esteem, nightmares, loss of intimacy in her marriage, and fear. Accordingly, Krystofik is entitled to summary judgment as a matter of law on her intentional infliction of emotional distress claim.

#### 6. *Damages*

The Court requires the parties to appear before the Court for a damages hearing. Evidence before the Court demonstrates an entitlement to economic damages; however, the

evidence before the Court is insufficient for the Court to award non-economic damages at this time. In light of this, the Court requires Plaintiff's counsel set this matter for a damages hearing, at which Krystofik shall establish her entitlement to both economic and non-economic damages.

### CONCLUSION

WHEREFORE, Plaintiff Inger Christine Krystofik's Motion for Summary Judgment is GRANTED because there remain no genuine issues of material fact and Krystofik is entitled to judgment on all claims as a matter of law. Plaintiff's counsel has **10 days** from the date of this Order to file a Notice to Set Hearing on Damages and contact this Court's clerk's office to obtain dates for a damages hearing.

It is so ordered.

Done this 9th day of April, 2009.

By the Court:



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Judge Norman D. Haglund  
Denver District Judge

Movant shall serve copies of this Order on any pro se parties, pursuant to C.R.C.P. 5, and file a certificate of service with the Court within 10 days.