

JUN 16 2009

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>NANCY REILLY,</p> <p style="text-align: center;">Plaintiff - Appellant,</p> <p style="text-align: center;">vs.</p> <p>JACKIE CRAWFORD, JAMES SCHOMIG, CHARLES MCBURNEY, and STATE OF NEVADA,</p> <p style="text-align: center;">Defendants - Appellees</p>

No. 07-17350

D.C. No. 2:04-cv-00784-KJD-
LRL

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada, Las Vegas
Kent J. Dawson, District Judge, Presiding

Submitted June 2, 2009**
Las Vegas, Nevada

Before: RAWLINSON and BYBEE, Circuit Judges, and BURNS,*** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously found this case suitable for decision without oral argument.

*** The Honorable Larry Alan Burns, United States District Court for the Southern District of California, sitting by designation.

The parties are familiar with the facts of this case, so we do not repeat them here.

Nancy Reilly appeals the district court's directed verdict against her pursuant to Rule 50 of the Federal Rules of Civil Procedure. There are two claims at issue: (1) constructive discharge arising out of a hostile work environment based on Reilly's gender, and (2) intentional infliction of emotional distress. We affirm.

The evidence simply does not support Reilly's claim that the so-called "scalpel incident" was orchestrated by her superiors to coincide with Reilly's shift as yard lieutenant at High Desert State Prison. Even if there is a genuine dispute about whether Dr. Chase was ever authorized to perform a systems check, there is no evidence of a conspiracy to have the systems check performed *on Reilly's watch*. Once the scalpel incident drops out of consideration, there is insufficient evidence that Reilly was subject to discriminatory working conditions based upon her gender.

A plaintiff who advances a constructive discharge claim based upon a hostile environment "must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Penn. State Police v. Suders*, 542 U.S. 129, 147 (2004). A constructive discharge occurs "when the working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood"

Poland v. Chertoff, 494 F.3d 1174, 1184 (9th Cir. 2007) (quoting *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000)). The district court correctly applied these legal standards when it ruled after hearing all of Reilly's evidence that a directed verdict was appropriate.

Reilly's claim for intentional infliction of emotional distress fails for the same reason her constructive discharge claim fails. There is insufficient evidence of extreme or outrageous conduct, or of requisite intent.

AFFIRMED.