Cause No. **327027-III**

COURT OF APPEALS
STATE OF WASHINGTON
(Div. III)

CRAIG S. CULBERTSON
Appellant,

v.

WELLS FARGO INSURANCE SERVICES USA, INC.;
JOSHUA TYNDELL and JANE DOE; and
RHONDA IDE and JOHN DOE;

Respondents.

Superior Court No. 14-2-01009-0
Spokane County
Honorable Judge Price

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. WELLS FARGO'S HANDBOOK PROMISES OF SPECIFIC TREATMENT IN SPECIFIC SITUATIONS ARE INCONSISTENT WITH ITS INCONSPICUOUS DISCLAIMERS.

1. Wells Fargo Breached Its Promises Of Specific Treatment In Specific Situations In Its Handbook.

There is sufficient evidence in the record to create a factual question about whether Wells Fargo's 2006 Handbook modified the employment relationship with Culbertson and other "team members."[1] "Whether or not an employer has made a promise specific enough to create an obligation and to justify an employee's reliance thereon is a question of fact." *Quedado v. Boeing Co.*, 168 Wn. App. 363, 369 (Div. 1) review denied 175 Wn.2d 1011 (2012) (citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 104-05 (1994)).

Wells Fargo's Response Brief does not address the mandatory language in Wells Fargo's 2006 Handbook. Wells Fargo makes the blanket assertion that its 2006 Handbook does not contain promises of

[1] Culbertson signed a form acknowledging that he had received and understood the 2006 Handbook for Wells Fargo Team Members when he was hired on November 1, 2006. CP 140, 564. There is no evidence in the record that Culbertson received the 2014 Wells Fargo Handbook before his branch manager fired him without notice on February 3, 2014. Wells Fargo organized its 2014 Handbook (CP 734-1004) the same as its 2006 Handbook (CP 585-733) with nearly the exact same language.

specific treatment in specific circumstances in regards to "problem solving" and/or "dispute resolution." Response Brief p. 34. However, Wells Fargo's Response Brief does not offer any explanation or argument as to why the language in the 2006 Handbook discussing the dispute resolution process does not contain promises of specific treatment in specific situations.[2]

a. The Opportunity To Use Internal Problem-Solving Resources And The Dispute Resolution Process.

The Wells Fargo 2006 Handbook makes the specific promise to provide "*each team member*" the "*opportunity* to use internal problem-solving resources" for "*any work-related problem*," "*when they're needed*." CP 634.

> At Wells Fargo *we feel it's essential to provide team members with a prompt, fair review of any work-related problem. So, we've developed a process through which each team member has an opportunity to use internal problem-solving resources.*
>
> Although we can't *guarantee* that every team member will always be satisfied with the outcome, *we can make sure that all team members have dispute resolution methods available when they're needed*... .

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[2] Wells Fargo asserts that Culbertson judicially admitted that his employment was at all times "at-will." Response Brief, p. 17, n. 5. This is not an accurate depiction of the record. Culbertson's answer to the complaint filed by Wells Fargo in a separate lawsuit admits that his employment was "'at will' *subject to the compensation agreements between the parties and the promises of specific treatment in specific situations contained in the Wells Fargo Team Member (employee) Handbook(s)* as alleged...." CP 506-507 (emphasis added).

> If you need alternatives or to escalate your dispute further, *you can follow the process outlined below. It's strongly recommended you use these resources in the order they're shown here*... .
>
> *The process stops at any point you decide to discontinue it, or when you've exhausted all the resources described here.*

CP 634-635.

> After speaking with your supervisor, if you feel you haven't been able to communicate effectively with him or her—or *if you want someone else to review the situation—you can meet with your supervisor's manager (or another manager above your supervisor in the chain of reporting relationships) to discuss the issue. Again, if you prefer, you can also contact your HR consultant and ask him or her to facilitate the meeting with your supervisor's manager, or to help you prepare for the meeting.*

CP 635 (emphasis added).

Wells Fargo's 2006 Handbook describes in detail the dispute resolution process. CP 634-636. The *"process"* begins with speaking with your supervisor *or another manager* above your supervisor. CP 635. The "process" also states , "you can contact *your* HR consultant." CP 635. The next step in the "process" allows the employee to contact "*your* Employee Relations consultant."

> Employee Relations consultants review disputes from an *objective position* and act in a consultative role to help resolve work-related issues. *Your Employee Relations consultant will work with your HR consultant to obtain related information in order to review the matter and make recommendations to you or your group's management, if appropriate.*

CP 635 (emphasis added). A jury could find the dispute resolution "process" in Wells Fargo's 2006 Handbook is tantamount to guaranteed

"due process" rights, which include rights: to seek counsel; to subpoena documents; and to have a neutral decision-maker decide the dispute. Its 2006 Handbook provides Wells Fargo discretion in deciding what action to take in a work-related dispute. However, its 2006 Handbook provides Wells Fargo no discretion to ignore the dispute resolution process. Wells Fargo must afford "each team member" an *opportunity to use internal problem-solving resources.*" CP 634.

It is undisputed that at the end of Culbertson's surprise and short meeting with his branch manager and the Wells Fargo's investigator they fired him, and escorted him out the door. CP 142-143. Wells Fargo never afforded Culbertson the *opportunity* to meet with anyone else in Wells Fargo's management reporting chain or *anyone in an objective position to assist him in obtaining any related information* to rebut the serious accusations his branch manager leveled against him. CP 142-143.

Wells Fargo's 2006 Handbook, Section 4.6, titled "Third Party Representation" makes the following promise summarizing the dispute resolution process:

> *We respect your right to communicate directly*, on an individual basis, *with* your supervisor, manager, *or HR Consultant about any of the terms or conditions or your employment....*
>
> If you encounter *any problems* on the job, *bring your concerns to your supervisor, manager*, or *HR Consultant. They're willing to*

> *discuss any work-related problem with you on a direct, person-to-person basis.*

CP 636 (emphasis added).

Wells Fargo completely ignored Culbertson's "right" to communicate on an individual basis with another manager in the reporting chain or with *his* HR consultant and *his* Employee Relations consultant about the serious accusations leveled against him before and after his termination. The record undisputedly shows that Wells Fargo never made any dispute resolution resources available to Culbertson when he needed them. CP 142-143. Culbertson never had the opportunity to decide when to discontinue the dispute process—because Wells Fargo prevented Culbertson from starting the dispute resolution process. CP 142-143.

b. The Specific Promise To Review The Termination Decision "From An Objective Position."

The Wells Fargo 2006 Handbook *makes the specific promise* to review termination decisions by "your HR consultant" and "if necessary it can be referred to Employees Relations." CP 636, 688.

> **Review of Termination.** If your employment is terminated involuntarily and you want to have that decision reviewed, contact your HR consultant as soon as possible following the termination. *Once your HR consultant has reviewed the matter, if necessary it can be escalated to Employee Relations.* They'll determine whether a further review is warranted based on the circumstances—and if so, they'll conduct one. (See "Dispute Resolution" on page 44.)

CP 636 (emphasis added). See also CP 688.

It is a question for the jury to decide if this language constitutes a specific promise to have terminations reviewed upon request by the employee.

This language in the 2006 Handbook provides Wells Fargo with discretion as to what action Wells Fargo can take after reviewing a disputed termination at the employee's request. However, the 2006 Handbook provides no discretion for Wells Fargo to ignore an employee's request that his/her termination be reviewed by his/her HR consultant, and if necessary by an Employee Relations consultant. There is no evidence in the record that a HR consultant reviewed Culbertson's termination after he sent his letter to Wells Fargo's HR Department requesting such pursuant to its Handbook. CP 145, 161-162. No representative from the Wells Fargo's HR Department contacted Culbertson in response to his February 3, 2014, letter. CP 145, 161-162.

Wells Fargo's Response Brief fails to rebut that Culbertson had raised a question of fact as to whether Wells Fargo's 2006 Handbook made promises of specific treatment in specific situations. Wells Fargo tries to dodge this issue by asserting that Wells Fargo did move and the trial court did not grant summary judgment on this element. Response Brief, p. 29, n.7. This assertion by Wells Fargo is not a true and correct depiction of

the trial court record.[3] In this appeal, Wells Fargo's entire defense to Culbertson's wrongful discharge claim is based on the disclaimers in the Handbook.

The facts in this case are distinguished from the facts in *Quedado.* Quedado contended Boeing's "Code of Conduct" and two company policy documents contained enforceable promises concerning how investigations of employee conduct are to be investigated and how discipline is to be imposed. 168 Wn. App. at 366. The *Quedado* Court concluded that Boeing's Code of Conduct makes no "offer" of new employment or entitlements, and did not make any specific promises as to how employees will be treated in special circumstances. *Id.* at 370. Furthermore, the *Quedado* Court concluded that the two other Boeing documents vest ultimate discretion in Boeing as to how investigations will be carried out and what discipline will be meted out. *Id.* at 371.

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[3] Wells Fargo's memorandum in support of its summary judgment motion explicitly states, "Plaintiff's first claim of wrongful discharge fails as a matter of law because it is undisputed that the employment policy manual of Wells Fargo did not contain promises of specific treatment in specific situations regarding the termination of Mr. Culbertson's employment. As a result, Mr. Culbertson cannot meet the first element of the prima facie case of said cause of action, and it must be dismissed." CP 473. The trial court's order granting summary judgment states, "The Court concludes, in interpreting the language of the Wells Fargo Handbook, that reasonable minds cannot differ the language asserted by Mr. Culbertson in the Wells Fargo Handbook to support his claim, does not sufficiently constitute an offer or promise of specific treatment in specific circumstances." CP 223.

Here, the factual question is not whether its 2006 Handbook reserves discretion for Wells Fargo to determine how to conduct its investigations, and what discipline will be meted out. Rather, the factual question here is whether Wells Fargo's 2006 Handbook makes promises of specific treatment in specific situations which provides "*each* team member" the "*opportunity* to use internal problem-solving resources," for "any work-related problem," and to have a termination decision reviewed by an objective HR consultant at the employee's request. CP 634-636, 688. Its 2006 Handbook vests no discretion in Wells Fargo to deny an employee the opportunity to use internal dispute resolution resources. Its 2006 Handbook mandates that Wells Fargo must afford the employee the opportunity to use internal dispute resolution resources. CP 634-636. Its 2006 Handbook further mandates that each employee will have his/her involuntary termination reviewed by a HR consultant and the Employee Relations consultant assigned to the employee "to obtain related information in order to review the matter and make recommendations to ... management." CP 636, 688.

2. The Disclaimers In Wells Fargo's 2006 Handbook Are Ineffective.

The disclaimer language in Wells Fargo's Handbook is ineffective because it is inconspicuous and inconsistent with its promises of specific

treatment in specific situations.

a. Wells Fargo's Disclaimers Are Inconsistent With Promises Of Specific Treatment In Specific Situations.

The State of Washington Supreme Court has held that employers are not entitled to use their employee handbooks to speak out of both sides of their mouths. "A disclaimer may be negated by later, inconsistent representations by the employer." *Id.* at 374 (citing *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 532 (1992)). "We reject the premise that this disclaimer can, as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make." *Swanson,* 118 Wn.2d at 532. "We note that *even if a disclaimer appears in the same handbook* as the relied upon policy, *summary judgment may be inappropriate.*" *Id.* at 535 (citations omitted) (emphasis added). "[*L*]*anguage in manual of personnel policies created enforceable rights despite the presence of disclaimer in manual.*" *Id.* (emphasis added). "First and most importantly, *an employer is not entitled to make extensive promises as to working conditions—promises which directly benefit the employer in that employees are likely to carry out their jobs satisfactorily with promises of assured working conditions—and then ignore those promises as illusory.*" *Id.* at 536 (emphasis added). "*We hold that the*

questions of reasonable notice and of applicability and effectiveness of the disclaimer involve issues of material fact which must be decided by the trier of fact." *Id.* at 538 (emphasis added).

It is undisputed that Culbertson received the 2006 Wells Fargo Handbook when Wells Fargo hired him, and he relied upon those promises. CP 140-142, 564. As set forth above herein, and in the Opening Brief, Wells Fargo's 2006 Handbook contains mandatory language when it comes to providing "*each* team member" the "*opportunity* to use internal problem-solving resources," and to have a termination decision reviewed by an objective HR consultant at the employee's request. Wells Fargo's promises of specific treatment in specific situations are inconsistent with the disclaimers in its 2006 Handbook. Therefore, the only question of fact which remains is the effectiveness of the disclaimers in Wells Fargo's 2006 Handbook. "[A] disclaimer must be read by reference to the parties' norms of conduct and expectations founded upon them." *Id.* at 535 (internal quotations and citations omitted).

3. Wells Fargo's Disclaimers Are Inconspicuous.

The disclaimers buried in Wells Fargo's 189 page 2006 Handbook are not "conspicuous." CP 585-733. The disclaimer language is not set out in large font, bold, capitalized, underlined, or italicized print, nor is it set out on separate pages. CP 585-733. There is nothing to make the disclaimers

obvious to the eye or mind. There is nothing to attract attention to the disclaimers in order to make them noticeable.

> *At a minimum*, the disclaimer must state in a *conspicuous* manner that nothing contained in the handbook, manual or similar document is intended to be part of the employment relationship and that such statements are instead simply general statements of company policy.

Quedado, 168 Wn. App. at 374 (emphasis added) (citing *Swanson*, 118 Wn.2d at 527) (citing *Thompson v. St. Regis Paper, Co.*, 102 Wn.2d 219, 230 (1984))).

The *Quedado* Court did not give any guidance on how to measure "conspicuous" in regards to employer's disclaimers in handbooks. The *Quedado* Court simply held, "Boeing's disclaimers met the minimum requirement described in *Swanson*," without any explanations as to why or how. 168 Wn. App. at 374. Moreover, the *Swanson* and *Thompson* Courts did not provide any measuring stick for evaluating whether a disclaimer is "conspicuous." Given the total lack of effort by Wells Fargo to make the disclaimers in its Handbook obvious, noticeable, or attracting attention, it is *at the very least* a question of fact for the jury to decide if they meet the minimum requirements for "conspicuous."

B. JUDICIAL ESTOPPEL APPLIES TO WELLS FARGO'S INCONSISTENT ARGUMENTS THAT CULBERTSON'S COMPENSATION AGREEMENT IS BOTH "AN EXCHANGE OF PROMISES," AND A CONTRACT WHICH CAN BE UNILATERALLY MODIFIED.

Wells Fargo asserted to the trial court in this matter (Judge Michael Price) that its compensation agreement with Culbertson was a unilateral contract, subject to modification at any time by Wells Fargo upon reasonable notice to the employee. CP 488-489, 498-500, 1048-1053. Wells Fargo further asserts in this appeal that the 2010 Producer Plan [a.k.a. Appendix A] *signed by both Culbertson and Wells Fargo* was not a "contract" but merely a "note." Response Brief, p. 44. This is a clear contraction of Wells Fargo's assertions to the trial court (Judge Annette Plese) in Wells Fargo's lawsuit against Culbertson. Wells Fargo also makes a red—herring argument in this appeal that "there is no 'exchange of promises' in which Wells Fargo agreed not to exercise its rights to roll out changes to the compensation plan." Response Brief, p. 45.

In its lawsuit against Culbertson Wells Fargo strenuously asserted that the 2010 Producer Plan [a.k.a. Appendix A] signed by both parties was an *agreement* containing an exchange of promises—in essence a bilateral contract—which provided the necessary consideration to support the enforcement of the restrictive covenants in the 2010 Trade Secrets Agreement ("TSA") later signed by Culbertson. Wells Fargo's arguments

in this appeal are a clear attempt to side step the assertions Wells Fargo made to the trial court (Judge Plese) in the lawsuit it filed against Culbertson.

Below are just a few of the arguments Wells Fargo asserted in its lawsuit against Culbertson. Wells Fargo's arguments clearly asserted that the 2010 Producer Plan [Appendix A] (CP 64) was an agreement containing an exchange of promises between Wells Fargo and Culbertson.

> That increased 1% in commissions was not an existing obligation of Wells Fargo, nor an existing benefit for Culbertson ***prior to his agreement*** to enter into the 2010 TSA. *The bargained for exchange of promises was an increase in commission for entering into the new agreement.*

CP 239 (emphasis added). See also CP 64, 565.

> *[T]he 2010 TSA's consideration was the additional 1% commissions which was established in [2010 Producer Plan] Appendix A Culbertson signed....*

CP 250 (emphasis added). See also CP 64, 565.

> Independent consideration involves new promises or obligations previously not required of the parties.
>
> The issue in *Labriola [v. Pollard Group, Inc.*, 152 Wn.2d 828 (2004)], *Labriola* involved an employee who, quote, remained at will and received no additional benefits. Employer incurred no additional obligations from the noncompete agreement. That's the exact opposite of this case.
>
> In fact, when you read the *agreement* that Wells Fargo put in front of Mr. Culbertson, it's as though they had *Labriola,* and they understood we can't just give them to him and have him

> sign it and not offer him anything else additionally on top of his continued employment.
>
> They said in addition to in consideration for signing this, we're going to give you in addition to your continuing employment, additional compensation of one percent new revenue and one percent net new revenue. *They promised that. That was an obligation if he signed this, which he did*, and then they paid it.
>
> Therefore, this Court on Summary Judgment can rule as a matter of law that *this contract is enforceable*. The 2010 TSA is supported by independent consideration, and, therefore it's enforceable.

CP 282. RP 10 (emphasis added). See also CP 64, 565.

> The appendix [2010 Producer Plan] is merely saying we're offering, we're telling you if want to sign this, we are going to give you additional consideration, more money. Culbertson had that choice. He signed it. He got it.

CP 284, RP 12.

> They said hey, *we're going to offer you this. We're promising, obligating ourself. If you sign a new TSA, we'll give you one percent on your revenue, one percent on new net revenue. He signed it. He got paid it. He's obligated by the contract, and that's Washington law.* No Washington law says that's not valid and enforceable.

CP 287. PR 15. (emphasis added). See also CP 64, 565.

Judge Plese (the trial judge in Wells Fargo's lawsuit against Culbertson) ruled from the bench concluding as a matter of law the 2010 compensation plan signed by the parties was a "contract" containing an exchange of promises.

> Now we are in 2009, and December 22nd here's the producer plan. Here's what it is. It does say in here for TSA considerations if you sign this, you're going to get an additional one percent of revenue.
>
> Then 14 days later, he gets this TSA, and he signs that one saying, you know, sure. Great. No problem. I'll sign it, and Wells Fargo says he got the money. I don't think there's any dispute to all of that....

CP 293. Judge Plese further ruled from the bench:

> So at this time, the Court is going to deny the Summary Judgments. I think I could say there's a contract with equitable estoppel is the issue of going to court.

CP 294-95.

Wells Fargo did not assert in its lawsuit against Culbertson that the 2010 Producer Plan was a unilateral compensation agreement which Wells Fargo could change at any time with a "new roll out." That assertion would lack the independent consideration to support the enforcement of the 2010 TSA later signed by Culbertson. See *Labriola v. Pollard Group, Inc.*, 152 Wn.2d at 836-37. "Consideration is a bargained-for exchange of promises." *Id.* at 836.

Wells Fargo asserted to Judge Annette Plese in its lawsuit against Culbertson that the exchange of promises in the 2010 Producer Plan [Appendix A] formed an agreement—a bilateral contract—which is clearly inconsistent with the assertions made by Wells Fargo to Judge Michael Price in this matter.

Flower v. T.R.A. Industries, Inc., 127 Wn. App. 13 (Div. 3, 2005) is directly on point. The *Flower* Court held that the promises exchanged by the employer and the employee formed a bilateral contact. *Id.* at 27.

> "Mutual modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds." *Jones v. Best, 134 Wn.2d 232, 240, 950 P.2d 1 (1998)*. "Without a mutual change of obligations or rights, a subsequent agreement lacks consideration and cannot serve as modification of an existing contract." *Ebling v. Gove's Cove, Inc., 34 Wn. App. 495, 499, 663 P.2d 132 (1983)*. Additionally, mutual assent is required; one party may not unilaterally modify a contract. *Jones, 134 Wn.2d at 240*. The burden of proving that the parties intended to modify the earlier agreement rests upon the party asserting the modification.

Id. at 27-28.

Culbertson's compensation agreement with Wells Fargo exchanges promises to pay Culbertson an additional one percent (1%) commission in exchange for Culbertson's promise to sign "a new TSA" was a bilateral contract—accepted by both parties when they signed the 2010 Producer Plan Agreement. CP 9, 28, 48-49, 64, 429, and 565. This bilateral contract was later modified by mutual agreement when Culbertson and Wells Fargo signed the 2011 Incentive Plan. CP 10, 28, 50-51, 70, 429, and 569. Any further modification of the compensation agreement between Culbertson and Wells Fargo required mutual assent.

Wells Fargo should be judicially estopped from asserting in this lawsuit/appeal that its compensation agreement with Culbertson could be

unilaterally modified whenever Wells Fargo "rolled out" a new compensation plan.

C. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO THE TERMS OF CULBERTSON'S BILATERAL COMPENSATION AGREEMENT WITH WELLS FARGO.

Culbertson averred that no other documents were attached to, enclosed with, or accompanied the 2010 Producer Plan [Appendix A] when the Wells Fargo Spokane Branch Manager presented the 2010 Producer Plan to Culbertson for his signature on December 22, 2009. CP 48, 64, 429, 565. A Wells Fargo representative averred that she provided Culbertson a "package" of documents describing the Wells Fargo Producer Plan effective January 1, 2010. Response Brief, p. 9. Culbertson averred that no Wells Fargo representative explained to him what was meant by the "the plan" referenced in the single-page 2010 Producer Plan [Appendix A] handed to Culbertson by the Spokane Branch Manager before he signed it on December 22, 2009. CP 48-49, 64, 429, 565. Culbertson further averred that he understood his entire compensation "plan" to be the single-page document handed to him by the Wells Fargo Spokane Branch Manager, and no other documents. CP 49, 64, 429, 565.

A genuine issue of material fact exists as to the terms of the 2010 Producer Plan agreement signed by both Culbertson and Wells Fargo. The 2010 Producer Plan agreement signed by Culbertson contains no language

expressly defining the "WFIS [Wells Fargo Insurance Services] Plan." CP 49, 64, 429, 565. The 2010 Producer Plan agreement signed by Culbertson contains no language expressly incorporating contractual terms by reference from other documents. CP 49, 64, 429, 565.

Culbertson averred that no other documents were attached to, enclosed with, or accompanied, the single-page 2011 Incentive Plan when the Wells Fargo's Spokane Branch Manager handed it to Culbertson for signature on November 22, 2011.[4] CP 50-51, 70. Similar to the 2010 Producer Plan signed by Culbertson on December 22, 2009, the single-page 2011 Incentive Plan agreement signed by Culbertson on November 22, 2011, does not contain any provision specifying how commissions will be paid after Culbertson's employment at Wells Fargo is terminated. CP 51-52, 70, 429, 569. The 2011 Incentive Plan agreement signed by Culbertson contains no language expressly incorporating contractual terms by reference from other documents. CP 51, 70, 429, 569. The 2011 Incentive Plan agreement contains the same terms as the 2010 Producer Plan

[4] Wells Fargo does not assert in this appeal that any other documents or "packages" were provided to Culbertson when he signed the 2011 Incentive Plan on November 22, 2011. Instead, Wells Fargo simply asserts that the 2011 Incentive Plan signed by the parties is "irrelevant." Response Brief p. 12, n. 4. However, the 2011 Incentive Plan is directly relevant because it was the last compensation agreement signed by the parties. Without a mutual change in obligations or rights, a subsequent agreement lacks consideration and cannot serve as modification of the existing contract between the parties. See *Flower*, 127 Wn. App. at 27-28; and *Ebling*, 24 Wn. App. at 499.

agreement; however, the 2011 Incentive Plan provided additional compensation of a $1,956.60 payment by Wells Fargo to Culbertson for "grandfathered incidentals." CP 64, 70, 565, 569.

As set forth above, the 2011 Incentive Plan is a bilateral contract—not a unilateral contract. As such, as a matter of law, Wells Fargo cannot unilaterally "roll out" a new compensation plan—regardless of the terms. Any modification of Culbertson's compensation required mutual assent. Id. at 27-28. Thus, unilateral contract analysis is not applicable.

D. THE TRIAL COURT ABUSED ITS DISCRETION DENYING CULBERTSON'S CR 56(f) MOTION.

Arguendo, if the compensation agreement between Culbertson and Wells Fargo was a unilateral contract, a genuine issue of fact exists as to whether Wells Fargo provided Culbertson with "reasonable notice" of its unilateral changes to Culbertson's compensation plan by electronically "rolling out" its 2013 Incentive Plan. "Whether reasonable notice has been given here is a question of fact." *Swanson*, 118 Wn.2d at 529.

Culbertson averred that he never received a printed copy of the 2013 Sales Incentive Plan. CP 142. Culbertson further averred that he did not read the electronic copy of the 2013 Sales Incentive Plan after it was electronically and unilaterally "rolled out" by Wells Fargo. CP 142. Wells Fargo has submitted no evidence into the record showing that Culbertson

opened the electronic link to the 2013 Sales Incentive Plan sent by Spokane Branch Manager Josh Tyndell October 29, 2013, via email.

The trial court abused its discretion denying Culbertson's CR 56(f) Motion to allow Culbertson to inspect his work computer at Wells Fargo because it was reasonably calculated to lead to the discovery of admissible evidence; namely, whether Culbertson opened the electronic link to Wells Fargo's 2013 Sales Incentive Plan.

"Actual notice is reasonable notice." *Govier v. North Sound Bank*, 91 Wn. App. 493, 502 (Div. 2, 1998)(citing *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 435 (1981)).

Nothing in Roger Roper's January 23, 2013, email which Vicki Kitley later forwarded to Culbertson on January 24, 2013, indicated that Wells Fargo had unilaterally modified all compensation agreements with its brokers by "rolling out" a 2013 Sales Incentive Plan. CP 1060-1061. Nothing in Roper's email discussed payment of post-termination commissions. CP 1060-1061. Roper's email discussed Wells Fargo's 2013 roll out of its Incentive Management Tracking ("IMT") system for calculating sales compensation and "true up" for any unpaid receivables. CP 1060-1061. Kitley's January 24, 2013, email to Culbertson simply notified the Spokane brokers that the Spokane office will implement the IMT in July 2013. CP 1059-60. Culbertson's January 24, 2013, email to

Kitley simply confirmed his understanding that the IMT may have little impact on his commissions on insurance "benefits" policies he sold because they "generally have low outstanding receivables." CP 1059. Kitley's January 24, 2013, reply email to Culbertson confirmed his understanding of the impact of IMT on payment of his commissions on benefits insurance he sold. CP 1059. This email did not provide notice that the 2013 compensation plan unilaterally changed the terms of all brokers' compensation agreements with Wells Fargo going forward. CP 1059-1061. Nothing in this email exchange from Roper, Kitley, and Culbertson discussed payment of brokers' post-termination commissions. CP 1059-1061.

Kevin Kenny's December 31, 2012, email to Wells Fargo's executives discussed "updates" to pay practices and mentioned that the 2013 Sales Incentive Plan "clarifies" policies on draw calculations to be implemented April 1, 2013. CP 1029-1031. Nothing in Kenny's December 31, 2012, email provided notice that going forward the 2013 Sales Incentive Plan unilaterally changed the terms of all brokers' compensation agreements with Wells Fargo. CP 1029-1031. Nothing in this email exchange from Kenny discussed payment of brokers' post-termination commissions. CP 1029-31.

Culbertson's December 31, 2012, email to Wells Fargo Spokane Branch Manager Josh Tyndell simply stated that he suspected that the "updates" and "clarifications" in Kenny's email of the same date wer likely to result in "haircuts" for the brokers. CP 1072. This does not show that Culbertson had actual notice that the "roll out" of 2013 Sales Incentive Plan unilaterally changed his compensation agreement with Wells Fargo—especially when it came to payment of post-termination commissions.

Spokane Branch Manager Josh Tyndell's October 29, 2013, email to the Spokane brokers did not provide notice that the 2013 Sales Incentive Plan unilaterally changed the terms of all brokers' compensation agreements with Wells Fargo going forward. CP 1029. Nothing in the email exchange from Kenny discussed payment of brokers' post-termination commissions. CP 1029. Tyndell's October 29, 2013, email simply provided the electronic link to the 2013 Sales Incentive Plan and concluded, "Let me know if you have any questions." CP 1029. This email did not provide notice that the 2013 Sales Incentive Plan unilaterally changed the terms of all brokers' compensation agreements with Wells Fargo going forward. CP 1029.

In *Gaglidari v. Denny's Rest.*, the Court held that the defendant-employer failed to give the plaintiff-employee reasonable notice that it had

changed its policies usually left in the employee's lounge. 117 Wn.2d 426, 425 (1991). "Whether the handbooks might actually be read in the employees' lounge would be wholly fortuitous; it would not be reasonable notice. Plaintiff is not bound by defendant's unilateral revisions of company policy unless defendant gave her reasonable notice of the changes." *Id.* at 435.

Similarly, here, it would be wholly fortuitous for Wells Fargo's employees to actually read policy changes to pay practices left in the "electronic employee lounge" via links in emails. Wells Fargo's 2013 Sales Incentive Plan does not bind Culbertson unless Wells Fargo provided him reasonable notice. This is a question for the jury. An inspection of Culbertson's work computer was reasonably calculated to lead to the discovery of admissible evidence, specifically whether he opened the electronic link to the 2013 Sales Incentive Plan. This evidence is directly relevant to the jury question if Culbertson had actual notice of the 2013 Sales Incentive Plan.

"[T]he court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case." *Coggle v. Snow,* 56 Wn. App. 499, 507 (Div.1, 1990). "The primary consideration in the trial court's decision on the [CR 56(f)] motion for a continuance should have been justice." *Id.* at 508. The trial court had a duty to give Culbertson a

reasonable opportunity to complete the record before ruling on Wells Fargo's summary judgment motion. The trial court abused its discretion by denying Culbertson's CR 56(f) Motion and granting Wells Fargo's Summary Judgment Motion.

E. CULBERTSON IS ENTITLED TO RECOVER HIS ATTORNEYS' FEES AND COSTS PURSUANT TO RCW 49.48.030 AND RAP 18.1.

Culbertson is entitled to recover his attorneys' fees and costs pursuant RAP 18.1(a) and (b) and RCW 49.48.030 if he prevails at trial after this appeal. *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 745 (Div. 3, 2003).

II. CONCLUSION

For the reasons set forth above, and in the Opening Brief, Culbertson respectfully asks this Court to reverse the trial court's judgment in favor of Respondent Wells Fargo and grant summary judgment in favor of Appellant Culbertson.

DATED this 24th day of April, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of April, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

☒ HAND DELIVERY ☐ U.S. MAIL ☐ OVERNIGHT MAIL ☐ FACSIMILE ☐ EMAIL	Scott A. Gingras Winston Cashatt, P.S. Bank of America Financial Center 601 W. Riverside, Suite 1900 Spokane, WA 99201 sag@winstoncashatt.com Facsimile: (509) 838-1416

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