Court of Appeals No. 79321-7-I

No. 98867-6

THE SUPREME COURT OF WASHINGTON

MARK A. FRISBY, a married individual,

Appellant-Cross Respondent,

v.

SEATTLE UNIVERSITY, a Washington non-profit,

Respondent-Cross Appellant.

SEATTLE UNIVERSITY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In its unanimous unpublished opinion (the "Opinion"), Division I correctly found that Seattle University ("SU") properly terminated Mark Frisby's employment for cause because the undisputed facts showed that he had been insubordinate—an express ground for dismissal under his employment agreement (the "Agreement"). The Court of Appeals also carefully reviewed the record with regard to Frisby's remaining, related "breach of specific promise" claim and correctly upheld the trial court's dismissal without prejudice based on Frisby's willful failure to abide by the case scheduling order. In any event, Frisby has no damages for breach of a specific promise with regard to SU's sexual misconduct investigation because, as the Court of Appeals held, the Agreement provided SU with an independent basis to terminate his employment for insubordination.

This is a standard employment dispute that the Court of Appeals resolved properly. It meets none of the criteria under RAP 13.4(b) for the grant of a petition and the Court should deny the petition for review.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's decision to enforce an order requiring the parties to mediate before trial conflicts with Supreme Court case law.

2. Whether the interpretation of a private employer's handbook policy is an issue of substantial public importance.

III. STATEMENT OF THE CASE

A. SU Hires Frisby as Head Men's and Women's Tennis Coach.

SU hired Frisby as its Head Men's and Women's Tennis Coach in 2008. Clerk's Papers ("CP") at 092, ¶ 3. In January 2014, he signed the Agreement, which extended his position at SU to June 30, 2018. *Id.* The Agreement expressly conditioned Frisby's employment on compliance with all SU policies and procedures, including SU's policies prohibiting discrimination, sexual harassment, and retaliation. CP 097, ¶ 2(c); Opinion at 11. Violation of policies constituted grounds for termination. CP 100, ¶ 7(e). The Agreement also gave SU the discretion to terminate Frisby's employment for several other reasons, such as insubordination or conduct that could "negatively impact" SU's moral or ethical standards:

> 7. Termination by University With Cause. University shall have the right to terminate this Agreement for cause prior to its normal expiration. The term "cause" shall include, in addition to and as examples of its normally understood meaning in employment contracts, any of the following:

> (a) A material breach, as determined by the University, of this Agreement by Employee;
>
> * * *
>
> (c) Any serious act of misconduct by Employee, including but not limited to . . . unlawful conduct, . . . insubordination, or any act injuring, abusing, or endangering others;
>
> (d) Any act that, in the sole good faith judgment of the University, brings Employee or the University into public disrepute, contempt, embarrassment, scandal, or ridicule, or that negatively impacts the reputation or high moral or ethical standards of the University;
>
> (e) Violation of any law, policy, rule, regulation, constitutional provision, bylaw or interpretation thereof of the University, . . . which violation may, in the sole good faith judgment of the University, reflect adversely upon the University or its athletic program . . . ;
>
> * * *
>
> "Cause" sufficient to satisfy the provisions of this section shall be determined by the Director or University President or his designee.

CP 100-101; Opinion at 11.

The Agreement expressly stated that it "contains all of the employment terms and conditions to which the parties . . . agreed. No other understandings or representations, either oral or written shall be deemed to exist or to bind the parties." CP 101-102 at ¶ 12. Frisby had

the opportunity to have the Agreement reviewed by his attorney prior to signing. CP 103 at ¶ 18.

B. A Female Undergraduate Athlete Files a Sexual Harassment Complaint Against Frisby.

On January 14, 2015, a sophomore student and athlete on the women's tennis team, "Student A," reported to SU's Athletic Department incidents of sexual harassment and retaliation by Frisby. CP 093, ¶ 4; Opinion at 2. Among other things, Student A reported that Frisby had made unwelcome, intimate physical contact of a sexual nature with her, and that he had made unwelcome comments to her about her physical appearance. CP 093. According to its standard practice, SU placed Frisby on administrative leave on January 16, 2015, pending an investigation into those allegations. CP 093 ¶ 5; CP 105. Frisby's supervisor, Director of Athletics Bill Hogan, informed Frisby that he was temporarily relieved of his duties, and that he was prohibited from coaching or communicating with any student athletes during that time. CP 105; CP 071 at 9-15; Opinion at 2.

SU followed the procedure described in its HR Manual and appointed its HR Compliance and Title IX Deputy Coordinator, Andrea

Katahira, to conduct an investigation.[1] CP 1039, ¶ 5; Opinion at 2. Katahira, a licensed attorney in Washington, had over 15 years of experience conducting such investigations. CP 077 at 16:22, CP 078; CP 1038-1039, ¶¶ 2, 3; Opinion at 2.

Over the next two months, Katahira interviewed 24 witnesses, including Student A, SU staff members, and student athletes. CP 1039, ¶ 7; CP 080 at 6-8. She also met with Frisby on two separate occasions, during which times she discussed the details of Student A's allegations, informed Frisby of the witnesses to the alleged incidents, and afforded him an opportunity to respond to the allegations and provide her with information or evidence that could assist her with the investigation. CP 1039, ¶ 8; CP 057 at 21-24; CP 058 at 4-9; CP 059 at 1-22; Opinion at 4. Frisby took notes during the meetings. CP 055 at 15-18. Katahira maintained an extensive and thorough investigative record and wrote a

[1] SU's HR Manual provides the following with regard to SU's investigation of a sexual harassment allegation:

"This investigation includes an interview with the alleged offending party, wherein he is informed of the nature of the complaint, the identity of the complainant, and the reported information surrounding the allegation. The investigation affords the alleged harasser the full opportunity to respond to the allegations." CP 121.

Notably, this investigation procedure only applies to sexual harassment investigations—it does not apply to investigations regarding other forms of misconduct. *See id.*

comprehensive 52-page report summarizing her investigation. CP 1042-1167.

1. SU concludes that Frisby violated its nondiscrimination and sexual harassment policies—a terminable offense under sections 7(a), (c), (d), and (e) of the Agreement.

On March 26, 2015, Katahira determined that, more likely than not, Frisby had engaged in inappropriate actions against Student A, and thereby violated SU's nondiscrimination and sexual harassment policies. CP 1073; CP 1039, ¶ 7; Opinion at 5. In making this determination, Katahira relied on, among other things: (1) an interview with Mark Hooper, the Assistant Head Coach of the Women's and Men's Tennis Teams, who stated that before Student A had filed her complaint, Frisby had told him on two occasions that he was "worried" Student A might "charge [him] with sexual harassment"; (2) an interview with a tennis camp counselor who had worked with Frisby and Student A, who confirmed that Frisby had made comments about Student A and her boyfriends, and who also confirmed that Student A had told her that those comments made her uncomfortable; and (3) an interview with a male student athlete, who reported that Frisby told him an incoming freshman

female was "very, very attractive" and had "a nice figure." CP 1061-1064, 1071.

2. SU also concludes that Frisby engaged in insubordination—an independent basis for termination under section 7(c) of the Agreement.

In addition to finding that Frisby had violated SU's nondiscrimination and sexual harassment policies, Katahira determined that Frisby engaged in insubordination (also a terminable offense under the Agreement). CP 1091-1092; Opinion at 6-7. In particular, Katahira concluded that Frisby had continued to coach and communicate with student athletes after being placed on administrative leave and during the course of the investigation into the sexual harassment allegations against him, despite being explicitly instructed by Hogan not to do so.[2] CP 1091-1092.; CP 093 ¶ 5; Opinion at 6. In reaching this determination, Katahira reviewed a series of group text messages from Frisby's wife, which were sent to eight of the nine student athletes on the tennis team. CP 1078-1079; CP 1135-1145. The only student athlete left off the group message was Student A. CP 1078. One text message read: "Couldn't be more

[2] Katahira's conclusions are undisputed. Frisby admits that he continued to coach and communicate with student athletes despite his supervisor's directive. CP 280 at ¶ 35.

grateful and proud . . . So sorry for these unforeseen, unfortunate, ill intended circumstances that have had such an impact on all of us." CP 1079; CP 1144. Other texts sent by Mrs. Frisby provided coaching instructions that had come from Frisby himself:

- "He switched [K] in because she beat this girl 6-3, 6-3 before."
- "He thanks you both for your captain leadership!"
- "[S]—he says hit the ball down the middle with this girl."
- "He says [M] needs to lay Australian on Babs serve all the time."

CP 1079-1081; CP 1147-1162.

Katahira also spoke with witnesses who had seen Frisby post a "travel list" of players on his door after being placed on administrative leave. CP 1086.

3. SU terminates Frisby's employment.

Given Katahira's findings, and after his own review of the investigative file, Hogan determined that (1) Frisby had violated SU's nondiscrimination and sexual harassment policies through his conduct toward Student A; and (2) Frisby had willfully disregarded Hogan's directive to refrain from coaching or communicating with students while on administrative leave. CP 093-094 at ¶ 7. Because each of these

violations alone constituted a "serious act of misconduct" justifying termination under the Agreement, Hogan decided to terminate Frisby's employment. CP 107-108. Frisby appealed his employment termination to then-Provost Isiaah Crawford, who invited Frisby to meet with him in person and provide any additional information that Frisby wanted him to consider. CP 110-111; Opinion at 8. Frisby's attorney declined the opportunity on Frisby's behalf. *Id.* Upon review of the investigation report and other information, Provost Crawford upheld SU's termination decision, which became effective on May 14, 2015. *Id.*

C. Frisby's Claims and the Trial Court's Orders.

Nearly two years after his termination, Frisby sued SU for breach of contract (based on the Agreement) and breach of promises of specific treatment (based on the sexual harassment investigation procedure described in the HR Manual).[3] CP 006-007 at ¶ 4.1-¶ 4.2.3.

SU filed a summary judgment motion on Frisby's claims, which the trial court granted in part and denied in part. The trial court's order had the practical effect of dismissing the breach of contract claim but not

[3] Frisby's complaint also asserted a defamation claim against Student A. CP 007 at ¶ 4.3. Student A was later dismissed from the lawsuit.

the breach of specific promises claim. Specifically, the court ruled that the undisputed facts showed that (1) SU had conducted an adequate investigation into the allegations against Frisby; (2) SU's decision to terminate Frisby's employment was based on substantial evidence that it reasonably believed to be true; and (3) SU's decision was not arbitrary, capricious, or made for an illegal reason. CP 749. The court denied summary judgment in part and held that a genuine issue of fact existed as to whether (1) SU complied with the sexual harassment procedure described in the HR Manual and (2) SU had cause to terminate Frisby's employment for insubordination. *Id.*

Prior to trial, and per the case schedule issued under King County Local Rule 4, Frisby was required to provide SU with a written settlement demand, which was to precede the mandatory alternative dispute resolution ("ADR") process. Frisby did not do so and, accordingly, the parties never engaged in ADR. In the weeks following its summary judgment order, the trial court notified the parties on multiple occasions that they were out of compliance with the case schedule and that the case was at risk of being dismissed. *See, e.g.*, CP 758 (court email dated October 29, 2018: "This email is the Court's final reminder that this case

is noncompliant with the Court's case scheduling order, is not being prepared for trial, and is at risk of dismissal in two weeks . . ."). Even after receiving these notifications, however, Frisby did not provide SU with a written settlement demand, nor did he otherwise attempt to initiate the ADR process.[4] As a result, on November 13, 2018, the trial court dismissed his remaining claim without prejudice. Frisby appealed the summary judgment order and the order of dismissal.

D. The Court of Appeals' Opinion.

Division I unanimously ruled that SU did not breach a contract and the trial court did not abuse its discretion in dismissing Frisby's breach of specific promise claim without prejudice. As to Frisby's breach of contract claim, the appellate court held that "SU complied with Washington State law and the employment agreement when it terminated Frisby for cause." Opinion at 13. Specifically, the court held that the undisputed facts showed as a matter of law that SU had terminated Frisby's employment for cause based on insubordination. It explained: "SU's decision to terminate Frisby for cause met the requirements . . . of

[4] Frisby also missed several other deadlines in the case, including the deadline to exchange witness and exhibit lists. CP 922. This is reflective of the appellate court's observation concerning willfulness: "[w]hen a party disregards a court's order 'without reasonable excuse or justification' the act 'is deemed willful.'" Opinion at 17.

the employment contract" because "[a]t a minimum, Katahira's findings supported SU's determination that Frisby committed insubordination under section 7(c) of the contract." *Id.* at 12.[5]

As to Frisby's remaining breach of specific promise claim, Division I explained that the record clearly showed that the trial court had repeatedly reminded the parties that the case may be dismissed under KCLCR 4(g) if they did not comply with the scheduling order's ADR requirement. Opinion at 17. Nevertheless, Frisby "failed to provide SU with the written settlement demand required by the order and needed for mediation." *Id.* Accordingly, the trial court did not abuse its discretion in administratively dismissing the case.

The Court of Appeals denied Frisby's motions to reconsider and publish the Opinion.

IV. ARGUMENT

A. Standard of Review.

This Court accepts discretionary review in only limited circumstances. RAP 13.4(b). Here, Frisby asserts that review is

[5] Although the trial court had found a genuine issue of material fact with regard to insubordination, an appellate court may affirm on any ground supported in the record. *Otis Housing Ass'n, Inc. v. Ha,* 165 Wn.2d 582, 594, 201 P.3d 309 (2009).

appropriate for two reasons: (1) the Orders conflict with this Court's precedent; and (2) this case presents an issue of substantial public importance. *Id.* at (b)(1), (4). Neither of these bases warrant review.

B. The Court of Appeals' Opinion Does Not Conflict With Any Decision of This Court.

Frisby concedes that "[t]his Court has never explicitly addressed whether a failure to attend mediation can support dismissing plaintiff's case," but inconsistently asserts that Division I "directly ignore[d]" this Court's prior rulings by affirming the trial court's dismissal without prejudice. Petition at 7, 9. Frisby mischaracterizes this Court's prior rulings, which involved discovery violations and more severe sanctions such as dismissals with prejudice, not failures to engage in ADR and administrative dismissals without prejudice.

Frisby's argument relies predominantly on this Court's decision in *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002), which analyzed whether dismissal with prejudice was an appropriate sanction for a party's discovery violations. There, the petitioner did not timely disclose possible witnesses or provide complete responses to respondent's discovery requests. *Id.* at 682. The

respondent moved to dismiss the case with prejudice. *Id.* at 683. The trial court granted the motion, which was later reversed by this Court. *Id.*

On review, the Court articulated the following rule:

> When a trial court imposes dismissal or default in proceeding as a sanction for violation of a discovery order, it must be apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a less severe sanction would probably have sufficed.

Id. at 697-98.

In *Rivers* and the other cases Frisby cites, a court imposed a severe sanction in response to a discovery violation. *See, e.g., id.* (dismissal with prejudice in response to discovery violations); *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009) (default judgment in response to a discovery violation; explaining that "[a] court should issue sanctions appropriate to advancing the purposes of discovery"); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) (excluding witness testimony in response to a discovery violation); *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011) (excluding witness testimony—ultimately resulting in a dismissal with prejudice—in response

to a discovery violation). Frisby makes no effort to explain why those decisions apply or should apply to this case, which (1) did not involve a discovery violation, and (2) resulted in a lesser sanction—an administrative dismissal *without* prejudice. The *Rivers* test does not apply, either in precedent or in policy, to Frisby's willful failure to engage in court-ordered ADR prior to trial or the administrative dismissal without prejudice that followed.

The Order Setting Case Schedule required Frisby to submit a written settlement demand 45 days before the trial date as a prerequisite to engaging in the required ADR process. CP 0996. "Frisby does not dispute that he failed to provide SU with the written settlement demand required by the order and needed for mediation. He [also] does not dispute the court warned the parties it might dismiss the case because they had not complied with the scheduling order." Opinion at 17. On three separate occasions, the trial court contacted the parties to warn them that the case was not in compliance and would be subject to dismissal on the trial date:

- **October 17, 2018:** "Absent the parties' timely filing of the Joint Confirmation of Trial Readiness [acknowledging parties' compliance with the ADR requirement], the Court cannot prepare the case for trial assignment, and may enter

an administrative order of dismissal on the date of trial." CP 760.

- **October 24, 2018:** "Absent either the parties' compliance with the ADR requirement or a waiver from that requirement from this court, this case is out of compliance with the case scheduling order and our trial assignments staff will not accept it for assignment to a trial court." CP 759.

- **October 29, 2018:** "This email is the Court's final reminder that this case is noncompliant with the Court's case scheduling order, is not being prepared for trial, and is at risk of dismissal in two weeks . . ." CP 758.

On October 29, 2018, SU's counsel wrote a letter to the court (and included Frisby's counsel) explaining that it had not received a settlement demand from Frisby but that SU "strongly supports ADR" and "wants to resolve this case." CP 755. Frisby continued to ignore the ADR requirement for another two weeks. Finally, the trial court appropriately dismissed the case in accordance with the express language of the local rule, which provides: "Failure to comply with the Case Schedule may be grounds for imposition of sanctions, *including dismissal*, or terms." KCLCR 4(g)(1) (emphasis added); CP 944.

In short, there is no conflict with this Court's prior rulings, which do not address sanctions related to a party's willful refusal to engage in ADR prior to trial. Accordingly, RAP 13.4(b)(1) is not a basis to accept

review. The trial court appropriately exercised its discretion by dismissing the case without prejudice, and the unanimous appellate court appropriately ruled that that the decision was not an abuse of discretion.

C. There Are No Issues of Substantial Public Importance.

Even if this Court were to grant review and later reverse the trial court's dismissal without prejudice with regard to the breach of specific promise claim, Frisby has already conceded that such reversal would be futile given the trial and appellate courts' rulings on the substantive termination. *See* Petition at A-000021 (describing how the trial court's order dismissing the breach of contract claim "compromised and effectively dismissed [the promise of specific treatment] claim"). Accordingly, in an effort to overturn the decision on the substantive termination, Frisby also argues that the Court should review SU's HR Manual language affording an employee accused of sexual harassment with "a full opportunity to respond" to the allegations because it is an issue of substantial public importance. Petition at 15 (citing RAP 13.4)(b)(4)). This argument fails for at least two reasons. First, this issue is of no public importance because it impacts no one other than SU employees and indeed, only those employees who have a complaint of sexual harassment

made against them. Second, even if this Court determines otherwise, the Court's decision would have no impact on the outcome of the case given the appellate court's determination that SU had cause to terminate Frisby for insubordination—an independent basis for termination under the terms of the Agreement.

A private employer's HR Manual is not an issue of substantial public importance. Instead, review under RAP 13.4(b)(4) is reserved for critical issues that have a statewide impact. For example, this Court noted that the "prime example of an issue of substantial public interest" was an appellate decision that had "the potential to affect every sentencing proceeding in Pierce County." *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (emphasis added). This Court has also reviewed cases involving such substantial public issues as sex offender registration, termination of parental rights and statutory child support obligations. *See Matter of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091 (2017); *In re Adoption of T.A.W.*, 184 Wn.2d 1040, 387 P.3d 636 (2016); *In re Marriage of Ortiz*, 108 Wn.2d 643, 646, 740 P.2d 843 (1987). This Court's decisions in all of those cases necessarily have wide-reaching effects and are important to more than just the parties involved.

Here, Frisby suggests that the "substantial public importance" in this case is the meaning of specific language within SU's HR Manual, which states that a person accused of sexual harassment will receive a "full opportunity to respond." Petition at 15. Unlike the public employers referenced in Frisby's cited cases, however, SU is a private employer, and it can define its HR Manual's terms and conditions however it deems appropriate. These terms and conditions will have no impact on non-SU employees or other private employers.

Moreover, even if the Court were to review this issue, it would not change the outcome of the case. SU's HR Manual language affording an accused person a "full opportunity to respond" only applies to investigations into sexual harassment allegations—not investigations involving other types of misconduct, including insubordination. CP 121. The Court of Appeals held that "Katahira's findings supported SU's determination that Frisby committed insubordination under section 7(c) of the contract." CP 121; Opinion at 12. In other words, SU decision to terminate Frisby's employment was made in accordance with the terms of the Agreement, regardless of whether SU provided him with a "full opportunity to respond" to the sexual harassment allegations.

In sum, Frisby cannot show that the public is substantially interested in this Court creating a rule for how private employers must define their investigative procedures or the language in their handbooks. But even if he could, it would make no difference to the outcome in this case. For these reasons, review is inappropriate under RAP 13.4(b)(4).

V. CONCLUSION

This is not a case that warrants discretionary review. For the reasons stated above, Frisby has failed his burden to show that RAP 13.4(1) or (4) apply to the issues he raises, and SU asks that the Court deny the Petition for Review.

RESPECTFULLY SUBMITTED this 3rd day of September, 2020.

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I hereby certify that I electronically filed the foregoing with the Washington State Supreme Court, using the e-File application, and I e-mailed a copy of the document to the following:

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Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

SIGNED at Seattle, Washington, this 3rd day of September, 2020.

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