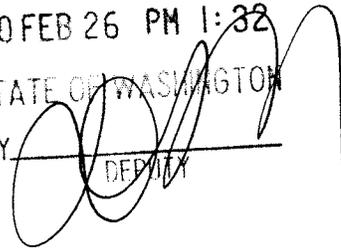


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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON
Case No. 39822-2-II**

ROGER COX,

Appellant,

and

THE BOEING COMPANY,

Respondent.

BRIEF OF APPELLANT

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1. **ASSIGNMENT OF ERROR**

The trial court erred in granting The Boeing Company's motion for summary judgment because there were genuine issues of material fact as to the employment agreement between Roger Cox and Boeing.

2. **ISSUE RELATED TO ASSIGNMENT OF ERROR**

Should the Court reverse the summary judgment because there are genuine issues of material fact as to whether Boeing breached the Employment Agreement between Roger Cox and Boeing?

2. **STATEMENT OF FACTS**

Roger Cox was employed by the Boeing Company. He had been employed by Boeing since 1989 (with a small gap for reduction in force in 1995-96). CP 341-348. Beginning June 2005, he was employed in a group with Boeing; one of his primary duties was to create a model of the ITAR (International Traffic in Arms Regulations). CP 41. This was a particularly sensitive subject in Boeing at the time, because a consent decree was at issue. CP 264-65.

His supervisor was David Badley. Mr. Cox and Mr. Badley had problems beginning soon after Mr. Cox started working for the group. Though the defendant brings up some issues concerning statements supposedly made by

Mr. Cox, those are not at issue in this case. They were not part of the Alternative Dispute Resolution (ADR) matter that is at issue. CP 301; 323-325.

The ADR at issue involves two Corrective Action Memo's (CAMS). Those CAMS involved what Mr. Badley and Boeing contend were Roger Cox's alleged failure to follow the management direction of David Badley, including the distribution of information concerning the ITAR Model. CP 301.

Mr. Cox vehemently denies that he failed to follow management direction. CP 318, 323, 325, 326,

After Roger Cox received the second CAM, he requested ADR. According to PROCEDURE PRO-780, there are several steps steps to the process. Initially, the ADR personnel determines if the employee is eligible. Roger Cox was found eligible. CP 284

Next is internal mediation. At that stage a Resolution Advocate acts as a mediator. In this case, the mediation was very short. CP 285

The mediation supervisors had questions about whether Mr. Badly, acting as the Boeing Representative, was acting in good faith. CP 285. Consequently, there was no resolution at the internal mediation stage. CP

285. The mediator came out of the meeting and questioned the ADR case managers about the good faith of the management representative. CP 285. However, in their depositions, the mediation confidentiality privilege was raised and Ms. Conrardy and Wooten would not answer further questions about the discussion with the mediator. CP 285.

Next, because there was no resolution at the internal mediation stage and management failed to participate in good faith, Roger Cox requested a Peer Panel Review. He was eligible for the Peer Panel Review. 286-87.

Procedure Pro-780 provides that a hearing will be conducted and the decision will be based on a majority vote. That procedure also provides as follows:

3.a.(10) The decision of a peer panel is binding upon the Company. . . .
CP 181.

The peer panel review was scheduled for October 2006. CP 288. However, that review was never held, because Marcie Lombardi, an attorney working for Boeing, called Teri Conrardy, the ADR case manager, and stated that Mr. Cox would be put on leave at some point and to cancel the hearing. CP 289.

Though Ms. Conrardy stated that it was policy to cancel such hearings

when a person is on leave, there is nothing written that allows such a procedure. CP 290.

Moreover, Ms. Conrardy would have expected the panel to meet by October 21, 2006, which was before Mr. Cox was put on leave (October 27, 2006). CP 291. Nonetheless, Ms. Conrardy cancelled the hearing at the request of Marcie Lombardi. Ms. Conrardy had no knowledge of any authority Ms. Lombardi had to cancel such a hearing. CP 293

In fact, this is the one and only time that Ms. Conrardy is aware of where a panel had been cancelled. CP 296. There is nothing in the document itself that allows for such a cancellation. Neither is there any way an employee would know that a cancellation was possible for any reason.

Nonetheless, the hearing was cancelled. Roger Cox was put on leave and eventually terminated without notice on February 14, 2007, though the document was not signed until February 22, 2007 and March 7, 2007. CP 373.

Though a Boeing employee states that employee corrective action review board (ECARB) for Everett was put in place in early 2007, the employee with knowledge about such corrective action Boards states that the ECARB was not put into place until November 2006—after the Peer Panel Review Board

was scheduled to meet. CP 298-299.

3. **ARGUMENT**

a. ***The Trial Court Erred in Granting Summary Judgment Because There Were Genuine Issues of Material Fact.***

Summary Judgment should be denied when there are genuine issues of material fact. Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact. LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). The moving party faces a heavy burden in obtaining a summary judgment; the moving party must prove the absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Jacobson v. State, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

The basic rule as to the moving party's burden in a motion for summary judgment is that:

“One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent would, at the time of trial, have the burden of proof on the issue concerned.” (emphasis supplied)

Preston v. Duncan, 55 Wn.2d 678, 682, 346 P.2d 605 (1960).

The appellate court will undertake the same inquiry as the trial court in reviewing summary judgment. Wilson v. Steinbach, 98 Wn.2d

434, 437, 656 P.2d 1030 (1982).

b. **Summary Judgment Is Not Proper If a Contract Has Two or More Reasonable but Competing Meanings.**

Summary judgment is not proper if the parties' written contract viewed in light of the parties' other objective manifestations has two or more reasonable but competing meanings. Hall v. Custom Craft Fixtures, Inc., 87 Wn. App. 1, 10, 937 P.2d 1143 (1997). In that case the court found that a letter created an ambiguity and summary judgment was not proper.

c. **Whether the Policies Were Part of the Contract Is a Question of Fact.**

Whether the Boeing policies constituted a part of the contract is a question of fact.

“The more modern view--and the view in keeping with the modern analysis of other types of contracts--is that the question whether employee handbook provisions are part of the contract is a question of fact. That is, the analysis is the same as that generally used to determine whether a contract has been formed: Would a reasonable person looking at the objective manifestations of the parties' intent find that they had intended this obligation to be part of the contract?”

Swanson v. Liquid Air Corp., 118 Wash.2d 512, 523-24, 826 P.2d 664 (1992). In Swanson, the court held that it was a question of fact as to whether a memorandum altered the at-will nature of the contract.

- d. **The Motion for Summary Judgment Should Have been Denied Because There Are Genuine Issues of Material Fact Concerning Boeing's Compliance with the Procedures Applicable to its Employee, Roger Cox.**

The trial court erred in granting the motion for summary judgment there are genuine issues of material fact concerning Boeing's compliance with the procedures applicable to its employee, Roger Cox.

- e. **Boeing Acted in Bad Faith.**

Boeing acted in Bad Faith. First, Boeing failed to follow the process because there was a lack of good faith at the mediation session. "There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." Metropolitan Park Dist. v. Griffith, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986). In that case, the court found that the contracting party seriously considered the proposed changes. Metropolitan Park Dist., 106 Wn.2d at 425. Consequently, there was no bad faith dealing under the contract.

The case at Bench is far different: There was a lack of good faith at the mediation and it was of such a concern that the mediator had to inquire of the case managers what should be done. By its failure to honor its own policies in good faith, Boeing breached the contract.

f. **Boeing Breached the Contract by Ignoring its Own Policies.**

Boeing breached the contract by ignoring its own policies. Boeing breached its policies outright. When the failed mediation did not deter its employee, Roger Cox, Boeing outright refused to follow the policy.

As is outlined in Procedure Pro-780, there are specific steps in the ADR process. After refusing to mediate in good faith, Boeing then refused to follow the Peer Panel Review process.

Pro-780 states that the result of the Peer Panel Review is ***binding*** on Boeing if the employee accepts the outcome. There is no provision for cancelling a Peer Panel Review. Nonetheless, Boeing proceeded to cancel the Peer Panel Review. This was done at the direction of an attorney employee of Boeing and by the ADR personnel, though there is no provision allowing for such a cancellation. Boeing then lied to Roger Cox about the cancellation, stating that the hearing had just been delayed.

g. **There Are Genuine Issues of Material Fact as to the Terms of the Contract Between Boeing and Roger Cox.**

There are genuine issues of material fact as to the terms of the contract between Boeing and Roger Cox. The contract between Roger Cox and Boeing included the unchanged Policies and Procedures applicable to

all Boeing Employees in his category.

Boeing's reliance on Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984) is misplaced. Thompson does stand for the proposition that an employer can retain control over its policies. However, the court went on to state as follows:

“Additionally, policy statements as written may not amount to promises of specific treatment and merely be general statements of company policy and, thus, not binding. Moreover, the employer may specifically reserve a right to modify those policies or write them in a manner that retains discretion to the employer.”

Thompson, 102 Wn.2d at 231.

In this case, the statements amounted to promises of specific treatment. Pro-780 specifically states that the outcome of the ADR Process is *binding* on the employer.

Unless that portion of the statement is removed, the defendant's argument is unreasonable. In essence, Boeing states that the outcome of the process is binding unless Boeing says it is not.

The argument as to being able to amend the policies is also inapposite. There is no evidence that the applicable policies were ever amended, cancelled or revoked.

It is clear that an employer may alter or amend the policies stated

in the employee handbook. Gagliardi v. Denny's Restaurants, Inc., 117 Wash.2d 426, 434, 815 P.2d 1362 (1991). However, those policy changes do not bind the employee until the employee has received reasonable notice of the changes. Gagliardi, 117 Wn.2d at 435.

Though Boeing argues that its ability to amend the policies means that Boeing is not bound by the policies, that is incorrect.

There are two ways an employer can obligate itself to provisions in the employee handbook: First, the parties can agree to contractually obligate themselves to the employee handbook provisions; second, “even absent a contractual agreement, if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of *specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship.”Duncan v. Alaska USA Federal Credit Union, Inc., 148 Wn. App. 52, 60, 199 P.3d 991 (2008). Where the policy creates a promise of specific treatment in specific situations, the employee reasonably relies on those statements, and the employer breaches the promise, the employee has proved his case for a breach of the employment agreement. Duncan,

148 Wn. App. at 60.

In this case, the very policy itself states that Boeing is bound by the policy. Under Boeing's analysis, the policy—and the contract—are at best ambiguous.

A contract is ambiguous if it can be understood in more than one sense. R.A. Hanson Co. v. Aetna Ins. Co., 26 Wn. App. 290, 295, 612 P.2d 456 (1980). Determination of ambiguity is a question of law. Hanson, at 495. An ambiguous contract should be construed against the drafter. See McGary v. Westlake Investors, 99 Wn.2d 280, 287, 661 P.2d 971 (1983).

Construing the contract in favor of the non-moving party, the motion for summary judgment should have been denied.

h. **Boeing Also Violated Policy Pro-1909**

Boeing also violated Policy Pro-1909. Pro 1909 states that specific steps are to be taken before an employee is disciplined. In this case, those steps were not taken. Roger Cox denies that he was given the counseling and discussion before the discipline. Because there is a genuine issue of material fact, the court should have denied the motion for summary judgment.

i. **Boeing Violated BPI-2616 by Failing to Investigate in a Timely Manner.**

Boeing violated BPI-2616 by failing to investigate in a timely manner. Paragraph "1" of BPI-2616 requires that investigations be conducted "as promptly as practicable. . ." In this case, however, the investigation lasted from at least some time in October 2006, until Mr. Cox was wrongfully terminated in February or March 2007. That investigation was not prompt and was a violation of the Boeing Policies upon which Mr. Cox relied.

j. **Boeing Never Modified its Procedures with Regard to Roger Cox.**

Boeing Never Modified its procedures with regard to Roger Cox. Boeing has a large list of personnel policies applicable to its employees. Those policies are specific as to what is required and to whom the policies apply. The policies are also specific as to when they are effective and whether they supersede any other policies. There is no evidence that the policies at issue in this case were altered, modified or amended.

Here, there was never a change to the pertinent portion of the employee policies during the time before Roger Cox was terminated. The only argument is as to the effective date of the ECARB: one employee

states that it was effective in early 2006; another employee states that it was not until November 2006. In any event, there was no showing that any notice was ever given to Roger Cox.

As to the ADR rules, there was never a change during the relevant period. Roger Cox reasonably relied on the ADR rules. The ADR process was well documented; the rules for that process state that the result of the Peer Panel Review will be binding. Even the ECARB rule, BPI 3946, states "Supersedes None". Thus, the ADR rule was in effect.

- k. **Boeing Waived the Attorney-Client privilege and the "Mediation Privilege" and the facts concerning each should be construed against Boeing..**

In this case, Boeing has hidden behind attorney client privilege in the testimony of Marcie Lombardi and the production of documents. Ms. Lombardi testified in this matter, and the privilege should be deemed waived. The attorney-client privilege is waived when: "(1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting parties; (2) through this affirmative act, the asserting party put the protective information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense." Seattle Northwest Securities

Corp. v. SDG Holding Co., 61 Wn. App. 725, 742, 812 P.2d 488 (1991).

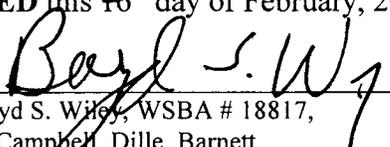
In this case, Boeing waived the attorney client privilege by having its employee attorney testify in this matter. The ADR representative also testified that the Peer Panel Review was cancelled at the order of Boeings attorney/employee, Marcie Lombardi.

Similarly, Boeing has waived the alleged mediation privilege. The mediator discussed the matter of the Boeing Representative, David Badley, and his lack of good faith at the Mediation. She discussed this matter with the ADR representatives; those representatives were not part of the mediation process, and the discussion is not covered by the mediation privilege.

4. **CONCLUSION**

Because there are genuine issues of material fact as to the contract and the Boeing's Breach of the contract, the trial court erred in granting the motion for summary judgment. The Order Granting Summary Judgment should be reversed and the case should be remanded for trial.

RESPECTFULLY SUBMITTED this ^{25th} 16th day of February, 2010.


Boyd S. Wiley, WSBA # 18817,
of Campbell, Dille, Barnett,
Smith & Wiley, PLLC
Attorney for Appellant

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned sent to the Attorney of Record for Respondent a copy of this document via e-mail pursuant to an agreement between the parties.

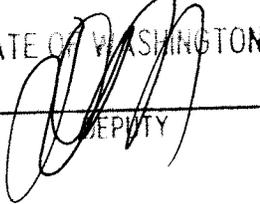
I certify under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

Puyallup WA 2-25-10 M. A. 22m
PLACE DATE SIGNED

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STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ROGER COX,

Appellant,

and

THE BOEING COMPANY,

Respondent.

No. 39690-4-II

**AFFIDAVIT OF
SERVICE**

MELINDA L. LEACH, being first duly sworn on oath, deposes
and says:

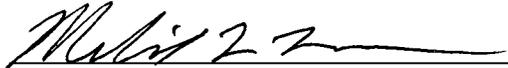
That on the 25th day of February, 2010, she delivered a true copy
of the **Brief of Appellant** by email addressed as follows and caused to be
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That also on the 26th day of February, 2010, she caused to be
delivered the original and one copy of the **Brief of Appellant** via ABC

Legal Messengers to the Court of Appeals, Division II, 950 Broadway,
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MELINDA L. LEACH

SUBSCRIBED AND SWORN to before me this 25th day of

February, 2010.




Printed Name: M. Y. Lewandowski
NOTARY PUBLIC in and for the State of
Washington residing at 101212
My commission expires: 10/15/12

Affidavit of Service

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