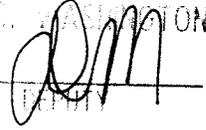


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STATE OF WASHINGTON

BY



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

ROGER COX,

Appellant,

and

THE BOEING COMPANY,

Respondent.

REPLY BRIEF OF APPELLANT

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1. ARGUMENT

a. *Response to Boeing's statement of facts.*

Though the defendant, Boeing, goes into a long summary of the alleged reasons for termination of Roger Cox, that statement of facts is not material to the issues in question. The statements are immaterial for two reasons: because Mr. Cox disputed the reasons; and because the very issue to be decided at the peer panel review was whether Boeing had supported the reasons for the termination. The Peer Panel Review is to determine whether there has been a misapplication of Boeing Policies. RP 178.

b. *The trial court erred in granting summary judgment because there are 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 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).

In this case, the issues of fact were disputed. There were issues as to the the interpretation of the contract. Consequently, the trial court should have, but did not, draw all inferences in favor of the non-moving party, Roger Cox.

c. **The Peer Panel Review Process was to determine whether Roger Cox had violated any employment policies.**

Though Boeing argues otherwise, the very heart of the question was whether there was any violation of personnel policies. That is at the heart of the Peer Panel Review as well. That Review is to determine whether there had been a misapplication of Boeing Policies. That was at the heart of the matter here. Mr. Cox believed there had been a misapplication of those processes and he properly requested alternative dispute resolution according to the company policies. Boeing then failed to follow the basic policies by cancelling the Peer Panel Review without authority.

d. **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.

Boeing is misleading in its quote of Burnside v. Simpson Paper Co., 123 Wn.2d 93, 864 P.2d 937 (1994). In Burnside, the court addressed whether the language in an employment manual could be read to imply that an employee could only be terminated for cause:

The language in the guide, entitled “Simpson's Management Guide”, at least arguably supports the notion it was binding on Burnside's superiors in the company, thus binding the company in its dealings with him. The guide suggests terminations will be for cause only, and will occur after warning. ^{FN8}

FN8. Under “Types of Terminations,” the following list appears. The categories seem to be exhaustive, and indicate only terminations “for cause”:

1.2 Terminations will be classified as:

- (a) Resignations, if initiated by the employee.
- (b) Releases, if initiated by the company *for cause*.
- (c) Curtailment, if initiated by the company for reduction of work force.
- (d) Retirement, when an employee commences to receive normal, early or disability retirement benefits.
- (e) Deceased, upon death of employee.

Burnside, 123 Wn.2d at 106. The Court went on to note that it would have been error to grant a motion for summary judgment because it was a question of fact for the jury whether the language was as a promise of specific treatment and whether that was a promise upon which the plaintiff could reasonably rely. Burnside, 123 Wn.2d at 106. Thus, the citation to the

case is misleading.

The trial court incorrectly granted the motion for summary judgment because there were genuine issues of material fact as to the promises in the contract and the reliance of Roger Cox on Boeing's promises.

e. **Boeing's argument on PRO-780 is circular.**

Boeing argues that PRO-780 does not immunize Roger Cox against **further** misconduct. That argument is circular. The very question of whether there was **any** misconduct was what the Peer Panel Review process was designed to decide.

In this case, the peer panel review process was designed as an alternative method of dispute resolution. However, that process was cancelled at the whim of Boeing personnel. That was a violation of the promises made to Roger Cox in the PRO-780 steps to dispute resolution where Boeing stated that the outcome would be **binding** on Boeing.

f. **Boeing Acted in Bad Faith.**

Boeing acted in Bad Faith and does not even try to argue otherwise. First, Boeing failed to follow the process because there was a lack of good faith at the mediation session. 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 bad faith, Boeing breached the contract. Boeing then went on to cancel the peer panel review without any authority to do so. Those acts constitute bad faith, as Boeing tacitly admits.

g. It is clear that Roger Cox relied on the promises of specific treatment in specific situations.

Boeing is again misleading in arguing that Roger Cox did not rely on the promise of the ADR Procedures. Mr. Cox relied on the procedure in asking for the mediation and the Peer Panel Review. He also relied on the language of the document itself, Pro-780, where there was nothing that would allow cancellation of the Peer Panel Review. CP 310-311. Consequently, his testimony and actions show that Roger Cox relied on the promises made by Boeing.

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2. CONCLUSION

Because there are genuine issues of material fact as to the contract and 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 28 day of April, 2010.



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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 4-28-10 M. S. Wiley
PLACE DATE SIGNED

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