

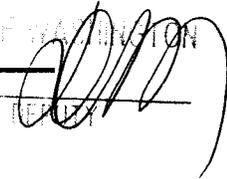
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COURT OF APPEALS  
DIVISION II

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No. 39822-2-II

STATE OF WASHINGTON

BY \_\_\_\_\_



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

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**ROGER COX,**

**Appellant,**

**v.**

**THE BOEING COMPANY,**

**Respondent.**

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**ORIGINAL**

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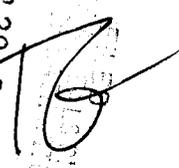
**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Appellant Roger Cox was fired from his job with Respondent The Boeing Company after an internal Boeing investigation confirmed that Cox had repeatedly and willfully violated his supervisor's clear directions. Cox had been disciplined for this and other misconduct time and time again and he had been warned at least twice that he was risking his job if he continued to violate and ignore his supervisor's directions. When the second of two, 5-day suspensions failed to correct Cox's pattern of insubordination, Boeing finally terminated his employment.

Cox, an at-will employee, contends that his firing gives rise to an "employee handbook" cause of action first recognized by the Washington State Supreme Court in *Thompson v. St. Regis Paper Co.* Although his briefing, both on appeal and before the trial court, is far from a model of clarity, Cox essentially alleges that his termination violated three Boeing procedures: Boeing PRO-1909 and BPI-2616, which outline Boeing's approach to employee discipline and corrective action, and PRO-780, which established an internal, Boeing alternative dispute resolution process. In order to prevail on his employee handbook claim, Cox must prove three requirements: (1) that Boeing's procedures amounted to promises of specific treatment in specific situations; (2) that Cox justifiably relied on these promises; and (3) that Boeing breached these

promises of specific treatment when it terminated him. The trial court, the Honorable Thomas McPhee presiding, granted Boeing's Motion for Summary Judgment, concluding there was no evidence that Boeing had made promises of specific treatment in the procedures and that there was no evidence that Cox had justifiably relied on Boeing's procedures. Judge McPhee also found no evidence that Boeing had breached either of its two discipline policies. Faced with a complete failure of proof on these required elements, the trial court dismissed the action. This appeal followed.

The trial court's ruling was correct and should be affirmed. The record demonstrates that the Boeing procedures at issue in this matter—Boeing PRO-1909, BPI-2616, and PRO-780—are not promises of specific treatment in specific situations and thus, are not enforceable under Washington law. The language Cox seeks to enforce—that is, where he even identifies specific language—is permissive, not mandatory, and therefore not a promise of specific treatment. Moreover, Boeing's procedures conspicuously state that they "[do] not constitute a contract or contractual obligation," a clear and permissible disclaimer that Cox admits he read and understood. In addition, and as the trial court observed, the record contains no evidence demonstrating that Cox justifiably relied upon the procedures at issue.

Cox, who had sought to appeal one of his suspensions through Boeing's internal Alternative Dispute Resolution ("ADR") procedure, primarily argues that once he invoked Boeing's ADR process, he became immune from further progressive discipline for additional misconduct until after his ADR claim ran its course. Not surprisingly, there is nothing in Boeing's ADR process that serves to immunize employees from the consequences of future acts of misconduct. As Judge McPhee correctly observed:

Boiled down to their essence, [Cox's claims] are that he participated in the process of addressing the transgressions that he was initially accused of committing. But then it seems to me, the record is indisputably the case that upon the completion of the investigation, which showed that continued violations of policies that would permit an at-will termination, he was terminated for those reasons, and to argue that somehow justifiable reliance on the earlier process inoculated him from that consequence, permitted him to commit the acts that he was accused of committing, it seems to me simply cannot meet the standard required by Thompson.

RP 37-38.

Cox lost his job because he repeatedly insisted on doing whatever *he* thought best, even after being suspended twice for failing to follow his supervisor's direction and other misconduct. Because nothing in Boeing's policies or procedures so much as hints that he would not be fired for his

persistent insubordination, or that filing an ADR challenge would immunize him from future discipline, the trial court was correct to dismiss Cox's claims on summary judgment. This Court should affirm.

## **II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES**

### **A. Assignment of Error**

Boeing assigns no error.

### **B. Statement of Issue**

Did the trial court correctly determine that Cox failed to produce sufficient evidence to support the three elements of his *Thompson* employee handbook claim, specifically: (a) evidence of promises of specific treatment in specific circumstances; (b) evidence that Cox justifiably relied on such promises; and (c) evidence that Boeing breached such promises?

## **III. STATEMENT OF THE CASE**

As set forth in more detail below, during his last years at Boeing, Cox established a pattern of ignoring his supervisor's directions, forcing Boeing to discipline him repeatedly. He claims that after he sought an internal ADR appeal of his second 5-day suspension, he was protected against discipline for new acts of insubordination until after his appeal had run its course. But Boeing's procedures provide no such immunity. When a final investigation revealed that Cox was continuing to defy his

supervisor's instructions while his ADR appeal was pending, Boeing properly suspended the ADR appeal and terminated Cox's employment.

**A. Overview of Cox's Employment with Boeing**

Roger Cox was employed by Boeing from August 2, 1987, until he was discharged on February 14, 2007.<sup>1</sup> CP 93 (Declaration of Kathie Powell ("Powell Decl.") at Ex. A); CP 194 (Declaration of Tim Sayers ("Sayers Decl.") at Ex. A). During his last years with Boeing, Cox worked as a modeler, a position that involves creating graphical presentations of complex procedures and concepts. CP 138 (Declaration of David Badley ("Badley Decl.") ¶ 3).

During all times relevant to this lawsuit, Cox was employed at-will. CP 93 (Powell Decl. at Ex. A). Cox understands what "at-will" means in the employment context:

Q. All right. Do you understand the concept of at-will employment?

A. Yes, I do.

Q. What -- how -- how do you understand the concept of at-will employment?

A. At-will employment says there is no contract.

...

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<sup>1</sup> The Corrective Action Memo discharging Cox was signed February 22, 2007, but his discharge was effective February 14, 2007.

Q. . . . is the concept of at-will employment something that's new to you or is this something that you've understood during your adult life?

A. It's something I've understood my entire lifetime.

Q. Okay. Do you understand at-will employment to mean that either the employer or the company can choose to end the relationship at any time?

A. That is correct.

CP 208-09 (Declaration of Tammy Sittnick at Ex. A ("Cox Dep.") at 144:8-145:1).

**B. Cox's Performance Problems**

In June 2005, at the recommendation of supervisor David Badley, Cox joined Boeing's Corporate Global Trade Compliance ("GTC") group, the entity within Boeing's Corporate Office of Internal Governance responsible for ensuring Boeing's compliance with the International Traffic in Arms Regulation ("ITAR").<sup>2</sup> CP 137-38 (Badley Decl. ¶¶ 2-3). Cox's primary job within GTC was to create a model that could be used internally within the GTC group to assist GTC Export-Import Systems personnel better identify ITAR compliance requirements. CP 138 (Badley Decl. ¶ 4). Instead of focusing on his assigned tasks, however, Cox

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<sup>2</sup> As discussed more fully below, the ITAR regulations generally forbid the sharing of information about defense and military technologies with foreign nationals unless the sharing is authorized by the U.S. Department of State or allowed under a special exemption. CP 137-38 (Badley Decl. ¶ 2). Violation of the ITAR can result in severe consequences for defense contractors like Boeing. *Id.*

repeatedly pursued unauthorized projects outside of his assigned job duties even when directly instructed not to do so.<sup>3</sup>

**1. Cox Repeatedly Contacts Outside Vendors in Violation of Badley's Instructions**

As a modeler, Cox had no purchasing authority at Boeing. CP 139 (Badley Decl. ¶ 7). Yet, Cox repeatedly contacted outside vendors about purchasing software. When Badley discovered that Cox was contacting outside vendors about procuring software, he told Cox to stop acting unilaterally and to follow the correct process:

I understand that you are conducting a vendor meeting today. Please coordinate any further vendor meetings with myself and Mark Bryant first. . . . This is also outside your [Responsibility, Authority, and Accountability], as we discussed, regarding the core export requirements.

CP 148 (Badley Decl. at Ex. C).

Two days later, on November 4, 2005, Badley sent an email to the entire GTC group, including Cox, reminding them of the proper procurement protocol. CP 139; 150 (Badley Decl. ¶ 8, Ex. D).

Despite receiving these two emails, Cox continued to deal directly with outside vendors without following the normal process. On

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<sup>3</sup> Cox's pattern of disregarding management directives and doing whatever he thought best had also been a problem in prior assignments. CP 57-60 (Brad Olson Decl.); CP 45-55 (Joanne Kuhns Decl.).

December 6, 2005, after learning from a vendor that Cox was continuing these unauthorized contacts, Badley sent Cox another email:

I understand from Penny Knelman of Telelogic that you have been speaking with Telelogic regarding purchases. . . . You are to cease any conversations with the vendor, as well as any with SM&P. . . . This also includes ceasing any further or ongoing contact with this and all other vendors such as Documentum and IBM. . . . See me first if you require technical contact or support from any vendors, for approval.

CP 139-40; 152 (Badley Decl. ¶ 9, Ex. E).

Two weeks later, *and after having been told to stop at least three times*, Cox contacted a vendor and downloaded the vendor's software onto Boeing's servers without first obtaining Badley's approval. CP 140; 155-56 (Badley Decl. ¶ 10, Ex. F). Badley responded immediately, emailing Cox that contacting the vendor was "non-compliant with the directions I gave you recently to not have further contact with vendors or supplier management unless authorized by me." CP 155 (Badley Decl. at Ex. E). Cox admitted contacting the vendor, but tried to justify his actions, saying he had "not done anything except keep Boeing out of trouble with the IRS." CP 155 (Badley Decl. at Ex. E).

As a result of his failure to stop contacting outside vendors, Cox was issued a Corrective Action Memo, or "CAM," on January 6, 2006. The CAM states:

During the month of December 2005, you failed to follow management direction. Specifically, you contacted a Boeing vendor after being directed, both verbally and by e-mail, not to contact any vendors without prior approval from your manager. You also communicated with a contract labor employee about a situation after you were verbally directed by your manager not to discuss the situation with that employee. Your behavior is inappropriate.

CP 158 (Badley Decl. at Ex. G).

**2. Cox Repeatedly Shares the ITAR Model Outside the GTC Contrary to Badley's Express Instructions**

Another example of Cox's open insubordination was his persistent effort to share the ITAR model with people outside of the GTC group despite being repeatedly told not to do this.

**a. Background on GTC and Boeing's Implementation of the ITAR**

A brief background on GTC's role in ensuring Boeing's compliance with the ITAR is helpful to understand the problems and potential liability that Cox's conduct could create for Boeing. The ITAR is a set of complex U.S. government regulations that control the export and import of defense-related articles and services on the U.S. Munitions List. The Department of State interprets and enforces the ITAR. CP 41 (Declaration of Marcie Lombardi ("Lombardi Decl.") ¶ 3). To better manage its compliance with the ITAR, Boeing created the GTC group. *Id.* GTC is responsible for

export compliance activities, including compliance with the ITAR. CP 40 (Lombardi Decl. at ¶ 2).

In order to ensure that Boeing Commercial Airplanes ("BCA") and Integrated Defense Systems ("IDS"), two of Boeing's key operating entities, comply with the ITAR, GTC develops compliance requirements. GTC then disseminates the approved compliance requirements to BCA and IDS. BCA and IDS then implement the requirements through their own internal compliance programs. CP 41 (Lombardi Decl. at ¶ 4).

Because of the serious penalties associated with ITAR violations, including fines and the loss of export privileges, it is essential that Boeing, one of the world's largest exporters, strictly comply with the regulations. CP 41 (Lombardi Decl. ¶ 5). Dissemination of compliance guidance, such as the ITAR model Cox was working on, that has not been vetted and approved by GTC could lead to non-compliance and serious penalties for Boeing. *Id.* Badley did not want the ITAR model Cox was working on to be distributed or used outside of GTC for two reasons: (i) It was incomplete and had not yet been reviewed and approved for final use by GTC; and (ii) It was never intended to be used by employees who were not experienced export personnel. CP 41 (Lombardi Decl. ¶ 6). If BCA or IDS personnel used or relied on the ITAR model developed by Cox,

and, as a result, made a mistake, Boeing could have been at risk for serious export compliance violations. *Id.*

**b. Badley Learns Cox Is Sharing the ITAR Model Outside GTC and Tells Him to Stop**

On March 1, 2006, having learned that Cox was sharing the ITAR model outside GTC, Badley emailed Cox and directed him to "cease discussions" with BCA and "move the published version of the ITAR model to a password protected section of the website." CP 140-41; 160 (Badley Decl. ¶ 12, Ex. H).

Six days later, Cox brashly violated Badley's clear directive and emailed three BCA employees to inform them that he was "working on alternate ways to share" the ITAR model despite "constraints." CP 220 (Cox Dep. at Ex. 2). Then, on March 8, 2006, Cox emailed BCA employee John Rhodes and told him that he would "bring . . . a CD that has the model on it. Then those who want copies can make them." CP 221 (Cox Dep. at Ex. 2).

On March 13, 2006, Badley again emailed Cox informing him that he was not to discuss the model outside of GTC without prior approval. CP 141; 163 (Badley Decl. ¶ 13, Ex. I). Despite yet another clear directive, on March 23, 2006, Cox emailed BCA employee Jack Goodstein the network path to the ITAR model website. CP 226 (Cox Dep. at Ex. 2).

Now at the end of his rope, Badley directed Cox to limit discussions of the ITAR model to only those three people within the GTC group specifically dedicated to the development of the model. CP 141 (Badley Decl. ¶ 15); CP 215 (Cox Dep. at 161:15-21). Despite this unambiguous direction, Cox shared the ITAR model with another person in violation of Badley's direction.<sup>4</sup> CP 215 (Cox Dep. at 161:15-25).

On March 30, 2006, as a consequence of his repeated dissemination of the ITAR model, Cox was issued a second CAM<sup>5</sup> and a 5-day suspension for failure to follow management direction. The CAM stated as follows:

Roger, you continue to fail to follow management direction. You were directed both verbally and by email not to engage in specific activities without management approval. You contacted a co-worker for procurement status and you contacted internal customers and employees regarding the UML model without management approval. This behavior is unacceptable and will not be tolerated.

CP 166 (Badley Decl. at Ex. J).

Both the March 30 CAM and the January 6 CAM advised Cox that he was "expected to comply with management's direction, while on

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<sup>4</sup> During his deposition Cox provided a clue as to one possible motivation behind his repeated refusal to follow his manager's instructions, explaining that he is known among his Boeing colleagues as the "genius among geniuses." CP 199 (Cox Dep. at 45:22-25). He may simply think he always knows better than his manager.

<sup>5</sup> On February 9, 2006, Cox was also issued a CAM and 5-day suspension for making racial and derogatory comments to two of his co-workers. CP 144 (Badley Decl. at

Company time or property" and that "further violations of this nature, will result in a review for further employee corrective action, up to and including discharge from the Boeing Company." CP 158, 166 (Badley Decl. at Exs. G, J). Cox admitted that he understood the content of the CAMs and that he could be terminated if he failed to comply with management's direction. CP 213-14; 216-17 (Cox Dep. at 159:3-160:17; 164:17-165:5).

**C. Cox Seeks ADR Review of His Second Corrective Action**

Shortly after he received his March 30, 2006 CAM and second 5-day suspension, Cox initiated an appeal of the CAM under Boeing's alternative dispute resolution process ("ADR"). CP 174 (Declaration of Terri Conrardy ("Conrardy Decl.") ¶ 3). Boeing's ADR process, outlined in Boeing PRO-780, is an internal Boeing program by which nonunion employees can seek to resolve certain employment related disputes. CP 173-74; 176-88 (Conrardy Decl. ¶ 2, Ex. A).

PRO-780 conspicuously states that the procedure does not constitute a contract:

This procedure does not constitute a contract or contractual obligation, and the Company reserves the right, in its sole discretion, to amend, modify, or discontinue its use without prior notice, notwithstanding any person's acts omissions, or statement to the contrary.

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Ex. A).

CP 176 (Conrardy Decl. at Ex. A at 1).

PRO-780 also makes it clear that ADR "does not alter the status of any employee who is employed 'at-will' and is not intended to grant any additional rights to continued employment with the Company." CP 179 (Conrardy Decl. at Ex. A, sec. 3.B).

Boeing's ADR provides for a 4-step resolution procedure. Cox initiated Step 1 of the ADR process on April 11, 2006, seeking review of his March 30, 2006 CAM and 5-day suspension. CP 174, 190 (Conrardy Decl. ¶ 3, Ex. B). The Step 2 internal mediation occurred on July 20, 2006. *Id.* The mediation was conducted by a "Resolution Advocate," a designated Boeing employee trained as a dispute mediator. Cox appeared on his own behalf and Badley attended on behalf of Boeing. The internal mediation was not successful, so the issue was designated for peer panel review, which is Step 3 of the ADR process. CP 180-82, 190 (Conrardy Decl. at Ex. A, sec. 3.E.3, Ex. B).<sup>6</sup>

**D. Cox Continues to Violate Badley's Directions While He Pursues His ADR Appeal**

Because of Badley's growing concerns about Cox's refusal to follow instructions, and the severity of the potential consequences, on March 31, 2006, around the time of Cox's second suspension, Badley

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<sup>6</sup> Step 4 of the ADR process provides for binding arbitration. CP 182-83 (Conrardy Decl. at Ex. A, sec. 3.E.4).

asked Boeing Computing Security Specialist Ron Godfrey to image the hard drive of Cox's laptop computer and review Cox's computer usage and recent emails. CP 82-89 (Declaration of Ronald Godfrey ("Godfrey Decl.") at Ex. A). Godfrey imaged Cox's laptop hard drive twice, once on March 31, 2006 and again in July 2006. CP 79-80 (Godfrey Decl. ¶¶ 2-3). The forensic analyses of these drives uncovered more evidence that Cox had continued to violate Badley's instructions even after receiving the March 30, 2006 CAM and 5-day suspension. CP 82-89 (Godfrey Decl. at Ex. A).

- On June 27, 2006, Cox emailed Paul Ben McElwain (who was not among the three individuals Cox was authorized to share the model with) a zip file containing the ITAR model. CP 87 (Godfrey Decl. at Ex. A, TBC 0012).
- On July 12, 2006, Cox emailed "multiple EAS personnel and provide[d] modeling information." CP 88 (Godfrey Decl. at Ex. A, TBC 0013).
- On July 13, 2006, Cox emailed David Harris from BCA export "regarding a meeting to discuss Export Cryptology." CP 86 (Godfrey Decl. at Ex. A, TBC 0011).

**E. Cox Copies and then Deletes His GTC Files in Direct Violation of Badley's Directive**

Godfrey's analysis also revealed that Cox had violated another management direction by deleting files from his computer. On July 19, 2006, shortly before Cox transferred from GTC to a new position, Badley directed Cox via email that "all materials and work product, including

work in progress is to remain on the laptop and not to be carried forward by any means to your new position." CP 88 (Godfrey Decl. at Ex. A, TBC 0013); CP 142 (Badley Decl. ¶ 18). After Cox surrendered his laptop as part of the transition to his new assignment, Godfrey reimaged the hard drive and discovered that, despite Badley's clear directive, "files and folders that had been located under Cox's computer profile *had been deleted*. Folders containing GTC models and data were also deleted." CP 88 (Godfrey Decl. at Ex. A, TBC 0013) (original emphasis). Godfrey's exam also showed that the files had been deleted intentionally, not as part of a "wipe and reload" by Boeing Information Technology ("IT") personnel, as Cox would later claim. CP 88 (Godfrey Decl. at Ex. A, TBC 0013); CP 73 (Declaration of David Wuerch ("Wuerch Decl.") at Ex. B). Similarly, computer monitoring software that had been installed on Cox's computer as part of the investigation revealed that Cox's files had been copied and deleted just minutes before a Disk Defragmentation program was run. CP 89 (Godfrey Decl. at Ex. A, TBC 0014). Godfrey concluded that the "activation of the Disk Defragmenter program was a willful attempt to prevent recovery of the deleted files and folders." CP 89 (Godfrey Decl. at Ex. A, TBC 0014).

**F. Boeing Completes Its Investigation and Cox Is Discharged**

On October 23, 2006, the forensic investigation was completed, the ADR process was suspended, and Cox was placed on leave pending completion of the internal disciplinary investigation by David Wuerch from Boeing's Corporate Investigations. CP 174 (Conrardy Decl. ¶ 4); CP 62 (Wuerch Decl. ¶ 3).

Wuerch completed his investigation and report on February 8, 2007. CP 75-78 (Wuerch Decl. at Ex. C) The case was subsequently designated for review by Boeing's Employee Corrective Action Review Board ("ECARB"), a panel of at least 6 Boeing employees tasked with reviewing certain employee discipline and discharge decisions. CP 229; 232-248 (Declaration of Cheryl Harding ("Harding Decl.") ¶ 1, Ex. A). The panel concluded that discharge was appropriate and warranted. CP 229-30 (Harding Decl. ¶ 2).<sup>7</sup> Cox's discharge was effective February 14, 2007. CP 194 (Sayers Decl. at Ex. A).

**IV. ARGUMENT**

**A. Standard of Review**

On summary judgment, this Court reviews the trial court's judgment de novo. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92-93 (2000). The relevant inquiry is whether the trial court properly found that

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<sup>7</sup> ECARB decisions are subject to their own review procedures and cannot be challenged

the "pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639 (2000). Bare assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence. *Trimble*, 140 Wn.2d at 93.

This Court may affirm the trial court's grant of summary judgment if the judgment order is correct based on the record before it, even if this Court were to find an alternate basis for the decision. *See, e.g., Ertman v. City of Olympia*, 95 Wn.2d 105, 108 (1980) (correct judgment will not be reversed even where appellate court gives alternate basis for its decision); *Pannell v. Thompson*, 91 Wn.2d 591, 603 (1979) (trial court's judgment may be affirmed on appeal on alternate grounds).

**B. The Legal Effect of Boeing's Procedures May Be Resolved on Summary Judgment**

Washington courts regularly resolve employee handbook cases on summary judgment. *See, e.g., Trimble*, 140 Wn.2d 88 (manual language was discretionary and not a promise for specific treatment as a matter of law); *Birge v. Fred Meyer, Inc.*, 73 Wn. App. 895, 900 (1994) (summary judgment for employer affirmed where employee handbook promised

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by the ADR process. CP 174 (Conrardy Decl. at ¶ 5).

immediate discharge for certain defined misconduct, but also reserved to the employer "the right to fire without warning for other reasons which are determined by the company to be of an equally serious nature").

Cox's reliance on *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522-23 (1992), to suggest that summary judgment is not appropriate is misplaced. *Swanson* does not stand for the proposition that employee handbook claims always present matters of fact or that summary judgment is never appropriate. The Washington State Supreme Court clarified in a subsequent decision, whether a handbook policy contains promises of specific treatment and whether the employee justifiably relied on such policies may be decided as a matter of law if reasonable minds could reach but one conclusion. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 106 (1994).

**C. Cox's Employee Handbook Claim Fails as a Matter of Law and the Trial Court Properly Granted Boeing's Summary Judgment**

**1. The Narrow *Thompson* Exception to the Employment At-Will Doctrine**

Generally, an employment contract, indefinite as to duration, is terminable at will by either the employee or employer. *Roberts v. Atl. Richfield Co.*, 88 Wn.2d 887, 894 (1977). In *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219 (1984), the Washington Supreme Court created a narrow exception to the employment at-will doctrine. Under *Thompson*,

"the employer's act in issuing an employee policy manual can lead to obligations that govern the employment relationship" and, in certain circumstances, "employers may be obligated to act in accordance with policies as announced in handbooks issued to their employees." *Id.* at 229.

The *Thompson* court ruled that an employee seeking to enforce a handbook policy must satisfy a three-part test, proving all of the following:

- (1) that a statement (or statements) in an employee manual or handbook or similar document amounts to a promise of specific treatment in specific situations,
- (2) that the employee justifiably relied on the promise, and
- (3) that the employer breached the promise of specific treatment.

*Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340-41 (2001); *Thompson*, 102 Wn.2d at 233.

## **2. The Trial Court Correctly Grants Summary Judgment**

On Boeing's Motion for Summary Judgment before the trial court, Judge McPhee ruled that Cox had failed to present evidence of promises of specific treatment or justifiable reliance as to any of the three policies identified by Cox. RP 36-37. Judge McPhee also ruled that Cox had failed to present evidence that Boeing had breached Boeing PRO-1909

("Administration of Employee Corrective Action") or BPI-2616 ("Employee Corrective Action Guidelines"). *Id.* As to the third policy, PRO-780 ("Alternative Dispute Resolution"), Judge McPhee ruled that while "there may be material issues of fact regarding [whether Boeing had fully complied with] PRO-780," Cox's failure to produce evidence of a specific promise or justifiably reliance rendered this disputed point immaterial. RP 38.

**3. Boeing's Procedures Do Not Contain Promises of Specific Treatment in Specific Circumstances**

Judge McPhee correctly followed *Thompson* in finding that there was no evidence that Boeing's procedures contain promises of specific treatment in specific circumstances. As *Thompson* observes, "employers will not always be bound by statements in employment manuals." *Thompson*, 102 Wn.2d at 230. Only those statements in employment manuals that constitute promises of specific treatment in specific situations are binding. *Id.*

Where as here, an employment procedure conspicuously disclaims that the procedure is not an enforceable obligation and retains discretion to the employer, the policies are not binding and enforceable against the employer. *Id.* at 230-31.

**a. Boeing's Procedures Conspicuously Disclaim Any Contractual Obligation**

It is established Washington law that employers can disclaim any intent to make the provisions of an employment manual part of the employment relationship. *Thompson*, 102 Wn.2d at 230. Employers can "specifically state in a conspicuous manner that nothing contained [within the employment manual] is intended to be part of the employment relationship and are simply general statements of company policy," in which case the policies do not become binding and enforceable against the employer under the *Thompson* doctrine. *Id.*

Here, each of the three Boeing procedures at issue, namely PRO-780, PRO-1909, and BPI-2616, contain a conspicuous statement disclaiming any contractual obligation. The disclaimer, found on the first page of each procedure, states that the procedure or process instruction:

does not constitute a contract or contractual obligation, and the Company reserves the right, in its sole discretion, to amend, modify, or discontinue its use without prior notice, notwithstanding any person's acts, omission, or statement to the contrary.

CP 105, 125 (Powell Decl. at Exs. C, D); CP 176 (Conrardy Decl. at Ex. A).

In addition, PRO-780 also makes it clear that Boeing's ADR procedure does not alter an employee's at-will status. Section 3.B states as follows:

ADR does not alter the status of any employee who is employed "at-will" and is not intended to grant any additional rights to continued employment with the Company.

CP 179 (Conrardy Decl. at Ex. A, sec. 3.B).

Cox admits that while he was employed at Boeing he read and understood these disclaimers.

Q. . . . And so you read the part that says, "This process instruction does not constitute a contract or contractual obligation, and the Company reserves the right, in its sole discretion, to amend, modify, or discontinue its use without prior notice notwithstanding any person's acts, omissions or statements to the contrary," right?

A. I'm very familiar with this, the statement.

Q. You've read that and you understood it, correct?

A. Understand it very clearly.

Q. Okay. And you understood it very clearly in January of 2006, right?

A. That's very true.

CP 210-11 (Cox Dep. at 151:15-152:8); *see also* CP 206-09 (Cox Dep. at 141:6-142:24; 144:2-145:1).

Cox neglects to even mention these disclaimers or his testimony admitting that he read and understood them. Nor does Cox provide any explanation or evidence as to why the disclaimers should not be given effect. Because it is undisputed that the procedures contain statements

disclaiming any contract or contractual obligation and because it is undisputed that Cox read and understood these statements, Boeing's procedures are not enforceable contracts as a matter of law and the trial court's ruling was correct.

**b. PRO-1909 and BPI-2616 Contain Discretionary Language That Cannot Amount to Promises of Specific Treatment in Specific Situations**

Policy statements as written may simply "not amount to promises of specific treatment" because they are general statements or because the employer "specifically reserve[s] a right to modify those policies or write[s] them in a manner that retains discretion to the employer."

*Thompson*, 102 Wn.2d at 231. Discretionary language disqualifies a workplace procedure from qualifying as a specific promise. *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613-14 (1988); *see, e.g., Drobny v. Boeing Co.*, 80 Wn. App. 97, 104 (1995) (Boeing's progressive discipline procedure found, as a matter of law, not to constitute a promise of specific treatment in specific circumstances because Boeing retained discretion in implementing discipline).

In his brief, Cox claims, without citation, that "PRO 1909 states that specific steps are to be taken before an employee is disciplined." Appellant Brief at 11. However, PRO-1909 contains no such mandatory language. Rather, PRO-1909 is crafted with the kind of permissive,

discretionary language that any employer needs to flexibly manage the workplace. CP 126-33. For example, immediate termination "*may be appropriate*" for serious offenses. CP 126-27 (emphasis added). Less serious offenses "*are normally to be governed* by progressive corrective action" and this procedure "*can include*" a variety of measures. CP 127. (emphasis added). Further to Cox's claim that Boeing skipped steps in his case, PRO-1909 explicitly states that "[i]t is not always necessary . . . that the discipline process . . . include every step." CP 128.

Likewise, BPI-2616 is crafted with permissive, discretionary language. Cox asserts that, "Paragraph '1' of BPI-2616 requires that investigations be conducted 'as promptly as practicable. . ..'" Appellant Brief at 12. However, Cox misleadingly crops the quoted language from Boeing's procedure. The portion of the policy cited by Cox actually reads: "Investigations *should* be concluded as promptly as practicable since critical information and/or relevant data may be lost or forgotten." CP 107 (Powell Decl. at Ex. C) (emphasis added). Because Cox only identifies discretionary language, he fails to demonstrate that Boeing's procedures contain promises of specific treatment in specific situations. Therefore, his claim fails as a matter of law.

c. **PRO-780 Does Not Contain a Specific Promise that Using Boeing's ADR Procedure Would Immunize Cox from the Consequences of Additional Misconduct**

On appeal, Cox argues that PRO-780 contains a promise of specific treatment in specific situations because it makes peer panel decisions binding. Appellant Brief at 8. This argument is a red herring. There is no claim in this lawsuit that Boeing rejected a peer panel decision. What Cox really claims is that Boeing supposedly violated its ADR procedures when it suspended Cox and his scheduled peer panel appeal after the forensic computer review turned up additional instances of insubordination. This claim fails because PRO-780 nowhere says that employees who are suspended for other misconduct have the right to nonetheless proceed with a previously commenced ADR process during the suspension. At best, as Cox implicitly concedes in his brief, PRO-780 is silent on whether or when the ADR process can be suspended. *Id.* at 3-4. As logic dictates, silence cannot be a promise of specific treatment in specific situations.

Likewise, there is nothing in PRO-780 that specifically promises that Boeing will suspend discipline for additional misconduct merely because an employee is using ADR to challenge corrective action received for other misconduct. In other words, and as Judge McPhee recognized, engaging in Boeing's ADR process does not immunize an employee from

discipline for other acts of misconduct. To the contrary, PRO-780 specifically says that Boeing does not waive its rights to investigate "issues that may violate Boeing policy." CP 179 (Conrardy Decl. at Ex. A, sec. 3.D). Accordingly, no enforceable contractual obligation exists and summary judgment is appropriate.

**D. No Justifiable Reliance**

In order to prevail on his employee handbook claim, Cox must not only demonstrate that Boeing's procedures amount to a promise of specific treatment in specific situations, but he must also demonstrate that he *justifiably* relied upon such procedures. *Thompson*, 102 Wn.2d at 233; *see Bulman*, 144 Wn.2d at 340-41.

As the trial court properly concluded, the record contains no evidence demonstrating that Cox justifiably relied on any of the policies at issue. RP 37-38. Even on appeal, Cox fails to identify *any* evidence of justifiable reliance, essentially conceding that no such evidence exists. It is not difficult to infer the reason for Cox's silence on this necessary element. Cox could not have demonstrated that he justifiably relied on such procedures for continued employment given that he admits he read and understood the explicit and unambiguous disclaimer that Boeing reserved the right to amend, modify, or discontinue use of the procedure without prior notice. CP 206-11 (Cox Dep. at 141:6-142:24; 144:2-145:1; 151:15-152:8).

**E. Boeing Did Not Breach Its Procedures**

Even if Cox could prove that Boeing's policies amounted to promises of specific treatment in specific circumstances, *and* that he justifiably relied on these promises, the trial court still correctly dismissed Cox's claim that Boeing breached its discipline policies. *See Bulman*, 144 Wn.2d at 340-41 (third prong in employee handbook claim requires the plaintiff to prove that promises of specific treatment were breached).

**1. Boeing Did Not Breach PRO-1909**

Cox alleges that Boeing breached PRO-1909, Boeing's corrective action procedures. Appellant Brief at 11. PRO-1909 describes a process for progressive discipline that *may* include verbal counseling, a written Corrective Action Memo, time off from work, and discharge. CP 127-28 (Powell Decl. at Ex. D, sec. 2.E). However, PRO-1909 also states that "[i]t is not always necessary . . . that the discipline process commence with a verbal warning or include every step" and that "[d]ischarge is appropriate when efforts at corrective action fail or the seriousness of the violation or problem warrants it." CP 128; 130 (Powell Decl. at Ex. D, secs. 2.E.1.c; 2.E.6.a).

Here, Cox was discharged for failure to follow management direction after he received two prior CAMs for the same conduct. As noted above, Cox received his first written CAM on January 6, 2006, and

a second CAM with 5-days off work on March 30, 2006. Cox was terminated as the third step of progressive discipline after Corporate Investigations confirmed that Cox had continued to violate management directions after the second CAM. In other words, Boeing did not breach PRO-1909 because Boeing's discipline and discharge of Cox was completely consistent with its procedures for progressive discipline.

## **2. Boeing Did Not Breach BPI-2616**

Finally, Cox alleges that Boeing breached BPI-2616. Specifically, Cox claims that the investigation into his conduct was not done promptly. Appellant Brief at 12. BPI-2616, however, does not provide for a time by when investigations must be completed. CP 107 (Powell Decl. at Ex. C, sec. B.1). BPI-2616 merely states that "investigations *should* be concluded as promptly as practicable, since critical information or relevant data may be lost or forgotten." *Id.* (emphasis added). Here, the investigation of Cox's conduct, which involved the review of copious pages of emails collected as part of the computer forensic analysis of Cox's computer, was undertaken in a timely manner, and Corporate Investigations completed its investigation and report as soon as practicable under the circumstances. Cox fails to identify any evidence supporting his claim that Boeing unduly delayed its investigation. Accordingly, Boeing did not breach BPI-2616.

**F. Cox Did Not Appeal the Issue of Waiver and These Rulings Are Not Subject to Review**

Without bothering to explain how it is material to his case, Cox argues that the trial court erred when it found that Boeing had not waived the attorney client and mediation privileges. This argument was properly rejected by the trial court. In denying Cox's motion for a CR 56(f) continuance on these grounds, Judge McPhee ruled that (a) Boeing had properly invoked the attorney client-privilege; (b) Boeing had not waived the attorney client privilege; (c) the claimed evidence from the mediation was immaterial; (d) there was no evidence to suggest that the parties' mediation confidentiality agreement would not be enforceable at trial; and (e) in delaying until after the close of discovery, Cox had waited too long to raise these arguments. RP 14-15. All these rulings were well within the discretion vested in the trial court. *See Tellevik v. Real Property Known As 31641 W. Rutherford St.*, 120 Wn.2d 68, 90-91 (1992) (standard of review for denial of CR 56(f) motion is abuse of discretion).

Moreover, Cox has waived these issues by failing to assign error to these rulings or designate them for review. RAP 2.4(a) states in part:

The Appellate court will, at the instance of appellant, review the decision or parts of the decision designated in the notice of appeal . . . .

Similarly, RAP 10.3(g) states in relevant part:

The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

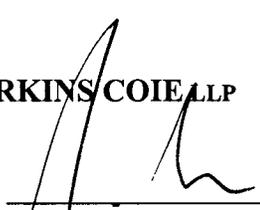
Both waiver of privilege arguments were asserted by Cox at the trial level as part of his CR 56(f) motion for continuance, a motion that was denied. CP 377 (Response to Motion for Summary Judgment); RP 3-15. In his Notice of Appeal, Cox only designated for appeal the trial court's Order granting Boeing's summary judgment, and not its ruling as to Cox's CR 56(f) motion. *See* Notice of Appeal to Court of Appeals. Similarly, in his opening brief on appeal, Cox failed to assign error to the trial court's ruling on his CR 56(f) motion. Washington Courts consistently refuse to review issues to which no error has been assigned. *See, e.g., Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 848 (1993) (ruling of trial court to which no error has been assigned is not subject to review); *State v. Hubbard*, 103 Wn.2d 570, 574 (1985) (holding that a ruling of the trial court to which no error has been assigned becomes the law of the case and is not subject to review by the court of appeals).

## V. CONCLUSION

For the foregoing reasons, Cox's appeal should be denied in its entirety. This Court should affirm the trial court's dismissal on summary judgment of Cox's employee handbook claims.

DATED: March 29, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2010, I caused to be served via hand delivery a true and correct copy of the foregoing Brief of Respondent upon:

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

DATED this 29th day of March, 2010, at Seattle, Washington.

  
Debbie Burge  
Legal Secretary

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