

NO. 49720-4 II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

RODNEY J. BAKER,

Appellant,

v.

PIERCE COUNTY PUBLIC TRANSPORTATION
BENEFIT AREA CORPORATION,

Respondent.

BRIEF OF APPELLANT

Loyd Willaford, WSBA #42696
CLINE & CASILLAS
520 Pike Street, Suite 1125
Seattle, WA 98101
(206) 838-8770
lwillaford@clinelawfirm.com
Attorney for Appellant Rodney J. Baker

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I. INTRODUCTION

This appeal stems from the Pierce County Superior Court's improper granting of summary judgment as to Appellant Rodney Baker's claim that Respondent Pierce Transit wrongfully terminated his employment in violation of contractual rights established in an employee handbook and by the conduct of Pierce Transit. The trial court failed to consider the facts in the light most favorable to Baker, improperly drew inferences in favor of Pierce Transit, and erroneously concluded that no reasonable juror could find in Baker's favor at trial.

In particular, the trial court ignored evidence of how Pierce Transit applied its personnel policies regarding discipline. It improperly dismissed Pierce Transit's different treatment of Lynne Griffith as irrelevant. It erroneously concluded that no reasonable juror could find that Pierce Transit promised Baker and other employees that they could only be disciplined or terminated for cause. Finally, the trial court erroneously concluded that no reasonable juror could find that Pierce Transit violated its promise to discharge Baker only for cause. For all these reasons, Baker requests that this Court reverse the trial court's summary judgment order.

II. ASSIGNMENT OF ERROR

The trial court erred as a matter of law when it granted Pierce County Transit's Motion for Summary Judgement as to Rodney Baker's claims of wrongful discharge in violation of contractual rights. CP at 749-754.¹

III. STATEMENT OF THE CASE

Pierce Transit hired Rodney Baker in June 2000. CP at 507. In March 2006, Pierce Transit established a Department of Public Safety. CP at 508. It named Baker Chief of Public Safety and Transit Police. *Id.*

A. Pierce Transit Issues Discipline and Discharge Policies

In 2004, Pierce Transit issued a Personnel Manual to Chief Baker and other employees. CP at 523. Under the headline "Purpose" the Manual states that it is a "summary of the Agency's policies and procedures that are presently in effect." CP at 284. The "Purpose" section goes on to state that when these policies or procedures are revised, "changes will be communicated through standard communication channels." *Id.* The section also contains language that states that the Manual contains "guidelines" and that the Manual is not intended to be a contract or a promise of specific treatment. *Id.* This language is not bolded, underlined, or otherwise set out in the Manual. *Id.*

¹ Baker is not appealing dismissal of his sex discrimination claim.

Section 8.2 of the Personnel Manual states: “Any regular employee may be disciplined for cause.” CP at 286. This section goes on to lay out procedural requirements for discipline. *Id.* Section 8.5 of the Manual states that Pierce Transit: “may discharge a regular employee for disciplinary reasons.” CP at 288. This section goes on to lay out requirements for discharge. *Id.*

B. Chief Baker Applies Discipline and Discharge Policies

Part of Chief Baker’s duties included supervising and disciplining employees. CP at 523. Pierce Transit required Chief Baker to apply Section 8 of the Personnel Manual to his discipline decisions. *Id.* Pierce Transit management regularly reviewed Section 8 with Chief Baker. *Id.* Pierce Transit management informed Baker that it was Pierce Transit’s policy to discipline only “for cause” and to employ “progressive discipline.” *Id.* Chief Baker followed the requirements of Section 8 when he issued discipline to employees. CP at 523. This included attaching a copy of Section 8 to discipline he issued. CP at 583-589. Chief Baker’s experience with Pierce Transit’s “for cause” discipline policy and its policy of progressive discipline led him to believe that Pierce Transit would apply these policies to him. CP at 523. Chief Baker relied on these policies in deciding to remain employed at Pierce Transit. *Id.*

C. Chief Baker Oversees Budget for Liaison Officers

Part of Chief Baker's job description included overseeing programs and administering the programs within "budgetary limitation." CP at 534. Pierce Transit CEO, Lynne Griffith, acknowledged that this was part of Chief Baker's duties. CP at 545. One of the programs Chief Baker oversaw was the coordination with other law enforcement agencies in a community policing effort. CP at 512-513. Pierce Transit had a contract with the Tacoma Police Department to provide liaison officers in the amount of one full time equivalent to coordinate the use of off-duty officers for the community policing effort. This liaison position consisted of two Tacoma police officers for 20 hours per week. Baker oversaw the administration and budget for the program. *Id.*

In 2012, one of the liaison officers for the Tacoma Police Department approached Chief Baker regarding the program. CP at 513. The liaison pointed out that due to the on-call nature of the liaison position, accounting for time was administratively difficult and that officers were routinely working more than 20 hours per week, with a significant portion of this time being spent simply accounting for their time. CP at 514, 591. The liaison proposed that the officers be paid at a flat rate within the budget already established. *Id.* Understanding his authority to manage the program's budget, Baker agreed to this proposal. The officers began

reporting 10 hours of work on Saturdays and Sundays. In reality, the officers were on call and performing work throughout the week. CP at 513-514; 593-594.

D. Pierce Transit Audits Chief Baker's Unit

In the fall of 2013, Pierce Transit conducted an audit of payroll records in Chief Baker's unit, including those of the Tacoma police liaisons. CP at 516-517, 547. Pierce Transit discussed with Chief Baker several concerns which came up as a result of the audit. CP at 517-519. Pierce Transit was concerned about the number of hours which the Tacoma officers were reporting. *Id.* It was also concerned about how Chief Baker uses a rubber stamp and staff persons to approve timecards. *Id.* Chief Baker provided explanations for the hours and time card approval process. *Id.* He discontinued the use of the rubber stamp. The Tacoma liaison officers changed how they reported hours. CP at 519-520. At no time during the discussion about the audit and change in practices did Pierce Transit inform Chief Baker he was potentially being subjected to discipline regarding these practices. CP at 520.

E. Pierce Transit Discharges Chief Baker

In September 2013, Doug Middleton replaced Lynne Griffith as Chief Baker's supervisor. CP 509. On November 19, 2013, Pierce Transit placed Chief Baker on paid administrative leave. CP at 520; CP at 561.

Pierce Transit commissioned an outside law firm to conduct an investigation into the time card issues. CP at 521. The investigator from this law firm, Jeffery Coppersmith, interviewed Chief Baker twice. CP at 521. Coppersmith's report later stated that Chief Baker had "likely exceeded his authority under the Pierce Transit Code when he authorized the Tacoma Police Department liaisons to work, "on salary," without obtaining the approval from the CEO or the Board." Coppersmith concluded that he had "not found evidence establishing that Chief Baker [or others] over-reported, falsified, or improperly approved hours for off-duty officers." CP at 258.

On February 25, 2014, Pierce Transit issued a letter to Chief Baker informing him that him that it was contemplating discipline, "up to and including dismissal." CP at 563-564. The letter specifically referenced Section 8 of the Personnel Manual. CP at 564.

On March 5, 2014, Chief Baker submitted a response to the pre-disciplinary letter. CP at 566-569. On March 20, 2014, Pierce Transit issued a termination letter to Chief Baker. CP at 571-582. This termination letter, like the pre-disciplinary letter, makes explicit reference to Section 8 of the Personnel Manual. *Id.* Pierce Transit's termination letter to Chief Baker also included a copy of Section 8 of the Personnel Manual. CP at 579-581.

F. Pierce Transit Treats Lynne Griffith Differently

Beginning in June 2013, Pierce Transit was aware that it was being investigated by the Washington State Auditor's office for unauthorized payments of administrative leave time. CP at 462-463; 504. On December 17, 2013, during the same period that Pierce Transit was investigating time card issues in Chief Baker's unit, it received a report from the Washington State Auditor's office regarding this audit. CP at 94-104. The report found that CEO Lynne Griffith had improperly authorized over \$120,000 worth of paid administrative leave time. CP at 100-101.

Pierce Transit accepted the Auditor's findings and promised to "direct management to ensure compliance with codified personnel policies." CP at 342-343. Pierce Transit also promised that it had "made immediate changes to its practices and procedures to address the Auditor's concerns."

On January 13, 2014, Pierce Transit formally approved the response to the Auditor's report. CP at 339. At the same time, Pierce Transit approved a personnel evaluation of CEO Lynne Griffith. *Id.* This personnel evaluation was overwhelmingly positive; it did not mention the State Auditor's findings of wrongful approval of paid administrative time. CP at 345-349. Pierce Transit did not consider disciplining CEO Griffith over the unauthorized payment of administrative leave time. CP at 309.

G. Procedural History

On February 27, 2015, Chief Baker filed a Complaint against Pierce Transit. CP at 1-4. The Complaint made a claim for Breach of Contract/Wrongful Termination. CP at 3. Pierce Transit answered the Complaint. CP at 5-11. On October 28, 2016, Pierce Transit filed a motion for summary judgment along with supporting documents. CP at 12-295. Chief Baker responded to the motion and filed his supporting documents. CP at 296-626. Pierce Transit filed a reply and additional documents. CP 627-748. The trial court heard oral argument on the motion on October 28, 2016. VRP at 1. The Court issued a written decision on November 7, 2016. CP at 749-754. The Court concluded the Chief Baker had “failed to produce any evidence that would allow a rational inference that he could only be fired for cause.” CP at 751. The Court also concluded that Pierce Transit had “produced substantial evidence supporting that it had cause for terminating Chief Baker's employment.” *Id.* This Appeal followed. CP at 755.

IV. LAW AND ARGUMENT

This Court reviews summary judgment orders de novo. *Utter ex rel. State v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 406, 341 P.3d 953, 957 (2015). The purpose of summary judgment is to avoid a useless trial. *Olympic Fish Prods. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737, 740

(1980). When considering a motion for summary judgment, the trial court must consider all the facts in the light most favorable to the non-moving party; in this case, Mr. Baker. *Sellsted v. Washington Mutual Savings Bank*, 69 Wn. App. 852, 859, 851 P.2d 716 (1993). Mr. Baker is entitled to the benefit of all reasonable inferences. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Only when reasonable minds can reach but one conclusion may the court grant summary judgment. *Ruff v. King County*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995).

Summary judgment is appropriate only if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). The moving party, Pierce Transit, bears the burden of showing there is no material fact at issue. *Safeco Insurance v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992).

As outlined below, the trial court failed to follow these standards when it decided Pierce Transit's motion for summary judgment. The Court substituted conclusory statements in favor of Pierce Transit for the reasoned analysis and deference to Chief Baker's factual position required by the rule.

A. Pierce Transit Made a Specific Promise to its Employees that Discipline and Termination Would be “For Cause”

While the default rule in Washington is that employment relationships are at-will, meaning no reason is required for termination, these relationships can be modified to be “for-cause,” “where there is an expressed or implied agreement to that effect.” *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081, 1089 (1984). Such agreement can take the form of the promise of specific treatment in specific situations. *Id.* Whether an employer’s policies create this agreement is a question of fact for a jury to decide. *Brady v. Daily World*, 105 Wn.2d 770, 775, 718 P.2d 785, 788 (1986).

Here, Section 8.2 of Pierce Transit’s Personnel Manual states that employees “may be disciplined for cause.” CP at 286. The logical inference from this statement is that employees may not be disciplined without cause. This is particularly true given that Section 8.2 goes on to give examples of what may constitute cause. Similarly, Section 8.5 of the Personnel Manual states the employee may be discharged for “disciplinary reasons.” CP at 288. The logical inference from this statement is that employees may not be discharged for non-disciplinary reasons. Given the requirement of “for cause” discipline, this means that Pierce Transit employees, including Chief Baker, were under the reasonable expectation that they could not be discharged without cause.

The trial court made a factual error and impermissible inference in favor of Pierce Transit when it concluded: “Pierce Transit expressly reserved the right to discharge employees at-will for other reasons not set forth in the Manual.” CP at 751. Nowhere in the Manual does this language appear. A reading of the Manual in the light most favorable to Chief Baker, combined with the conduct of Pierce Transit, would lead a reasonable juror to conclude that Pierce Transit promised to discipline or discharge employees only “for cause.” Thus, summary judgement on this element of Chief Baker’s claim was inappropriate.

B. Pierce Transit’s Attempted “Disclaimer” was Ineffective and Voided by its Conduct

An employer which attempts to disclaim promises it makes in a handbook must do so in a conspicuous manner. *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 171, 914 P.2d 102, 109 (1996), quoting *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 527, 826 P.2d 664 (1992). The disclaimer must be effectively communicated to the employee. *Id.* Finally, any disclaimer “may be negated by inconsistent representations and practices. The disclaimer must be considered in light of the surrounding circumstances, including the parties’ representations and conduct. The effect of a disclaimer in an employee manual is a question of fact.” *Id.*, citing *Swanson*, 118 Wn.2d at 528-34.

Where employees have presented evidence that an employer has acted inconsistently with its alleged disclaimer, courts have not hesitated to find that the disclaimers are negated. *See, e.g., Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 541, 826 P.2d 664, 679 (1992) (affirming reversal of summary judgment in favor of employer where employer widely circulated a memo promising specific treatment); *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 733, 75 P.3d 533, 541 (2003) (affirming jury verdict in favor of employee where managers were told to apply the terms of personnel handbook regarding discipline); *Payne v. Sunnyside Hosp.*, 78 Wn. App. 34, 43, 894 P.2d 1379, 1384 (1995) (reversing summary judgment for employer where employer practiced a progressive discipline policy which was inconsistent with its disclaimer).

In the present case, Pierce Transit's alleged disclaimer was in a section which reads as follows:

2.1 Purpose

The purpose of this manual is to provide general procedures and guidelines for the administration of the Agency's personnel program. This manual is an overview and summary of the Agency's policies and procedures that are presently in effect. As policies, benefits, and procedures are revised, changes will be communicated through standard communication channels. Advance notice may not always be possible.

The policies, procedures, and rules contained in this manual constitute guidelines only. They do not constitute an

employment contract, nor are they intended to make commitment to any employee concerning how individual employment actions can, should, or will be handled. These guidelines are not to be interpreted as promises of specific treatment.

This manual or subsequent updates supersede all previous manuals, letters, memoranda, oral or written provisions, and understandings.

CP at 285.

This alleged disclaimer was not conspicuous. It is printed in a more than 50 page manual in a section which does not clearly tell the employees that it contains a disclaimer. There is no evidence that Chief Baker signed an acknowledgement of the disclaimer. Unlike Section 8 of the Personnel Manual containing the “for cause” discipline promise, there is no evidence that Pierce Transit ever discussed the disclaimer with Chief Baker. In addition, the disclaimer section is ambiguous in that the first paragraph of the section tells the employee that the Manual contains summaries of the policies “presently in effect” and it goes on to promise that revisions to the policies “will be communicated” to the employees. This is followed by language that states that the policies do not constitute a contract. In *Wlasiuk v. Whirlpool*, the Court held that similar inconsistent statements created an issue of fact for a jury to decide. *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 172, 914 P.2d 102, 109 (1996).

Just as in *Swanson*, *Carlson*, and *Payne*, Pierce Transit acted in a manner inconsistent with its disclaimer. By telling Chief Baker to apply the Section 8 policies to discipline he issued and by attaching the policy to such discipline, Pierce Transit acted in a manner consistent with creating the impression that Section 8 policies, including the “for cause” requirement, would be applied to discipline and discharge. In addition, Pierce Transit created the patina of compliance of Section 8 in Chief Baker’s case, when it issued detailed letters regarding the discipline referenced considering the disciplinary guidelines of Section 8, and attached Section 8 to Chief Baker’s termination letter. CP at 571-582. Having done all this, Pierce Transit should not be allowed to now claim that the “for cause” requirement of Section 8 does not apply because of one paragraph buried in its Personnel Manual.

The trial court erred as a matter of law when it accepted Pierce Transits “disclaimer” at face value without undertaking any analysis into the context of how the disclaimer was communicated and how Pierce Transit applied its policy in practice. CP at 751. Because a reasonable juror could find the Pierce Transit’s “disclaimer” was negated by its conduct, summary judgement was not appropriate.

C. Pierce Transit Violated its Promise to Discipline and Terminate Baker Only “For Cause”

Our Supreme Court has defined “cause” for the purposes of employment decision-making as “a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power.” *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 139, 769 P.2d 298, 304 (1989). The Court went on to hold that “a discharge for “just cause” is one which is not for any arbitrary, capricious, or illegal reason and which is based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true.” *Id.*

The Court elaborated on this standard in *Civil Serv. Comm'n v. City of Kelso*, 137 Wn.2d 166, 969 P.2d 474 (1999). “Whether there is just cause for discipline entails much more than a valid reason; it involves such elements as procedural fairness, the presence of mitigating circumstances, and the appropriateness of the penalty. Seven factors are considered in determining whether there was just cause for discipline, including whether the employer applied its rules even-handedly, and whether the degree of discipline was reasonably related to the seriousness of the infraction given the employee's record of service.” *City of Kelso*, 137 Wn.2d at 173. “[W]hether an employer properly determined it had just cause for termination is a question for the trier of fact.” *Lund v. Grant Cty. Pub. Hosp. Dist. No. 2*, 85 Wn. App. 223, 228, 932 P.2d 183, 185 (1997).

As initial matter, the policy in Section 8 of Pierce Transit's Personnel Manual uses the phrase "for cause," rather than "just cause." But the Manual goes on to describe procedural requirements that are like "just cause" because of the standard articulated by the court in *City of Kelso*. Chief Baker was instructed to use "cause" and "progressive discipline" when applying Section 8 in cases where he disciplined employees. CP at 523. In addition, in Chief Baker's termination letter, Pierce Transit made specific reference to mitigating factors, such as length of service, and other "just cause" factors. CP at 573. Thus, a juror could reasonably conclude that "just cause" was the standard that Pierce Transit used for discipline.

Applying the *Baldwin* and *City of Kelso* standards to this case: the primary reason that Pierce Transit gave for terminating Chief Baker was that he had changed the payment arrangements with the liaison officers without express authorization from others at Pierce Transit. But managing this program within the budget was one of Chief Baker's duties. Chief Baker did change the budgetary amount of the program. Chief Baker had a good faith belief that he could manage the program in a cost-effective way. There was no allegation of any malfeasance on the Chief's part. There was also no allegation that Chief Baker's actions adversely affected the operations or budget of Pierce Transit.

While Pierce Transit's investigation appeared to be superficially procedurally fair, in fact Pierce Transit Manager Doug Middleton refused to consider key evidence. This included statements from the liaison officers involved. CP at 595. Middleton had only begun to supervise Baker in September 2013. CP at 509. Middleton did no follow-up investigation following the Coppersmith report. CP at 363. While Middleton did apparently attempt to reach out to Lynne Griffith regarding Baker, Griffith refused to cooperate. CP at 366; 482-483. Presumably, this was because Griffith was aware that she was under investigation for improperly authorizing \$120,000 in administrative leave time. Based on these facts, a reasonable juror could conclude that Pierce Transit's investigation of this matter was procedurally unfair.

The discipline issued by Pierce Transit was not applied even-handedly. Lynne Griffith received no discipline for violating the law in making \$120,000 in unauthorized payments. Where an employer did not discipline other employees for similar acts, a court found that there was an issue of triable fact as to whether the discharge was arbitrary, and therefore not "for cause." *See, Lund*, 85 Wn. App. at 230. A reasonable juror could conclude that the even if Chief Baker had exceeded his authority in changing the time-keeping practices and payment arrangements for the liaison officers, his termination for these violations was not even-handed

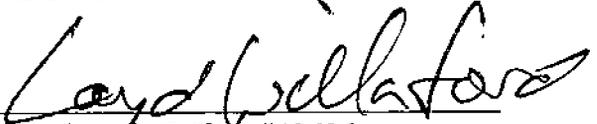
treatment. A reasonable juror could also conclude on these same facts that termination was an inappropriate punishment given the infraction. Thus, summary judgment was inappropriate.

VI. CONCLUSION

The trial court in this case failed to follow the law on summary judgement. It improperly concluded that a reasonable juror could not find that Pierce Transit promised Chief Baker that he would be terminated only for cause. It improperly concluded that a reasonable juror could not find that Pierce Transit had waived any right to disclaim this promise. And the trial court improperly concluded that a reasonable juror could not find Pierce Transit's firing of Chief Baker violated its promise to discharge him only "for cause." Because reasonable jurors could disagree with all these trial court conclusions, summary judgment was improperly granted. Chief Baker respectfully requests that this Court reverse the trial court and remand this matter for trial.

RESPECTFULLY SUBMITTED THIS 1st day of May, 2017.

CLINE & CASILLAS



Loyd Willaford, WSBA #42696
520 Pike Street, Suite 1125
Seattle, WA 98101
(206) 838-8770
Attorney for Appellant Rodney J. Baker

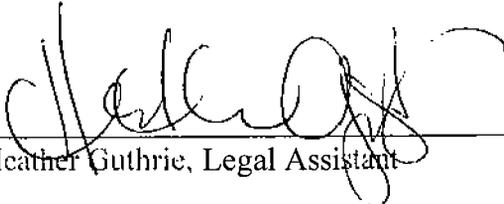
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the below date, I caused to be served via email a true and correct copy of the foregoing Brief of Appellant on the individuals below:

Counsel for Respondent:

Suzanne Kelly Michael, WSBA #14072
Claire Marshall, WSBA #48324
MICHAEL & ALEXANDER PLLC
701 Pike Street, Suite 1150
Seattle, WA 98101
suzanne@michaelandalexander.com
claire@michaelandalexander.com

DATED this 14th day of May, 2017, at Seattle, WA.



Heather Guthrie, Legal Assistant

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