

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.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. Pierce Transit and the Trial Court Failed to Follow the Summary Judgment Standard.

Rather than taking all facts alleged by Chief Baker as true and assuming logical inferences in favor of Chief Baker, as is required by CR 56 and the applicable case law, Pierce Transit and the trial court in this case ignored Chief Baker's factual assertions and drew inferences in favor of Pierce Transit. The trial court apparently relied on Pierce Transit's conclusory statements that no reasonable juror could find for Chief Baker. Such reliance is not sufficient to meet Pierce Transit's burden of demonstrating that it is entitled to summary judgment as a matter of law.

The most egregious example of the improper weighing of evidence and use of improper inferences is the trial court's conclusion that Pierce Transit had reserved for itself the right to "discharge employees at-will for other reasons not set forth in the Manual." CP at 751. Nowhere in the Pierce Transit's manual does it state that Chief Baker or other employees are "at-will" employees. To the contrary, Section 8 of the manual states that the discipline "may be issued for cause." CP at 286. Section 8 goes on to list reasons that constitute "cause" and states that this list is non-exhaustive. *Id* at 286-287. The logical inference here is that any reasons not in the list must still have to constitute "cause" for discipline.

Pierce Transit told Chief Baker to use Section 8 in the discipline he issued to employees. It told Chief Baker that he should employ progressive discipline. Pierce Transit attached Section 8 to the discipline it issued to Baker. This is all evidence of Pierce Transit's promises which was ignored by the trial court and ignored by Pierce Transit in its briefing. This evidence goes directly to the issue of whether Pierce Transit waived by conduct any disclaimer it might have made.

Finally, the trial court also ignored the legal rulings which state that whether an employer has made a promise abrogating "at-will" employment; whether an employer had disclaimed such a promise; and whether an employer has established just cause for termination are questions of fact for a jury to decide. *See, e.g., Brady v. Daily World*, 105 Wn.2d 770, 775, 718 P.2d 785, 788 (1986) (whether an employer made a promise is a question of fact for the jury); *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 171, 914 P.2d 102, 109 (1996) (whether the employer disclaimed its promise is question of fact for the jury). *Lund v. Grant Cty. Pub. Hosp. Dist. No. 2*, 85 Wn. App. 223, 228, 932 P.2d 183, 185 (1997) (whether an employer has established just cause for termination is a question of fact for the jury).

Here, the language in Section 8 of the manual, Pierce Transit's actions about discipline generally, and the facts surrounding Chief Baker's

termination combined to create issues of fact that the trial court should have allowed a jury to decide.

B. A Reasonable Juror Could Find that Pierce Transit Promised Chief Baker he Would only be Terminated “for Cause.”

Pierce Transit attempts to gloss over the language in its handbook which specifically states that it will discipline employees “for cause.” CP at 286. As one court has noted; “[f]or cause’ and ‘just cause’ remain terms of art in the employment context, which automatically incorporate a body of case law interpreting those terms.” *Drobny v. The Boeing Co.*, 80 Wn. App. 97, 105, 907 P.2d 299, 304 (1995). Pierce Transit is a sophisticated entity that can be presumed to know the legal effect of the term “for cause.”

Pierce Transit makes conclusory statements that the promises in its manual were not promises of specific treatment in a specific situation. But they patently were. When employees are disciplined or terminated, a specific situation, Pierce Transit stated that it may do so “for cause,” a specific treatment. Pierce Transit used the term “for cause” in its employment handbook. It performed actions which suggested that it intended to follow through on this promise, i.e., disseminating the policy whenever it issued discipline. These are all sufficient reasons for a reasonable juror to conclude that Pierce Transit promised Chief Baker and

other employees that discipline and discharge would be “for cause.” Summary judgment was inappropriate.

C. **A Reasonable Juror Could Find that Chief Baker Reasonably Relied on Pierce Transit's Promises of “for Cause” Protection.**

Pierce Transit makes a half-hearted attempt to argue that Chief Baker has not demonstrated that he reasonably relied on promises in the manual. *See* Respondent’s Brief at 22-23. With this argument, Pierce Transit, once again, fundamentally misunderstands the burden of proof at this stage of the litigation. It is Pierce Transit’s burden to show that no reasonable juror could find that Chief Baker reasonably relied on the promise of for-cause discipline. It provided no evidence to support that assertion. Instead, it merely states in conclusory fashion that Chief Baker did not supply evidence to support reliance. It then takes issue with the evidence that Chief Baker did supply; his declaration describing how Pierce Transit instructed him in how to apply Section 8.¹ These instructions and Chief Baker’s statement that he maintained his position at Pierce Transit in

¹ Pierce Transit argues at page 24 n.10 of its brief that the statements from Pierce Transit managers to Chief Baker about using Section 8 and progressive discipline are inadmissible hearsay. Chief Baker contends that these individuals were acting in their management capacities as agents of Pierce Transit and therefore their statements are its statements and are admissible. Even if this were not the case, the evidence that Chief Baker attached copies of Section 8 to discipline he issued and that Section 8 was attached to the discipline issued to him is enough to establish that Pierce Transit intended to be bound by the policy.

reliance on the expectation that he would only be disciplined or terminated for cause is sufficient evidence to show reliance. *See* CP at 523.

Where courts have found no reasonable reliance on a policy as matter of law, the evidence has been that the employee was not aware of the policy at all. *See, e.g., Bulman v. Safeway*, 144 Wn.2d 335, 354, 27 P.3d 1172 (2000). Here there is no doubt that Chief Baker was aware of the policy because Pierce Transit told him to follow it, and Chief Baker did follow it. Contrary to Pierce Transit’s suggestion, establishing reliance does not require a specific act of reliance, it merely requires evidence that the given policy creates an expectation of fair treatment and job security, evidence of knowledge of the policy, and evidence that the employee stayed employed with the employer because of that expectation. *See Bulman.*, 144 Wn.2d at 343 (discussing *Thompson . St. Regis Paper Co.*, 102 Wn.2d 219, 230, 685 P.2d 1081 (1984)). Here, the specific promise of “for cause” discipline, Chief Baker’s knowledge of the promise, and his continued employment with Pierce Transit is more than enough for a reasonable juror to conclude Chief Baker justifiably relied on the promise.

D. A Reasonable Juror Could Find that Pierce Transit’s “Disclaimers” Were Voided by its Actions.

Pierce Transit attempts to argue that language in Section 8 about following “guidelines” in issuing discipline and deciding the discipline on the “facts of each case” somehow equates to a reservation of unfettered

discretion in its ability to discipline. *See* Respondent's Brief at 26. In fact, the logical inference from these statements is precisely the opposite of what Pierce Transit claims. A suggestion that an employer will follow specific procedures; i.e., discipline for cause; giving specific examples of what constitutes cause; and telling the employees that the employer will make discipline decisions based on the "facts of each case;" is strong evidence that the employer is telling the employees, their employment is no longer "at-will."

Had Pierce Transit wanted to clearly tell its employees that they were "at-will," it could have done so. If it wants to argue that it did so in this case, it can present evidence and make that argument to a jury. But it was improper for the trial court to completely disregard the language in Pierce Transit's manual and Pierce Transit's later actions which were inconsistent with its alleged disclaimer.

Pierce Transit attempt to distinguish *Payne v. Sunnyside Hosp.*, 78 Wn. App. 34, 894 P.2d 1379 (1995) as to the effect of future conduct on an alleged disclaimer is ineffectual. In *Payne*, the employer's disclaimer stated that "The policies and procedures described [here] are implemented at the *sole discretion* of the hospital and are subject to change at any time without prior notice." *Id.*, 78 Wn. App. at 37. The policy went on to state that "This [document] is designed to outline general hospital policies and

procedures. Nothing contained [here] is to be considered as an employment contract. Employees have the right to resign the employment at any time, without notice, for any reason or no reason. The hospital retains a similar right to discontinuation of the employment of any employee.” *Id.*, 78 Wn. App. at 42.

The *Payne* disclaimer was much clearer than the alleged disclaimer in this case. The *Payne* court found a reasonable juror could find the employer’s conduct in telling its managers to apply progressive discipline policy waived its disclaimer. This is very similar to what occurred in this case. Chief Baker supplied evidence that he complied with Pierce Transit’s demand that he utilize Section 8 in discipline and that he apply progressive discipline when issuing discipline as a manager. *See* CP at 523, 583-589. Pierce Transit supplied a copy of Section 8 with its discipline to Chief Baker. *See* CP at 571-582. This is all evidence that Pierce Transit intended to abide by the promises in Section 8. It is in direct contravention of Pierce Transit’s conclusory statement that it did not intend to be bound its own policies. *See* Respondent’s Brief at 27. As Pierce Transit correctly points out, conclusory, self-serving statements are insufficient evidence to support or defeat a motion for summary judgment.

Pierce Transit’s attempts to distinguish *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 733, 75 P.3d 533, 541 (2003) are similarly

ineffectual. The disclaimer in that case was somewhat similar, but slightly more forceful than the alleged disclaimer in the present case. It read in part: “This Handbook is intended as a set of general guidelines and should not be construed as a contract or covenant of your employment. Management reserves the right, at any time, to revise this Handbook, wholly or in part.” *Id.* In the present case, the language in Pierce Transit’s manual informing its employees that Pierce Transit would communicate to them changes to the manual creates the expectation that the policies will be applied until they changed. CP at 284.

In discussing the employer’s conduct, the court in *Carlson* made this observation: “Significantly, the pages of the Handbook that dealt with discipline and discharge were mailed to Mr. Carlson with the termination letter from Mr. Tesch.” This is precisely what occurred in this case. As in *Carlson*, this is strong evidence that Pierce Transit intended to be bound by its policies, whatever its generalized disclaimer might have stated. Pierce Transit failed to meet its burden of showing that no reasonable juror could find that Pierce Transit waived its alleged disclaimer by conduct.

E. A Reasonable Juror Could Find that Pierce Transit did not Discharge Chief Baker for Cause.

As described in the Chief Baker’s opening brief, an employer fails to discipline or fire an employee “for cause” when it does so for “arbitrary, capricious, or illegal reasons.” *Baldwin v. Sisters of Providence*, 112 Wn.2d

127, 139, 769 P.2d 298, 304 (1989). In addition, “just cause” requires that the employer’s investigation is fair, its discipline is proportionate to the violation committed, and that the discipline is even-handed. *Civil Serv. Comm’n v. City of Kelso*, 137 Wn.2d 166, 173, 969 P.2d 474 (1999).² Where there are questions of fact about whether an employer has met its burden of showing cause for termination, these questions are for a jury. *Lund v. Grant Cty. Pub. Hosp. Dist. No. 2*, 85 Wn. App. 223, 228, 932 P.2d 183, 185 (1997).

1. A Reasonable Juror Could Find that Pierce Transit’s Investigation was Unfair.

Pierce Transit suggests that it conducted an unbiased investigation into the allegations against Chief Baker. Yet, Lynne Griffith testified that she refused to discuss Chief Baker’s conduct with Doug Middleton, even though Griffith supervised Baker during the period he was alleged to have violated Pierce Transit’s policies. CP at 482-483. Griffith was still employed by Pierce Transit. This failure to gather relevant facts suggests that Pierce Transit did not conduct its investigation in good faith. Similarly, Doug Middleton’s failure to consider additional statements from the liaison officers involved, suggests that Pierce Transit was not interested in getting

² Contrary to Pierce Transit’s suggestion at page 30 n.14 of its brief, the definition of just cause in *Kelso* did not come the collective bargaining agreement at issue in that case; it came from over “30 years of case law.” *See, Kelso*, 137 Wn.2d at 173.

to the facts of the matter, but rather, it had already decided to fire Chief Baker before it had all the facts. *See* CP at 595. A reasonable juror could conclude from these facts that Pierce Transit's investigation of this matter was not unfair and that its subsequent termination decision was arbitrary, capricious, and not based on substantial evidence.

2. A Reasonable Juror Could Find that Pierce Transit's Termination Decision was Arbitrary.

The job description supplied to Chief Baker provided that he had authority to administer programs and budgets. *See* CP at 534. A reasonable juror could conclude, as Chief Baker did, that this authority included changing the procedures for reporting hours worked to enhance efficiency. The same juror could also conclude that firing Chief Baker for his good-faith exercise of the discretion granted to him by Pierce Transit was not based on substantial evidence and therefore was arbitrary.

Despite Chief Baker's long unblemished service to Pierce Transit and what appeared to be a dispute over scope of authority, Pierce Transit gave a one line lip service to considering discipline other than termination. *See* CP at 573. This is not in keeping with its representations to Chief Baker to follow progressive discipline. This too is evidence that a reasonable juror could use to conclude that decision to terminate Chief Baker was arbitrary and not for cause.

3. A Reasonable Juror Could Find that Pierce Transit's Termination of Chief Baker was not Even-Handed.

Evidence that employers have not disciplined other employees for similar violations is evidence of arbitrariness. *See Lund*, 95 Wn. App. at 230. Citing no legal authority, Pierce Transit simply declares that Lynne Griffith is not a valid comparator as “a matter of law.” The facts are these: Lynne Griffith, like Chief Baker, was in management at Pierce Transit. CP at 345. Like Chief Baker, Lynne Griffith allegedly committed mismanagement related to reporting of employee time. See CP at 100-101. The State Auditor found that Lynne Griffith had improperly granted paid leave time to employees in cases where they had not earned it. *Id.* CP at 100-101. This resulted in over \$120,000 in improperly paid time. A reasonable juror could fairly characterize both Lynne Griffith and Chief Baker's behavior as exercising discretion in administering the programs at Pierce Transit's direction.

Pierce Transit fired Chief Baker after he made a good-faith changes to time-keeping requirements in administering a liaison program. Pierce Transit did not even discipline Lynne Griffith for failing to follow applicable law in compensating employees. These facts are enough to suggest to a reasonable juror that the discipline issued to Chief Baker was not “for cause,” rather it was arbitrary and not even-handed. This suggestion is even stronger when one considers that Ms. Griffith, who

supervised Chief Baker during the relevant period, failed to provide information for Chief Baker's investigation, despite still being a Pierce Transit employee.

Pierce Transit did not meet its burden of showing that no reasonable juror could conclude that it did not fire Chief Baker for cause.

II. CONCLUSION

This is a case where the trial court over-stepped its authority and decided multiple issues of contested fact that should properly go to a jury. Instead of accepting Chief Baker's facts and drawing inferences in his favor, the trial court improperly decided questions of fact and drew inferences against Chief Baker.

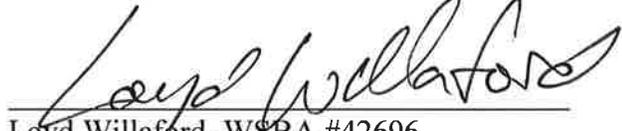
There is a question of fact in this case around whether Pierce Transit promised Chief Baker that it could only terminate him for cause when Pierce Transit outlined and implemented specific policies stating that discipline and termination would be for cause. There is a question of fact as to whether Pierce Transit may have disclaimed its promise to discipline for cause using additional language in its manual. There is a question of fact as to whether Pierce Transit waived any alleged disclaimer when it told its managers, including Chief Baker, to apply the for cause standard and attaching copies of this section of policy manual to its disciplinary decision. Finally, there is a question of fact as to whether Pierce Transit's termination

of Chief Baker met the just cause standard when its investigation was unfair, its discipline was disproportionate to the alleged violation, and the discipline was not even-handed.

Because reasonable jurors could disagree on all these points, Pierce Transit failed to meet its burden under the summary judgment standard. Chief Baker asks this court to reverse the trial court and remand this matter for trial.

RESPECTFULLY SUBMITTED THIS 14th day of July, 2017.

CLINE & CASILLAS

A handwritten signature in black ink, appearing to read "Loyd Willaford", written over a horizontal line.

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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, using the JIS portal, a true and correct copy of the foregoing Reply Brief of Appellant on the individuals below:

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