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Court of Appeals
Division III
State of Washington

NO. 339742

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LIZ TATE

Plaintiff/Appellant

v.

TATE TRANSPORTATION, INC., a Washington corporation,

Defendant/Respondent

RESPONDENT'S BRIEF

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I. INTRODUCTION

Plaintiff brought this action against defendant Tate Transportation, Inc. (hereinafter “Tate Transportation”) after defendant terminated plaintiff’s employment. Plaintiff alleged in her complaint that: (a) plaintiff and Tate Transportation had an implied employment agreement and that Tate Transportation breached that agreement by terminating her on May 30, 2014, without just cause (CP at 6-7); (b) defendant retaliated against plaintiff by terminating her employment because defendant was upset that plaintiff’s reports of compliance issues interfered with the operation of the company (CP at 7-8); and (c) defendant made promises of continued employment and no discharge without just cause, upon which plaintiff justifiably relied. (CP at 7-8.) On appeal, plaintiff’s challenges relate solely to the alleged breach of an implied employment contract.

II. STATEMENT OF THE ISSUES

1. Did the trial court appropriately conclude that there was no genuine issue of material fact and appropriately grant defendant’s motion for summary judgment? [Plaintiff/appellant’s assignment of error 1]
2. Does the alleged implied employment contract violate the Statute of Frauds? [Plaintiff/appellant’s assignment of error 2]

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

In May 2008, Ray Nulph and Chris Nulph (father and son, respectively) purchased Tate Transportation from Tom Tate (plaintiff's former husband). (CP at 51, ¶ 2.) Plaintiff and Tom Tate had operated Tate Transportation for 20 years. (CP at 4.) Defendant agreed in 2008 to have Tom Tate continue to work at Tate Transportation after the purchase to assist with the continuity of the company's operations; Liz Tate continued her employment with Tate Transportation after the purchase as well. (CP at 51, ¶ 2.)

Plaintiff claims that defendant repeatedly represented to plaintiff that she had a position with the company as long as she wanted to continue working and as long as she could satisfactorily perform her duties, indicating to plaintiff as late as June 20, 2012, that she could continue her employment with defendant until at least January 2017. (CP at 4-5, ¶¶ 5-6; CP at 36, 126.) Chris Nulph agrees that when plaintiff asked about her future with the company he would respond with statements to the effect that he didn't expect her hours or pay would change or that he saw no reason why her job would not be secure. (CP at 52, ¶¶ 3-5.) Plaintiff alleges that she "understood these representations to mean that there was

an agreement for continued employment for an indefinite period and that Plaintiff could only be terminated for just cause.” (CP at 4, ¶ 5.)

Through written interrogatories defendant inquired what “Ray Nulph and Chris Nulph requested from plaintiff, or what plaintiff provided, in exchange for these [alleged] representations of continued employment.” (CP at 37.) Plaintiff responded, “Ray and Chris Nulph made it clear that they wanted Liz to continue in her role as she had performed over the years with Tate Transportation and that she was an indispensable member of the Tate Transportation management team.” (CP at 37.)

Plaintiff knew at the time that the Nulphs purchased the company in 2008 that she would retain all of the same job duties with the added responsibility of training Chris Nulph (CP at 112, ¶ 8), but she also claims that in exchange for a promise of job security she agreed to be on call at all times on a 24/7 basis, she performed duties for Tate Transportation while on vacation, she went back to school for two years to receive additional training for health and safety issues, and she agreed to train Chris Nulph in the management of a trucking operation. (CP at 117-118, ¶¶ 21, 24.) Tom Tate recalls that at the time he sold the company to Tate Transportation the expectation was that plaintiff would retain all of her job

duties with Tate Transportation and would have the additional responsibility of training Chris Nulph. (CP at 130.)

Chris Nulph never asked plaintiff to be on-call or respond while she was on vacation—plaintiff expected and demanded to be on-call, just as she had before the Nulphs bought the company. (CP at 154, ¶ 8.) Chris Nulph did not know that plaintiff had gone back to school. (CP at 152, ¶3.) Chris Nulph also believes that plaintiff had the same duties after the Nulphs bought the company as she did before and she did not take on any extra work or responsibilities. (CP at 52, ¶ 6.)

In discovery (in response to allegations that defendant had retaliated against plaintiff because of safety and health issues she had raised), defendant asked plaintiff to provide “the specific complaints that plaintiff made, including when the complaint was made, who the complaint was made to, what the alleged violation consisted of, and what federal law or regulation or state law or regulation plaintiff alleges was violated.” (CP at 39.) Instead of specifying complaints as requested plaintiff cursorily responded as follows, “Plaintiff would frequently email and discuss with Chris Nulph health and safety issues and legal issues regarding Tate Transportation. Seventy-five percent of these communications were via email and 25% [sic] of these communications involved face-to-face conferences with Chris Nulph. Also, these issues

were raised in safety meetings with dispatch. The federal law and regulation is the Federal Motor Carrier Act.” (CP at 39.) In contrast, Chris Nulph explains that he addressed the issues plaintiff brought to his attention, defendant put in place additional safety precautions after plaintiff left, and defendant continues to have exemplary safety ratings and practices. (CP at 55-56, ¶¶ 17-18.)

While plaintiff worked at Tate Transportation she frequently treated drivers, co-workers, and her supervisors with disrespect. (CP at 53-55, ¶¶ 9-15.) For example, she intimidated and humiliated people she closely supervised or those with whom she closely interacted (*i.e.*, Susan Bruton, truck drivers, etc.). (CP at 42, ¶ 4; CP at 44, ¶¶ 4-5; CP at 47, ¶ 5.) On one occasion she called Chris Nulph on the phone screaming, “Who the f@!* do you think you are . . . Do you want to get your skinny little a** up here and do this job yourself?” (CP at 53, ¶ 9.) She also called Chris Nulph when he was on vacation with his family and screamed at him, “I’m F@!*ing pissed!”, while his wife and young daughter were lying next to him and could hear plaintiff screaming. (CP at 53, ¶ 9.) Plaintiff also verbally threatened to hang Sue Remillard and Chris Nulph out of her office window by their ankles and take matters into her own hands if Chris Nulph didn’t do what she wanted the next time. (CP at 53, ¶ 10.) She also spoke derogatorily of the company owners (*e.g.*, referring

to Ray Nulph as a “potato hauler” that was unqualified to haul refrigerated freight) to staff and outside contractors, including telling others that Chris Nulph would never be able to run the company and was running the company into the ground. (CP at 44, ¶ 6; CP at 50, ¶ 5; CP at 54, ¶ 13.) Plaintiff has not denied these actions and statements.

Through a series of email correspondence, phone calls, and in-person interactions, plaintiff refused to carry out work-related tasks requested by her supervisor, Chris Nulph, or threatened to stop doing work she customarily fulfilled. Examples include telling Chris Nulph, “You tucked your tail and ran upstairs to question me . . . Remember yesterday when I told you I wouldn’t take on more hours and responsibility because of the way management is done here” (CP at 54, ¶ 12.) Another example includes plaintiff telling Chris Nulph, “Apparently the 2.5 hours of training that you have received in your career equip you well enough to take over this aspect of my job, in the future I will notify you of all HR matters and you can handle them.” (CP at 54, ¶ 12.) Plaintiff has not denied these actions and statements.

Through these series of interactions with plaintiff Chris Nulph felt bullied and intimidated by plaintiff. When he drove into the office in the morning and saw the light on in her office he would get physically sick and anxious in anticipation of how she might treat him that day. He felt

like he was being held hostage in his own company and could do nothing to prevent her behavior. Because he was new to the business he feared that if he made plaintiff angry she would sabotage the business and make it perform poorly. (CP at 54-55, ¶ 15.)

Chris Nulph became aware in the second or third week of May 2014 that two of his largest customers (*i.e.*, Norpac and Newly Weds Foods) would be losing business in the coming year and that that loss would impact Tate Transportation directly. He was concerned about the loss of business and immediately began making efforts to compensate for the anticipated loss of business. Chris Nulph approached plaintiff on May 27, 2014, expressed that the company needed to grow the business into other areas in anticipation of the loss of business and requested that plaintiff assist in that effort. Plaintiff flatly and rudely refused to assist in any way with that effort while the company was still under the current management. Recognizing that plaintiff, as a part-time employee earning as much or more than the full-time Tate employees, refused to help the company in response to the significant anticipated loss of business, Chris Nulph elected to terminate her as a cost-cutting measure. On May 30, 2014, Chris Nulph terminated Liz Tate as an employee at Tate Transportation. (CP at 56-57, ¶¶ 20, 22.)

Owner Chris Nulph explains that the anticipated loss of significant business and Liz Tate’s refusal to help the company when they needed her help most, was the proverbial “last straw.” (CP at 56, ¶ 20.) Chris Nulph considered all of this history before deciding to terminate Liz. He believed he could have terminated her for how she treated him disrespectfully, how she refused to help him grow the business, and as a cost-cutting measure to address the expected loss of income. (CP at 57, ¶ 22.)

Tate Transportation lost the business as expected. As of September 2015, defendant was on track to lose \$850,000.00 to \$1,000,000.00 between those two companies alone in 2015. As planned, Tate Transportation did not replace plaintiff but instead required existing employees to assume plaintiff’s former duties and responsibilities. (CP at 57-58.)

B. PROCEDURAL BACKGROUND

Plaintiff filed the underlying action against defendant on November 20, 2014. (CP at 3.) After an exchange of written discovery between the parties, defendant moved for summary judgment against all of plaintiff’s claims and sought sanctions under CR 11. (CP at 15, 17-18.) On November 5, 2015, the trial court heard defendant’s motion for summary judgment. The trial court granted defendant’s motion for

summary judgment, dismissing all three causes of action raised by plaintiff in her complaint. (CP at 174-176; RP at 28.) The trial court denied defendant's requests for fees as sanctions under CR 11, but determined that statutory costs and attorney fees were appropriate. (RP at 28.)

On November 16, 2015, plaintiff filed a motion for reconsideration. (CP at 179.) Plaintiff sought reconsideration as to only plaintiff's first claim (*i.e.*, implied contract claim). In a letter opinion, dated November 23, 2015, the trial court denied the motion, stating, "The arguments made by plaintiff in [*Greaves v. Medical Imaging Systems, Inc.*, 124 Wn.2d 389, 394, 879 P.2d 276 (1994)], parallel the theories of the Plaintiff in this case. Just as in *Greaves*, viewing the facts in the light most favorable to the nonmoving party the Court cannot find facts sufficient to constitute an implied contract. As the Court previously noted, to have an implied contract there must be at least an implied agreement, not just a personal understanding." (CP at 230.) The trial court declined to base its holding on the statute of frauds, concluding instead as stated above. (CP at 230.) Plaintiff filed a notice of appeal on December 10, 2015, seeking review of the Order Granting Defendant's Motion for Summary Judgment and the Final Judgment entered on December 3, 2015. (CP at 241.)

IV. ARGUMENT

A. THE TRIAL COURT APPROPRIATELY GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

Summary judgment is appropriately granted if the evidence presented shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). One who moves for summary judgment has the initial burden of showing the absence of an issue of material fact, irrespective of which party, at the time of trial, will have the burden of proof on the issue concerned. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. *See id.* at 226. A material fact is one upon which the outcome of the case depends, in whole or in part. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

“A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case.” *Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006)(“*Shooting Park Ass'n*”). “Once the moving party has met its burden, the burden shifts to the nonmoving party to present admissible

evidence demonstrating the existence of a genuine issue of material fact.”
Id. at 351. “If the nonmoving party cannot meet that burden, summary
judgment is appropriate.” *Id.*; *Indoor Billboard/Washington, Inc. v.*
Integra, 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

**1. The Trial Court Appropriately Concluded that
Plaintiff’s Breach of Implied Employment Contract
Claim Raised No Genuine Issues of Material Fact.**

There is no genuine issue of material fact with regard to plaintiff’s
breach of implied contract claim. Plaintiff contends that defendant
repeatedly represented to plaintiff that she had a position with the
company as long as she wanted to continue working and as long as she
could satisfactorily perform her duties. Plaintiff also contends that Chris
Nulph signed a letter written by plaintiff and addressed to the Department
of Homeland Security in June 20, 2012, referencing her employment with
Tate Transportation.

Chris Nulph agrees that when plaintiff asked about her future with
the company he would respond with statements to the effect that he didn’t
expect her hours or pay would change or that he saw no reason why her
job would not be secure. He also acknowledges signing the letter that
plaintiff wrote to the Department of Homeland Security as a personal
favor to her. He also does not dispute that he had discussions with
plaintiff about her long-term employment. The facts regarding the

communications between plaintiff and Chris Nulph about her employment at Tate Transportation are not in dispute, just the legal impact of those facts (as discussed below).

In addition, there is no genuine issue of material fact with regard to defendant's claim that it had just cause to terminate plaintiff. Plaintiff contends that there is a factual dispute as to whether Tate Transportation needed to terminate plaintiff as a cost-cutting measure based on Chris Nulph's request that plaintiff take on more duties to expand the business. Chris Nulph doesn't dispute asking plaintiff to take on more duties, but explains that he did so in an effort to grow the business in anticipation of expected loss to business revenue. Plaintiff hasn't even attempted to address the significant anticipated loss of business reported by Tate Transportation's customers in May 2014 (*see e.g.*, CP at 80, 151), that defendant presented as evidence of its decision to take cost cutting measures. Plaintiff has raised no genuine issue of material fact with regards to defendant's claim that it terminated plaintiff as a cost cutting measure.

Plaintiff also argues that there are disputed facts regarding plaintiff's insubordination. Namely, she asserts that one email in March 2013 (14 months before her termination) from Glenn Silver, Chris Nulph's request in May 2014 for her to help address the expected decline in the

business, plaintiff's visit to Chris Nulph's house, and Chris Nulph's visit to plaintiff's house create genuine issues of material fact regarding the just cause of her termination. A close review of the record however contradicts plaintiff's position. First, there is no dispute that in March 2013, Glenn Silver thought favorably of plaintiff. Glenn Silver later explained however that as he interacted with plaintiff more, his opinion of her changed. (*See* CP at 168, ¶ 3.)

Second, Chris Nulph has explained the alleged factual disputes. Chris Nulph acknowledges that he visited plaintiff's house once for a meeting; he also acknowledges that plaintiff went by his house once when he wasn't home and looked in the window at his kitchen. It's a valid question to inquire why Chris Nulph interacted with plaintiff as long as he did and why he asked her to help him with the expected decline in business if she treated him so poorly; in hindsight he should have terminated her much earlier based merely on how she treated him and others. However, it can be hard for someone who has been bullied and harassed to explain why he acted the way he did while in the midst of the harassment; Chris Nulph explains: (a) "I was afraid to cross her or get her mad out of fear that she would sabotage the company or abandon it and compete with our company before I had a chance to learn our business" (CP at 53, ¶ 8); (b) "It was so strange; she could be one of the nicest

people to work with and helped me learn the ropes of the business and moments later she would be one of the worst people to work with” (CP at 54, ¶ 14); (c) “I truly felt like I was being held hostage in my own company and could do nothing to prevent her behavior. Because I was new to the business I feared that if I made Liz angry she would sabotage the business and make it perform poorly” (CP at 54-55, ¶ 15); and (d) “[D]ue to the large role she played at the time . . . I knew if she was still with the business I couldn’t succeed in creating more business unless she supported the idea. Basically I felt like she held me hostage and was dictating to me the terms allowing me to grow my business” (CP at 157, ¶ 14).

Despite alleging that there are genuine issues of material fact plaintiff has not denied that she called Chris Nulph on the phone screaming, “Who the f@!* do you think you are . . . Do you want to get your skinny little a** up here and do this job yourself?” She has not denied that she called Chris Nulph when he was on vacation with his family and screamed at him, “I’m F@!*ing pissed!” Plaintiff has not denied that she verbally threatened to hang Sue Remillard and Chris Nulph out of her office window by their ankles and take matters into her own hands. She has not denied refusing to carry out work-related tasks Chris Nulph had given her or threatening to stop doing work she

historically had done. Plaintiff has not denied speaking derogatorily of Ray and Chris Nulph to employees and independent contractors.

Considering these facts, not only has plaintiff failed to raise any genuine issues of material fact related to her insubordination, she hasn't even denied the basic facts underlying her insubordination.

2. The Trial Court Correctly Concluded that the Parties Did Not Enter into an Implied Contract Terminable Only for Cause.

An employment contract that is indefinite as to duration is terminable at will by either the employer or the employee. *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 26, 111 P.3d 1192 (2005). “In Washington an employer has the right to discharge an employee, with or without cause, in the absence of a contract for a specified period of time.” *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887, 891, 568 P.2d 764 (1977). “A contract for permanent or steady employment (as opposed to ‘temporary’ or ‘lifetime’ employment) is terminable by the employer only for just cause if: (1) there is an implied agreement to that effect, or (2) the employee gives consideration in addition to the contemplated services.” *Greaves v. Medical Imaging Systems, Inc.*, 124 Wn.2d 389, 393, 879 P.2d

276 (1994)¹(quoting *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887, 568 P.2d 764 (1977)). An agreement cannot be established solely by an employee’s subjective understanding or expectations as to employment . . . Even an assurance of ‘steady’ employment is not sufficient.” *Roberts*, 88 Wn.2d at 894.

“[F]or a contract to exist there must be mutual assent to its *essential terms.*” *Weiss v. Lonquist*, 153 Wn. App. 502, 511, 224 P.3d 787 (2009) (emphasis added). “Mutual assent generally takes the form of an offer and an acceptance. In determining the mutual intention of contracting parties, the unexpressed, subjective intentions of the parties are irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations. A contract may be . . . implied in fact with its existence depending on some act or conduct of the party sought to be charged.” *Id.* Mutual assent to an agreement may be deduced from the “circumstances surrounding a transaction, inferring the existence of a contract based on a course of dealings between the parties or a common understanding within a particular commercial setting.” *Id.*; *see also Johnson v. Whitman*, 1 Wn. App. 540, 544-545, 463 P2d 207 (1969).

¹ Interestingly the Court also noted that, “neither an assurance of steady employment nor the plaintiff’s understanding that he would be employed as long as he performed his work in a satisfactory manner could reasonably establish evidence of an implied contract.” *Greaves*, 124 Wn.2d at 394.

Plaintiff did not establish that the parties entered into an implied contract in which plaintiff's employment was terminable only for cause. Plaintiff argued in her briefing that the letter written by plaintiff in June 2012 (*see* CP at 126) was ample evidence of an agreement for permanent or steady employment terminable by defendant only for cause. The letter was drafted by plaintiff and described plaintiff's position as a "long term temporary position." The letter relayed that plaintiff received an annual wage of approximately \$75,000 with benefits, but did not specify her hourly rate (or state whether plaintiff was paid a salary) or what specific benefits plaintiff was to receive. The letter indicated that *plaintiff had agreed* to stay on as an employee until at least January 2017, but the letter *did not state that Tate Transportation had agreed* to that arrangement (*i.e.*, the letter states plaintiff's intentions but does not state Tate Transportation's intentions). The letter was signed by Chris Nulph, but was prepared by plaintiff for her own personal purposes unrelated to work. The letter was *not* addressed from one party to the other party, but was instead addressed to a third party—not a common practice if the parties had intended for the letter to memorialize an agreement between the parties. In short, even in a light most favorable to the plaintiff the letter clearly failed to include essential terms of the alleged contract (*i.e.*, length, base pay, benefits, the parties, mutual assent by the employer, etc.).

Plaintiff also argued that statements from Chris Nulph that plaintiff could stay in her position as long as she wanted was proof of an implied contract. Again, these statements were vague at best, and contained no specific details about terms of employment. Notably, neither the letter nor any other evidence submitted by plaintiff gives any indication that the parties discussed how plaintiff's employment could be terminated (*i.e.*, whether she could only be terminated for cause). Rather plaintiff presents her subjective understandings of her discussions with her employer and the alleged promises of long term employment.

The allegations proffered by plaintiff amount to no more than promises of steady employment, which the *Roberts* court found to be insufficient to constitute an implied agreement for employment terminable only for cause. Under the law stated in *Weiss*, the alleged promises of long term employment and the 2012 letter simply are not sufficient to establish an offer, acceptance, or mutual intention of the parties to agree that plaintiff could only be terminated for cause. The trial court correctly concluded that plaintiff failed to establish the creation of an implied employment contract.

3. The Trial Court Appropriately Determined that the Alleged Employment Contract was Unenforceable because it Lacked Consideration.

“A contract for permanent or steady employment (as opposed to ‘temporary’ or ‘lifetime’ employment) is terminable by the employer only for just cause if: (1) there is an implied agreement to that effect, or (2) the employee gives consideration in addition to the contemplated services.” *Greaves*, 124 Wn.2d at 393. One “factor in determining an implied agreement is whether there is consideration in addition to required services which results in detriment to the employee and a benefit to the employer.” *Greaves*, 124 Wn.2d at 394.

In *Greaves*, the court considered the respondent’s argument that he could only be terminated for cause because the circumstances surrounding his employment allegedly gave rise to an implied contract. In April 1998, Greaves entered into a 3-year employment contract with a hospital at a specified salary. *Greaves*, 124 Wn.2d at 391. A contractor, MIS, moved its equipment to the hospital and the contractor was ultimately charged by the hospital for Greaves’ services. MIS approached Greaves in July 1988 and offered to hire Greaves. Greaves resisted at first because he was worried about losing his position at the hospital if MIS lost its contract with the hospital. MIS assured Greaves that that would not happen and offered him employment with MIS for 5 years at a specified salary.

Greaves accepted the position and became a MIS employee. MIS lost its contract in April 1989 and Greaves was subsequently terminated. *Id.*

Greaves brought suit against MIS claiming breach of an oral employment contract terminable only for just cause. *Id.* at 392. The Court found that respondent Greaves' agreement to transfer his employment from the hospital to the contractor was not sufficient independent consideration to support an implied contract terminable only for cause.

In *Roberts*, appellant Roberts alleged that he gave consideration (for the implied contract terminable only at will) in the form of longevity of service, forgoing other job opportunities, moving four times with his family when transfers were ordered, and accepting a lower present salary. 88 Wn.2d at 895-96. The court found that none of these actions supplied independent consideration beyond the services he was expected to perform for his employer. *Id.* at 896.

Plaintiff has not shown that plaintiff provided consideration in addition to the duties she was expected to fulfill. Plaintiff argues that in exchange for a promise of job security she agreed to be on call at all times on a 24/7 basis, she performed duties for Tate Transportation while on vacation, she went back to school for two years to receive additional training for health and safety issues, and she agreed to train Chris Nulph in the management of a trucking operation. However, plaintiff's own

statements and submissions contradict and undermine these claims. When questioned via interrogatories whether plaintiff had provided something of value in exchange for the assurance of indefinite employment plaintiff asserted that the request from defendant's agents was that she "continue in her role as she had performed over the years with Tate Transportation and that she was an indispensable member of the Tate Transportation management team." She made no mention of any additional consideration given, even though the interrogatory specifically requested that information. Tom Tate acknowledges that *at the time he sold the company* to Tate Transportation the expectation was that plaintiff would retain all of her job duties with Tate Transportation and would have the additional responsibility of training Chris Nulph. Plaintiff also admits that she knew *at the time of the purchase of the company by the Nulphs in 2008* that she would retain all of the same job duties with the added responsibility of training Chris Nulph. (CP at 112, ¶ 8.)

Chris Nulph explains that he never asked plaintiff to be on-call or respond while she was on vacation—plaintiff expected and demanded to be on-call, just as she had before the Nulphs bought the company; plaintiff does not deny this. As for plaintiff's suggestion that she went back to school for two years, Chris Nulph knew nothing of her going back to school. In summary, the items mentioned by plaintiff as consideration

were provided by plaintiff before any alleged promises of job security were ever made by Tate Transportation or, in the case of additional education, doesn't constitute consideration because Tate Transportation knew nothing of plaintiff's efforts to gain an education. In summary, plaintiff did not provide defendant additional value in exchange for the alleged promise that she could work indefinitely and could only be terminated for cause; she only continued the duties she had always had (or expected to have when the Nulphs purchased the company). As stated in *Greaves and Roberts*, consideration *in addition to* fulfilling the employee's duties is required to support an implied contract and defeat an employer's right to terminate employment at will. As such, no implied contract could have been formed in this case because plaintiff provided no consideration in exchange for the alleged promise of termination without cause. Absent an employment contract, plaintiff was an at-will employee and defendant was justified in terminating plaintiff with or without cause.

4. Defendant had Just Cause to Terminate Plaintiff's Employment.

Just cause or good cause has been described as a "fair and honest reason for dismissal, exercised in good faith on the part of the party exercising the power. A discharge for good cause is one that is based on the facts that (1) are supported by substantial evidence; (2) are reasonably

believed by the employer to be true; and (3) are not for any arbitrary or capricious or illegal reason.” *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 166, 876 P2d 435 (1994).

Even if the Court assumes that plaintiff and defendant entered into an employment contract (terminable only for just cause), plaintiff’s claim must still fail as a matter of law because defendant had just cause to terminate plaintiff. First, defendant had just cause to terminate plaintiff’s employment as a cost-cutting measure. As described above, Chris Nulph became aware in the 2nd or 3rd week of May 2014 that two of his largest customers would be reducing their business in the coming year. He was concerned about the loss of business and immediately began making efforts to compensate for the loss of business. Chris Nulph approached plaintiff, expressed that the company needed to grow the business into other areas in anticipation of the loss of business and requested that plaintiff assist in that effort. Plaintiff flatly refused to assist in any way with that effort while the company was still under the current management. Recognizing that plaintiff, as a part-time employee earning more than many full-time Tate employees, refused to help the company in response to the significant anticipated loss of business, Chris Nulph was justified in terminating her position as a cost-cutting measure. Chris Nulph has submitted evidence of the loss of business; plaintiff has

introduced no evidence to contradict the loss of business suffered by Tate Transportation.

Second, plaintiff was insubordinate, disrespectful, and blatantly hostile towards company owners (and others). Examples of plaintiff's insubordination and disrespect include: yelling vulgarities at Chris Nulph in person and over the phone; speaking derogatorily of Chris and Ray Nulph to defendant's employees and contractors and suggesting that she would take the company back over when the Nulphs had driven it into the ground; and refusing to do work requested by her boss, Chris Nulph (including refusing to help work to compensate for the significant loss of business expected in 2015), or otherwise relieving herself of her duties (as though she had authority to determine what her duties were). Any one of these actions alone are just cause for termination.

Defendant's termination of plaintiff satisfies the test for just cause set forth in *Havens*. First, the reasons provided are supported by substantial evidence (as outlined in the numerous declarations filed with the trial court). Second, Chris and Ray Nulph decided to terminate plaintiff based on facts that they reasonably believed to be true (in fact they observed or experienced the derogatory actions themselves). Third, the reasons given were based on facts important to the business and were not based on any arbitrary, capricious, or illegal reason.

B. THE ALLEGED CONTRACT IS VOID UNDER THE STATUTE OF FRAUDS

The “general rule, almost universally adhered to, is that a contract for personal services which by its terms is not to be performed within a year must be in writing.” *Greaves*, 124 Wn.2d at 396. A contractual provision allowing early termination of a contract of fixed duration exceeding a year, or the existence of a possible excuse to performance, does not take the agreement out of the statute of frauds. *French v. Sabey Corp.*, 134 Wn.2d 547, 552-53, 951 P.2d 260 (1998)(where the Court rejected the employee’s contention that the parties’ ability to terminate the 5-year oral contract on six months’ notice took the agreement out of the statute of frauds).

Some courts have held that contracts that are of indefinite length *and terminable at will* do not fall within the statute of frauds (*e.g.*, *Sargent v. Drew-English, Inc.*, 12 Wn.2d 320, 328, 121 P.2d 373 (1942)), based on the reasoning that the parties intend that those contracts can be fully performed within one year. *See e.g.*, *In re Field’s Estate*, 33 Wash. 63, 74-75, 73 P. 768 (1903). However, “when no time for the performance of a contract is fixed by the parties, if it nevertheless appears from the surrounding circumstances and, considering the object contemplated by the contract, that the parties intended that it should extend over a year,

recovery could not be had upon it, unless in writing.” *Fish Clearing House v. Melchor*, 174 Wash. 539, 545, 25 P.2d 381 (1933) (internal quotations omitted). Washington law disfavors allowing implied contracts to circumvent the statute of frauds. *See e.g., Cushing v. Monarch Timber Co.*, 75 Wash 678, 687, 135 P. 660 (1913)) (Where the Court said, “Historically considered, all statutes of frauds are intended for the prevention of frauds and perjuries. To permit recovery upon . . . an implied contract would be to defeat the purpose of the statute and supply, by implication, a contract which the statute expressly says may only be proven by written evidence”) (cited as current law in *Henry v. Green*, No. 26286-3-III (Wash. Ct. App. Div. 3 Feb. 14, 2008)).

“The statute of frauds . . . is a positive statutory mandate which renders void and unenforceable those undertakings which offend it. The memorandum or memoranda in writing, to satisfy the requirements of the statute must not only be signed by the party to be charged but it must also be so complete in itself as to make recourse to parol evidence unnecessary to establish any material element of the undertaking. Liability cannot be imposed if it is necessary to look for elements of the agreement outside the writing.” *Smith v. Twohy*, 70 Wn.2d 721, 725, 425 P.2d 12 (1967) (internal case citations omitted); *see also Family Medical Bldg., Inc. v. State, Dept. of Social & Health Services*, 104 Wn.2d 105, 108, 702 P.2d

459 (1985) (“To satisfy the statute, written memoranda must disclose the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration.”).

Plaintiff argues that the alleged implied agreement for an indefinite duration terminable only for just cause is exempted from the statute of frauds. Interestingly plaintiff characterizes the alleged agreement as being of indefinite duration but yet she presented evidence in which she asserted that she had agreed to work for defendant for a minimum of 5 years. Specifically, in the letter plaintiff wrote to the Department of Homeland Security in June 2012 (and asked Chris Nulph to sign) she indicated that she had “agreed to stay on as an employee until at least 2017.” If such an implied agreement were truly in place, because the proposed 5-year time period could not be completed within one year (and because plaintiff and defendant did not enter into a written employment contract), the alleged implied contract is void under the statute of frauds as stated clearly in *Greaves* and *French* above. In addition, under *Cushing*, allowing implied contracts to circumvent the statute of frauds would negate the intention of the statute.

Plaintiff cites to a California case, *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) for the position that, “if an agreement whose

performance would otherwise extend beyond a year *could* be completely performed within a year on the happening of some contingency, it is not within the Statute of Frauds.” *Id.* at 674-75. This holding is inapplicable to this case and directly conflicts with Washington case law. Plaintiff waffles between two factual positions—on the one hand she argued that she had agreed to work for defendant for at least 5 years, while arguing on the other hand that the contract has no definite term. To reconcile these two factual positions, the Court must assume that the plaintiff contends that she had an implied employment agreement with defendant for some indefinite time period *lasting at least 5 years*. Where a party (*i.e.*, plaintiff) asserts the formation of a contract of a definite length over one year, the *French* court specifically held (contrary to *Foley*) that a contingency that might cause the contract to terminate in less than one year (*e.g.*, termination for cause by the employer) does *not* take the case out of the statute of frauds. *See French*, 134 Wn.2d at 552-53. Or, even if the alleged contract was considered to be of indefinite length as plaintiff proposes, under the holding in *Fish Clearing House*, the alleged contract still does not satisfy the statute of frauds because the implied contract that plaintiff alleges was formed was intended (in the light most favorable to

plaintiff) to extend over a year. In short, reliance on California law is unnecessary and erroneous.²

Plaintiff also erroneously argues that the letter to the Department of Homeland Security dated June 20, 2012, serves as a note or memorandum that satisfies the statute of frauds. As already discussed above, the letter: was drafted by plaintiff for her own personal purposes unrelated to work; did not specify plaintiff's hourly rate (or state whether plaintiff was paid a salary); did not discuss whether she was to receive benefits; did not state that Tate Transportation had agreed to employ plaintiff for any certain period of time (*i.e.*, the letter states plaintiff's intentions but does not state Tate Transportation's intentions); and was not addressed from one party to the other party, but was instead addressed to a third party. In short, as described in *Smith and Family Medical Building*, for this letter to constitute a note or memorandum sufficient to take the alleged agreement out of the statute of frauds the letter has to be so complete in itself to make it unnecessary to consult to parol evidence to establish the terms of the agreement. Even in a light most favorable to the plaintiff the letter clearly fails to include essential terms of the alleged

² Plaintiff's statement that *Foley* has been cited by the Washington Supreme Court three times (*see* Appellant's Br. at 16) is misleading, as each of the cases referenced cited *Foley* for a legal principle inapplicable to this matter (*i.e.*, the tort of wrongful discharge in violation of public policy).

contract (*i.e.*, length, base pay, benefits, the parties, mutual assent by the employer, etc.). The alleged contract is void as a result of the statute of frauds.

In summary, based on the facts asserted by plaintiff herself, the implied contract is purported to be of a term beyond one year, was not reduced to writing, and therefore is void because of the statute of frauds.

C. DEFENDANT IS ENTITLED TO RECOUP ATTORNEY FEES AND COSTS ON APPEAL

If this court denies plaintiff's appeal, defendant should be considered the prevailing party and should be awarded its costs and reasonable attorney's fees incurred in connection with this appeal, consistent with RCW 4.84.060, .080, and RAP 18.1.

V. CONCLUSION

Plaintiff has failed to present sufficient evidence to support her case and has failed to demonstrate any genuine issues of material fact. The facts failed to show that the parties entered into an implied employment contract terminable only for cause. Furthermore, even if an implied contract was formed, defendant had just cause to terminate plaintiff's employment. As such, the trial court appropriately granted summary judgment for the defendant and appropriately denied plaintiff's motion for reconsideration. The Court of Appeals should affirm the trial

court's order in all respects and should dismiss this appeal on its merits.
The Court of Appeals should also award defendant its reasonable attorney fees and costs to the extent permitted under RAP 18.1.

Respectfully submitted this 5th day of May, 2016.

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PROOF OF SERVICE

I certify that I caused to be served a copy of this document on all parties or their counsel of record on the date below as follows:

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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 5th day of May, 2016, at Walla Walla, Washington.

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