

NO. 64908-6-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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ROGER DAIGNAULT,

Appellant

v.

PACIFIC NORTHWEST REGIONAL COUNCIL OF CARPENTERS,  
DOUG TWEEDY, AND CASS PRINDLE

Respondents

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
NO. 09-2-15934-3 KNT

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BRIEF OF APPELLANT

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## TABLE OF CONTENTS

<b>I. ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>II. STATEMENT OF THE ISSUES.....</b>	<b>1</b>
<b>III. STATEMENT OF THE CASE.....</b>	<b>2</b>
<b>IV. SUMMARY OF THE ARGUMENT.....</b>	<b>9</b>
<b>V. ARGUMENT AND AUTHORITY</b>	
1. Standard of Review.....	12
2. The trial court erred when it dismissed as a matter of law Daignault’s breach of contract claim.....	13
a. Genuine issues of material fact exist as to whether the Personnel Policy contained enforceable promises of specific treatment in specific situations.....	13
b. The trial court erred when it concluded that the Personnel Policy was adequately disclaimed.....	17
i. The language of the disclaimer is unclear and ambiguous as a matter of law.....	17
ii. Whether the enforceable promises in the Personnel Policy of specific treatment in specific situations were adequately disclaimed was, at minimum, a question for the jury.....	23

- c. Material issues of fact remain as to whether the Council breached its contract with Daignault when it terminated him without just cause or a meaningful appeal conducted in good faith and with fair dealing.....27
  - i. A reasonable jury could have found that the Council breached its contract with Daignault when it terminated him without just cause.....28
  - ii. A reasonable jury could have found that Daignault’s appeal to the Executive Board was not conducted with good faith and fair dealing.....30
  - iii. The trial court erred when it failed to review the decision of the Executive Board.....32
- d. Daignault justifiably relied on the promises in the Personnel Policy.....34
- e. The section of the Personnel Policy stating that the Council’s promises in the policy cannot be enforced in a court of law is unconscionable.....37
- 3. The trial court abused its discretion when it denied Daignault’s motion for continuance of the summary judgment hearing.....38

**VI. CONCLUSION.....40**

## TABLE OF AUTHORITIES

### Cases

<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004).....	37
<i>Barrett v. Weyerhauser</i> , 40 Wn. App. 630, 700 P.2d 338 (1985).....	30-31
<i>Baldwin v. Sisters of Providence in Washington, Inc.</i> , 112 Wn.2d 127, 769 P.2d 298 (1989).....	29, 31
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	14, 23
<i>Briggs v. Nova Services</i> , 135 Wn. App. 955, 147 P.3d 616 (2006).....	40
<i>Butler v. Joy</i> , 116 Wn. App. 291, 65 P. 3d 671 (2003).....	39-40
<i>Carlson v. Lake Chelan Community Hospital</i> , 116 Wn. App. 718, 75 P.3d 533 (2003).....	19, 20, 22, 25
<i>Civil Service Comm'n v. City of Kelso</i> , 137 Wn.2d 166, 969 P.2d 474 (1999).....	29
<i>Clark v. Sears Roebuck &amp; Co.</i> , 110 Wn. App. 825, 41 P.3d 1230 (2002).....	22
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 784 P.2d 554 (1990).....	38-40
<i>Doolittle v. Small Tribes of Western Washington, Inc.</i> , 94 Wn. App. 126, 971 P.2d 545 (1999).....	27-28
<i>Duncan v. Alaska USA Fed. Credit Union, Inc.</i> , 148 Wn. App. 52, 199 P.3d 991 (2008).....	14, 26-27, 36
<i>In re Estate of Wahl</i> , 99 Wn.2d 828, 830-31, 664 P.2d 1250 (1983).....	27
<i>Gaglidari v. Denny's Restaurants, Inc.</i> , 117 Wn.2d 426, 815 P.2d 1362 (1991).....	35

<i>Govier v. North Sound Bank</i> , 91 Wn. App. 493, 957 P.2d 811 (1998).....	14
<i>Jacoby v. Grays Harbor Chair &amp; Mfg. Co.</i> , 77 Wn.2d 911, 919, 468 P.2d 666 (1970).....	23
<i>Korslund v. DynCorp Tri-Cities Servs., Inc.</i> , 156 Wn.2d 168, 125 P.3d 119 (2005).....	15, 26, 34-36
<i>Kuest v. Regent Assisted Living, Inc.</i> , 111 Wn. App. 36, 43 P.3d 23 (2002).....	24, 36
<i>Malarkey Asphalt Co. v. Wyborney</i> , 62 Wn. App. 495, 814 P.2d 1219 (1991).....	31
<i>Nelson v. McGoldrick</i> , 127 Wn.2d 124, 896 P.2d 1258 (1995).....	37
<i>Payne v. Sunnyside Hospital</i> , 78 Wn. App. 34, 894 P.2d 1379 (1995).....	24-25
<i>S&amp;S Construction, Inc. v. ADC Properties, LLC</i> , 151 Wn. App. 247, 211 P.3d 415 (2009).....	33
<i>Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003).....	12
<i>Swanson v. Liquid Air</i> , 581 Wn.2d 512, 826 P.2d 664 (1992).....	12, 14-16, 18-19, 26-28, 35
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	11-13, 16, 17, 22-25, 27, 29
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005).....	12
<i>Wlasiuk v. Whirlpool Corp.</i> , 76 Wn. App. 360, 914 P.2d 102 (1996).....	18, 19
<i>Zuver v. Airtouch Communications</i> , 153 Wn.2d 293, 317, 103 P.3d 753 (2004).....	27

**Statutes**

RCW 7.04A.230.....33

**Rules**

Washington Civil Rule 56.....12

**Other Authorities**

2 Restatement (Second) of Contracts § 208, cmt. e (1981).....38

Kelby D. Fletcher, *The Disjointed Doctrine of the Handbook Exception to Employment At Will: A Call for Clarity Through Contract Analysis*, 34 GONZ. L. REV. 445 (1998).....13

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred as a matter of law when it found that the employer's personnel policy did not form the basis for a contract claim and ordered summary judgment for respondents.
2. The trial court erred when it found no disputed material facts on the issue of whether the employer's personnel policy formed the basis of a contract claim.
3. The trial court erred when it found that the contract was adequately disclaimed.
4. The trial court erred when it found no disputed material facts on the issue of whether the employer's personnel policy contained enforceable promises of specific treatment in specific situations on which the appellant justifiably relied.
5. The trial court erred when it failed to consider whether the appellant's appeal to the Executive Board was conducted with good faith and fair dealing.
6. The trial court abused its discretion when it denied appellant's motion for a continuance of the summary judgment hearing.

## **II. STATEMENT OF THE ISSUES**

1. Did the trial court err as a matter of law when it found that the employer's personnel policies did not form the basis for a contract claim, despite the existence of disputed material facts? (Assignments 1, 2)
2. Did the trial court err when it found the contract was properly disclaimed by the Council? (Assignment 3)

113. For four years, Daignault reported to Tweedy without incident. CP at 264-65.

Tweedy was up for reelection in August 2008. CP at 113. In the fall of 2007, Tweedy initiated a conversation with Daignault about the elections to be held the following year. CP at 68. He asked Daignault if Daignault was “on his team.” Daignault said, “I’m on your team, Doug,” but that doesn’t mean I have to vote for you.” *Id.* According to Daignault, Tweedy’s treatment of Daignault “went all downhill” after that. CP at 70. After Daignault suggested that he might not vote for Tweedy, Tweedy stood up and told Daignault “how dumb [he] was” and that he was lucky to qualify as a business agent. CP at 69. Tweedy then took a blank piece of paper, gave it to Daignault, and told Daignault to write a resignation letter. Daignault refused to resign. *Id.*

Shortly before Daignault’s conversation with Tweedy in the fall of 2007, the Council’s business manager, who was Rob VanAlstyne at the time, requested a breakfast meeting with Daignault. CP at 80. At the meeting, he asked Daignault whether he was planning to vote for Tweedy in the upcoming election; Daignault said no. *Id.* The business manager told Daignault that if Daignault did not vote for Tweedy, he would probably lose his job. *Id.*

Daignault ultimately decided to run for the EST position in August 2008 against Tweedy. CP at 80. Daignault lost the election, but he did not believe he could be terminated by the Council for running against Tweedy. Every union member had the right to run for office, and Daignault understood that he could be fired only for cause. CP at 81.

Daignault was terminated on August 19, 2008, two days after the EST election. When Daignault asked Tweedy about the termination, Tweedy looked at Daignault and said, "You know why you got fired. You ran against me." CP at 266. Daignault protested that he had not violated any of the personnel policies and that there was no cause for termination.

What constitutes cause for termination is set out in the Pacific Northwest Regional Council of Carpenters Personnel Policy for all employees ("Personnel Policy"). CP 134-39. The Personnel Policy was originally created in October 1996, and it was modified on February 16, 2008. The sections of the 2008 Personnel Policy related to termination are as follows:

#### **Section 4 Discipline and Termination**

4.1 General Statement: It is the policy of the Regional Council that principles of corrective and reasonable discipline should apply to employees covered by this policy. In situations where employee misconduct is minor and correctable in nature, discipline short of termination is appropriate. Consideration therefore should be given in instances of less severe employee misconduct to the policies set forth below, with the understanding that

specific situations may lead to less or more discipline than is set forth below. The Regional Council retains the right to terminate an employee immediately even for one act of misconduct if that act is sufficiently severe or harmful to the interest of the Regional Council, in which case the policy of progressive discipline set forth in Section 4.2 would not apply.

#### **4.2 Discipline**

As noted in Section 4.1, consideration should be given to the following, in cases where employee misconduct is minor and correctable in nature: [omitted for space]

#### **4.3 Termination**

A) Termination of employment by the Regional Council shall be at the discretion of the Executive Secretary for acts which are severe in nature or harmful to the interests of the Regional Council, for repeated infractions as covered in Section 4.2, or for other reasons including the following:

1. Violation of the UBC Nomination and Election Procedures while on duty.
2. Theft.
3. Conviction of a crime that would disqualify an individual for a union office under the Landrum-Griffin Act.
4. Loss of Valid State Drivers License and/or the ability to drive.
5. Not insurable for auto insurance.
6. Economic reasons.
7. Insubordination.

CP at 137-38.

On February 26, 2008, before running for the EST position, Daignault received a copy of this Personnel Policy and signed underneath the following statement on the final page of the policy:

I understand that my continuing employment is subject only to the terms of this policy, that the Employment Policy

does not create a contract of employment or a right to employment, and that the Pacific Northwest Regional Council of Carpenters has the discretion to terminate my employment subject only to appeal to the Regional Council Executive Committee and further appeal as may be provided in the UBC Constitution.

CP at 139. The Personnel Policy also contained one sentence in the body of the policy itself stating the policy “creates no rights enforceable against the Regional Council in a court of law.” *Id.* At the time he signed this, Daignault felt assured that he would be terminated for cause only and relied upon the integrity of the union that he had been a part of for 35 years. CP at 265.

In addition, Daignault signed a document entitled, “Payment of Union Dues and Fees.” In that document, Daignault acknowledged his obligation to pay local union dues and Regional Council dues as a condition of his employment, and he authorized the Council to withhold the amount due from his wages. CP at 140. The document also stated, “Employment terms and appeal rights are set by the Council delegates and the Executive Board.” *Id.* Daignault signed the document to pay union dues, despite not being represented by the union.

When Daignault was terminated by Tweedy, it was not for any of the reasons listed in the Personnel Policy or for severe misconduct. There

was no suggestion that Daignault committed any act severe in nature or harmful to the interests of the Regional Council.

Daignault appealed his termination to the Executive Board of the Council, expecting the Council to follow the procedures in its Personnel Policy. He expected that his appeal would be met with “due process.” CP at 265. However, when Tweedy presented his side to the Executive Board, Daignault was not allowed in the meeting. CP at 102. Daignault was given no opportunity to question Tweedy, and he was not told what was said in the meeting. He was told only that the termination was upheld by the Board.

After the Executive Board meeting, Daignault spoke with several members of the Board. These individuals included President Bruce Dennis, Vice President Roger Hornbuckle, Executive Board Member Robert Acker, and Rick Short. CP at 266. Bruce Dennis told Daignault that “there is no appeal process.” *Id.* In the context in which he told him, he meant that the Executive Board does what it wants, regardless of the rules it is administering. *Id.* Roger Hornbuckle told Daignault that he voted against upholding the termination, because Tweedy did not follow the personnel policies. *Id.* Acker told Daignault that there was not enough information to support his termination. CP at 266. Thus,

Daignault learned from individuals in the meeting that his termination was not given due consideration by the Board.

**b. Daignault's Superior Court action**

Daignault brought an action in King County Superior Court for breach of contract and wrongful discharge in violation of public policy<sup>1</sup> against the Council, Doug Tweedy, Cass Prindle, and several Does.<sup>2</sup> CP at 1-13. Daignault's first counsel did not take any depositions or serve any interrogatories or requests for production. CP at 193. Daignault's first counsel failed to respond to a summary judgment motion,<sup>3</sup> and the court, prior to the date the motion was set for hearing and without hearing oral argument, granted the summary judgment motion. CP at 174-75.

Daignault then retained new counsel. His second (present) counsel moved for reconsideration and a continuance. CP at 176-187. The trial court granted the motion for reconsideration, but denied a continuance of the summary judgment hearing, CP at 208-209, effectively precluding

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<sup>1</sup> Daignault is not appealing the dismissal of his wrongful termination in violation of public policy claim.

<sup>2</sup> No additional parties were joined in the trial court; the Does are no longer a part of this case.

<sup>3</sup> Daignault's first counsel incorrectly calculated the date the response brief was due. CP at 188-189. His first counsel later submitted a declaration explaining that when the brief was due, he was distracted by the earthquake and subsequent tsunami that hit American Samoa on September 29, 2009. Daignault's first counsel had an office and family members in American Samoa. *Id.*

Daignault's new attorney from taking any discovery. Because of the short amount of time the Court gave counsel to file opposition papers, Daignault's attorney was not able to note depositions<sup>4</sup> and depose the defendants prior to deadline to provide additional material facts for Daignault's response to the summary judgment motion. Summary judgment was granted for the Council, Doug Tweedy, and Cass Prindle on January 19, 2010. CP at 332-36.

#### **IV. SUMMARY OF THE ARGUMENT**

Daignault was not an at-will employee. He worked under an employment policy which permitted the Pacific Northwest Regional Council of Carpenters Local No. 1144 ("the Council") to terminate him only for specific reasons set out in the Personnel Policy, and then only after an appeal to the Executive Board. Daignault was terminated for running against his supervisor for the Secretary-Treasurer position in the union, which was not a reason that would constitute grounds for termination under the policy. Daignault's subsequent appeal to the

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<sup>4</sup> Plaintiff's counsel received the court's order on reconsideration on November 16, 2009, and faxed a deposition notice to Defendant's counsel (whose office is in California) that day. He noted the deposition five days away, the day before Plaintiff's opposition papers were due. Defense counsel did not move to quash, but did object on the basis that service was done via facsimile. Plaintiff moved to compel attendance at deposition. The trial court denied the motion based on the fact that service was improper, as it was by fax.

Executive Board was not conducted in good faith and with fair dealing.

He was not provided a genuine opportunity to appeal his termination.

The trial court erred when it ordered summary judgment for respondents after it found no basis for a breach of contract claim. Viewed in the light most favorable to Daignault the evidence in this case shows, at minimum, genuine issues of material fact as to whether the Council's Personnel Policy contained enforceable promises of specific treatment in specific situations that were not adequately disclaimed. These promises were (1) that an employee would be terminated only for just cause, and (2) that an employee would receive a meaningful appeal to the Executive Board prior to termination. Whether the Personnel Policy's unclear, ambiguous and inherently contradictory disclaimer effectively disclaimed the promises listed above was a question for the jury, not the trial court.

Respondents breached the contract by terminating Daignault without just cause and without following the appeal procedures promised in the Personnel Policy with good faith and fair dealing. There is no substantial evidence in the record that would demonstrate that Daignault's appeal to the Executive Committee was conducted with good faith and fair dealing. In essence, the appeal process given to Daignault was a sham.

Even if a clear disclaimer were to exist, the trial court would still have erred by entering summary judgment for the respondents, because

disputed issues of material fact remained as to whether Daignault had justifiably relied on the promises of specific treatment in specific situations set out in the Council's written Personnel Policy. There is sufficient evidence in the record that Daignault relied on the employer's specific promises to defeat a summary judgment motion, despite the existence of a disclaimer. The disclaimer in the Personnel Policy itself reinforces the promise that appellant's employment could be terminated only after the respondents followed the promised procedures laid out in the Personnel Policy; under the circumstances of this case, Daignault's reliance was justified.

In addition, Daignault's ability to present his case prior to the trial court's order of summary judgment was prejudiced by the trial court's denial of his motion to continue the summary judgment hearing. Daignault retained new counsel after his first counsel failed to conduct discovery, yet the trial court denied Daignault's new counsel a short extension of time in which to conduct necessary depositions and other discovery. This extension of time would have enabled Plaintiff's counsel to depose members of the Executive Board to obtain additional evidence that Plaintiff's termination was for political reasons, as opposed to a termination for "good cause" under the employment policies. The interests

of justice required the trial court to grant Daignault's motion for continuance; by denying the motion, the trial court abused its discretion.

## V. ARGUMENT AND AUTHORITY

### 1. Standard of Review

The Court of Appeals reviews a grant of summary judgment de novo. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). The appellate court performs the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003).

A grant of summary judgment is only appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Swanson v. Liquid Air*, 581 Wn.2d 512, 518, 826 P.2d 664 (1992) (citing CR 56). Facts and all reasonable inferences drawn from those facts are considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.* The party moving for summary judgment has the burden of proving there is no genuine issue as to any material fact. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

**2. The trial court erred when it dismissed as a matter of law Daignault's breach of contract claim.**

**a. Genuine issues of material fact exist as to whether the Personnel Policy contained enforceable promises of specific treatment in specific situations.**

The Washington Supreme Court, in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), established two methods for employees to establish breach of contract claims based on employer-issued handbooks: one based on express contract law, and the other based on promissory-estoppel type analysis. Thus, under *Thompson*, the default relationship of at-will employment can be modified by statements contained in employer's policy manuals or handbooks presented by the employer to its employees. *Id.* at 228.

Employers may be obligated to act in accordance with the policies they announce in such handbooks issued to their employees. *Id.* at 229. As the *Thompson* court recognized, it would be incongruous to expect an employee to follow the employer's policies, while not also expecting the employer to abide by policies promising certain treatment of employees. *Id.* at 229-30; *see also* Kelby D. Fletcher, *The Disjointed Doctrine of the Handbook Exception to Employment At Will: A Call for Clarity Through Contract Analysis*, 34 GONZ. L. REV. 445, 466 (1998).

One way in which an employer may be obligated to act in accordance with the policies announced in its handbooks is by the employer and employee “contractually obligat[ing] themselves concerning provisions found in an employee handbook.” *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 199 P.3d 991 (Div. 1, 2008) (citing *Thompson*, 102 Wn.2d 228-29). The concepts of offer, acceptance, and consideration are requisite to an express contract analysis of employee handbooks. *Swanson v. Liquid Air*, 118 Wn.2d 509, 521, 762 P.2d 1143 (1988).

Whether the parties intended specific policies in an employment document to be part of their employment agreement is an issue of fact subject to the Washington context rule of interpreting contracts. *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522-23, 826 P.2d 664 (1992) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990)). Even though an employer may unilaterally change its policies (with notice to employees), the written policies are enforceable by an employee for as long as they are in effect. *Govier v. North Sound Bank*, 91 Wn. App. 493, 499-501, 957 P.2d 811 (1998).

Whether handbook language requiring the employer to follow a particular procedure before terminating an employee is a promise of specific treatment is a question of fact precluding summary judgment.

*See, e.g., Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d at 233; *Swanson*, 118 Wn.2d at 525. For example, in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), an employee who was forced to resign for “stepp[ing] on somebody’s toes” relied on a handbook providing that terminations would be conducted in a manner at all times fair, reasonable, and just. *Id.* at 221-22. On the record before the Supreme Court, the Court concluded that it could neither determine the effect of the manual in relation to the employment relationship nor whether any statements in the manual amounted to promises of specific treatment in specific situations. *Id.* at 233. Thus, the Court remanded the case to the trial court for further factual determinations. *Id.* at 235.

Similarly, in *Swanson v. Liquid Air*, 118 Wn.2d 512, 826 P.2d 664 (1992), a document created by the employer contained an exclusive list of five types of conduct sufficient for termination without a warning. *Id.* at 516. The document provided, “In all other instances of misconduct, at least one warning shall be given.” *Id.* The Court held that, even though the employees had been told that their employment was “at will”, the document in question raised genuine issues of material fact. For this reason, the trial court’s grant of summary judgment was reversed. *Id.*

Here, the Council’s Personnel Policy set out in writing the terms of Daignault’s employment. These terms are promises of specific treatment

in specific situations. According to the Policy, Daignault could be terminated only for “repeated infractions,” for “acts which are severe in nature or harmful to the interests of the Regional Council,” or for reasons explicitly listed in the policy and reasons similar to those listed. Like the policy in *Swanson*, the Council’s policy uses mandatory language to limit the discretion of the Executive Secretary to terminate employment: “Termination . . . *shall* be at the discretion of the Executive Secretary for acts which are severe in nature . . .” CP at 137.

The policy also set out procedures of progressive discipline which would be followed in less severe cases, with the Council retaining the right to terminate an employee immediately for one act of misconduct only if that act is “sufficiently severe or harmful to the interest of the Regional Council[.]” The Council did not retain discretion in the policy to terminate Daignault for no reason at all or without an appeal to the Executive Board conducted with good faith and fair dealing.

Offer, acceptance, and consideration existed: (1) Daignault was offered terms and conditions of employment as set out by the Council delegates and Executive Committee, and not by any collective bargaining agreement; (2) he accepted those terms and conditions as indicated by his signature on the last page of a copy of the Personnel Policy; and (3) he

employment policies were not properly drafted so as to make it clear to Daignault that the employer did not intend to be bound by its promises of specific treatment or afford him a meaningful appeal as was established in the policy. The “disclaimer” in the Council’s employment policies is inadequate because it does not state that employment is “at will” or that the policies could be modified at any time, at the sole discretion of the employer.

The *Thompson* decision provided a way for an employer to avoid liability arising from policies in the handbooks distributed to its employees: it could include a clear and “conspicuous” disclaimer that the handbook was not part of the employment relationship. *Thompson*, 102 Wn.2d at 230-31. This would allow the employer to state affirmatively that it wished to “retain discretion” over termination decisions in the workplace. *Id.* Such a disclaimer would require an employer to state in a conspicuous manner that nothing in the employment manuals is intended to be part of the employment relationship. *Thompson*, 102 Wn.2d at 230-31. The disclaimer must also state in a conspicuous manner that nothing contained in the handbook is intended to be part of the employment relationship and that such statements are instead “simply general statements of company policy.” *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 170, 914 P.2d 102 (1996) (citing *Swanson*, 118 Wn.2d at 527).

A disclaimer's statement that nothing in an employee handbook shall be deemed to constitute a "contract of employment" is "manifestly unclear," because even employees who can be terminated at-will have a contract of employment. *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 171, 914 P.2d 102 (1996); *see also Swanson*, 118 Wn.2d at 537.

Disclaimer language must constitute a clear and conspicuous statement when taken alone. *See Carlson v. Lake Chelan Community Hospital*, 116 Wn. App. 718, 732, 75 P.3d 533 (2003) (stating that "the disclaimer language, taken alone, does not constitute a clear, conspicuous statement).

In *Carlson*, Division Three affirmed the trial court's judgment for Carlson against his employer, holding that the disclaimer language suggested that the employer was willing to accept some limitations on its authority. The disclaimer language in the hospital's handbook was as follows:

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.

*Carlson*, 116 Wn. App. at 731. The court determined that "[w]hile the first sentence suggests that [the employer] did not intend to be bound by the procedures in the Handbook, the second sentence suggests that the employer is accepting some limitations on its authority." *Id.* at 732. The

court read the phrase “[m]anagement reserves the right, at any time, to revise this Handbook,” as insufficiently strong to allow management to retain the authority to act apart from the handbook’s procedures. *Id.* The court upheld the trial court’s determination that the disclaimer was ineffective as a matter of law. *Id.*

The *Carlson* decision also provided some examples of successful disclaimers. In *Clark v. Sears Roebuck & Co.*, 110 Wn. App. 825, 41 P.3d 1230 (2002), a case cited by *Carlson*, the lengthy disclaimer’s strong language began, “Employment at Sears is for an indefinite period and terminable at the will of either Sears or an associate with or without notice and without or without cause at any time.” *Id.* at 831. That sentence was followed by the following statements:

References in this Guide to reasons for termination are illustrative only and are not intended to limit in any way either the reasons for which an associate may be terminated or the Sears authority to terminate at will. Employment at Sears is for an indefinite period and . . . Sears reserves the right to depart from its standard disciplinary procedures when, in its discretion, such a departure is deemed warranted.

*Id.* The court in *Carlson* compared that language to the disclaimer in the Lake Chelan Community Hospital handbook, which it viewed as significantly weaker. *Carlson*, 116 Wn. App. at 732. It held that the

disclaimer's language was not strong enough to prevent the hospital's handbook from altering the at-will employment relationship. *Id.*

The Council's disclaimer on the last page of its Personnel Policy is as follows:

I understand that my continuing employment is subject only to the terms of this policy, that the Employment Policy does not create a contract of employment or a right to employment, and that the Pacific Northwest Regional Council of Carpenters has the discretion to terminate my employment subject only to appeal to the Regional Council Executive Committee and further appeal as may be provided in the UBC Constitution.

CP at 139. This “disclaimer” is not even its own sentence—it is contained in a clause that promises that employment is subject to the “terms of this policy”. The Council did not use “at will” language in the disclaimer or indicate that the policy was “illustrative” only. While the second clause suggests that the Council does not intend to be bound by the terms of the Personnel Policy, first and the third clauses of the sentence set clear limitations on the authority of the employer by reasserting that the “continuing employment is subject only to the terms of this policy” and that “the Pacific Northwest Regional Council of Carpenters has the discretion to terminate my employment subject only to appeal to the Regional Council Executive Committee and further appeal as may be provided in the UBC Constitution.” This is strong language indicating

**ii. Whether the enforceable promises in the Personnel Policy of specific treatment in specific situations were adequately disclaimed was, at minimum, a question for the jury.**

Under Washington contract law, interpretation of a contract provision is a question of law “only when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence.” *Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428 (1993) (*Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990)). If a contract provision can be interpreted in more than one reasonable way, it must be interpreted by the finder of fact. Here, where more than one inference may be taken from the language of the employer’s policy as a whole, it must be, at minimum, a question for the jury.

In Washington contract law, ambiguity is construed against the drafter, who could have taken more care in drafting the agreement. *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 919, 468 P.2d 666 (1970). The Council wrote its policy, and the language in the policy’s disclaimer, where ambiguous, *must* be construed against the drafter. *See id.* Thus, an ambiguous disclaimer or internally contradictory policy such as this one cannot, as a matter of law, meet the standard set out in

*Thompson* for an employer's disclaimer to properly defeat claims by its employees for a breach of express or implied contract.

In *Kuest v. Regent Assisted Living, Inc.*, 111 Wn. App. 36, 43 P.3d 23 (2002), the court held that questions of fact existed in a case in which the employee asserted that her employer had violated a specific promise of progressive discipline, despite a disclaimer. *Id.* at 40. The policy was not disclaimed in part because the employer followed the progressive discipline policy with other employees and assured the employee before hiring her that the employer would follow the policy. *Id.* at 53.

Similarly, in *Payne v. Sunnyside Hospital*, 78 Wn. App. 34, 36-37, 894 P.2d 1379 (1995), the employer issued a document stating that it had "an obligation to retain employees who are qualified" and stating that it would be "fair, consistent and impartial." Although at-will employment was expressly reserved in the disclaimer, the document also stated that "all steps of the progressive discipline policy will be used." *Id.* The testimony of the employer's personnel director that she expected the progressive discipline policy to be followed was inconsistent with the expression of at-will employment in the manual. *Id.* at 38.

Here, as in *Payne*, the handbook was not effectively disclaimed. The disclaimer in *Payne* contained much stronger language than the Council's disclaimer, yet the court in *Payne* found the effectiveness of the

disclaimer to be a question for the jury. *See Carlson*, 116 Wn. App. at 732 (comparing the disclaimer in *Payne* to the disclaimer signed by Carlson). If the effectiveness of a clear and conspicuous disclaimer such as the one in *Payne* is a question for the finder of fact, the effectiveness of the Council's disclaimer would, at minimum, need to be a question for the jury.

The Council's disclaimer does not go far enough to warn the employee that the employer can terminate the individual for *any* reason, as opposed to the reasons enumerated in the policy. Nor does it disclaim the termination procedure that must be provided to an employee upon termination; in fact, it reasserts that specific promise of appeal in the disclaimer itself: "the Pacific Northwest Regional Council has the discretion to terminate my employment subject only to appeal to the Regional Council Executive Committee and further appeal as may be provided in the UBC Constitution." Thus, the disclaimer, in essence, *confirms* that the employer will provide due process prior to termination, while also implying, but not stating, that the employer need not provide such process. In light of the internal inconsistency of the disclaimer itself, the Council's termination of Daignault without a meaningful appeal in

violation of the Personnel Policy cannot be seen as consistent with statements made in a clear and conspicuous disclaimer.<sup>5</sup>

In addition, inconsistent representations and conduct of an employer can negate or override even a clear disclaimer, creating a jury question about the effectiveness of the disclaimer. *Swanson*, 118 Wn.2d at 519. *See also Korslund*, 156 Wn.2d at 189-90 (reversing summary judgment for employer where employer did not follow through on promise in ethics booklet sent to employees). Courts will not allow employers to benefit from making “extensive promises as to working conditions” in order to ensure better employee performance, and then to ignore those promises based on even a clear and conspicuous disclaimer. *See Swanson*, 118 Wn.2d at 532. Whether this has occurred is an issue of fact. *Swanson*, 118 Wn.2d at 519; *see also Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52 (2008). Certainly, there is evidence in the record that the Council has benefited from the inconsistent representations. By promising termination only for cause, the union benefited by creating an illusion of fairness such that Daignault felt he was safe to run for union election against his own supervisor. Furthermore, Daignault has stated, in

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<sup>5</sup> It is widely known that employees subject to labor agreements are generally protected from at-will employment by grievance mechanisms leading up to and including arbitration. In this context, it would be disingenuous for the Council of Carpenters to argue that its own employment policy did not provide such protections from at-will employment.

his sworn statement, that had he known he would be terminated for running for office or speaking his own mind at union meetings, he would never have taken the job. CP at 265.

**c. Material issues of fact remain as to whether the Council breached its contract with Daignault when it terminated him without just cause or a meaningful appeal conducted in good faith and with fair dealing.**

In *Thompson*, the Supreme Court held that an employee may sue for breach of contract based on the contents of the employer's employee policy manual. *Thompson*, 102 Wn.2d at 228-29. Promises in the policy manual may not be treated as illusory. *Id.* at 230. A contract is illusory when its provisions make performance optional or discretionary. *Zuver v. Airtouch Communications*, 153 Wn.2d 293, 317, 103 P.3d 753 (2004). “[A]n employer is not entitled to make extensive promises as to working conditions – promises which directly benefit the employer in that employees are likely to carry out their jobs satisfactorily with promises of assured working conditions – and then ignore those promises as illusory.” *Swanson*, 118 Wn.2d at 536.

When construing contracts, courts give great weight to the parties' intent. *In re Estate of Wahl*, 99 Wn.2d 828, 830-31, 664 P.2d 1250 (1983). In *Doolittle v. Small Tribes of Western Washington, Inc.*, 94 Wn. App. 126, 971 P.2d 545 (1999), this court held as follows:

[W]here an employer issues an employee handbook that creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations, and expressly provides in that same handbook that changes in the employer's policies and procedures assuring job security will not be made without following a set procedure that in and of itself is designed to assure employees that changes affecting their job security will not be made arbitrarily but only after consultation with the employer's shareholders or other equivalent bodies, and the employer then unilaterally removes job security without following the prescribed procedure, a trier of fact can properly find a breach of the employment contract as to an employee who has justifiably relied on the promises made in the handbook in accepting or retaining employment.

*Id.* at 551-52. Like the handbook in *Doolittle*, the intent of the Council's Personnel Policy was clearly to set out what would constitute grounds for termination and the procedure that would be taken before terminating an employee. As argued above, a reasonable jury could find that Daignault justifiably relied on the promises made in Personnel Policy, whether or not the disclaimer language is effective. Furthermore, if the promises in the Council's Personnel Policy are illusory, there is a genuine issue of material fact with regard to whether the disclaimer was effective. *See Swanson*, 118 Wn.2d at 540.

- i. **A reasonable jury could have found that the Council breached its contract with Daignault when it terminated him without just cause.**

Under the terms of the Personnel Policy, Daignault could only be terminated for cause.<sup>6</sup> In *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 769 P.2d 298 (1989), our Supreme Court defined “just cause” in the context of private employment as “a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power.” *Id.* at 139. It further held 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.*

“Once an employer announces a specific policy or practice, especially in light of the fact that he expects employees to abide by the same, the employer may not treat its promises as illusory.” *Thompson* at 230. Here, the contract was clear as to the permissible grounds to terminate an employee, and it provided a right of appeal. The appeal process created a work environment which purported to be fair, by identifying the type of conduct which could lead to discharge.

The terms of the Personnel Policy indicate that the Council may terminate an employee immediately “for one act of misconduct if that act

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<sup>6</sup> “Just cause” is a term of art in labor law. *See, e.g., Civil Service Comm’n v. City of Kelso*, 137 Wn.2d 166, 170, 969 P.2d 474 (1999) (determining “whether there is just cause for discipline entails much more than a valid reason; it involves such issues as procedural fairness, the presence of mitigating circumstances, and the appropriateness of the penalty”).

is sufficiently severe or harmful to the interests of the Regional Council.” Respondents have not argued that there was good cause to terminate Daignault’s employment; there are no allegations of misconduct. The policy goes on to enumerate a list of seven other items for which a person may be terminated. Conspicuously absent is any policy that allows the Council to terminate employees for not voting for certain union candidates, for running against certain union office holders, or for a supervisor’s private belief that the employee would not “faithfully and loyally support and promulgate the policies that [Doug Tweedy] set out for the Council.” Therefore, the Council breached the policy when it terminated Daignault without cause under the Personnel Policy and without following the procedures set out in that policy

**ii. A reasonable jury could have found that Daignault’s appeal to the Executive Board was not conducted with good faith and fair dealing.**

Washington courts have held that in every contract there is an implied covenant of good faith and fair dealing that obligates the parties to cooperate with one another so that each may obtain the full benefit of performance. *Barrett v. Weyerhaeuser*, 40 Wn. App. 630, 635, 700 P.2d

338 (1985).<sup>7</sup> See also *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 814 P.2d 1219 (1991) (upholding a jury instruction stating that an implied covenant of good faith and fair dealing exists in every contract, without also mentioning, in that same instruction, that an employer's right to terminate an at-will employee is unrestricted by any such covenant).

While the *Thompson* court declined to imply good faith into every employment contract, our Supreme Court has held that there is no inconsistency in rejecting an implied covenant of good faith as part of every employment contract and allowing good faith to serve as part of the standard to review whether terms placed into the contract by the employer were breached. *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 137, 769 P.2d 298 (1989).

In *Baldwin*, our Supreme Court stated, "In the absence of any evidence of express or implied agreement whereby the employer contracted away its fact-finding prerogative to some other arbiter, we shall not infer it." *Baldwin*, 112 Wn.2d at 137-38. In Daignault's case, however, the Council clearly intended to surrender the power to determine whether an employee's misconduct warranted his termination to the Executive Committee. Authority to make the factual determination

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<sup>7</sup> The *Barrett* court distinguished this obligation from the *Thompson* court's holding that there is not an implied covenant of good faith and fair dealing which limits an employer's right to terminate an employee "at will." *Barrett* at 635.

regarding Daignault's termination was transferred to the Committee, but there is no evidence in the record that the Committee conducted this review with good faith and fair dealing. Rather, the Committee manifestly disregarded the very promises it was supposed to enforce.

Respondents breached the duty of good faith and fair dealing when they provided Daignault with a sham appeal rather than following the appeal process in good faith. No reasonable person could find that Daignault was afforded a meaningful appeal. Even members of the Executive Board admit that "there is no appeal process." CP at 266. Daignault reasonably believed that he would in fact be judged on his action, rather than on his union activities. There is ample evidence to suggest that this review was not done in good faith or with fair dealing, as there was no evidentiary basis to uphold the termination.

**iii. The trial court erred when it failed to determine whether the decision of the Executive Board was done in good faith or fair dealing or with undue partiality.**

The trial court did not review the decision of the Executive Board to confirm Daignault's termination. At minimum, the court should have reviewed the Board's decision for good faith or fair dealing, or partiality, similar to a superior court's review of an arbitration award. Because the

Executive Board is intended to provide an independent review of the decision to terminate, it functions substantially like an independent arbitrator. A court shall vacate an arbitration award if, among other things, there is evidence that an arbitrator acted with partiality, exceeded his powers as an arbitrator, or committed misconduct prejudicing the rights of a party to the proceedings. RCW 7.04A.230; *see S&S Construction, Inc. v. ADC Properties, LLC*, 151 Wn. App. 247, 211 P.3d 415 (2009) (reviewing a claim of partiality by an arbitrator appointed to be neutral under RCW 7.04A.230 and Washington case law). An arbitrator is also not permitted to refuse to consider evidence material to the controversy; the trial court must vacate an award if such evidence is not considered. RCW 7.04A.230(c).

Even the limited evidence in the record, obtained without the benefit of discovery, a jury could find that the appeal process was a sham. An Executive Board member told Daignault “there is no appeal process”-- The logical inference being that Executive Board does what it wants, regardless of the rules it is administering. There is no dispute in this case about why Daignault was fired. Respondents did not argue in the trial court that Daignault was terminated for cause; they admitted that Doug Tweedy fired Daignault for running against Tweedy in the union election. CP at 115, 133. Rather than provide a fair appeal, the members of the

construed as an admission that Duncan did not rely on provisions in an employee handbook, despite evidence presented by the employee to the contrary. The Court held that such evidence showed the existence of a material factual dispute, which is suited for a finder of fact, not a trial or appellate court.<sup>8</sup> The Court then remanded the case to the trial court for a determination of whether the appellant relied on handbook provisions.

The record in this case demonstrates that, at minimum, it is a jury question whether Daignault justifiably relied on the promises contained in the Personnel Policy. Daignault relied on the promise that he could be terminated based on his work performance, rather than for his union activity, when he decided to run for union election. He understood that he worked under the Personnel Policy and that he had a right to appeal a termination under the procedures set out in the policy.

Given that the record contained evidence of Daignault's reliance on the Personnel Policy, the question of whether Daignault justifiably relied on promises of specific treatment in specific situations was properly a question for the trier of fact. *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 191, 125 P.3d 119 (2005); *see also Kuest v. Regent*

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<sup>8</sup> In *Duncan*, this court considered only the specific treatment prong of *Thompson* because Duncan's opening brief only advanced arguments under the specific treatment prong. The appellant did not raise the contractual argument until his reply, thus it was not considered by the court. Here, on the other hand, appellant is raising arguments under both the contractual and the specific treatment prongs of *Thompson*.

*Assisted Living, Inc.*, 111 Wn. App. 36, 43 P.3d 23 (2002) (remanding to the trier of fact to determine the effect of a disclaimer in the employer’s manual).

**e. The section of the Personnel Policy stating that the Council’s promises in the policy cannot be enforced in a court of law is unconscionable.**

The Personnel Policy contains one line stating that the policy “creates no rights enforceable against the Regional Council in a court of law.” This line should be stricken, as the creation of unfettered discretion beyond what is allowed in the policy is substantively unconscionable. To the extent that the contract allows one party to be the sole decider in determining whether a breach of the contract has occurred, that clause must be deemed unconscionable. Unconscionability is a question of law that the appellate court reviews de novo. *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995).

Washington law recognizes two categories of unconscionability: substantive and procedural. *Adler v. Fred Lind Manor*, 103 P.3d 773 (2004). “Substantive unconscionability involves those cases where a term in the contract is alleged to be one-sided or overly harsh[.]” *Id.* (quoting *Shroeder*, 86 Wn.2d at 260). A contract is procedurally unconscionable when one party has a “lack of a meaningful choice, considering all the

circumstances surrounding the transaction.” *Id.* The Supreme Court has held that individual contractual provisions may be so one-sided and harsh as to render them substantively unconscionable even if the circumstances surrounding the parties’ agreement to the contract do not support a finding of procedural unconscionability. *Id.* (citing 2 Restatement (Second) of Contracts § 208, cmt. e (1981)). Thus, a contract does not need to be both substantively and procedurally unconscionable to support a claim of unconscionability under Washington law.

The Council’s personnel policy with the attached disclaimer allows one party, the employer, to be the sole decider in the event of a disagreement. This clause of the contract is substantively unconscionable and should be stricken by the court.

**3. The trial court abused its discretion when it denied Daignault’s motion for continuance of the summary judgment hearing.**

The trial court denied the motion made by Daignault’s second counsel for a limited window of time to conduct additional discovery. Rulings on motions for continuance and for reconsideration are within the trial court’s discretion, and are reversible by the appellate court only for a manifest abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990). “The proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes

of the trial court's discretion." *Coggle*, 56 Wn. App. at 507. In *Coggle*, this court held that the trial court committed reversible error when it failed to grant a continuance to the appellant after he after obtained new counsel. The court determined should not be penalized for the dilatory tactics of his former attorney. 56 Wn. App. at 507 (stating that the court should have viewed the motions "in the context of the new legal representation"). "The primary consideration in the trial court's decision on the motion for a continuance should have been justice." *Id.*

In *Butler v. Joy*, 116 Wn. App. 291, 65 P. 3d 671 (2003), Division Three continued this line of reasoning when it held that a trial judge's denial of continuance of a summary judgment hearing was an abuse of discretion. In *Butler*, the plaintiff retained her attorney shortly before the summary judgment hearing. *Id.* at 299. Her original counsel had withdrawn just one month prior to the summary judgment hearing. The court stated:

As noted in *Coggle*, it is hard to see 'how justice is served by a draconian application of time limitations' when a party is hobbled by legal representation that has had no time to prepare a response to a motion that cuts off any decision on the true merits of a case.

*Id.* (quoting *Cogle* at 508).<sup>9</sup>

Here, as in *Cogle* and *Butler*, justice required a continuance to allow Daignault to fully develop the facts in his case. The trial court improperly exercised its discretion by denying the motion for continuance. The problem is that Daignault's new counsel never had the opportunity to fully develop the facts of this case. In particular, Daignault's counsel never had the opportunity to depose members of the Executive Committee to learn why members voted to uphold the termination in apparent clear violation of the terms of the employment policy. Furthermore, there was no discernable prejudice to the Respondents. The motion for summary judgment was filed long before the discovery deadline. Justice required the trial court to continue the summary judgment hearing in order to allow Daignault's new counsel to take depositions of essential witnesses.

## VI. CONCLUSION

The evidence presented in the trial court shows, on its face, material issues of fact precluding summary judgment. The trial court erred when it ordered summary judgment for the respondents,

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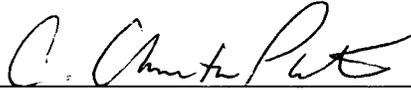
<sup>9</sup> In *Briggs v. Nova Services*, 135 Wn. App. 955, 147 P.3d 616 (2006) (aff'd by *Briggs v. Nova Services*, 166 Wn.2d 794; 213 P.3d 910 (2009)), Division Three held that a trial court did not err in denying a CR 56(f) motion to continue. The court of appeals distinguished the *Cogle* and *Butler* cases in part by pointing out that in both of those cases, the plaintiffs had obtained new counsel shortly before the summary judgment hearing, and neither counsel had sufficient time to respond to the summary judgment motion. *Id.* at 962. *Briggs* is distinguishable from Daignault's case for the same reason.

as there was sufficient evidence in the record that an express employment contract existed between Daignault and the Council and that the contract was not properly disclaimed. In addition, there was sufficient evidence that Daignault justifiably relied on the Council's promises in the Personnel Policy, despite language in the disclaimer.

A jury could have found that Daignault's termination was not reviewed by the Executive Committee with good faith and fair dealing, simply because there was no evidence that Daignault did anything to warrant termination under the handbook. Material issues of fact remain about whether Daignault's appeal to the Executive Committee was conducted with good faith and fair dealing. Development of these facts by Daignault was prejudiced by the trial court's denial of his motion to continue the summary judgment hearing, despite the fact that to do so would have resulted in no significant prejudice to the respondents. For these reasons, the trial court erred by granting respondents' motion for summary judgment.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of May, 2010,

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