NO. 335283

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

KIM MIKKELSEN

Plaintiff / Appellant

v.

PUBLIC UTILITY DISTRICT #1 OF KITTITAS COUNTY, JOHN HANSON, PAUL ROGERS, ROGER SPARKS, and CHARLES WARD,

Defendants / Respondents

REPLY BRIEF OF APPELLANT KIM MIKKELSEN

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I. INTRODUCTION

Movies provide enjoyment. I rarely go to a movie if I know what is going to happen in the end. In watching the movie, time and time again, I might think that "this person did it" or "that person will die" but I don't know until the end. In the Sixth Sense, I did not know that Bruce Willis was actually dead until that last scene of the movie. (Sorry for dating myself). The bottom line is that that is all the plaintiff seeks in this case. She wants a jury to see and hear the end of the movie. Multiple issues of fact are presented. While respondents' claim to know "who did it", issues of fact are presented that make summary judgment inappropriate.

II. POINTS AND AUTHORITIES

A. Standards Applicable to Summary Judgment Decisions

Respondents' factual recitations in their briefs bear no rational relation to the applicable standards that this Court must apply. This is an appeal from a summary judgment order. The PUD/Ward were the moving parties. Plaintiff was the non-moving party. The trial court granted the motions and Plaintiff appeals.

The standard of review of the trial court's order is "de novo," with this Court engaging in the same inquiry as the trial court. *See SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, ___ P.3d ___ (2015). The evidence viewed by this Court is viewed in a far different way than was used by the

Respondents in their briefs. In reviewing the summary judgment motion, this Court must take all facts presented and reasonable inferences from those facts in a light most favorable to the nonmoving party. *See Dowler v. Clover Park Sch. Dist.,* 172 Wn.2d 471, 485, 258 P.3d 676 (2011).

The moving party bears the initial burden of proving its right to judgment as a matter of law. *See Geer v. Tonnon,* 137 Wn. App. 838, 843, 155 P.3d 163 (2007). If the moving party satisfies this initial burden, the burden shifts to the nonmoving party to show that a triable issue exists thus precluding summary judgment. *See Doherty v. Mun. of Metro. Seattle,* 83 Wn. App. 464, 468, 921 P.2d 1098 (1996). In making these determinations, the Court views all reasonable inferences from the evidence presented in favor of the nonmoving party. *See Lamon v. McDonnell Douglas Corp.,* 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

Where issues of fact are present, the motion for summary judgment should be denied. Issues of fact can be determined as a matter of law on summary judgment only when reasonable persons could reach only one conclusion from those facts. *See Moore v. Blue Frog Mobile, Inc.,* 153 Wn. App. 1, 6-7, 221 P.3d 913 (2009). The Court's function on summary judgment is to determine whether genuine issues of material fact exist. The Court's job at this stage is not to judge or resolve those factual issues. *See Jones v. Dep't of Health*, 140 Wn. App. 476, 487, 166 P.3d 1219 (2007).

Issues of fact can only be decided on a summary judgment motion, "if the facts and inferences from them are plain and not subject to reasonable doubt or difference of opinion." *Martini v. Post*, 178 Wn. App. 153, 164-65, 313 P.3d 473 (2013). Where different inferences can be drawn from the facts presented as to ultimate issues of fact, such as "knowledge", summary judgment is inappropriate. *See Aduddell v. John Manville Corp.*, 42 Wn. App. 204, 207, 709 P.2d 822 (1985). A showing at the summary judgment stage of the proceeding may not be sufficient for trial. However, that's not the issue presented in the summary judgment motion.

> While this might not be sufficient proof of a breach for purposes of trial, it is sufficient at this stage of the proceedings. Summary judgment must be denied "if the record shows any reasonable hypothesis which entitles the nonmoving party to relief."

White v. Kent Medical Center, 61 Wn. App. 163, 175, 810 P.2d 4 (1991).

The Respondents have it backwards. The facts and reasonable inferences therefrom must be viewed in a light most favorable to the **plaintiff** and not the respondents.

B. Counter Statement of the Case

The first item to point out is the thinly veiled attempt to paint plaintiff as some sort of "troublemaker" for having been involved in a whistleblower action with respect to a previous PUD general manager. To dispel any potential myth, plaintiff was indeed **one of four** individuals to

bring the issue to the attention of the Board. The plaintiff was one of those four individuals and the legitimate issues raised by these four individuals were a factor in the general manager leaving his position. (CP 316-17; 326-28) That's the truth as to what happened—not the spin thereof.

As is relevant to this present motion, this Court must accept that plaintiff was called into a meeting by defendant Ward and fired because, "it was not working out." (CP 319, 398-99). Ward read from a script he prepared. He stuck to the script. (CP 398-99) Even though Plaintiff asked, defendant Ward would not elaborate on what "it" was. (CP 319)

While the respondents now attempt to trump up other reasons that it now claims exist to "justify" the firing, there is no evidence in the record that those other issues were **ever** discussed with plaintiff. Plaintiff would cite to the record but one cannot cite to a document or reference that doesn't exist. There is absolutely nothing adverse in plaintiff's personnel file. No discipline. No warnings. No notes of meetings to address concerns. No notes of oral discipline. Nothing. (CP 319) Respondents both concentrate on the "last straw" to justify plaintiff's termination. There were no straws at all, let alone a "last straw."

There was a meeting held between Plaintiff and Ward to address perceived issues on March 30, 2011 (9 months after defendant Ward was hired and about 4 months before plaintiff was fired). **Plaintiff** initiated this

meeting to address issues she perceived existed. (CP 318) Ward never called a meeting to discuss any perceived issues with plaintiff. The only meeting he specifically called with Plaintiff was to fire plaintiff.

As to the now infamous "survey issue", which respondents claim was the "last straw," the Court must view plaintiff's evidence as true. On July 24, 2011, PUD Commissioner Hanson called Plaintiff. Plaintiff did not initiate the call. In fact, Plaintiff was out of the PUD office at the time on a consulting trip. (CP 83). Commissioner Hanson called to find out "how things were going at the PUD." Plaintiff told him the state of affairs with respect to the PUD at that time. Commissioner Hanson asked, "what do you think the Board should do?" (CP 83)

Plaintiff responded that that decision was one for the Board and not an employee to make. However, as a consultant, she would recommend a client do a survey to use as a tool to see what, if any problem existed. (CP 83-84). On August 9, 2011, Commissioner Hanson asked Plaintiff to forward a copy of a survey to him. She did as requested. (CP 319). Commissioner Hanson asked that Plaintiff forward the survey to the other two commissioners of the PUD. She did so. Commissioner Hanson (not plaintiff) asked for a special meeting of the Board. (CP 84-85).

Finally, Plaintiff did address her discrimination issues with the PUD. She told Commissioner Hanson, the Chair of the Board, of her discrimination concerns on the July 24, 2011, phone call. (CP 86, 319).

C. Standards Applicable to the Discrimination Claim

In their response briefs, the respondents often "mix and match" standards and concepts from the various types, forms and stages of litigation of discrimination cases. The PUD consistently maintains in its response brief that plaintiff has not met the "discriminatory intent" prong of the discrimination test. There is no such prong of any test.

The ultimate issue to be decided by the jury in a discrimination case, **at trial**, brought under RCW 49.60.180(2) (WLAD) is for the plaintiff to show that the "protective characteristic" [sex and age in this case] was a "substantial factor" in the adverse employment action. *See Scrivener v. Clark College*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). A "substantial factor" is one that has the protected characteristic being a significant motivating factor in bringing about the firing. However, the protected characteristic need not be proved to be the sole factor in the firing. *See Mackay v. Acorn Custom Cabinetry, Inc.,* 127 Wn.2d 302, 310-11, 898 P.2d 284 (1995). The requirements are far different at the summary judgment stage of the proceeding and the Court has set forth specific requirements to survive a summary judgment motion.

A plaintiff in a discrimination case can prove her case by utilizing direct evidence and/or circumstantial evidence. The more difficult path is the direct evidence method. Courts recognize that employers typically don't leave an identifiable trail of discriminatory practices:

> Direct, "smoking gun" evidence of discriminatory animus is rare, since "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *United States Postal Serv. Bd. Of Governors v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), and "employers infrequently announce their bad motives orally or in writing. *deLisle v. FMC Corp.,*57 Wn. App. 79, 83, 786 P.2d 839 (1990). Consequently, it would be improper to require every plaintiff to produce "direct evidence of discriminatory intent." *Aikens*, 460 U.S. at 714 n.3, 103 S.Ct. 1478. Courts have thus repeatedly stressed that "[c]ircumstancial, indirect and inferential evidence will suffice to discharge the plaintiff's burden. *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 860, 851 P.2d 716, *review denied*, 122 Wn.2d 1018, 863 P.2d 1352 (1993). **"Indeed, in discrimination cases it will seldom be otherwise. . . ."** deLisle, 57 Wn. App. at 83, 786 P.2d 839.

Hill v. BCSTI Income Fund-I, 144 Wn.2d 172, 179-80, 23 P.3d 440 (2001)(emphasis added).

Thus, while in rare occurrences, there are situations where a plaintiff under a WLAD claim may possess actual evidence of discrimination. Under this method, a WLAD plaintiff can present a prima facie case by showing direct evidence: (1) the employer acted with a discriminatory motive and (2) discriminatory motive was a significant or substantial factor

in the firing. *See Alonso v. Quest Communications Co., LLC*, 178 Wn. App. 734, 744, 315 P.3d 610 (2013). That's not the theory pursued in this case.

The "circumstantial evidence" pathway to proving a WLAD claim provides a significantly different method of proof to be followed in order to defeat summary judgment. The framework is referred to as the *McDonnell Douglas* analysis first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), first adopted in Washington in *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988) ("McDonnell Douglas analysis").

The *McDonnell Douglas* analysis establishes a three part "shifting burden" procedure to be followed in such a circumstantial evidence situation. *See Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 354, 172 P.3d 688 (2007). The first showing to be made is by the plaintiff. Plaintiff must establish a prima facie case of discrimination looking to several factors which are addressed in greater detail below. Once the plaintiff satisfies this first prong, a presumption of discrimination arises and the burden shifts to the employer to present a legitimate, nondiscriminatory reason for the termination of employment. If the employer makes this showing, the burden shifts back to the plaintiff to show that the proffered reasons were "pretextual." *See Scrivener*, 181 Wn.2d at 446.

Unlike other cases, the granting of a summary judgment to the defendant employer is rarely appropriate in a WLAD case because of the inherent proof problems that exist in such cases. *See Scrivener,* 181 Wn.2d at 445; *Riehl v. Foodmaker, Inc.,* 152 Wn.2d 138, 144, 94 P.3d 930 (2004).

The prima facie showing by the plaintiff carries a burden that is "not onerous." *See Fulton v. State, Dept. of Social & Health Services,* 169 Wn. App. 137, 152, 279 P.3d 500 (2012). Indeed, "the requisite degree of proof necessary to establish a prima facie case . . . is **minimal** and does not even need to rise to the level of a preponderance of the evidence." *Fulton,* 169 Wn. App. at 152 (emphasis in original).

Respondents do not argue that the first three elements to be considered by the Court do not exist in this case. The first three elements of a prima facie case are substantively similar: (1) plaintiff was in the protected class (a woman or over 40); (2) plaintiff was discharged; (3) the plaintiff was doing satisfactory work. *See Rice v. Offshore Systems, Inc.,* 167 Wn. App. 77, 88, 272 P.3d 865 (2012).

It is the fourth "element" of replacement of someone outside the protected class, that is at issue in this case. Respondents call this the "discriminatory intent" element, but no Court has called it such. It is important to remember that when the test was originally adopted in *Grimwood, supra,* it was specifically noted that the four "elements" of the

test were not "absolutes," but, rather were guides for the court. *Grimwood*, 110 Wn.2d at 362-63. In fact, it has been specifically noted that these four elements of a "prima facie" case should not be used as a "rigid, mechanized, or ritualistic or exclusive method for proving the claim". *See Hatfield v. Columbia Federal Sav. Bank,* 57 Wn. App. 876, 881-82, 790 P.2d 1258 (1990). Yet, that is exactly what the respondents seek to do.

The fourth "element" has been viewed in many different ways. These were set forth in the previous briefing. In addition, the *Hill* court set forth the plaintiff's initial prima facie case as:

> A prima facie case of racial discrimination, for instance, is generally established "by showing (i) that [the plaintiff] belongs to a racial minority; (ii) that he [or she] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his [or her] qualifications, he [or she] was rejected; and (iv) **that, after his [or her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.**" *Id.* Unless a prima facie case of discrimination is set forth, the defendant is entitled to prompt judgment as a matter of law. *Kastanis,* 122 Wash.2d at 490, 859 P.2d 26 (citing *Burdine,* 450 U.S. at 254, 101 S.Ct. 1089).

Hill, 144 Wash. 2d at 181(footnote omitted)(emphasis added).

As is outlined in the initial brief and above, this "fourth" element of a prima facie case is the subject of much debate, and, quite frankly, confusion. Washington law states it differently depending on the case involved. The PUD cites a case, *Callahan v. Walla Walla Housing*

Authority, 126 Wn. App. 812, 819-20, 110 P.3d 782 (2005) that adds a different requirement to this showing. No other Washington case does so.

The PUD also attempts to distinguish *Pivirotto v. Innovative Systems, Inc.,* 191 F.3d 344 (3d Cir. 1999). However, that discussion was done in the context of the analysis of whether the admitted error (that female plaintiff needed to be replaced by a male) that had been committed by the trial court was "harmless." *Pivirotto*, 191 F.3d at 357-58. Thus, the issue relied upon by the PUD **was not the prima facie analysis**, but, rather, where that admitted error was prejudicial to the plaintiff in the **jury trial.**

Summary judgment presents a different issue. The respondents have cited no authority to refute that the "replacement" showing of a prima facie case is a **requirement** to making such a showing at the summary judgment stage. The Plaintiff has made her showing of a prima facie case of discrimination in this case. At the very least, issues of fact exist that would preclude summary judgment exist.

The second issue of respondents' showing that it had a nondiscriminatory reason for discharge is resolved by reference to the standards on summary judgment and issues of fact. It is undisputed, that plaintiff was simply told "it was not working out," as the reason for her termination. Now, respondents set forth other rationale. Those do not rise to the level of specific facts since they involve "management style" and

"trust factors." These are simply code words for "discrimination." The PUD admits that it told the State that Plaintiff was not terminated "for cause." Plaintiff has refuted all of the allegations that the defendant Ward has set forth in his "after the fact" attempted justification to fire Plaintiff. The Plaintiff has established all elements necessary to proceed to trial. A prima facie case was presented and plaintiff is entitled to her day in court.

D. At the Very Least, Issues of Fact Exist as to the PUD Following its Own Corrective Action Policy.

There are two recognized paths an at-will employee may take to enforce the terms of company policy statements from an employer. First, the contractual relationship between employer and employee can be modified by statements contained in employee policy statements. *See Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 228, 685 P.2d 1081 (1984). This pathway presents an issue of fact for the jury to determine. *See Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522, 826 P.2d 664 (1992). This is termed the "implied contract" theory. *See Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 433, 815 P.2d 1362 (1991). In its response brief, the PUD ignores this pathway but, instead, focuses on the second pathway discussed below.

The second pathway is distinct and independent of the first. The second pathway examines whether the employer has created an atmosphere

of job security and fair treatment with promises of specific treatment in specific situations and the employee is induced thereby to remain on the job and not actively seek other employment. *See Thompson*, 102 Wn.2d at 228-29. This inquiry also presents issues of fact to be decided by the trier of fact and thus not normally amenable to a summary judgment motion. *See Swanson*, 118 Wn.2d at 525. This is often referred to as the specific treatment, promissory estoppel, or justified reliance theory. *See Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 27 P.3d 1172 (2001). These are two different theories with two different proof elements.

1. Promissory Estoppel/Justified Reliance

The Corrective Action Policy is enforceable against the employer because it promises specific processes will be followed. This theory is the focus of the PUD's response brief. However, despite the PUD's argument, issues of fact are presented that preclude summary judgment. *See Burnside*, 123 Wn.2d at 105. In order for summary judgment to be appropriate, the court has to find that no reasonable person could conclude, even in the light most favorable to Plaintiff, that: (1) the terms of the policy amounted to promises of specific treatment in specific situations and (2) Plaintiff justifiably relied on any of these promises. *See Bulman*, 144 Wn.2d at 339.

The PUD's argument is that, **as a matter of law**, the PUD is immune from liability because the PUD retained discretion in the implementation of

the Corrective Action Policy. However, the situation faced herein is most analogous to *Thompson v. St. Regis Paper Co., supra,* wherein the Court reversed a summary judgment finding because an employee, who was fired for "stepping on toes," justifiably relied on a policy stating: terminations "will be processed in a manner which will at all times be fair, reasonable, and just." *Thompson*, 102 Wash.2d 219, 222, 685 P.2d 1081 (1984).

The Court noted that employers expect, if not demand, that employees refrain from activity that is detrimental to the employer, and that such expectations can create obligations on the part of the employers because employees justifiably rely upon them:

> Therefore, we hold that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of *specific treatment in specific situations* and an employee is induced to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship.

Id. at 230.

The *Thompson* Court held that **issues of material fact existed** with regard to the effect of the employment manual on the employment relationship; whether any statements therein amounted to promises of specific treatment in specific situations; whether the employee justifiably relied upon those promises; and whether the promises were breached. *Id.* at

233. The plaintiff in *Thompson* was a model employee who, just like plaintiff, had never been disciplined and who was fired with the vague assurance that good reasons existed for the discipline. Plaintiff deserves her same day in court as well.

Rather than address *Thompson* and all its similarities to the case at bar, Defendant cites to *Trimble v. Washington State University* as support for their contention that summary judgment is appropriate in this case. *Trimble*, 140 Wash.2d 88, 993 P.2d 259 (2000). *Trimble* states that summary judgment is appropriate if no reasonable mind could find that an employee manual altered the at-will employment relationship by promising specific treatment. *Id.* at 94-95. The Plaintiff in *Trimble*, an adjunct professor who was denied tenure, sued WSU on the theory that the University failed to follow the steps in the Faculty Manual for making a tenure decision and that he justifiably relied upon the Faculty Manual. The court was unpersuaded and held that no reasonable mind could find that the Faculty Manual promised written evaluations when it stated evaluations are to be accomplished, "for example, in an open meeting, in written evaluations . . . or by other appropriate means." *Id.* at 95. The court went on to hold that even if the manual did make a specific promise, the Plaintiff provided no evidence that the University failed to follow the manual nor that any failure affected the Plaintiff's job status.

In contrast, reasonable minds could find that the PUD's Corrective Action Policy—both by its very name as a "policy", which implies an organization wide application, and by its terms, which created levels of disciplinary action—did create a promise of specific treatment that was relied upon by plaintiff. Defendant argues that the Corrective Action Policy made no specific promises, but rather stated that "the rules set out here are intended only as guidelines and do not give any employee a right to continued employment or any particular level of corrective action."

However, a reasonable person is just as likely to give weight to other statements in the Policy, such as: "Corrective action *must* be administered with due consideration of, and respect for, employee rights and *expectations*, whether those rights and *expectations* derive from employment policies, operation of law, or contract" (emphasis added). A reasonable person could certainly conclude that defendants would abide by the very terms of their Policy, and the Court has made clear that "the crucial question is whether the employee has a reasonable expectation the employer will follow the discipline procedure, based upon the language used in stating the procedure and the pattern of practice in the workplace." *Payne*, 78 Wn. App. at 42. If the plaintiff in *Thompson* could reasonably rely upon the vague statement that terminations "will be . . . fair, reasonable, and just," then plaintiff was absolutely justified in relying upon the promise that all

corrective action "must be administered with due consideration of, and respect for, employee rights and expectations." Issues of fact exist.

Additionally, the plaintiff's claim should have survived summary judgment because the discretionary language of the Corrective Action Policy was contravened by the actions that the defendants' took to implement the policy as the exclusive means of employee discipline. As this Court recently noted:

> [T]he effect of employer policies and disclaimers is normally a question of fact for the jury. *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 534, 826 P.2d 664 (1992). Moreover, a disclaimer may be negated by inconsistent employer representations and practices. *Swanson,* 118 Wn.2d at 534, 826 P.2d 664.

Kries v. Wa-Spok Primary Care, LLC, ___ Wn. App. ___, ___ P.3d ___ 2015 WL 5286176 at ¶ 56, *11 (Div. III, 2015)(emphasis added).

It is undisputed that the disciplinary levels in the Corrective Action Policy were used in all disciplinary actions during the two years leading up to plaintiff's termination. There is no evidence that the Policy was treated as discretionary. When plaintiff was the interim manager, she followed the policy without any indication from her superiors that she was wrong to do so. Defendant Ward also used it as General Manager, and never made any indication that it was discretionary. Plaintiff helped craft and implement the policy so that there would be clear guidelines that made employees feel that the procedures were clear, fair, and commensurate with

the employee's behavior. It was done as a protection to both employee and employer so that everyone knew what the rules were

In *Payne, supra,* the defendant hospital had a progressive discipline policy with several provisions that stated the "discretionary" nature of the policy. The policy stated, "The policies and procedures described [here] are implemented at the sole discretion of the hospital and are subject to change at any time without prior notice." *Payne*, 78 Wn. App. at 37.

The *Payne* policy provisions in its employee manual are very similar as to what is presented in the PUD policy. Because the PUD Corrective Action policy mentions that "discretion" could be used, defendants argue that they are immune from liability. Again, such is not the case, because discretionary language is effectively a disclaimer and disclaimers can be negated by an employer's actions. *Swanson, supra,* recognized that even if a "disclaimer" was effectively communicated to an employee, an issue of fact as to its enforceability could still be presented if inconsistent representations and or contradictory employment practices operate to negate the disclaimer. *See Payne*, 78 Wn. App. at 40. That's exactly what happened in *Payne.* The Court found that such issues of fact, precluding summary judgment, existed. *Payne*, 78 Wn. App. at 42-43.

Swanson, supra, was faced with exclusionary language in the policy that, on its face, unambiguously established an "employment at will"

scenario. *Swanson,* 118 Wn. 2d at 532. However, *Swanson* expressly rejected the premise put forth by defendants herein that, the disclaimer language could, **as a matter of law**, be the basis of a summary judgment motion. Rather, the Court noted: "We reject the premise that this disclaimer can, as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make." *Swanson*, 118 Wn.2d at 532.

Instead, a disclaimer can be negated by either inconsistent employer representations or practices. This is a question of fact for the trier of fact. *See Swanson*, 118 Wn.2d at 534. Even in the face of a disclaimer, if the policy has been consistently used by the employer, a question of fact is presented as to the effectiveness of the disclaimer. *See Johnson v. Nasca*, 802 P.2d 1294, 1297 (OK App 1990)(cited with approval in *Swanson*, 118 Wn.2d at 535).

As the Court stated in *Payne*, "the crucial question is whether the employee has a reasonable expectation the employer will follow the discipline procedure, based upon the language used in stating the procedure and the pattern of practice in the workplace." *Payne*, 78 Wn. App. at 42. **These are issues of fact.** Summary judgment was not appropriate.

The PUD argues that defendant Ward did give "due consideration" to firing Plaintiff because all that was required was that he "think before he

acted." The PUD is asking the Court to decide an issue of fact, not of law, and accept the PUDs statement that due consideration was given. Multiple issues of fact exist that should be presented to the jury as to the meaning of the policy as well as its use over time. As the Court noted in *Swanson, supra*:

> An employee handbook is only useful if the policies and procedures set forth in it are followed by the employer and its management personnel. **Instead of looking for new ways to avoid liability when handbook provisions are not followed, employers should concentrate on setting forth reasonable policies and ensuring compliance with these policies.**

Id. at 541; *quoting The use of Disclaimers to Avoid Employer Liability Under Employee Handbook Provisions*, 12 J.Corp.L.105, 119 (1986)(emphasis added).

The PUD's response is really that it "disclaimed" any liability by allegedly keeping discretion to do whatever it wanted to. This is an "illusory" policy and, at the very least, issues of fact exist as to whether Plaintiff was promised and expected the application of the progressive discipline model. Summary judgment was inappropriate.

2. Modification of the At-Will Employee Contract

Even though not specifically addressed by the PUD in its response, Plaintiff will address, briefly, the implied contract theory because issues of fact exist that make summary judgment inappropriate. As mentioned in the opening brief, this Court must consider the framework for contract analysis

set forth in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) when interpreting the employee policies. *Berg* mandates that "extrinsic evidence" must be viewed to aid the Court in determining the intent of the parties and thus interpret the contract. *Berg*, 115 Wn.2d at 667. This analysis is consistent with the rationale set forth in *Thompson, supra*, that, "the idea that whether the parties intended policies in an employment document to be part of their employment contract involves issues of fact." *Swanson*, 118 Wn.2d at 523 (emphasis added). Thus, as with the discrimination analysis, issues of fact exist as to appropriateness of the trial court's granting of summary judgment below mandating a reversal of that decision.

In *Swanson v. Liquid Air Corp.*, the plaintiff was fired for fighting and sued his employer because fighting was not found in a list of offenses that would result in immediate termination. *Swanson*, 118 Wash.2d 512, 826 P.2d 664 (1992). The defendants' in Swanson argued that disclaimer language stating that employees remained "at will" effectively precluded Plaintiff from relying on anything to the contrary. The Court held that summary judgment was inappropriate because it was up to a jury to determine whether a memorandum containing a provision about "Work Rights" and employee discipline modified the employee's at will employment status. *Id.* at 519-520. Even if equivocal or disclaimer language is included in an effort to preclude the employee gaining anything but "at

will" employment status, the courts will look at an employer's conduct to see if it negates or overrides a disclaimer. *Id.* at 519.

The progressive disciplinary provisions in the Corrective Action policy are specific enough to be enforced as contract terms. The extrinsic evidence existing shows that the Corrective Action policy was adopted when Plaintiff was the interim manager at the PUD in 2009. She took a large part of the policy from the Chelan County PUD. Others assisted in the work up of the document. The union steward and the union representative as well as her fellow managers Matt and Brian also reviewed and worked on it prior to the presentation to and adoption by the PUD Board. (CP 416, 421).

The primary purpose for developing the Corrective Action policy and presenting it to the Board was that Plaintiff wanted guidelines, approved by the Board, to be followed in the discipline process. This was especially important with the union employees that existed. (CP 417-18). Once the policy was adopted in 2009, it has been followed on two instances, both of which involved the issuance of a verbal warning. Once, while Plaintiff was interim general manager (CP 419-20) and once while Mr. Ward was the General Manager. (CP 317; 556). There was never any discussion nor dispute as to the use of the policy. There is no evidence that the policy was "not" used until Plaintiff was terminated by Defendant Ward. Thus, there is

a question of fact as to whether the defendants' actions effectively contravened any disclaimer of the terms of the Corrective Action Policy and thus modified the at-will employment of plaintiff.

There are issues of fact presented in the interpretation the application of the progressive discipline policy at issue in this case. At the very least, the Corrective Action Policy states that the disciplinary levels are "typically" imposed for offenses that are commensurate with the examples listed in the Policy. *Appellant's Brief, Appendix A6*. This type of statement is exactly the type of thing meant to give employees peace of mind by promising that, so long as the employee's actions are "typical," the employee can reasonably expect disciplinary action to follow the Policy. This is exactly the type of language that gives rise to a question of fact: was Ms. Mikkelsen's behavior typical, and if so, why wasn't her discipline meted out in accordance with the Corrective Action Policy? Issues of fact that cannot be established as a matter of law are presented and, accordingly it was error for the trial court to grant defendants' motions for summary judgment.

E. Reply Only Applicable to Defendant Ward's Response

Defendant Ward argues that he cannot be held liable for firing plaintiff because it was an action taken in his capacity as an employee of PUD. Defendant cites to *Houser v. City of Redmond*, 16 Wn.App. 743, 559

P.2d 577 (1977); *aff'd* 91 Wash.2d 36, 586 P.2d 482 (1978), which involved a claim against the city by an employee for tortious interference with contract.

Houser is distinguishable from this case. *Houser* deals with a suit for tortious interference with contract claim against the city of Redmond. The suit alleged that employees of the city interfered with the plaintiff's employment, and thus the city employees actions are imputed to the city itself. The court rejected this reasoning, holding that because the city was in contractual privity with the plaintiff, the city could not then be accused as a "third-party" that was tortiously interfering with a contract that the "third-party" was a signatory of. The holding in *Houser* has limited, if any, weight when applied to a situation beyond a tortious interference case. Here, defendant Ward was the employee whose actions caused plaintiff's damages. Ward fired her. Any defense or claim of indemnification that Ward may have does not stem from a case about an employer's liability for tortious interference with a contract.

F. Plaintiff's Negligence Claim Presents Issues of Fact and the Outrage Claim Should Likewise Proceed.

Under the same analysis as set forth above, the Plaintiff's negligence claims should likewise proceed since issues of fact are involved. As noted above, Plaintiff did inform the Chairman of the Board of Plaintiff's

discrimination claims. There are issues of fact presented as set forth in the original brief.

As to the Outrage claim, again, the basis was set forth before in briefing. The response seems to be that emotional distress claims may be duplicative. To the extent that a "duplication" argument is made, Plaintiff agrees that she can only recover emotional distress once. She is not entitled to multiple such awards.

III. CONCLUSION

For the reasons set forth above, the trial court's decision should be reversed and this case should be remanded for trial on the merits.

DATED this 28 day of December, 2015.

HALVERSON | NORTHWEST Law Group P.C.
Attorneys for Appellant Mikkelsen

By: _____
J. Jay Carroll, WSBA No. 17424

CERTIFICATE OF SERVICE

I, JENNIFER FITZSIMMONS, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am the assistant to J. Jay Carroll, the attorney for Kim Mikkelsen and am competent to be a witness herein.

On December 28, 2015 I caused to be mailed by U.S. Mail, postage pre-paid, the original of the foregoing document to the following:

Court of Appeals Division III 500 N. Cedar Street Spokane, WA 99201	☑ First Class U.S. Mail

On December 28, 2015, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

James M. Kalamon Paine Hamblen LLP 717 West Sprague Avenue Suite 1200 Spokane WA 99201	☑ First Class U.S. Mail
Sarah L. Wixson Stokes Lawrence Velikanje Moore & Shore 120 N. Naches Avenue Yakima, WA 98901-2757	☑ First Class U.S. Mail

DATED at Yakima, Washington, this 28th day of December, 2015.

Jennifer Fitzsimmons, Legal Assistant
HALVERSON | NORTHWEST Law Group P.C.