

No. 43708-2-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

SUSAN K. BROWN,

Appellant,

vs.

CITY OF TACOMA, et. al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 11-2-05394-1

OPENING BRIEF OF APPELLANT

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WSB #17283

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted the City's summary judgment motion dismissing Appellant's wrongful discharge claim based upon pretext and retaliation.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it granted the City's summary judgment motion when Ms. Brown's discharge was pretextual and retaliatory in response to Ms. Brown's complaint against a fellow employee's abusive conduct? (Assignments of Error #1).

III. STATEMENT OF THE CASE

A. Procedural History

On January 12, 2011, Susan Brown, appellant herein, filed a complaint for damages against the City of Tacoma, John Briehl and Jacqueline Strong Moss for wrongful discharge, and intentional and negligent infliction of emotional distress. On April 24, 2012, all defendants filed summary judgment motions to dismiss plaintiff's complaint. On June 15, 2012, the court granted the defendants' motions. On June 25, 2012, plaintiff filed a motion for reconsideration for the court to reconsider its dismissal of plaintiff's retaliation claim. On July 13, 2012, the trial court denied plaintiff's motion. Plaintiff filed her notice of appeal to the Court of Appeals on July 18, 2012, with respect to the retaliation claim only. At this time, respectfully, the appellant urges this court to reverse the trial court's decision.

B. Facts

On October 20, 2003, plaintiff Susan Brown was hired as an administrative assistant in the City of Tacoma, Human Rights and Human Services Department, and served under Department Director, defendant John L. Briehl. CP 6-7. Throughout Ms. Brown's employment with the City of Tacoma, defendant Briehl made it clear to Ms. Brown that her job was secure and she understood that she could only be removed from her

employment position for cause. CP 7. Although Mr. Briehl never made any express statements to Ms. Brown that she could not be fired except for cause, Mr. Briehl continually commended Ms. Brown for her work performance and recommended her for additional work, such as to the City Manager's Clean and Safe Teams. CP 255.

In February, 2008, defendant Jacqueline Strong Moss was hired as the Human Rights and Human Services Department Manager. CP 7. That upon Ms. Strong Moss' hire, Ms. Strong Moss began to institute an abusive and hostile work environment against Ms. Brown. CP 7-8.

In mid-October, 2008, Ms. Brown and another HRHS employee, Frank Gavaldon, complained to the City of Tacoma Human Resources Department that they were being subjected to a hostile work environment. CP 8. As a result of Ms. Brown's and Mr. Gavaldon's complaints, an investigation arose into Ms. Strong Moss' behavior. CP 8. After the investigation concluded, although no determination was made that a hostile work environment existed, a mediation occurred between Ms. Brown and Ms. Strong Moss to address issues raised in the investigation. CP 9.

Shortly after the mediation, and unbeknownst to Ms. Brown, an internal investigation for alleged City Code of Ethics violations was instituted due to questions regarding computer usage by Ms. Brown and Mr. Briehl. This investigation started on March 19, 2010, approximately

one month after the mediation between Ms. Brown and Ms. Strong Moss.
CP 9.

On May 10, 2010, after the ethics investigation concluded, Ms. Brown received a notice of intent to terminate and was subsequently terminated by the City of Tacoma on May 12, 2010. CP 9-10. Although the ethics investigation recommended discipline and/or counseling to both Ms. Brown and Mr. Briehl based upon the findings, Ms. Brown was the only person disciplined by the City of Tacoma. CP 81-90.

As a result of her termination, Ms. Brown brought this action against the City of Tacoma, John Briehl and Jacqueline Strong Moss.

Respectfully, given that material facts exist to support Ms. Brown's wrongful discharge cause of action based on pretext and retaliation against the City of Tacoma, Ms. Brown respectfully urges this court to reverse the trial court's order granting summary judgment in favor of defendant City of Tacoma.

IV. ARGUMENT

The purpose of summary judgment is to avoid an unnecessary trial when no genuine issue of material fact exists. Pelton v. Tri-State Mem'l Hosp., Inc., 66 Wn.App 350, 355, 831 P.2d 1147 (1992). However, a trial is absolutely necessary if there is a genuine issue as to any material fact. Olympic Fish Products, Inc. v. Lloyd, 93 Wn.2d 596, 611 P.2d 737 (1980); Jacobsen v. Stay, 89 Wn.2d 1045 569 P.2d 1152 (1977). Thus, a court must be cautious in granting summary judgment so that worthwhile

causes will not perish short of a determination of their true merit. Smith v. Acme paving Co., 16 Wn.App. 389, 558 P.2d 811 (1976). If a genuine issue of fact exists as to any material fact, a trial is not useless; rather it is necessary. Lish v. Dickey, 1 Wn.App. 112, 459 P.2d 810 (1969).

A genuine issue of material fact exists where reasonable minds could reach different factual conclusions after considering the evidence. Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 616 P.2d 644 (1980). Furthermore, on a motion for summary judgment, a trial court is required to view all evidence, draw all reasonable inferences in favor of the nonmoving party, and deny the motion if the evidence and inferences create any question of material fact. DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 140, 960 P.2d 919 (1998); Scott v. Pacific West mountain Resort, 119 Wn.2d 484, 487, 834 P.2d 6 (1992).

Considering the evidence in the light most favorable to the appellant, a prima facie case exists to support Ms. Brown's wrongful termination claim based on retaliation.

A. PLAINTIFF WAS WRONGFULLY TERMINATED AS THE TERMINATION WAS BASED ON PRE-TEXT AND RETALIATORY.

1. Ms. Brown's Discharge Was Pretextual and in Retaliation For Her Complaint Against Jacqueline Strong Moss.

RCW 49.60.210(1) states that it is an unfair practice for an employer to discharge an employee who opposes an unfair practice. "A claim for wrongful discharge in violation of public policy may arise when an employer discharges an employee for reasons that contravene a clear

mandate of public policy.” Korslund v. DynCorp Tri-Cities Servs, 156 Wn.2d 168, 178, 125 P.3d 119 (2005). “The cases addressing the claim generally involve situations where employees are fired for refusing to commit an illegal act, for performing a public duty or obligation, for exercising a legal right or privilege, or for engaging in whistleblowing activity.” Id. “The claim of wrongful discharge in violation of public policy is a claim of an intentional tort -- the plaintiff must establish wrongful intent to discharge in violation of public policy.” Id.

To satisfy the elements of this cause of action, the plaintiff must prove (1) plaintiff engaged in a statutorily protected activity, (2) the employer took adverse employment action against plaintiff; and (3) a causal connection exists between plaintiff’s activity and the adverse employment action. See Crownover v. Dept. of Transportation, 165 Wn.App. 131, 148, 265 P.3d 971 (2011). If plaintiff meets such burden, the defendant must offer an overriding justification for the adverse action. Id. If the employer meets its burden, then plaintiff must show that the employer’s justification is pre-textual. Id.

At summary judgment, respondent City of Tacoma conceded that Ms. Brown established the first and second elements of this cause of action, but asserted that Ms. Brown could not establish the causal nexus between her termination and the protected activity she engaged in. In support, the City relies upon the fact that Frank Gavaldon, another City of Tacoma Human Resources employee, who made the same hostile work

environment complaint against Jacqueline Strong Moss, was not terminated. Although the City is correct that Mr. Gavaldon was not terminated, Mr. Briehl, an agent of the City of Tacoma, informed Ms. Brown that as a result of the complaint lodged against Jacqueline Strong Moss, that one of them would get fired, meaning Ms. Strong Moss, Mr. Gavaldon or Ms. Brown. CP 261-262. Clearly, the unrebutted inference is that because of Ms. Brown's complaint, a termination would occur.

The City also suggests that the ethics investigation findings relating to computer usage support its position that Ms. Brown's termination was not retaliatory. Significantly, however, Mr. Briehl and Ms. Brown were both subjects of the ethics investigation. Mr. Gavaldon was not a target of nor mentioned in the investigation. The investigator concluded that both Ms. Brown and Mr. Briehl had misused their computers and should be subjected to some form of discipline and/or counseling. CP 89-90. Termination was not suggested. Id.

Ms. Brown disputed that she engaged in any type of ethics misconduct because Mr. Briehl authorized personal computer work so long as the employee's City work was completed. CP 261. As a result of this investigation, however, Ms. Brown was terminated, Mr. Briehl was not. In fact, no sanction whatsoever was imposed against Mr. Briehl. As such, a material issue of fact exists surrounding whether the City's basis of termination was legitimate or simply pretextual and retaliatory given that the only difference in treatment for both employees is that Ms. Brown had

previously complained about Ms. Strong Moss and her abusive conduct. Respectfully, this court should reverse the trial court's order dismissing Ms. Brown's retaliation claim as material facts exist surrounding her discharge.

V. CONCLUSION

Based upon the aforementioned, Ms. Brown respectfully urges this Court to reverse the trial court's order granting summary judgment in favor of the City of Tacoma and Jacqueline Strong Moss.

RESPECTFULLY submitted this 15th day of January, 2013.



BRETT A. PURTZER
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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington, this 18th day of January,

2013.


LEE ANN MATHEWS

HESTER LAW OFFICES

January 18, 2013 - 2:22 PM

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