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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA 297616

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

MONICA WALTERS,
Appellant

v.

YOUNG WOMAN'S CHRISTIAN ASSOCIATION, a
Washington nonprofit corporation
Respondent

BRIEF OF APPELLANT

Paul J. Burns
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Attorney for Appellant

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I. ASSIGNMENT OF ERROR

1. The trial court erred by failing to rule on plaintiff's CR 50 motion to determine (a) the YWCA 2006 by-laws were in effect at the time of plaintiff's termination, and (b) the YWCA breached its duty to provide notice to Ms. Walters prior to releasing her from her employment as Executive Director. (Findings of Fact 10; Conclusion of Law 3)

2. The trial court erred by failing to make findings of fact and conclusions of law sufficient to suggest the factual basis for the ultimate conclusions.

3. The trial court erred in concluding that the YWCA complied with its by-laws when it voted to release Ms. Walters from her employment as Executive Director on February 24, 2009. (Conclusion of Law 5)

4. The trial court erred in concluding that plaintiff's employment relationship with the YWCA was "at-will". (Conclusion of Law 1, 2, 3, 5)

5. The trial court erred in determining that the YWCA did not violate any duty owed to plaintiff by wrongfully interfering with any perceived contractual right or duty. (Conclusion of Law 6)

6. The trial court erred in concluding that the YWCA did not breach any perceived implied covenant of good faith or fair dealing. (Conclusion of Law 6)

7. The trial court erred in concluding that the YWCA did not unlawfully discriminate against plaintiff in violation of Washington law. (Conclusion of Law 6)

8. The trial court erred in concluding that the YWCA did not publish false information about plaintiff or place her in false light. (Conclusion of Law 6)

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion by failing to rule on plaintiff's CR 50 motion and make a factual determination concerning whether the YWCA's 2006 or 2008 by-laws were in effect when defendant terminated plaintiff from her employment on February 24, 2009? (Assignments of Error 1, 2, 3)

2. Did the trial court err in concluding that plaintiff's employment relationship with defendant YWCA was "at-will"? (Assignment of Error 4)

3. Did the trial court err in concluding that the YWCA did not violate any duty owed to plaintiff by wrongfully interfering with her contractual rights and duties as the executive director of the organization? (Assignment of Error 5)

4. Did the trial court err by concluding that defendant did not breach an implied covenant of good faith and fair dealing in the parties' employment agreement? (Assignment of Error 6)

5. Did the trial court err in concluding that defendant did not unlawfully discriminate against plaintiff under RCW 49.60.180? (Assignment of Error 7)

6. Did the trial court err by concluding that the YWCA did not publish false information about plaintiff or place plaintiff in a false light? (Assignment of Error 8)

7. Did the trial court err in concluding that plaintiff failed to prove any damages as the result of the termination of her employment on February 24, 2009? (Assignment of Error 9)

II. STATEMENT OF THE CASE

Plaintiff Monica Walters brought this lawsuit against her former employer, the YWCA of Spokane, alleging claims of wrongful termination premised on theories of breach of contract and disability discrimination under RCW 49.60.180. She also alleged a common law tort claim of Invasion of Privacy/False Light. (CP 1-7) The case was tried to the Spokane County Superior Court without a jury from May 18 through June 1, 2010. On July 1, 2010 the trial court entered Findings of Fact and Conclusions of Law rejecting all of plaintiff's claims. (CP 161-169)

Ms. Walters was employed as the Executive Director of the YWCA of Spokane from November 19, 1996 through February 24, 2009. (Findings of Fact 1, CP 161) The terms and conditions of the parties' employment agreement were defined, in part, by the YWCA By-Laws and Board Policies. (CP 1-7, 162) Several renditions of those by-laws and board policies were admitted into evidence at trial. (See, Trial Exhibits 1, 2, 30, 31, 33, 100, 101, 102) As discussed *infra*, there was a dispute at trial concerning whether the February 28, 2006 by-laws, or the December 8, 2008 by-laws were in effect at the time of Ms. Walters' discharge on February 24, 2009. (RP 962-969) The 2006 version of the by-laws required notice to the executive director before the board could vote to release her from her employment. (Trial Exhibit 33, RP 963) There was no similar notice requirement in the December 2008 version of the by-laws. (Trial Exhibit 1)

At the close of the evidentiary presentation at trial plaintiff moved under CR 50 for a directed verdict that (1) the 2006 version of the by-laws was in effect at the time of plaintiff's discharge, and (2) defendant YWCA failed to provide notice to Ms. Walters of its intent to vote to release her from her employment at the February 24, 2009 board meeting. (RP 962-969) Importantly, the trial court failed to rule on that motion. (RP 969) Further, the court made no

finding of fact or conclusion of law concerning which version of the by-laws was in effect at the time of plaintiff's discharge on February 24, 2009. (CP 161-169) The court made a finding of fact that on February 24, 2009, "The board voted to release Ms. Walters without notice to Ms. Walters." (Finding of Fact 20; CP 168) However, the court made no finding concerning which version of the by-laws was in effect at the time of the discharge. (See Conclusion of Law 3; CP 168) ("Neither the board policies whether those pre-existing or attempted to be adopted by the board of directors on December 9, 2008 or the by-laws changed or modified Ms. Walters' status as an at-will employee of the YWCA").

The parties' agreed that the YWCA Board Policies and By-Laws defined, in part, the terms and conditions of the employment agreement between Ms. Walters and the organization. Although it is unclear, it appears the trial court made a finding of fact to that effect. (See Finding of Fact 2; CP 162) Several of those by-laws and policies were particularly significant in this case.

Article XIII, Section 2 of the YWCA By-Laws provided, in part:

- (a) The executive director shall administer the work of the association as delegated by the board.

(b) The executive director shall have the responsibility for the selection, appointment, direction, supervision and release of staff.

(Trial Exhibit 1, 33) Further, Board Policy No. 4.3.3 provided:

As long as the Executive Director uses reasonable interpretation of the Board's ENDS and Executive Limitations Policies, the Executive Director is authorized to establish all further policies, make all decisions, take all actions, establish all practices and develop all activities as need for the operation of the organization.

(Trial Exhibit 2)

Under Board Policy 4.4, the YWCA Board of Directors had the responsibility to regularly monitor Ms. Walters' performance as the Executive Director "against expected Executive Director job outputs, organization and accomplishments of Board's ENDS policies and organizational operations within Executive Director Limitations Policies."

The trial court specifically found that throughout her tenure of employment with defendant YWCA, Ms. Walters performed her job responsibilities as executive director competently, meeting the legitimate expectations of the Board of Directors. (Findings of Fact 3, 4; CP 162) Evidence at trial demonstrated that the organization had significant financial stress in late 2008 and early 2009 when the events giving rise to this litigation occurred. (Findings of Fact

6, 7, 8; CP 162-163) In March, 2008 Ms. Walters' hired Ms. Denette Hill as the Finance Director for the organization. (Finding of Fact 5; CP 162) However, as time went on, Ms. Walters' had significant difficulty in her working relationship with Ms. Hill. (Transcript of Proceedings 5/20/10, RP 73-85) On December 29, 2008 Walters' discharged Hill from her employment as Finance Director. (Finding of Fact 5; CP 162) This decision triggered the events which culminated in the termination of Walters' employment as executive director two months later on February 24, 2009.

The trial court found that the Board of Directors, and the Executive Committee of the YWCA "strongly believed that Ms. Hill's financial expertise and guidance were absolutely necessary in order for the YWCA to properly identify and develop plans and procedures to deal effectively and successfully with present financial conditions." (Finding of Fact 7; CP 162-163) Ms. Walters left on a planned vacation in early January, 2009. (Finding of Fact 20; CP 165) In Ms. Walters' absence, the recently discharged Finance Director, Denette Hill had several contacts with Board Members Virginia Bott and Jennifer Senske. Hill conveyed her concerns and opinions regarding the YWCA's financial condition and Ms. Walters' alleged mismanagement. (Finding of Fact 20; CP

165) Board Member Bott called Hill and asked her if she would be willing to return as finance director for the YWCA if the board could resolve the conflict between Ms. Hill and Ms. Walters. (Finding of Fact 20; CP 165)

When Ms. Walters returned from her vacation in mid January 2009 she had several meetings with the Executive Committee of the Board to discuss (1) the financial condition of the organization, (2) preparation of the 2009 budget, and (3) her recent decision to discharge Ms. Hill. (Findings of Fact 20; CP 165-166) The board members with whom she met made it clear they wanted Walters to rehire Hill. Id. It was apparent to Ms. Walters that the board members were ordering her to rehire Ms. Hill. (Findings of Fact 20; CP 166) This was directly contrary to Article XIII, Section 2 of the By-Laws and Board Policy 4.3.3 which gave Ms. Walters, as Executive Director, exclusive authority over the operational functions of the YWCA, including the hiring and firing of staff.

Board Policy 2.3.1 required Ms. Walters, as Executive Director, to produce a balanced operating budget for the board at the beginning of each calendar year. (Trial Exhibit 2) While the events relating to the discharge of Ms. Hill were unfolding, Ms. Walters was preparing the 2009 budget for presentation to the

board at its January 2009 meeting. (Finding of Fact 20; CP 166)
Ms. Jennifer Senske was a board member, the treasurer of the organization, and a member of the YWCA finance committee. On January 20, 2009 Ms. Walters presented a proposed budget for 2009 to Ms. Senske for her review. Senske was dissatisfied with the format and rejected Walters' proposed budget. (Finding of Fact 20; CP 166)

YWCA Board Policy 3.5 provides:

Board committees cannot exercise authority over staff. The executive director works for the full board and will thus not be required to obtain approval of a board committee before an executive action.

On January 27, 2009 the board conducted a formal meeting. Ms. Walters presented 30 copies of her proposed budget to Board Treasurer Senske for distribution and presentation to the entire board. Ms. Senske refused to distribute Walters' proposed budget to the full board. (Finding of Fact 20; CP 166) This was in direct violation of Board Policy 3.5.3.

During the January 27, 2009 board meeting Board Treasurer Jennifer Senske again raised the issue of rehiring Denette Hill as Finance Director. (Finding of Fact 20; CP 166) There was heated discussion over the issue and Ms. Walters made it clear she was not willing to do so. (RP 391-396) This was

entirely within her authority as executive director under Article XIII, Section 2(b) of the By-Laws. At one point Board Member Virginia Bott made a motion to the board that the board recommend to Ms. Walters that she hire Denette Hill. The motion was never seconded and died for lack of a second. (RP 392) Ms. Walters' made it clear to the board that she was willing to hire a finance director, but she was adamant that she would not rehire Denette Hill. (RP 392-393) Several board members were so insistent that Walters rehire Ms. Hill that, when she refused to do so, they indicated they would resign from the board. (RP 393-395)

At this point five facts are clear in the record. (1) Ms. Walters' had performed her job responsibilities as executive director of the YWCA competently and well and met the legitimate expectations of the Board of Directors. (Finding of Fact 3, 4; CP 162) (2) Article XIII, Section 2(b) of the YWCA By-Laws, and Board Policy 4.3.3 gave Ms. Walters', as executive director, exclusive authority over operational decisions with respect to the hiring and firing of staff. (3) The board had substantially interfered with her decision to discharge Denette Hill from her position as finance director. (4) Board policy required Ms. Walters to submit a budget for the calendar year 2009 at the January board meeting. (5) Board Treasurer Jennifer Senske interfered with her efforts to do

so by refusing to distribute Walters' proposed budget to the full board at the January 27, 2009 board meeting.

These events impacted Ms. Walters' health. She saw her primary health care provider, Physician Assistant Robyn Smith, on January 28, 2009. Ms. Smith diagnosed Walters to be suffering from anxiety and depression. (Finding of Fact 20; CP 166) She recommended that Ms. Walters take a leave of absence, which was granted by the YWCA. (Finding of Fact 17, 18)

Because of the developing conflict with the board Ms. Walters also sought legal advice from Spokane attorney Greg Arpin. (Finding of Fact 20; CP 166-167) On February 5, 2009 Mr. Arpin wrote a letter to Board President Deborah Booth detailing Ms. Walters' concerns and conveying her offer to resolve the developing dispute by resigning, subject to certain conditions. (Finding of Fact 20; CP 166-167; Trial Exhibit 16) The board met on February 10, 2009 to discuss Mr. Arpin's letter, and appointed Development Director Trish McFarland as interim Executive Director while Ms. Walters was on leave of absence. (CP 167) On February 13, 2009 Walters' health care provider wrote a second note to the YWCA stating that it was imperative that Ms. Walters leave of absence be extended. (CP 167) In the meantime, on February 11, 2009 interim Executive Director McFarland rehired

Denette Hill as Finance Director. (Finding of Fact 20; CP 168; RP 781-782) Ms. McFarland did not advise Ms. Walters that she had rehired Hill as Finance Director. (RP 782)

On February 23, 2009, while still on leave of absence, Ms. Walters emailed interim Executive Director McFarland and asked to be kept apprised of developments at the YWCA, and the upcoming February 24, 2009 board meeting. (Trial Exhibit 185; RP 728-729) Ms. McFarland did not respond to the email because she did not think Walters was coming back and she (McFarland) did not think she needed to. (RP 729)

On February 24, 2009, the board voted to release Ms. Walters, without notice to her. (Finding of Fact 20; CP 168) Under Article XIII, Section 1(b) of the YWCA By-Laws, the executive director could be released from her employment only by a vote of two-thirds majority of the entire board. (Trial Exhibit 1; CP 49) When the board of directors voted to release Walters from her position as executive director on February 24, 2009 it did so with less than the entire board present and voting. (CP 43, 61)

Plaintiff Walters brought this lawsuit against the YWCA alleging claims of breach of contract, disability discrimination and invasion of privacy/false light. (CP 1-7) The case was tried to the Spokane County Superior Court, sitting without a jury, from May

18, 2010 through June 1, 2010. On July 1, 2010 the trial court issued Findings of Fact and Conclusions of Law rejecting all of plaintiff's claims. (CP 161-169) This appeal timely followed. (CP 183-197)

III. ARGUMENT

1) The trial court abused its discretion by failing to rule on the plaintiff's CR 50 motion and make a factual determination concerning whether the YWCA's 2006 or 2008 by-laws were in effect when defendant terminated plaintiff from her employment on February 24, 2009.

Defendant YWCA is a Washington non-profit corporation. (CP 1-7; 21-33) A non-profit corporation must act in a manner consistent with its by-laws. "Where a meeting of a non-profit corporation is not in accordance with its by-laws, its proceedings are void." *Water Association v. Rogers*, 52 Wn.App. 425, 426, 761 P.2d 627 (1988). In the instant case a significant dispute developed at trial concerning whether the 2006 or 2008 version of the YWCA By-Laws was in effect at the time of plaintiff's discharge. At the end of the evidentiary presentation plaintiff moved under CR 50 for a directed verdict that the 2006 by-laws applied, and the YWCA failed to comply with them with respect to the notice requirement preceding a vote to release the executive director.

The trial court failed to rule on that motion. The trial court failed to address this issue in its Findings of Fact and Conclusions of Law. This was an abuse of discretion requiring reversal. See, *Marriage of Lawrence*, 105 Wn.App. 683, 686, 20 P.3d 972 (2001).

The YWCA By-Laws state the method, manner and process by which they can be amended. Article XIII, Section A of the 2006 By-Laws stated:

Amendment to these by-laws not affecting the association's membership in the Young Woman's Christian Association of the United States of America may be made by a two thirds affirmative vote of the members present at a regular meeting of the membership, providing the following requirements have been met:

...

General Amendments: The by-laws may be altered, amended or rejected by a two-thirds, affirmative vote of the board of directors at a regular or special meeting provided that notice to amend, including copies of the proposed amendments, will have been given at a previous regular board of directors meeting.

(Trial Exhibit 33; RP 964) Therefore, under the 2006 version of the YWCA By-Laws two steps were required for amendment: (1) two thirds affirmative vote by the board of directors, and (2) two-thirds affirmative vote by the membership. (RP 411-415)

On December 9, 2008 the board met and attempted to amend the 2006 by-laws. (RP 409-415) However, the membership of the YWCA never approved those 2008 amendments, as required by Article XIII of the 2006 By-Laws. (RP 409) Therefore, the 2006 by-laws were never effectively amended in December 2008, and remained in effect at the time the board released Ms. Walters from her employment on February 24, 2009. *Water Association v. Rogers*, 52 Wn.App, at 426.

The issue of which version of the by-laws was in effect at the time of plaintiff's discharge was significant. Under the 2006 version, the board of directors could release the executive director from her employment by a vote of two-thirds of the entire board "provided that previous notice has been given to the entire board and the executive director." (Trial Exhibit 33; RP 963) The 2008 version of the by-laws contained no requirement of notice to the executive director before a vote to release her from her employment. The trial court expressly found that the board did not give notice to Ms. Walters before voting to release her from her employment on February 24, 2009. (Finding of Fact 20; CP 168) But the court made no finding regarding which version of the by-laws was in effect when the board voted to release Walters as executive director.

Plaintiff raised the issue of which version of the by-laws was in effect in a CR 50 motion at the end of the evidentiary presentation at trial. (RP 962-969) The court deferred ruling on the motion pending its further review of the evidence. (RP 969) The court never ruled on plaintiff's CR 50 motion on the record. It made no reference to that motion in the Findings of Fact and Conclusions of Law. The court made no finding or conclusion concerning which version of the by-laws was in effect when Ms. Walters was discharged.

The evidence clearly established that the membership of the YWCA did not vote to approve amendments to the 2006 by-laws following the Board of Directors vote on December 9, 2008. (RP 409) Therefore, the evidence established that those by-laws were never effectively amended. The 2006 by-laws required notice to the executive director before a board vote to release her from her employment. The court found no such notice was given in this case. (CP 168) Therefore, under the 2006 version of the by-laws, the board vote to release Walters from her employment as executive director was void. *Water Association*, 52 Wn. App., at 426.

A trial court must make findings of fact and conclusions of law sufficient to suggest the factual basis for the ultimate

conclusions. *Marriage of Lawrence*, 105 Wn. App. 683, 686 (2001). The trial court is required to create an adequate record of the proceedings for appellate review, and must establish and set forth the existence or non existence of determinative factual matters. In *Re Detention of LaBelle*, 107 Wn.2d 196, 219, 728 P.2d 138 (1986); *Lawrence*, 105 Wn. App., at 686, n.2. In the instant case the trial court abused its discretion by failing to rule on plaintiff's CR 50 motion and make a factual determination with respect to which version of the YWCA By-Laws was in effect at the time of plaintiff's discharge. That abuse of trial court discretion requires reversal.

2) The trial court erred in concluding that the YWCA complied with its by-laws when it voted to release Ms. Walters from her employment as executive director.

In its Conclusion of Law No. 5 the trial court stated:

Although an at-will employee, the YWCA through its Board of Directors, in order to terminate the at-will executive director, was required to have a minimum of two-thirds vote of the board to do so, and they complied with that requirement.

(CP 168) Although characterized as a conclusion of law, this was actually a factual finding, or, at best, a mixed finding of fact and conclusion of law. To the extent it is a factual finding, it is not supported by substantial evidence. To the extent it is a conclusion

of law, it is not supported by any finding of fact. Again, the trial court failed to make adequate factual findings to support this conclusion, and this failure requires reversal. See *Groff v. Department of Labor & Industries*, 65 Wn.2d 35, 40, 395 P.2d 633 (1964).

There is no evidence to support the court's finding or conclusion that the board complied with the by-laws in releasing Walters as the executive director. First, as explained above, the evidence established that the 2006 by-laws were never effectively amended, and were therefore operative at the time of the February 2009 vote to release Ms. Walters. Those by-laws required notice to the executive director prior to a vote to release her. The court expressly found that no such notice was given. (Finding of Fact 20; CP 168) Therefore, the court's finding/conclusion that defendant complied with its by-laws in releasing Ms. Walters is not supported by its own finding of fact or the evidence in the record.

Second, regardless of whether the 2006 or 2008 by-laws were in effect, both required a two-thirds majority vote of the entire board to release the executive director. (See Trial Exhibits 1, 33) Article XIII, Section 1B of the 2006 By-Laws states: "The board of directors by a vote of two-thirds of the entire board shall have the authority to release the executive director provided that

previous notice has been given to the entire board and the executive director.” (Trial Exhibit 33; RP 963) Article XIII, Section 1(b) of the 2008 By-Laws states: “The Board of Directors by a vote of two-thirds majority of the entire board shall have the authority to release the executive director.” (Trial Exhibit 1) It is undisputed that the entire board was not present on February 24, 2009 when the vote was taken to release Walters from her employment. The trial court’s Conclusion of Law No. 5, indicating the board was required to have a “minimum two-thirds vote of the board” to release the executive director, disregards the word “entire” in both the 2006 and 2008 by-laws.

The by-laws of a corporation are interpreted in accordance with general principals of contract construction. *Davenport v. Elliott Bay*, 30 Wn.App., 152, 154, 632 P.2d 76 (1981). It is a fundamental principal of contract construction that words used in the contract will be given their ordinary meaning unless a different meaning is clearly intended. *Id.* The plain language of the YWCA by-laws expressly provides that the executive director may be released from her employment only by a two-thirds vote of the entire board. Entire board means entire board. In February 2009 the entire Board of Directors of the YWCA consisted of 24 members. (CP 43, 61) Only 21 were present when the vote was

taken to release Ms. Walters from her employment as executive director. (5/19/11 Trial Transcript, RP 359; CP 43, 61) The executive director and the board of directors are contractually bound by the terms of the corporation by-laws. *Davenport*, 30 Wn. App., at 52. Where a meeting of a non-profit corporation is not in accordance with its by-laws, its proceedings are void. *Water Association v. Rogers*, 52 Wn. App. 425, 426 (1988). The record does not support the trial court's finding/conclusion that defendant complied with its by-laws in releasing Ms. Walters from her position as executive director. The trial court's decision should be reversed.

3) The trial court erred in concluding that plaintiff's employment relationship with the YWCA was "at-will".

The trial court's Conclusions of Law No. 1-3 state:

1. YWCA of Spokane Employee Handbook defines without limitation employees of the YWCA as at-will absent a specific written agreement declaring otherwise, Ms. Walters was an at-will employee.
2. The Executive Director is not otherwise addressed in the handbook, other than that position's authority to enter a written agreement designating an employee to be other than at-will.
3. Neither the Board Policies (whether those pre-existing or attempted to be adopted by the Board of Directors on December 9, 2008) or the by-laws changed or modified

Ms. Walters' status as an at-will employee
of the YWCA.

(CP 168) Again, although characterized as conclusions of law, these are at best mixed findings of fact and conclusions of law. Once again, to the extent they are factual findings there is no evidence in the record to support them. The court made no finding of fact which even remotely relates to, or supports its conclusion that plaintiff's employment status was at-will. Once again, the trial court failed in its duty to "make findings of fact and conclusions of law sufficient to suggest the factual basis for the ultimate conclusions." *Marriage of Lawrence*, 105 Wn. App., at 868, citing CR 52(a); *Groff v. Department of Labor & Industries*, 65 Wn.2d, 35, 40 (1964).

There was absolutely no testimony presented at trial to support a factual determination that Ms. Walters was employed at-will. The court's reference to at-will language in the YWCA Employee Handbook in Conclusion of Law No. 1 does not support its at-will finding. Board member Virginia Bott, who was one of defendant's two CR 30(b)(6) designees, testified that the employee handbook does not apply to the executive director of the YWCA. (Trial Transcript 5/25/10, RP 418) That testimony was undisputed. Therefore, there simply was no evidence in the record to support

the trial court's finding/conclusion that Ms. Walters was employed at-will.

Significantly, defendant YWCA did not allege "at-will" employment as an affirmative defense. (CP 8-20) Defendant did not argue at-will employment at the summary judgment stage. There was no discussion of, or reference to, at-will employment during the entire evidentiary presentation at trial. It was not until counsel for both parties had completed their closing arguments at the end of the case that the trial court, sua sponte, raised the issue of at-will status. (RP 1089) In the colloquy that followed counsel for the YWCA agreed that Ms. Walters was not an at-will employee. (RP 1089, 1090) The court's sua sponte conclusion that Ms. Walters was employed at-will is completely unsupported by the record.

The parties agreed that the terms and conditions of Ms. Walters' employment relationship were governed by the YWCA by-laws and board policies. Those documents make no reference to whether the executive director can be terminated at-will, or only for just cause. However, the by-laws clearly place limitations on the board's ability to terminate the executive director. The executive director can be released from her employment only by a two-thirds majority vote of the entire board. Under the 2006 by-

laws the board was required to give notice to the executive director before a vote to release her from her employment. All of this is contrary to the notion of at-will employment. See, *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984).

In *Roberts v. Arco*, 88 Wn.2d 887, 894, 568 P.2d 764 (1977), the court summarized the factors to consider in determining whether the parties had an implied agreement that the employment relationship could be terminated only for just cause:

The courts will look at the alleged “understanding”, the intent of the parties, business customs and usage, the nature of the employment, the situation of the parties, and the circumstances of the case to ascertain the terms of the claimed agreement.

See also, *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 503, 504, 814 P.2d 1219 (1991). The record clearly demonstrates that the parties had an implied agreement that Ms. Walters could be terminated only for just cause. First, throughout this litigation, defendant has conceded that she was not at-will. This is evidenced by (1) the absence of an at-will affirmative defense, (2) defendant’s failure to advance an at-will argument at the summary judgment stage, and (3) defense counsel’s concessions on the record that plaintiff was not employed at-will. None of the employment documents suggest at-will employment. Trial Exhibit

3 was the letter offering Ms. Walters employment as the YWCA executive director. There was no at-will language in that document. The by-laws do not state Ms. Walters was at-will, or served at the pleasure of the board. While the YWCA Employee Handbook contains at-will language, Board Member Virginia Bott testified the handbook does not apply to the executive director.

The trial court sua sponte raised the at-will issue, and concluded, without evidence or factual finding, that Ms. Walters was an at-will employee. This issue was never raised or litigated by the parties. The entire evidentiary presentation at trial was premised on the fact that Ms. Walters could be terminated only for just cause. There is no evidence to support the trial court's finding/conclusion that Walters was employed at-will. There was no factual finding which supported this conclusion of law. The trial court abused its discretion in concluding, without supporting evidence or finding of fact, that Walters was employed at-will. This decision must be reversed.

4) The trial court's Conclusion of Law No. 6 is not supported by any factual finding or evidence in the record.

The trial court's Conclusion of Law No. 6 provides the following summary statement:

6. Although the YWCA's activities and responses to the financial crisis and Ms.

Walters were not necessarily their finest moment, they did not violate any obligation or duty to Ms. Walters by:

- Unlawfully discriminating against her in violation of any Washington law;
- Wrongfully interfering with any perceived contractual rights or duties;
- Publishing false information or placing her in a false light; or
- Breach any perceived implied covenant of good faith or fair dealing

Once again, this summary Conclusion of Law finds no basis or support in any of the court's Findings of Fact. The evidence in the record fails to support these summary conclusions. They are clearly erroneous and require reversal.

A) No finding of fact supports the trial court's conclusion that defendant did not unlawfully discriminate against Ms. Walters in violation of Washington law.

Plaintiff alleged a claim of disability discrimination under RCW 49.60.180. (CP 1-7) Specifically she alleged that the YWCA unlawfully discriminated against her by failing to accommodate her disability. To establish her disability discrimination claim premised on a theory of failure to accommodate, Ms. Walters was required to show she (1) had a disability that substantially limited

her ability to perform the job; (2) was qualified to perform the essential functions of the job with or without reasonable accommodation; (3) gave the YWCA notice of her disability and its accompanying substantial limitations, and (4) that upon notice, the YWCA failed to reasonably accommodate her. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003) Evidence at trial established each of these elements.

First, plaintiff's health care provider, Physician Assistant Robyn Smith, testified Ms. Walters was diagnosed with anxiety and depression and required a medical leave of absence. (Trial Transcript 5/19/10, RP 384-389) This evidence was uncontroverted and established that Ms. Walters had a disability that substantially impaired her ability to do her job. RCW 49.60.040(7). The court found that Ms. Walters was qualified to perform the essential functions of her job. (Finding of Fact 3, 4; CP 162) The evidence demonstrated, and the court found that the YWCA granted Ms. Walters her leave of absence during February 2009. However, the evidence further established that rather than engage in any interactive process to determine additional appropriate accommodations, the YWCA discharged Ms. Walters while she was on her leave of absence. See, *Frisino v. Seattle School District No. 1*, 160 Wn. App. 765, 249 P.3d 1044 (2011) (When initial

accommodation attempts fail, employer may be required to engage in interactive process to determine what additional accommodations may be effective). This was clearly established by the testimony of Trish McFarland who was appointed interim executive director in Ms. Walters' absence. McFarland refused to respond to Walters' request to be kept apprised of developments while she was on medical leave. She did not consult or inform Walters of her decision to rehire Denette Hill as finance director. She did not respond to Walters' request to be informed about the February 24, 2009 board meeting. (RP 780-785) McFarland explained she did not communicate with Walters while she was on medical leave because she "didn't expect she [Walters] was coming back and I didn't think I needed to." (RP 729) The evidence establishes that the YWCA was not accommodating Ms. Walters during her leave of absence. They had effectively discharged her.

The trial court made no factual findings concerning whether Ms. Walters had a disability. Clearly she did. The trial court made no factual findings concerning whether the YWCA breached its duty to accommodate Walters' disability. Clearly it did. The trial court's summary conclusion of law that the YWCA did not unlawfully discriminate against Walters is unsupported by

any factual finding or evidence. This unfounded conclusion should be reversed.

B) The trial court's summary conclusion that the YWCA did not wrongfully interfere with any perceived contractual rights or duties is unsupported by the findings of fact or the evidence.

The trial court summarily concluded that the YWCA did not wrongfully interfere with plaintiff's contractual rights or duties. This is contrary to the court's findings of fact.

Under Article XIII, Section 2 of the By-Laws, and Board Policy 4.3.3 Ms. Walters, as executive director, had exclusive operational authority with respect to the hiring and firing of staff. She exercised this authority and fired Denette Hill as finance director on December 29, 2008. (Finding of Fact 5; CP 162) The court found that the board of directors "strongly believed that Ms. Hill's financial expertise and guidance were absolutely necessary in order for the YWCA to properly identify and develop plans and procedures to deal effectively and successfully with present financial conditions." (Finding of Fact 7; CP 162-163) The court further found that the board of directors and executive committee "were angry when advised of Ms. Hill's termination and were resolved to make efforts to have Ms. Walters' decision regarding Ms. Hill reversed." (Finding of Fact 15; CP 164) Board Member

Bott called Ms. Hill and “asked if she would be willing to return as finance director for the YWCA if the board could resolve the conflict between Ms. Hill and Ms. Walters. Hill agreed.” (Finding of Fact 20; CP 165) During the January 27, 2009 board meeting, board member Jennifer Senske said “Ms. Hill was willing to return to work, but on Ms. Hill’s terms, and she had spoken with staff members who state Ms. Walters was “mean and abusive.”(Finding of Fact 20; CP 166) These findings establish that the board interfered with Walters’ contractual rights and responsibilities to manage the operational decisions regarding hiring and firing of staff. The court’s conclusion of law that the YWCA did not interfere with Walters’ contractual rights and responsibilities is contrary to its own findings of fact. There certainly is no finding of fact which supports this conclusion.

Under Board Policy 2.3.1 Ms. Walters, as executive director was required to submit a proposed budget to the board of directors on or before January 1st each year. Evidence at trial established that this was typically done at the January board meeting. Board Policy 3.5.3 states that the executive director “works for the full board and will thus not be required to obtain approval of a board committee before an executive action.” The court found that at the January 27, 2009 board meeting, “Board

Treasurer Ms. Senske refused to distribute Ms. Walters' proposed budget to the full board." (Finding of Fact 20; CP 166) This finding demonstrates that, in fact, the board members of the YWCA interfered with Ms. Walters' contractual duty to submit a proposed budget to the board of directors at the beginning of the year. The court's summary conclusion that the YWCA did not wrongfully interfere with any of Ms. Walters' contractual duties is contrary to its own finding of fact.

C) The court's conclusion that the YWCA did not publish false information or place Ms. Walters in a false light is contrary to the evidence and its own finding of fact.

Plaintiff alleged a common law tort claim of invasion of privacy/false light. An invasion of privacy claim is established by evidence of publication of private affairs of another that would be highly offensive to a reasonable person. *Reid v. Pierce County*, 136 Wn.2d 195, 206, 961 P.2d 333 (1998) A false light claim arises when someone publicizes a matter that places another in a false light if (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed. *Eastwood v. Cascade Broadcasting*, 106 Wn.2d 466, 470-471, 722 P.2d 1295 (1986). The court found that

following Ms. Walters' termination, "there was an article in the Spokesman Review, March 11, 2009 ed., referencing "Deborah Booth, President of the YWCA Board, said Walters resigned citing medical reasons..." (Finding of Fact 19; CP 164) (See also, Trial Exhibit 26) The statement that Ms. Walters resigned for medical reasons was blatantly false. (Trial Exhibit 16) Ms. Walters' testified the newspaper publication was false and extremely upsetting to her. (5/20/10 Trial Transcript, RP 132-138)

The trial court found that Ms. Walters' counsel, Greg Arpin, wrote to the board and conveyed her offer to resign subject to certain conditions. (Finding of Fact 20; CP 166-169) (See Trial Exhibit 16) The court further found that on February 24, 2009 the board voted to release Ms. Walters. (Finding of Fact 20; CP 168) Therefore the March 11, 2009 newspaper quote from Board President Deborah Booth indicating Walters resigned for medical reasons was blatantly false. The court failed to make a specific finding concerning whether the statement in the article was false or highly offensive and/or invaded Ms. Walters' privacy. The trial court's summary conclusion that defendant did not publish false information about Ms. Walters, or place her in a false light is contrary to, and unsupported by, its findings of fact. Further, it is unsupported by any evidence in the record. It should be reversed.

5) The court's conclusion that Ms. Walters' failed to prove damages is unsupported by the record.

Inexplicably, the trial court entered Conclusion of Law No. 7 which stated: "Ms. Walters, had she proved any of her causes of action, did not prove that alleged damages were proximately caused by the YWCA's decision to terminate her employment." There is no factual finding to support this conclusion. This conclusion is obviously contrary to the evidence.

The court's factual findings established that defendant breached the employment agreement, as evidenced by the by-laws and board policies, in at least two respects. First, board members interfered with plaintiff's authority to make operational decisions with respect to the hiring and firing of staff. Second, board members prohibited Ms. Walters from presenting her proposed budget to the full board at the January 27, 2009 board meeting. The record further establishes that the board failed to provide notice to Ms. Walters of its intent to vote on her continued employment at the February 24, 2009 board meeting. This was required by the 2006 by-laws which were in effect at the time. Further, the vote to release Walters from her position as executive director was void because the entire board did not vote, as required by the by-laws. *Water Association v. Rogers*, 52 Wn. App. 425 (1988).

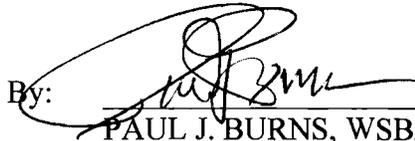
Plaintiff's economic loss expert, Richard Schatz, Ph.D. testified that Ms. Walters' sustained economic loss of \$145,362.00 as the result of the termination of her employment. (5/19/10 Trial Transcript, RP 231) Further, Ms. Walters testified she suffered significant emotional distress as a result of the termination of her employment. (5/20/10 Trial Transcript, RP 131-139) The trial court's Conclusion of Law No. 7 regarding plaintiff's failure to prove damages is unsupported by any findings of fact or the evidence in the record. It should be reserved.

IV. CONCLUSION

The trial court's Findings of Fact fail to support its Conclusions of Law. For the reasons set forth above plaintiff/appellant Monica Walters respectfully requests this court to reverse the findings/conclusions and judgment of the trial court and remand this case for a new trial.

RESPECTFULLY SUBMITTED this 21 day of
November, 2011.

PAUL J. BURNS, P.S.

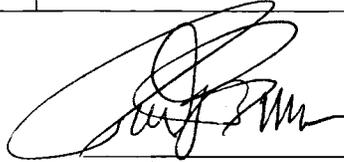
By: 

PAUL J. BURNS, WSBA #13320
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 21 day of November, 2011, at Spokane, Washington, the forgoing was caused to be served on the following person(s) in the manner indicated:

Kammi Mencke Smith Winston & Cashatt 601 West Riverside Avenue Suite 1900 Spokane, WA 99201	<input type="checkbox"/> Regular Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail
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PAUL J. BURNS