

Court of Appeals Cause No. 93731-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KIM MIKKELSEN,

Petitioner,

v.

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

Respondents.

**SUPPLEMENTAL BRIEF OF RESPONDENT PUBLIC UTILITY
DISTRICT #1 OF KITTITAS COUNTY**

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I. ISSUES PRESENTED FOR REVIEW

A. In a sex or age discrimination case under the three part *McDonnell Douglas* “shifting burden” analysis on summary judgment, once the plaintiff has satisfied the first burden and the burden then shifts to the defendant under the second part of the test, if the plaintiff can demonstrate issue of facts exist as to either of the next two burdens under the *McDonnell Douglas* test, should summary judgment be denied to the defendant and the plaintiff then be permitted to try the case on the merits?

1. In order to be able to prevail on a summary judgment motion on the second and third “shifting burden” test of *McDonnell Douglas* must the defendant establish compliance with the second test and the plaintiff’s alleged failure as to the third test **as a matter of law** in order to be entitled to summary judgment? If issues of fact exist as to either test, is summary judgment appropriate?

B. In an action to enforce provisions of an employee manual by the employee, can the employer establish, as a matter of law on a summary judgment motion by the language used that the policy cannot be used to alter the “at will” relationship with the employee?

1. What is the “disclaimer” language of such policy that can be used, or is it an issue of fact for the trier of fact to determine, based on the evidence presented?

C. With respect that an employee manual has “Promises of Specific Treatment” in both words and practice by the employer, what is

the showing that an employee must make to resist a summary judgment motion by the employer and is it an issue of fact?

II. STATEMENT OF THE CASE

Kim Mikkelsen was terminated from her employment with the Public Utility District #1 of Kittitas County (“the District”) because “it just wasn’t working out.” CP 319. She brought claims of age and gender discrimination. Mikkelsen, a woman over 40 years of age, was replaced by Genine Pratt, also a woman and also over 40 years of age. CP 65. The trial court dismissed Mikkelsen's discrimination claims because she failed to establish a prima facie case. CP 532. A prima facie case of discriminatory discharge is established by showing that the employee (1) was within a statutorily protected group; (2) was discharged by the defendant; (3) was doing satisfactory work; and (4) was replaced by someone outside the protected group—or, in the case of age discrimination, by someone “significantly younger.” *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 188, 23 P.3d 440 (2001) (age discrimination); *Domingo v. Boeing Emps. Credit Union*, 124 Wn. App. 71, 80, 98 P.3d 1222 (2004) (sex discrimination). The trial court noted that the prima facie case allows for flexibility; under certain circumstances, the replacement element, may not be necessary. CP 532. However, the trial

court found that the facts presented did not warrant “deviation from the requirement of the fourth element.” CP 532.¹

The Court of Appeals was uncomfortable with the prima facie case’s flexibility: “[a]llowing trial courts to require or dispense with the replacement element. . .results in too much uncertainty for trial courts and parties.” A-23. Therefore, the Court of Appeals did away with the replacement element. It noted that replacement by someone in the protected class “is relevant evidence,” but moved its consideration from the first step of the *McDonnell Douglas* test to the third step.

After the Court of Appeals excused Mikkelsen from the fourth element, Mikkelsen established a prima facie case. However, she still did not survive summary judgment because she failed to show that the reason for her termination was pretextual or that discrimination was nonetheless a substantial motivating factor in the District’s decision to terminate her.

There is no dispute that Mikkelsen and her supervisor, Ward, had differing communication and management styles. CP 125, 110, 131, 115.

Mikkelsen testified that she and Ward had a complete and mutual communication breakdown and that they lost trust in one another. CP 23,

¹ The Court of Appeals announced new law and altered the prima facie case. The issue was addressed in briefing before the Court of Appeals. However, the issue was not raised in the motion for discretionary review nor in a cross appeal, therefore it is not addressed in the briefing before this Court. RAP 13.7(b).

117. Then, while Ward was on vacation and without his knowledge or input, Mikkelsen suggested to one of the District's Commissioners that the Board send out an employee survey to evaluate, among other things, Ward's performance as a manager. CP 84. Ward believed the timing of the survey was proof that Mikkelsen was trying to get him fired. CP 152. Ward then fired Mikkelsen instead. The District replaced Mikkelsen with Genine Pratt, also a woman over 40. The Court of Appeals found that "[a]gainst this strong evidence that no discrimination occurred, Ms. Mikkelsen offers only speculation and evidence from which no discriminatory animus can reasonably be inferred." A-27. The Court of Appeals affirmed the summary dismissal of Mikkelsen's discrimination claims. A-31.

Mikkelsen also asserts that the District's Corrective Action Policy which contained a progressive discipline policy should have prevented her summary termination. Mikkelsen asserts that the policy was implemented so that "everybody knew what the rules were." (Brief of Petitioner, p. 4, citing CP 417-418). However, the policy, implemented by Mikkelsen herself, does not set forth hard and fast rules. Rather the policy expressly provides for flexibility and discretion, stating that it is only a "guideline" that does not does not "give any employee a right to. . . any particular level of corrective action." CP 346. In addition, the policy contains a

disclaimer that it does not “does not give any employee a right to continued employment.” CP 346. The Court of Appeals correctly held that the policy neither altered the at-will nature of Mikkelsen’s employment nor promised any particular treatment or process prior to her termination as a matter of law.

III. ARGUMENT

The burden shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) is commonly used where a plaintiff lacks direct evidence of discriminatory motive. *Hill v. BCTI Income Fund–I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 354, 172 P.3d 688 (2007). Under this burden-shifting scheme, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Hill*, 144 Wn.2d at 181. If the plaintiff fails to establish a prima facie case, the defendant is entitled to judgment as a matter of law. *Id.*

If, however, the plaintiff succeeds in establishing a prima facie case, a “legally mandatory, rebuttable presumption” of discrimination temporarily takes hold and the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment action.

Id. If the defendant fails to meet its burden, the plaintiff is entitled to an order establishing liability as a matter of law because no issue of fact remains in the case. *Id.* at 181–82. But if the defendant provides a nondiscriminatory reason for its employment action, the presumption established by the plaintiffs prima facie case is rebutted and it “ ‘simply drops out of the picture.’ ” *Id.* at 182 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510–11, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)).

The burden then shifts back to the plaintiff to show that the defendant's reason is actually pretext for what, in fact, is a discriminatory motive. *Hill*, 144 Wn.2d at 182; *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 364, 753 P.2d 517 (1988). If the plaintiff fails to make this showing, the defendant is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 182.

A. The Appellate Court correctly analyzed and applied the *McDonnell Douglas* test.

1. The District demonstrated a nondiscriminatory reason for termination.

The District demonstrated a legitimate, nondiscriminatory reason for its adverse employment action: “it wasn’t working out.” CP 66. As the Court of Appeals pointed out, “it is the defendants who get to articulate the reason for her discharge.” A-25. The PUD’s obligation at this stage is only a burden of production. *Texas Dep't of Cmty. Affairs v.*

Burdine, 450 U.S. 248, 254-55, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

However, it also serves an important function, because it requires the employer “to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.” *Id.* at 255–56. Once the employer chooses the battleground in this manner, “the factual inquiry proceeds to a new level of specificity.” *Id.*, at 255. The employer has no burden to prove that its proffered reasons are true. *Id.* at 256. The District met its burden of production at step two as a matter of law.

2. Mikkelsen failed to create an issue of fact that the reasons given for her termination are pretext or that discrimination was a motivating factor in the decision.

At the third step of the *McDonnell Douglas* test, Mikkelsen must show that there is a question of fact that the defendant's reason is actually pretext for what, in fact, is a discriminatory motive. *Hill*, 144 Wn.2d at 182; *Grimwood*, 110 Wn.2d at 364. Washington courts apply a “hybrid-pretext” standard, which provides for summary dismissal when the “record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision, or if the plaintiff create[s] only a weak issue of fact as to whether the employer's reason [i]s untrue and there [i]s abundant and uncontroverted independent evidence that no discrimination ha[s] occurred.” *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418

(2002) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)).

The District's reason for Mikkelsen's termination was that "it just wasn't working out." An employer's assertion that "it just wasn't working out" may not survive an assertion of pretext as a matter of law in all cases, but it does here. There is uncontroverted evidence that Mikkelsen and Ward "just plain didn't get along." Mikkelsen and Ward had "conflicting management styles", which resulted in discord and loss of trust. CP 114, 123.

There may be instances in which "not getting along" are the result of an underlying bias or a "problem with women in general", but such is not the case here. Mikkelsen acknowledged that Ward's management style, which included oversight over men and women, "obviously isn't working." CP 110. Mikkelsen asserted that Ward's "management style was termination and insubordination." CP 109. She asserted that "the verbs 'insubordination' and 'termination' [were] used more frequently in the past 12 months [of Mr. Ward's tenure] than ever in my 27 years with the District and 33 in the industry." CP 137. The use of the words insubordination and termination were used with reference to both men and women. CP 109, 137. Ward's management style, according to Mikkelsen, "dissolve[d]" the morale of the District, both men and women.

CP 137. As a result, Mikkelsen asserted that “several employees were seeking employment elsewhere,” referring to both men and women.

CP 132-133. Ward’s approach to management was different than what the employees of the PUD were used to; however, neither his management style nor its effects were gender specific. A-25.

The final incident that led to Mikkelsen’s termination was when she proposed, without Ward’s knowledge, that the Board circulate an employee survey regarding, in part, Ward’s effectiveness as a manager. CP 93-96; see also CP 97. Ward believed that Mikkelsen was undercutting his authority and was going behind his back. CP 152. Her termination was not the result of bias or a problem with women in general, but in response to an action that Ward perceived as an effort to get him fired. After this incident, Ward believed that they could no longer effectively work together: “it just wasn’t working out.”

The record contains no evidence that Ward terminated Mikkelsen because of her age or gender. Mikkelsen attempted create an inference that Ward had a “problem with women” (CP 86) and her, by recounting that he referred to office personnel (who were all female) as “ladies” or “girls” (CP 135), that he expressed disdain for the color pink (CP 86), and that he would put his hands in his pockets and rearrange his genitals prior to sitting down (CP 88). Courts draw reasonable inferences from facts,

but a party resisting summary judgment cannot rely on pure speculation or conjecture. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Undercutting any inference of discrimination, is the fact that Mikkelsen was replaced by a woman over 40. CP 65.

The Court of Appeals properly analyzed and applied the third step of the *McDonnell Douglas* test found Mikkelsen's evidence to be insufficient to establish an issue of fact.

B. The District's policies contained a disclaimer as a matter of law.

An express contract may alter the at will nature of employment. However, "an employer can disclaim what might otherwise appear to be enforceable promises in handbooks or manuals or similar documents." *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 526, 826 P.2d 664 (1992). "At a minimum, the disclaimer must state in a conspicuous manner that nothing contained in the handbook, manual, or similar document is intended to be part of the employment relationship and that such statements are instead simply general statements of company policy." *Id.* at 527 (citation omitted).

The District's policy reads: "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." CP 346. Rather

than use the term “at-will,” it uses plain language indicating that the policy does not give a right to continued employment. This is an effective disclaimer. The Court of Appeals correctly found that Mikkelsen failed to demonstrate that the PUD's progressive discipline policy altered the at will nature of her employment. A-33. *See Kuest v. Regent Assisted Living, Inc.*, 111 Wn. App. 36, 51, 43 P.3d 23 (2002), *review denied*, 149 Wn.2d 1023 (2003).

C. The District’s policies do not promise specific treatment as a matter of law.

Promises of specific treatment in specific situations contained in an employee handbook may bind the employer to act in accordance with those promises. However, general statements of company policy that do not amount to promises of specific treatment are not binding. A “promise” in a manual is not binding if its performance is optional or discretionary. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984). Whether a promise is binding is largely dependent upon the reasonable expectation of the employee.

This case is somewhat unique in that Mikkelsen chose and implemented the policy. CP 317. She chose a flexible policy because “as the general manager . . . I wanted some protection.” CP 417. Although she now asserts that the corrective action guidelines are “rules” that should

be rigidly adhered to in every instance, that is far from what the policy actually says. Rather, the policy is replete with discretionary language and allows for “immediate discharge without prior corrective action or notice.” CP 346-347. There are instances in which an employer’s conduct may create a reasonable expectation of progressive discipline. Mikkelsen asserts the progressive policy was used in two instances and that its “consistent” use is the basis of her reasonable expectation that it would be used prior to her discharge. However, in both instances progressive discipline was used with union employees who had a contractual right to progressive discipline. CP 419, 317. Mikkelsen, as a member of the management team and the former interim general manager, must appreciate the difference between union and non-union personnel. The prior use of progressive discipline with union employees does not give rise to Mikkelsen’s justifiable reliance of similar mandatory treatment for management personnel under different circumstances.

IV. CONCLUSION

For the reasons stated above, the District respectfully requests that the Court affirm the decision of the Court of Appeals.

DATED this 10th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 10 day of March, 2017, I caused a true and correct copy of the foregoing document, "Supplemental Brief of Respondent Public Utility District #1 of Kittitas County," to be delivered to the following counsel of record:

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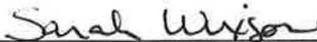
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