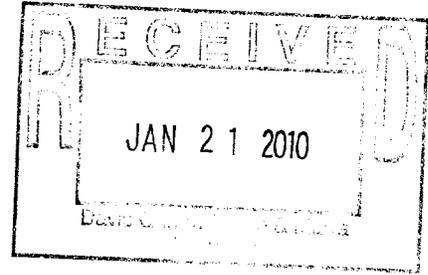


64139-5

641395



Docket No. 64139-5-1
WASHINGTON STATE COURT OF APPEALS
DIVISION ONE AT SEATTLE

Rong Su, Appellant,

v

SMITH & JUST, P.S.

Respondents.

APPELLANT'S OPENING BRIEF

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3. INTRODUCTION

This appeal asks the court to give effect to the important public policy in RCW 49.52.050 which makes it a crime to intentionally underpay employee compensation, knowing without a doubt that a contract obligation says to pay more. There are three main ways to invade this employee protection. One, an employer can just refuse to pay the contract obligation. Two, the employer can announce its decision to rewrite or redefine the contract pay rates. Three, the employer can impose severe, career-ending punishment on those who protest low pay. Number three is the most damaging, coercing employees to submit to low pay or to pay such a severe economic price for their protest that nobody in their right mind would ever seek redress under 49.52.050. This case concerns all three.

4. ASSIGNMENTS OF ERROR

1. Did the trial court misapply the summary judgment standards in its order granting summary judgment?
2. Did the trial court misapply the governing law when granting summary judgment?

5. STATEMENT OF THE CASE

Su accused her employer, Smith & Just P.S., of paying her less than what her contract states. For instance, for the pay period from March 16, 2007 through March 31, 2007 she was paid \$1,664.51 (cp 209) instead of \$1,833.33. Her employment contract states a base salary of \$44,000 per year, which is \$1,833.33 per pay check as her employer pays bi-monthly. (cp 193) From February 1, 2007 through February 28, 2007, Su was paid \$3,331.13 (cp 206-207), From March 1, 2007 through March 31, 2007, Su was paid \$3,331.13 (cp 208-209), although according to her employment contract, she should be paid \$3666 per month. In total, her employer underpaid Su \$3,114.41 (cp 4, Breskin ¶ 7 and cp 138). Smith & Just then fired Su on April 2, 2007 for protesting.

The employer told the court the real reason for dismissal was their productivity policy which reduced the contract "base salary" if work hours were not billable client hours or did not meet a 50 billable hour per week minimum.

The trial court granted summary judgment dismissing Su's case on August 21, 2009. This appeal was within time frames.

HISTORICAL FACTS

The employer signed an employment contract with Su in

December 2006. The contract states the subject of the contract is “employment. “ The contract states the terms of employment.

There is a minimum “base salary” at the \$44,000/yr (\$1,833.33/per pay check) rate. (cp 193) There is an incentive pay increase term: “production based compensation...equal to 33%...time charges to client...less base salary will be paid to employee” (cp 193).

Paragraph 6 of the contract states termination conditions. (cp 195)

Su asked about the incentive compensation and “base salary” before signing the contract. She wrote to the company principle Norman Roberts, (who forwarded her email to firm administrator Ms. Dahl) asking if:

“production based compensation is less than the base salary, will the base salary be reduced by the difference?” (cp 183-184)

She had to ask this because she was told that her immigration authorization hinges on a pay no less than \$44,000 per year for a full-time accountant position. Ms. Dahl replied that base salary means minimum pay, and production based compensation is never a reduction from it:

“If you make less money at the end of the year than what we

paid you in salary, you would not be responsible to pay it back.” (cp 182)

But after Su started working, the company violated this agreement by reducing her contract rate. For February, the company paid Su only \$3331, not the \$3666 rate. For March the company paid her \$3253, not the \$3666 rate. In total, her employer underpaid Su \$3,114.41 (cp 4, Breskin ¶ 12 & cp 138).

In Mr. Just’s statement to the court, he re-defined the contract term “base salary,” contradicting that it is minimum pay. Mr. Just re-defined “production based compensation...equal to 33% of time charges to client,” contradicting that it is a time-based incentive program. Mr. Just testified that

“Accountants have a 50-hour billable expectation during tax season which lasts from February through April. All accountants are informed of this expectation before they start working at Smith & Just.”(cp 214 Just ¶ 4)

Mr. Just also testified that one of the reasons for Su’s dismissal was “[her failure] to meet the hours of work requirements.” (cp 215, Just ¶ 7). Just re-defined minimum salary and time based incentive pay increases to be time based salary reductions and

time based salary disqualifications.

Su met with Mr. Roberts February 21st to protest “[she had] concerns how [she was] being paid (cp 174 ,Su ¶ 11) because what she was being told by firm administrator Jackie Dahl contradicted her contract. Right after Su expressed her concern, Mr. Roberts received a phone call. When he got off the phone, Mr. Roberts told Su that perhaps she should look for another job. (cp 174, Su ¶ 11) The employer took two positions about this occurrence. The employer originally denied that Su made any complaints about the way she was being paid before February 26, 2007. The employer then asserted that Su may have complained she had concerns about her pay, but her complaint wasn’t specific enough to be classified as protected activity. However, the employer does not deny that Su stated in her meeting with Mr. Roberts that she had concerns about the way she was being paid, and was then told by Mr. Roberts that

“Perhaps she should start looking for another job.” (Cp 144)

After this discussion with Mr. Roberts, Su made several email complaints on Feb 26, 2007 (cp 202-203) regarding the fact that she was not paid properly. Not only was she not being paid the

contract-stated wages, but she was also denied pay for time spent in meetings with firm administrator Jackie Dahl, meetings which Ms. Dahl initiated (cp 202).

Again on the morning of April 2nd, Su brought up the issue with Ms. Dahl that she was not paid properly (cp 177 ¶ 16 & cp 212). Then, during her lunch hour, she sent an email to Mr. Roberts expressing her complaints about not being paid properly (cp 212). About half hour later after she sent the email, she was called into Mr. Just's office and fired.

The employer testified the 50-billable-hour, time based production rule was a key to Su's dismissal (cp 215, ¶ 7 "she failed to meet the hours of work requirements"). This rule redefined her contract paragraphs 1,3,6 minimum salary and "time based...production based compensation". (cp 193-195). The added and contradictory term is nowhere to be found in her contract.

6. ARGUMENT

A. Review of the Summary Judgment Order is De Novo.

The appeals court reviews the grant of summary judgment de novo, engaging anew in the analysis undertaken by the trial court.

Roger Crane & Assocs v Felice, 74 Wn. App. 769, 875 P.2d 705 (1994). Summary judgment must be denied if “a genuine issue as to **any** material fact” is shown to exist; if there is such an issue, the moving party is not “entitled to judgment as a matter of law.” (CR 56c)(emph. added) A fact is material if it is “such that a reasonable jury could return a verdict of the nonmoving party.” Anderson v Liberty Lobby, Inc., 477 US 242, 251, 106 S.Ct. 2505, 1511, 91 L.Ed. 2d 202 (1986). The nonmoving party’s evidence taking issue with moving party affidavits is viewed “in the light most favorable to the non-moving party.” Atherton Condo Ass'n. v Blume Dev. Co., 115 Wn. 2d 506, 516, 799 P.2d 250 (1990)

B. GOVERNING LAW RE: DISCHARGE VIOLATING PUBLIC POLICY:

The elements of the tort or wrongful termination in violation of public policy are set out in Gardner v. Loomis, 128 Wn.2d 931:

(1) The plaintiffs must prove the existence of a clear public policy (the clarity element).

(2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element).

(3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the causation element).

(4) The defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element).

B1 Clarity Element

The clear public policy is RCW 49.52.050, which makes it a crime to intentionally “pay any employee a lower wage than the wage such employer is obligated to pay such employee by...contract.”

In this case Su had an employment contract which stated that she was to be paid a \$44,000 yearly minimum base salary (\$1,833.33 per pay period). (cp 193 ¶ 3) She even asked for clarification of this point and was informed by the employer that “if you make less money at the end of the year than what we paid you in salary, you would not be responsible to pay it back.” (cp 182) However, she was only paid \$3331 in February and \$3253 in March.

This underpayment violates RCW 49.52.050. Summary judgment dismissing the case for lack of a clear public policy was error.

B2 Jeopardy Element

The court has clarified the jeopardy element in Thompson v St. Regis Paper Co., (appellant employee claimed he was

discharged for compliance with the Foreign Corrupt Practices Act).

The court reversed the pretrial order of the employer for summary judgment, holding:

The Foreign Corrupt Practices Act is a clear expression of public policy that bribery of foreign officials is contrary to the public interest...If appellant's discharge was premised upon his compliance with the accounting requirements of the Foreign Corrupt Practices Act and ***intended as a warning to other St. Regis controllers***, as appellant alleges, then his discharge was contrary to a clear mandate of public policy and, thus, tortious.

Thompson, 102 Wn. 2d 219, 685 P.2d 1081 (1984).¹ Coercing employees to submit to underpayment or to pay such a severe price for their protest that nobody in their right mind would seek redress is contrary to the clear mandate of RCW 49.52.050.

Su claims her discharge was premised on her complaints of underpayment, and that the employer forced her to pay with her job for protesting. Just as in Thompson, this action by the employer serves as a warning to other employees, and coerces employees to submit to underpayment or pay the price as Su did. Summary judgment dismissing the case for lack of jeopardy was error.

¹ A protest need not be directed at government regulators. Bennett v Hardy, 113 Wn 2d 912, 922, 923-24, 784 P.2d 1258 (1990) ("She hired an attorney to warn defendant...(S)eeking counsel when confronted with discrimination...is not an unreasonable manner of attempting to remedy employer misconduct.") See, Delahunty v Cahoon, 68 Wn App 829, 840, 832 P.2d 1378 (1992) (picketing defendants' place of business to make known the grievance is desirable under the public policy stated in RCW 49.60.030) .

Note that even if section 070 of the statute contains an alternative means for correcting the refusal to pay, it does not address the choice between submitting to coercion or paying so severe a price that nobody would risk it. For this added reason, Summary Judgment was error.

B3 Causation

The application of determinative factor causation was conclusively rejected in Wilmot.

The employee need *not* attempt to prove the employer's *sole motivation was retaliation*...Instead the employee must produce evidence that (protected conduct) was a cause of the firing....

....Under the determinative factor test, and employer could clearly contravene the public policy mandate...yet not be liable for wrongful discharge...if the employer fired an employee both for misconduct and for pursuing (protected conduct)...Under the substantial factor test, if the pursuit of a claim...was a significant or substantial factor in the firing, the employer could be liable *even if the employee conduct otherwise did not meet the employer's standards*...

Wilmot v. Kaiser Alum. Co., 118 Wn.2d.46, 70-74, 821 P.2d 18

(1991) (emph.added). Furthermore, "proximity in time" between

the desirable employee action and firing creates a rebuttable

presumption of a causal link which "precludes a motion for

dismissal." Wilmot, 118 Wn 2d 46 at 68-69. Su has established

time proximity. She had one conversation about her pay complaint

with her employer on February 21, 2007, after which she was told to start look for another job (cp 174 ¶ 11). She sent email messages complaining about not being paid properly to the firm's partners and administrator on Feb 26th, 2007 (cp 202-203). Then on April 2nd, she discussed with Ms. Dahl her concern of not being properly paid, and sent an email to Mr. Roberts expressing the same. A half an hour later, she was told she was dismissed.

In Kahn v. Salerno, the court stated that [i]f an employee establishes that he or she participated in an opposition activity, the employer knew about the opposition activity and he or she was discharged, then an rebuttable presumption is created in favor of the employee that precludes us from dismissing the employee's case." Su made oral and written email complaints about the way she was paid to the firm administrator and its partners, then she was fired. On this basis, summary judgment dismissal for causation was error.

In addition, the employer's dispute with Su centered upon a so-called time based salary reduction policy (the 50-billable-hours minimum requirement). This underpayment was the basis for Su's protest and the employer's admitted quarrel with her performance.

Wage reduction was a substantial factor in her firing. On this basis, summary judgement dismissing the case for lack of causation is error.

B4 Justification

Company justification is an inherently factual question of both credibility and subjective motivation:

...(T)he plaintiff may respond to the employer's articulated reason either by showing that the reason is pretextual, or by showing that although the employer's stated reason is legitimate, the worker's pursuit of (protected conduct...) was nevertheless a substantial factor motivating...discharge.

This is not to say however that simply pointing to a policy of discharging employees for...(violations) will entitle an employer to prevail. For example, if that policy s not evenly applied... an employee may use those circumstances as tending to show the...policy was a pretext for discharge.

Wilmot, 188 Wn.2d at 73, 74, (emph. added).

The court has held that "extrinsic evidence outside the four corners of an agreement...should not be considered for the purpose of contradicting or modifying other written parts" of the agreement. US Credit Life Ins. Co. v Williams, 129 Wn 2d 565 569 (1996).

The case in point is Emrich v Connell, 105 Wn 2d 551

(1986), where one party proposed that an oral agreement to extend time modified the clause that defined cancellation. The Court gave no effect to this supposed modification:

... an oral agreement that the lease will not be canceled until the property is ready to be developed would substantially limit and is clearly inconsistent with the lessor's right of cancellation as expressed in paragraph 19.

Emrich, 105 Wn 2d at 556.

This employers defense hinges on re-defining, contradicting, and eradicating from its written contract the minimum pay and time-based incentive pay terms. Despite the contract with Su for a \$44,000 base salary, the employer *later* claimed that he explained orally to Su the contract really meant that during tax season \$3666 per month was paid only if 50-billable-hours were met. This new time based productivity standard resulted in docked pay and dismissal instead of added pay (cp 214 , Just ¶ 4). Pay-docking contradicts the written term "base salary." In contradicts incentive pay. Summary judgment considering time based productivity limits was error.

Salary reduction also contradicts the definition of base salary transmitted to Su by Dahl during negotiations. A productivity

limit on salary is inadmissible in evidence. See, Berg v. Hudesman, 115 Wn 2d 657, 663 (1990) (“Parol evidence is admissible...to elucidate the meaning of words used in the contract...**not** for the purpose of importing into a writing an intention not expressed therein...”). “Time based productivity” as pay reduction policy contradicts the written term “production based compensation...equal to 33%...time charges to client...less base salary will be paid to employee” expressed in the contract to be a salary enhancement (cp 193). Productivity as a pay reduction policy contradicts the definition expressed to Su by Dahl that “if you make less money at the end of the year than what we paid you in salary, you would not be responsible to pay it back” (cp 182) Parol evidence contradicting written terms is “inadmissible to prove the meaning of the contract terms.” Nationwide Mutual v. Watson, 120 Wn 2d 178 at 189 (1992) (“subjective beliefs...do not constitute evidence of the parties’ intent.”) Summary judgment which considered as justification for dismissal this parol evidence of a productivity/salary reduction policy and productivity/termination standard was error.

Furthermore, summary judgment determining the motive for

discharge is “seldom appropriate.” DeLise v. FMC Corp., 57 Wn App 79, 786 P.2d 839, rev. den. 114 Wn 2d 1026 (1990). The issue of defendant’s justification at the time of the plaintiff’s discharge is clearly a factual question. The supreme court recently reaffirmed Lord Justice Bowden’s treatment of a problem a century ago:

The state of a man’s mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.

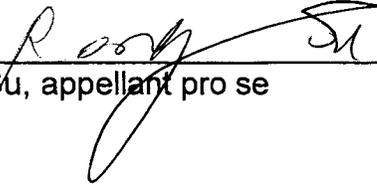
Thus by pointing to evidence which calls into question the defendant’s intent, the plaintiff raises an issue of material fact, which, if genuine, is sufficient to preclude summary judgment.

DeLise, 57 Wn App at 82-83. Su’s complaint was a substantial factor in her termination. The justification offered for dismissal was parol evidence of a productivity/salary reduction policy and productivity/termination standard which **contradicted** Su’s written contract. Summary judgement dismissing the case on the basis of justification is error.

7. CONCLUSIONS AND RELIEF REQUESTED

The Order re Summary Judgment should be reversed. The trial court should be instructed to reinstate Su’s claims.

Respectfully Submitted this 21th day of January 2010



Rong Su, appellant pro se

