IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RONG SU, individually,	)	No. 64139-5-I
Appellant,	)	DIVISION ONE
v.	)	
SMITH & JUST, P.S.,	)	UNPUBLISHED
Respondent.	)	FILED: July 19, 2010

COX, J. — In this action by an accountant for retaliation, wrongful discharge in violation of public policy, and unpaid wages, Rong Su contends her employer intentionally underpaid her and then fired her when she complained about her pay. The superior court dismissed Su's claims on summary judgment. She appeals, arguing that the court erred in dismissing her claim for wrongful discharge in violation of public policy. We affirm.

In December 2006, Su accepted a position as an accountant with Smith & Just, P.S., a public accounting firm. The written employment agreement stated that Su was "a full-time exempt salaried employee." The proposed base salary was $44,000. This salary was to be a draw against "Production Based Compensation," which was defined in the employment agreement as all "time charges to client engagements . . . ." The agreement provided that "[e]xcept for rate of base salary, this agreement may only be modified by the written consent of the parties . . . ."

Before signing the employment agreement, Su asked the firm

administrator by e-mail whether her base salary would be reduced "if production based compensation is less than the base salary . . . ." The administrator responded that "[i]f 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."

Charles Just, one of the firm's owners, claims the firm informed Su before she started working that all accountants were expected to produce at least 50 billable hours per week during tax season. According to Just, Su indicated the requirement "would not be a problem." Su denies these claims.

The parties agreed, and a letter from the firm acknowledged, that Su would initially work reduced hours during her transition from her then employment, and that this schedule would continue through January 2007. The letter stated that "[a]lthough the overall production based salary will not be affected by this arrangement, the base salary will be prorated appropriately."

Charles Just claims that on January 12, 2007, Su asked for an extension of the transition period. According to Just, the parties agreed the period would last "about three weeks" and that Su would be paid on an hourly basis during the transition. Su stated in her deposition that the transition period was supposed to last "at least three weeks," but denied any agreement to hourly pay. She claims the transition period ended when she began working full time on February 2, 2007. It is undisputed that the firm continued to pay Su by the hour until her termination in April 2007.

On February 19, 2007, the firm administrator informed Su by e-mail that all time during tax season "needs to be chargeable, so be sure to keep track of everything client related so it can be billed. Also, let me know if you need more work as you have only been putting in 8 hours M-F and 3 hours on Saturday." Su's response began with "Thank you for the reminder."

According to Su, the administrator informed her the next day that "during tax season I was only to be paid for the hours I worked that were billable to clients and that was the only time I should record . . . ." The administrator added that accountants were expected to produce a minimum of 50 billable hours per week during the season. Su said she would try to fulfill the requirement. The administrator then asked why Su was only recording 8 hours on her time sheets even when she worked more than 8 hours. Su responded that she thought she was only supposed to put down 8 hours per day because she "was paid on a salary basis." The administrator allegedly replied, "from now on put down all billable hours, but not administrative time."

On February 21, 2007, the firm's managing partner, Norm Roberts, called Su into his office and angrily told her that he heard she could not produce 50 billable hours per week. Su said she could not guarantee it, but she would try. Su also said she had "some concerns about the way [she was] being paid" but did not get into specifics. After taking a phone call, Roberts told Su that "perhaps [she] should look for another job" and that the firm would "give [her]

time off . . . to look for another job." Su claims that Roberts did not terminate her employment, and even proposed that she continue to work for the firm part time. Just, on the other hand, claims that Roberts ended Su's employment that day but agreed to employ her temporarily because Su said she would be deported if she stopped working.

On February 26, 2007, Su exchanged e-mails with the firm administrator regarding her time sheets. The e-mails focused on how to treat non-billable administrative time and whether Su would be paid for such time. The administrator told Su that "[i]t isn't that we aren't going to pay you for admin meetings, its only that you have so much time each day in admin for meetings. I'm sure that I explained to you earlier that all the accountants have to have totally billable time." Su told the administrator that she was still getting familiar with the firm's culture and thought it would be good to bring the issue to the partners' attention "so that we all operate on a consensus." Ultimately, Su pointed out that they were arguing over eight minutes of time and told the administrator "don't worry about it." Just, who was copied on these e-mails, sent an e-mail to Roberts the same day saying "[t]his is getting out of control. Can one of you intervene?"

On April 2, 2007, Su complained to Roberts by e-mail that the administrator expected her to empty the shredder bin next to her computer but said she would not be paid for doing so. Su told Roberts that she did not think it

was right "to demand an employee to complete a task required for the job but refus[e] to pay for it." According to Su, she was fired 30 minutes later by Just. When she asked why he was firing her, Just allegedly said "because you are very disruptive; you made everybody mad."

Just disputes Su's version of her termination. He claims that Su's employment was terminated on February 23, 2007, not April 2, 2007, and that she was fired because of her poor performance and inability to get along with others. He claims that she failed to meet billable requirements, had poor attendance, produced poor quality work, and took too long to complete her returns. The firm gave her a grace period to look for a new job, but terminated that period on April 2, 2007 when Su admitted she had not looked for a job and had no intention of doing so until after April 15, 2007. Su disputes the accuracy and/or legitimacy of all the alleged grounds for her termination.

Su eventually filed a claim for unpaid wages with the United States Department of Labor. This claim was for hours Su had worked but not reported on her time sheets. In September 2007, the Department, Su, and the firm reached an agreement under which the firm paid Su $3,114 for back pay and attorney fees.

On March 31, 2008, Su filed this action for wrongful termination and failure to pay wages. The complaint alleged alternative theories of wrongful termination -- unlawful retaliation in violation of RCW 49.46, and wrongful

discharge in violation of public policy. Evidence produced on summary judgment showed that while Su's base pay under the employment agreement was supposed to be $3,666 per month, she was paid $3,331 in February 2007, and $3,252 in March. These amounts were based on an hourly rate and the number of hours worked.

The court granted the firm's motion for summary judgment. Su appeals.

WRONGFUL TERMINATION

Su's sole contention on appeal is that the trial court erred in dismissing her claim for wrongful termination in violation of public policy.

The burden of the nonmoving party on summary judgment is to show the existence of a genuine issue of material fact for trial.[1] Summary judgment is proper "if the nonmoving party fails to establish the existence of an element essential to that party's case."[2] We review a summary judgment order de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party.[3] We do not, however, consider issues that are inadequately argued or given only passing treatment on appeal, and we apply this rule to attorneys and pro se litigants alike.[4]

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[1] Kendall v. Public Hospital District, 118 Wn.2d 1, 9, 820 P.2d 497 (1991).

[2] Id.

[3] Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005).

[4] State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider claims that are insufficiently argued); State v. Marintorres, 93 Wn. App. 442, 452, 969 P.2d 501 (1999) (appellate court need not consider pro se arguments that are conclusory); State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004)

Employees in Washington are generally terminable at-will, meaning they can quit or be fired for any reason.[5] A narrow exception to this rule allows an employee to bring a tort action if his or her termination contravenes public policy.[6] This exception is "applied cautiously to avoid allowing the exception to swallow the general rule . . . ."[7] To establish a claim under the exception, a plaintiff must prove that (1) a clear public policy exists, (2) discouraging the employee's conduct would jeopardize the public policy, (3) and the public-policy-linked conduct caused the dismissal.[8] Also, (4) the employer must be unable "to offer an overriding justification for the dismissal"[9] and must have intentionally discharged the employee in violation of the public policy.[1]

The first element is satisfied here. Under RCW 49.52.050(2), it is a misdemeanor to "[w]illfully and with intent to deprive the employee of any part of his wages . . . pay any employee a lower wage than the wage such employer is obligated to pay such employee by . . . contract . . . ." This and other statutes governing wages evidence a "strong policy in favor of ensuring that employees receive the full amount of wages to which they are entitled."[11]

(court will not review pro se arguments that receive only passing treatment).

[5] Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 935, 913 P.2d 377 (1996).

[6] Id.; Korslund v. Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 178, 125 P.3d 119 (2005). Courts have found public policy violations when employees are fired for refusing to commit an illegal act, performing a public duty or obligation, exercising a legal right or privilege, or engaging in whistle-blowing activity. Korslund, 156 Wn.2d at 178.

[7] Anica v. Wal-Mart Stores, Inc., 120 Wn. App. 481, 495, 84 P.3d 1231 (2004).

[8] Id.

[9] Id.

[1] Wrongful discharge in violation of public policy is an intentional tort; therefore, the plaintiff must establish wrongful intent to discharge. Korslund, 156 Wn.2d at 178.

The second element required Su to show that she "engaged in particular conduct, and the conduct *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy."[12] This burden includes a showing "that other means of promoting the public policy are inadequate."[13] Aside from a brief discussion of the law, Su's argument regarding each of these requirements in her opening brief amounts to a single, conclusory sentence.

As to the "directly relates" alternative, Su summarily contends that "her discharge was premised on her complaints of underpayment, and that the employer forced her to pay with her job for protesting." This argument fails to identify the protected conduct or explain how that conduct directly relates to the public policy of protecting employees' contract wages. Such analysis is particularly important in this case given that Su's complaints regarding pay for administrative time and document disposal bore no direct relationship to her contract as written and were contrary to the plain terms of one of the two distinct types of pay provided in the agreement. In short, the argument on this alternative is inadequate. Additional arguments raised for the first time in Su's reply brief come too late.[14] In short, she has failed to carry her burden to show the existence of a genuine issue of material fact for this element.

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[11] Moore v. Blue Frog Mobile, Inc., 153 Wn. App. 1, 7, 221 P.3d 913 (2009), review denied, 168 Wn.2d 1020 (2010); Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co., 139 Wn.2d 824, 830, 991 P.2d 1126 (2000) (referencing chapters 49.46, 49.48 and 49.52 RCW); Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 157-58, 961 P.2d 371 (1998).

[12] Gardner, 128 Wn.2d at 945.

[13] Korslund, 156 Wn.2d at 182.

[14] In re Marriage of Sacco, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990).

Su's argument regarding the "effective enforcement" alternative and the adequacy of other available remedies is equally wanting. The entire argument in her opening brief is "that even if [RCW 49.52.070] contains an alternative . . . 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." Given the existence of administrative, civil, and criminal remedies for violations of RCW 49.52.050,[15] and in light of the over-arching requirement that the public policy exception to the terminable at will doctrine be narrowly drawn, we conclude that this argument also fails to demonstrate a genuine issue of material fact for trial.

In addition, because the public policy embodied by RCW 49.52.050(2) is violated only when underpayments are made "[w]ilfully and with intent to deprive," Su had the burden of proving that the firm's underpayments in this case were made with intent to deprive her of her contract pay. She fails to show any genuine issue of fact on this point.

We conclude that Su has failed to show any genuine issue of material fact for trial. Smith & Just, P.S. was entitled to judgment as a matter of law.

We affirm the summary judgment order.

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[15] RCW 49.52.050; RCW 49.52.070; Schilling, 136 Wn.2d at 157-58 (wage statutes contain a "comprehensive scheme" of remedies for unpaid wages, including criminal and civil penalties and administrative enforcement); Korslund, 156 Wn.2d at 183 (comprehensive administrative remedies available to whistleblowers were adequate to protect public policy identified by plaintiff). We note that despite having recovered unpaid wages and attorney fees via her DOL action, Su does not address the adequacy of that remedy to promote the public policy at issue.

Cox, J.

WE CONCUR:

Spearman, J.

Leach, A.C.J.