

October 25, 2016

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

BRUCE MORET,

Petitioner,

v.

BREEA GALE, SHERRY BENNETT, YWCA  
CLARK COUNTY,

Respondents.

No. 47768-8-II

UNPUBLISHED OPINION

JOHANSON, J. — Bruce Moret appeals the summary judgment dismissal of his gender discrimination, disparate treatment, and wrongful termination claims against Young Women’s Christian Association Clark County (YWCA). Moret argues that summary judgment is unwarranted because genuine issues of material fact exist regarding his claims. Because Moret fails to establish that any genuine issues of material fact exist, we affirm the summary judgment dismissal.

## FACTS<sup>1</sup>

### I. BACKGROUND FACTS

#### A. MORET'S EMPLOYMENT AND YWCA EMPLOYMENT POLICY

Starting in 2010, Moret worked for the YWCA in a senior management position. Moret's employment was "at-will." Clerk's Papers (CP) at 227. The YWCA employee handbook and his hiring letter explained, "Any employee may be discharged at any time for any reason, unless such reason is prohibited by law." CP at 227. Moret signed the hiring letter. Moret reported to YWCA Executive Director Sherri Bennett.

The YWCA employee handbook contains policies about "conflict and problem resolution" and sexual harassment reporting and investigation. CP at 155. The conflict and problem resolution section states in part that "[i]t is the policy of YWCA to promote the resolution of problem situations in an informal discussion between the employer and her or his immediate supervisor." CP at 155. And the YWCA reporting and investigation policy for sexual harassment states in part that "[i]nvestigations *may* include interviewing witnesses. . . . All complaints and investigations will be kept as confidential as possible, and information will only be disclosed to those with an authorized need to know." CP at 149 (emphasis added).

In 2012, Bennett verbally communicated an additional policy on workplace relationships to all senior management members of the YWCA, including Moret. Under the policy, any YWCA employee in a position of formal leadership or role whose influence extends beyond program or

---

<sup>1</sup> Moret's statement of the case primarily presents facts not supported with record cites, facts not contained in the record before the superior court, and irrelevant facts. Under RAP 9.12, we rely on facts properly supported only by the record before the superior court.

department direction must refrain from dating or becoming romantically involved with any staff they supervise. Moret confirmed that he understood the policy applied to him, and he agreed to abide by it.

#### B. KUSMIC'S SEXUAL HARASSMENT COMPLAINT

Barbara Kuzmic, a recently hired YWCA employee, reported to Moret for approval of budget items. In March 2013, Kuzmic complained to her immediate supervisor, Natalie Wood, that Moret was sexually harassing her in violation of the YWCA policy. Kuzmic also complained to the YWCA Director of Human Resources, Breea Gale. That day, Bennett and Gale met with Moret and told him an employee had accused him of sexual harassment. Moret was placed on immediate paid administrative leave.

In April, Kuzmic submitted a written complaint to Bennett detailing Moret's sexual harassment toward her. Among other matters, the complaint stated that Moret asked Kuzmic out to dinner shortly after she started at the YWCA and told her that they could not "tell anyone" and "shouldn't say anything" about getting dinner together.<sup>2</sup> CP at 157. The complaint was not shared with Moret.

---

<sup>2</sup> Kuzmic's complaint noted that Moret flirted with her over e-mail and detailed several incidents when she and Moret spent time together outside of work. During each incident, Kuzmic reported that Moret asked her questions about her personal life that made her feel uncomfortable and vulnerable. Moret told Kuzmic that he wanted to date her several times despite Kuzmic telling Moret that she was not interested in dating him or any co-worker. Moret persisted and asked if they could "just lay together," told Kuzmic that she had to change the way she dressed at work if she would not date him, later made lewd noises when she would walk by and leered at her at work, and once showed her that he had an erection. CP at 158.

### C. MITCHELL'S INVESTIGATION

Third-party investigator Dean Mitchell interviewed Kuzmic and Moret. Kuzmic reiterated that Moret told her that she could not tell anyone they were getting dinner together outside of work. Moret confirmed that he was told about the policy that he could not date YWCA employees. Mitchell asked Moret about what he told Kuzmic:

MITCHELL Okay. But you're not denying the fact that you told [Kuzmic] that you probably shouldn't tell Natalie that you guys were together?  
Yes or no.  
MORET Yes.

CP at 215.

After his investigation, Mitchell concluded that Kuzmic's sexual harassment allegations could not be substantiated, but that Moret's actions were consistent with attempts to cultivate a personal relationship with Kuzmic. Mitchell's report also noted that Moret told Kuzmic that it would "be easier if she did not tell anyone' about their relationship." CP at 225. Mitchell concluded that this implied that Moret suspected his behavior was inappropriate and that Moret violated Bennett's instructions by not reporting his interactions with Kuzmic. Mitchell stated that it was difficult to believe that Moret was trying to cultivate only a friendship with Kuzmic and that, at the "very least, he used extremely poor judgment." CP at 225.

### D. MORET'S TERMINATION

Following the investigation, Bennett sent a termination letter and a summary of Mitchell's report to Moret. The letter noted that while it was unclear whether Moret sexually harassed Kuzmic, their social interaction, and specifically his asking Kuzmic that she keep their interactions a secret, were in opposition to the YWCA's core values of respect and empowerment.

#### E. MORET'S REPLACEMENT

After Moret's termination, the YWCA hired a male accountant to temporarily fill Moret's position while they sought a permanent replacement. Another male was offered and accepted the position, but resigned before starting. The position was then reclassified with reduced hours and supervising responsibilities and was filled by a female.

### II. PROCEDURAL HISTORY

#### A. MORET'S DISCRIMINATION, DISPARATE TREATMENT, AND WRONGFUL TERMINATION COMPLAINT

In January 2014, Moret filed a complaint in superior court asserting gender discrimination, disparate treatment, and wrongful termination. The complaint alleged that Moret was the only individual subject to the verbal "dating rule," that there was no "dating" policy in his employee handbook, that Kuzmic was not reprimanded for making false accusations against him, that in 2010 there was a harassment cross complaint filed against two female management team members who were given a meeting to resolve the issue and who were not terminated, that Bennett observed romantic interactions between two other employees who were not then terminated, and that YWCA management did not follow the YWCA's policy on conflict resolution by allowing him to respond to Kuzmic's charges or to correct misstatements in Mitchell's report. CP at 4.

#### B. YMCA'S SUMMARY JUDGMENT MOTION

The YWCA moved for summary judgment dismissal, asserting that Moret could not establish the essential elements of his claims that included that (1) his termination resulted from gender discrimination, (2) he received disparate treatment under the YWCA policies based on gender, and (3) any exception to the Washington doctrine of at-will employment applied. YWCA's motion was supported by transcripts of Mitchell's interviews with Kuzmic and Moret,

Moret's complaint, Mitchell's report, the YWCA employee handbook, Moret's offer and termination letters, and a declaration from Bennett.

Bennett's declaration stated that the workplace relationship policy applied to all senior members of the YWCA management irrespective of gender. It was the YWCA's policy not to give an employee accused of sexual harassment a written copy of a complaint regardless of the accused's or accuser's gender. Bennett did not reach any conclusions that Moret sexually harassed Kuzmic, violated the workplace relationships policy, or dated Kuzmic, and those factors did not determine her decision to terminate Moret. Bennett explained her reasons for firing Moret:

I terminated Mr. Moret specifically because I felt that his admission that he requested that Ms. Kuzmic keep details of their relationship hidden from her immediate supervisor, Natalie Wood, was in opposition to the YWCA's core values of respect and empowerment. I felt Mr. Moret exercised poor judgment to an extent that fell below my expectations for senior YWCA Clark County management by requesting a relatively new subordinate employee to be secretive and less than candid with her supervisor.

CP at 140. She stated that she would have terminated any similarly situated employee for similar behavior irrespective of gender.

#### C. MORET'S OPPOSITION TO SUMMARY JUDGEMENT

Moret opposed the motion for summary judgment by filing only an opposition memorandum. Moret did not support his opposition memorandum with a declaration or other admissible evidence. In his memorandum, Moret alleged YWCA terminated him to avoid investigating whether Kuzmic made false accusations in violation of YWCA policy. Moret again alleged that he was wrongfully terminated because Mitchell did not interview other employees about the accusations and because Moret was not given the opportunity to review and dispute

Kuzmic's claims against him. Moret also asserted that he was given only one hour in the interview with Mitchell to respond to nonspecific questions.

#### D. YMCA'S REPLY TO MORET'S OPPOSITION

The YWCA's reply in support of their summary judgment motion noted that Moret did not support his opposition with a declaration or other admissible evidence.

The superior court granted the YWCA's motion for summary judgment.<sup>3</sup> Moret appeals.

### ANALYSIS

#### I. SUMMARY JUDGMENT DISMISSAL

Moret contends that the superior court erred by dismissing his claims on summary judgment.<sup>4</sup> We disagree.

#### A. STANDARD OF REVIEW AND RULES OF LAW

We review summary judgment decisions de novo. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). Summary judgment is appropriate where the pleadings, admissions on file, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c).

---

<sup>3</sup> The superior court considered the YWCA's motion for summary judgment, the declaration of Bennett with exhibits including the YWCA's handbook, Kuzmic's complaint, Moret's hiring and termination letters, the transcripts of Kuzmic's and Moret's interviews with Mitchell, the declaration of YWCA's attorney with Moret's complaint as an exhibit, Moret's opposition memorandum, the YWCA's reply in support of summary judgment, the YWCA's attorney's additional declaration in support of summary judgment, and the YWCA's addendum to their reply.

<sup>4</sup> Moret also assigns error to the superior court's denial of his motion for joinder of another lawsuit. But Moret appeals only the May 29 summary judgment order and not the order denying joinder. Further, Moret makes no argument regarding why the joinder was improperly denied. Thus, we consider this issue no further.

When evaluating summary judgment motions in employment discrimination cases, Washington courts have largely adopted the federal burden-shifting scheme announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Scrivener*, 181 Wn.2d at 445. Under the first prong of the *McDonnell Douglas* framework, a plaintiff bears the initial burden of establishing a prima facie case of discrimination with specific and material facts, which creates a presumption of discrimination. *Scrivener*, 181 Wn.2d at 446; *Fulton v. Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 147, 279 P.3d 500 (2012). Second, once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Scrivener*, 181 Wn.2d at 446. Third, if the employer meets this burden, then the plaintiff must produce sufficient evidence that the employer's alleged nondiscriminatory reason for the employment action was a pretext. *Scrivener*, 181 Wn.2d at 446. If the plaintiff fails to establish a prima facie case, the moving party is entitled to judgment as a matter of law. *Fulton*, 169 Wn. App. at 148.

A material fact is one that could affect the litigation's outcome. *Baldwin v. Silver*, 165 Wn. App. 463, 472, 269 P.3d 284 (2011). A plaintiff opposing summary judgment must set forth specific evidentiary facts by affidavits, interrogatories, depositions, or other admissible documentation and cannot meet its burden by relying on mere allegations or denials of a pleading. CR 56(e). Further, a plaintiff cannot meet its burden by relying on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value. *Retired Pub. Emps. Council of Wash. v. Charles*, 148 Wn.2d 602, 612, 62 P.3d 470 (2003).

We must consider the facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one



conclusion. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014), *cert. denied*, 135 S. Ct. 1904 (2015).

## B. GENDER DISCRIMINATION AND DISPARATE TREATMENT

Moret argues that the superior court erred by granting the YWCA's motion for summary judgment. But Moret does not state which material facts are genuinely in dispute. Thus, this argument fails.

### 1. PRINCIPLES OF LAW

Both the United States Civil Rights Act of 1964 and Washington law prohibit discrimination in the form of discharging an individual based on gender. 42 U.S.C. § 2000e-2(a)(1); RCW 49.60.030. "To establish a prima facie gender discrimination case, a plaintiff must show that she: (1) is a member of a protected class; (2) was discharged; (3) was doing satisfactory work; and (4) was replaced by a person of the opposite sex or otherwise outside the protected group." *Domingo v. Boeing Emps.' Credit Union*, 124 Wn. App. 71, 80, 98 P.3d 1222 (2004). A prima facie showing of disparate treatment requires showing the first three elements of a gender discrimination case, as well as a fourth element of different treatment than persons of the opposite sex who are otherwise similarly situated. *Domingo*, 124 Wn. App. at 80.

### 2. GENDER DISCRIMINATION CLAIM

Even assuming without deciding that Moret could establish the first three elements of a prima facie gender discrimination case, he cannot meet the fourth element that he was replaced by a female. Moret fails in his complaint and opposition memorandum to even allege that he was replaced by a female. And the undisputed evidence shows that two males succeeded Moret. Thus, Moret did not produce specific evidentiary facts to establish the prima facie case of gender

discrimination and this claim fails as a matter of law. *Fulton*, 169 Wn. App. at 147-48; *Domingo*, 124 Wn. App. at 80-81 (holding female plaintiff could not meet prima facie burden of gender discrimination where she was replaced by a woman in her former role).

3. DISPARATE TREATMENT CLAIM

Regarding his disparate treatment claim, Moret has not set forth facts establishing that similarly situated female employees at the YWCA were treated differently under YWCA policy. Moret's complaint alleges that he was the only individual subject to the no-dating rule and that the YWCA handbook did not have a no-dating policy that applied to others. But Bennett's undisputed declaration states that the policy applied to everyone in management positions at the YWCA. Moret cannot rely on the mere allegations in his complaint or opposition memorandum to establish that he was the only employee subject to the no-dating rule. CR 56(e); *Charles*, 148 Wn.2d at 612. Moret offered no specific evidence to dispute Bennett's declaration that the policy was not selectively applied, and thus he did not establish a genuine issue of fact regarding the disparate application of the dating policy.

Moret's complaint also alleges that Kuzmic was not reprimanded for making false accusations of sexual harassment against YWCA policy, while he was terminated for violating YWCA policy. Disparate treatment must be established by a showing of different treatment of individuals who are otherwise similarly situated. *Domingo*, 124 Wn. App. at 80. But Bennett's undisputed declaration states that Moret and Kuzmic were not similarly situated employees: Kuzmic was a subordinate who reported directly to Wood and to Moret for financial approval of budget items, while Moret was a senior manager who reported to executive director Bennett.

No. 47768-8-II

Moret failed to file a declaration to dispute Bennett's declaration. Thus, the undisputed evidence is that Kuzmic and Moret were not similarly situated.

Lastly, Moret's complaint alleges that there was a cross complaint of harassment and discrimination filed between two female management members, but that those individuals were given a meeting to resolve the issue and were not terminated. And Moret alleges that Bennett observed romantic interactions between two other employees who were not then terminated.

But Moret does not offer any evidence by way of declaration or other admissible evidence to dispute Bennett's declaration stating that the "no dating" policy was never selectively applied or enforced based on gender and that she would have terminated any similarly situated senior management employee for behavior akin to Moret's, irrespective of gender. Moret offers no admissible evidence that the individuals involved in the incidents he recounts were similarly situated members of senior management or that either of these instances involved one employee encouraging a subordinate to keep a secret from her supervisor in order to not potentially violate YWCA policy as Moret did. Moret also does not state that he witnessed these events in a sworn statement. Again, Moret cannot rely on mere allegations or speculation that the YWCA applied their policies differently with respect to other employees based on gender. CR 56(e); *Charles*, 148 Wn.2d at 612.

In sum, Moret did not meet his burden as the nonmoving party to set forth specific, material facts to dispute YWCA's evidence that a male replaced him and that the YWCA did not treat similarly situated persons of the opposite gender more favorably or apply its workplace policies discriminately. Because Moret fails to establish a prima facie case of gender discrimination or

disparate treatment, we conclude that YWCA was entitled to summary judgment with respect to these claims.

### C. WRONGFUL TERMINATION

Moret argues that the superior court erred by granting the YWCA's motion for summary judgment, but he fails to state which material facts are genuinely disputed regarding his wrongful termination claim. Again, Moret's argument fails.

#### 1. PRINCIPLES OF LAW

Subject to exceptions, under the common law at-will employment doctrine an employer may discharge an at-will employee with or without cause. *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 754-55, 257 P.3d 586 (2011).

#### 2. MORET'S WRONGFUL TERMINATION ALLEGATIONS

Moret alleges in his complaint that he was wrongfully terminated because the YWCA lacked sufficient grounds to justify termination.<sup>5</sup> He argues this is so in part because YWCA management did not determine the veracity of Kuzmic's statements by interviewing other

---

<sup>5</sup> Moret cites to *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 978, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988), for the proposition that the YWCA's actions in this case were "uncommon" because the YWCA suspended him based on Kuzmic's accusations, terminated him for other reasons, and protected Kuzmic by not disclosing her complaint. It is unclear how this argument establishes that Moret's termination from at-will employment was wrongful. Regardless, *Watson* does not address Moret's proposition. *Watson* primarily addresses whether a disparate impact analysis—an analysis that balances trend data submitted by employers and employees as to whether or not a practice has a discriminatory effect—can be used to evaluate whether subjective promotion systems are discriminatory. *See* 487 U.S. 986-1000.

employees or by allowing Moret to see Kuzmic's complaint.<sup>6</sup> Second, Moret alleges in his complaint that he was wrongfully discharged because the YWCA management did not follow the handbook policy on conflict and problem solving. These allegations appear to assert that YWCA policy entitled Moret to specific treatment, thus establishing an exception to his at-will status, but Moret failed to file a declaration to support these allegations.

In her declaration, Bennett stated that Moret was terminated because she felt "Moret exercised poor judgment to an extent that fell below [her] expectations for senior YWCA Clark County management by requesting a relatively new subordinate employee to be secretive and less than candid with her supervisor." CP at 140. Moret did not file an affidavit or other admissible evidence to dispute Bennett's reasons for firing him. In fact, Moret admitted that he told Kuzmic not to tell her supervisor that he and Kuzmic were going to dinner together.<sup>7</sup> Moret also does not

---

<sup>6</sup> Moret cites to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 230, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), for the proposition that YWCA was "ethically bound to determine the veracity of Kuzmic's statements and they failed to do so." Br. of Appellant at 15. Moret does not analyze or offer legal argument on how YWCA's ethical obligations establish that Moret's termination was wrongful. *Price Waterhouse* has been superseded, and it primarily addressed the balance of the burden on an employee and an employer to make a showing that gender was or was not the basis for a denial of a promotion. See 490 U.S. at 239-59. Moret also cites to *MacDonald v. Korum Ford*, 80 Wn. App. 877, 912 P.2d 1052 (1996), in support of his assertion that YWCA could have determined whether Kuzmic's allegations were true by interviewing additional YWCA employees or allowing Moret to see Kuzmic's complaint. *MacDonald* does not include any analogous facts that lend credence to Moret's assertion; rather, it analyzed whether an attorney lacked a factual basis for pursuing a hostile environment claim and wrongful discharge claim such that sanctions were warranted. See 80 Wn. App. 880-94.

<sup>7</sup> Moret also argues that his comment to Kuzmic was taken out of context and that he was actually suggesting that Kuzmic not tell her supervisor, Wood, about a conversation that he and Kuzmic had relating to his suggestions to improve morale in Kuzmic's department. But Mitchell directly asked Moret if he told Kuzmic that she "probably shouldn't tell [Wood] that you guys were together," and Moret stated that he was not denying he said that. CP at 215. And Moret did not submit an affidavit or other evidence to support his assertions or to refute Bennett's declaration or the transcript of Moret's interview with Mitchell.

dispute that his employment at the YWCA was at will. Indeed, he acknowledged his at-will employment status when he signed his hiring letter. Because Moret was an at-will employee, the YWCA did not need “sufficient grounds” nor *any* grounds to terminate him unless an exception to the at-will doctrine applies. *Roe*, 171 Wn.2d 754-55.

3. MORET ARGUES AN EXCEPTION TO AT-WILL EMPLOYMENT APPLIES

Moret appears to argue that the YWCA handbook made promises about its conflict resolution process and sexual harassment investigation procedures that modified his “at-will” employment such that an exception applies. We disagree.

a. PRINCIPLES OF LAW

An exception to at-will employment arises when an employer issues an employment manual or handbook to the employee that contains promises of specific treatment in specific situations regarding termination, thereby contractually modifying the at-will relationship and creating the right to sue if the employer fails to adhere to those promises. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 228-29, 233, 685 P.2d 1081 (1984). In order to prove this exception applies, “the employee has to establish such a promise contained in an employee manual or handbook or the like.” *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 36, 959 P.2d 1104 (1998).

b. CONFLICT AND PROBLEM RESOLUTION POLICY

The YWCA employee handbook “conflict and problem resolution” section states in part that “[i]t is the policy of YWCA to promote the resolution of problem situations in an informal discussion between the employee and her or his immediate supervisor.” CP at 155. And the YWCA reporting and investigation policy for sexual harassment states in part that “[i]nvestigations *may* include interviewing witnesses. . . . All complaints and investigations will

be kept as confidential as possible, and information will only be disclosed to those with an authorized need to know.” CP at 149 (emphasis added).

c. NO SPECIFIC PROMISE

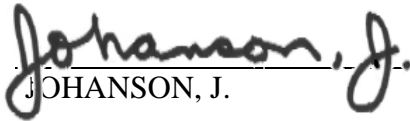
Neither of these provisions contains promises of specific treatment that Moret seems to assert he was entitled to. The conflict and problem solving policy does not make a specific promise that Moret was entitled to an informal discussion with YWCA management regarding termination or a sexual harassment charge, thereby creating a right to action in the event such a meeting was not provided. And the sexual harassment policy states that the investigation “may” involve interviewing witnesses, but does not guarantee that employees besides the accused and accuser will be interviewed. Additionally, the sexual harassment policy states that the investigation will be kept as confidential as possible, thus undermining Moret’s claims that he was entitled to a copy of Kuzmic’s complaint. Moret has not established that the handbook contained promises of specific treatment regarding sexual harassment allegations or termination, thereby contractually modifying his at-will status at the YWCA and creating the right to sue if the YWCA failed to adhere to those promises. Thus, his argument fails.

We conclude that Moret has not established any genuine issues of material fact concerning his status as an at-will employee. He has also failed to establish that any exceptions to the at-will doctrine apply. *Thompson*, 102 Wn.2d at 228-29; *DePhillips*, 136 Wn.2d at 36. Thus, we conclude that Moret’s claim for wrongful termination was properly dismissed on summary judgment.

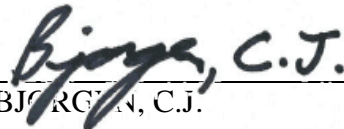
No. 47768-8-II


We affirm the superior court's summary judgment dismissal of Moret's claims.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
JOHANSON, J.

We concur:

  
\_\_\_\_\_  
BJORGE, C.J.

  
\_\_\_\_\_  
LEE, J.