IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT J. FISCHER,	)	**No. 29361-1-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
CITY OF ROSLYN,	)	**UNPUBLISHED OPINION**
	)	
Respondent.	)	
	)	

Kulik, C.J. — Robert Fischer sued the City of Roslyn (City) for damages due to age discrimination, disability discrimination, breach of implied contract, and wrongful termination in violation of public policy after the City fired him as street superintendent. The superior court dismissed on summary judgment the claims for breach of implied contract and wrongful termination in violation of public policy. After trial, the jury returned a verdict for the City on the remaining claims. Mr. Fischer appeals, contending the superior court erred by dismissing his claims based on promises of specific treatment in a specific situation and based on wrongful termination in violation of the public medical leave policy. We affirm the trial court's summary judgment dismissal of these

claims.

FACTS

Mr. Fischer began working for the city works department in 1987. As street superintendent, Mr. Fischer was responsible for duties such as street and sidewalk maintenance, snow removal, sanding, mowing, and maintenance of equipment. The city works department had two other employees: Joe Peck, the water and sewer superintendent, and a crew member supervised by both Mr. Fischer and Mr. Peck. During the last three years of Mr. Fischer's employment with the City, Mayor Jeri Porter supervised Mr. Fischer. Mr. Fischer's summer work schedule was from 7:00 a.m. to 3:30 p.m. and, in the winter months, he plowed snow and sanded roads from 5 a.m. until the plowing was done.

While employed in the city works department, Mr. Fischer received both positive and negative evaluations from the public and his supervisors. Mayor Porter considered him highly skilled in road maintenance. Although she discounted citizen snow-removal complaints because people typically complain about plowing, she was concerned that Mr. Fischer's difficult personality was causing a rift in the public works crew. Specifically, Mr. Fischer clashed with Mr. Peck.

In April 2006, Mayor Porter had Mr. Fischer sign a "written request for correction

of . . . unacceptable behavior on the job." Clerk's Papers (CP) at 257. The topic of the notice was Mr. Fischer's inability to get along with co-workers and his abusive treatment of people doing business with the City. Mayor Porter directed him to treat crew members and the public with respect and to meet daily with the crew at 7:00 a.m. to discuss the daily work load and scheduling. The notice concluded with the following warning: "If you do not correct your behavior, the disciplinary action would range from suspension without pay for up to two weeks, or even dismissal. This would depend on the severity of the offense. An extremely serious offense is gross insubordination." CP at 257. Mr. Fischer claims he considered the daily meetings optional, especially during the winter months. Mayor Porter agrees that the meetings could not have been conducted at the shop on snow and ice days, but insists that she expected the meetings to take place by cell phone during the winter months. Mr. Fischer does not deny the mayor's assertion that the city works staff held only two of the required meetings after the April 2006 corrective notice.

The city council held an executive session in summer 2006 to discuss Mr. Fischer's work performance. The council members noted complaints made against Mr. Fischer and told the mayor that they would support any decision she made regarding his employment. Additionally, the mayor and city council discussed reorganization of the

city works department. The personnel committee recommended combining the street, water, and sewer responsibilities, renaming the department public works, and having one public works director with two subordinate crew members. Mayor Porter admitted that she hoped Mr. Fischer would be the public works director after the reorganization and that the new structure of the department would solve the department's personnel problems.

Mr. Fischer and his crew learned of the planned reorganization at a December 2006 safety meeting. According to Mr. Fischer, he informed Mayor Porter at this meeting that he was saving up medical leave and vacation time to take the summer of 2007 off for knee surgery and recuperation. The mayor denies that Mr. Fischer told her about this medical leave.

On March 19, 2007, Mayor Porter terminated Mr. Fischer. She informed him in writing that the termination was based on "Gross Insubordination, the inability to get along with other employees, and specifically, not following the correction action outlined in a letter dated April 19, 2006." CP at 104. The letter also stated that Mr. Fischer lacked initiative, told "intentional half truths," disrespected the mayor, and "caused a great deal of angst within the City crew." CP at 104. Mr. Fischer received unemployment benefits over the City's objections. In February 2008, Mr. Fischer filed a

claim against the City for damages due to breach of the employment contract, promissory estoppel, unlawful age and disability discrimination, retaliation for the expressed intent to exercise medical leave rights, and wrongful termination in violation of public policy. The City denied his claim in May 2008.

Mr. Fischer then filed a complaint for damages and declaratory judgment in Kittitas County Superior Court. He sought lost wages and benefits, compensatory damages, and attorney fees for (1) age discrimination in violation of the Washington law against discrimination (WLAD), chapter 49.60 RCW; (2) disability discrimination and/or retaliation under the WLAD; (3) breach of implied-in-fact or specific employer representations and promissory estoppel; and (4) wrongful termination in violation of public policy. The superior court granted the City's motion for summary judgment dismissal of Mr. Fischer's third and fourth causes of action. The jury returned a verdict for the City on Mr. Fischer's remaining claims of age and disability discrimination and the trial court entered judgment for the City in September 2010. Mr. Fischer filed a timely appeal of the summary judgment order to this court.

ANALYSIS

Breach of Promises of Specific Treatment. Mr. Fischer first contends the trial court erred by summarily dismissing his claim that the City breached an enforceable

promise of specific treatment in specific situations. Citing *Thompson v. St. Regis Paper Company*, 102 Wn.2d 219, 685 P.2d 1081 (1984), he asserts he relied to his detriment on a personnel policy that promised a four-step progressive discipline procedure before termination.

Our review is de novo. *Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). "Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* Considering the facts in the light most favorable to the nonmoving party, we will affirm summary judgment if reasonable minds could reach but one conclusion from the presented evidence. *Id.*

In Washington, employment of indefinite duration generally may be terminated by either the employer or the employee at any time, with or without cause. *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340, 27 P.3d 1172 (2001). An exception to this termination-at-will employment relationship was first recognized in *Thompson*. *Id.* (citing *Thompson*, 102 Wn.2d at 225). *Thompson* held that an employer will be bound by promises of specific treatment in specific situations if the employee is induced by those promises to remain on the job and to not seek other employment. *Thompson*, 102 Wn.2d at 230; *see Bulman*, 144 Wn.2d at 340. The employee must prove that (1) a statement in

an employee manual or similar document amounts to a promise of specific treatment in specific situations, (2) the employee justifiably relied on that promise, and (3) the employer breached that promise. *Korslund*, 156 Wn.2d at 184-85. Although these elements involve issues of fact, the issues may be decided as matters of law if reasonable minds could not differ in resolving them. *Id*. at 185.

In this case, Mr. Fischer contends the City's personnel policy promises a four-step progressive discipline procedure before an employee is terminated. The section entitled "Constructive/Progressive Discipline" states that the City's policy is "to take appropriate action when an employee engages in a practice which is in conflict with the best interests, and impair the effective functioning, of the City of Roslyn." CP at 535. The section continues, "In determining the degree of disciplinary action to be applied, full consideration will be given to the seriousness of the offense, the intent and attitude of the individual, and the environment in which the offense took place." CP at 535. The stages of the disciplinary procedure are set out in four steps: (1) "a verbal request for a correction of unacceptable on-the-job practice," with a memo documenting the discussion; (2) a written warning when the offense is serious or the oral warning has been ineffective; (3) an investigative suspension; and (4) dismissal. CP at 536. Step 4 adds, "In the event of [an] extremely serious offense, i.e., theft, violence, or gross

insubordination, it may not be necessary and appropriate for the Mayor to use all or part of the initial states [sic] of the procedure." CP at 536. The section concludes with a nonexhaustive list of offenses for which disciplinary action—including dismissal—may be taken, including "[i]nability to get along with other employees or volunteers," "[n]eglect of duties or poor work performance," and "[m]isconduct or behavior not appropriate for a Roslyn employee while representing the City." CP at 537.

We first ask whether the statements in the City's progressive discipline section constitute promises of specific treatment in specific situations. *Korslund*, 156 Wn.2d at 184-85. As *Thompson* noted, policy statements written in an employee manual may be merely general statements of company policy and may not amount to promises of specific treatment. *Thompson*, 102 Wn.2d at 231. In *Stewart v. Chevron Chemical Company*, for instance, Chevron's policy manual stated that in determining layoffs, "'consideration *should* be given to performance, experience and length of service.'" *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 611, 762 P.2d 1143 (1988) (emphasis added). *Stewart* noted that an alleged promise may be illusory if it is indefinite or if its performance is optional or discretionary on the part of the promisor. *Id.* at 613. Because Chevron's layoff policy stated only that management "should" consider performance, experience, and length of service, the court held that the policy was discretionary rather than mandatory. *Id.*

Additionally, the policy merely urged Chevron to consider these factors, without assigning relative weight or value to them. Consequently, the wording of the policy did not create a binding promise. *Id.* at 614.[1]

The existence of a promise for specific treatment is a question of fact if the language of the employment policy could be construed to require the employer to use a certain process or procedure. *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 62, 199 P.3d 991 (2008) (citing *Thompson*, 102 Wn.2d at 233; *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 525, 826 P.2d 664 (1992)). For instance, when an employment manual or policy requires that an employee receive at least one warning before being dismissed, it is a question of fact whether this constitutes a promise of progressive discipline. *Drobny v. Boeing Co.*, 80 Wn. App. 97, 103, 907 P.2d 299 (1995). In *Swanson*, a memorandum of "'working conditions'" listed specific employee misconduct deemed sufficient cause for discharge without notice, and stated that in all

[1] *Stewart* treated the claim of specific treatment in specific situations as an alleged breach of an implied contract. *Stewart*, 111 Wn.2d at 611. Decided before *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) established that extrinsic evidence is admissible to determine the intent of contracting parties, *Stewart* confined its analysis to the language of the employment manual and interpreted it as a matter of law. *Stewart*, 111 Wn.2d at 613. More recent cases emphasize that a cause of action based on promises of specific treatment in specific situations is not contract-based, but equitable. *See, e.g.*, *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 36, 959 P.2d 1104 (1998); *Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 190 n.1, 951 P.2d 280 (1998).

other instances of misconduct, at least one warning "'shall be given.'" *Swanson*, 118 Wn.2d at 523-24. The court held that the promise of a prior warning was specific enough to be binding. *Id.* at 524. In *Drobny*, on the other hand, even a specific progressive discipline procedure was held to be too discretionary to constitute a promise. *Drobny*, 80 Wn. App. at 103-04. The manual in *Drobny* stated that disciplinary actions taken by supervisors "'are to be governed by progressive discipline'" and set out the process as:

(1) written warning, (2) suspension, (3) dismissal, and (4) other corrective action. *Id.* at 102. Although the manual stated that the discipline process for less serious violations will "'normally'" begin with a written warning, acts warranting severe discipline might justify such measures as dismissal or suspension even if no prior warning had been given. *Id.* at 102-03.

The City's progressive discipline policy is similar to the one in *Drobny* because the policy does not require prior notice or use of the progressive steps if the mayor decides that the offense is "extremely serious." CP at 536. The City retains discretion to determine the degree of disciplinary action, taking into consideration "the seriousness of the offense, the intent and attitude of the individual, and the environment in which the offense took place." CP at 535. The statement that a written warning "should be utilized

when warranted" is discretionary rather than mandatory. CP at 536; *see Stewart*, 111 Wn.2d at 613.

On its face, the City's progressive discipline section is discretionary and does not constitute a promise that each step of the progressive discipline will be used before termination. *See Birge v. Fred Meyer, Inc.*, 73 Wn. App. 895, 900, 872 P.2d 49 (1994) (an employee responsibility form reserved the employer's right to fire without warning for any reason determined by the company to be serious enough in nature). Reasonable minds would not construe the discipline policy as requiring the City to use each step of the progressive discipline procedure. *Duncan*, 148 Wn. App. at 62. Thus, the trial court did not err in granting summary judgment dismissal of Mr. Fischer's claim that the City breached promises of specific treatment in specific situations.

Wrongful Termination in Violation of Public Policy. Mr. Fischer also contends the trial court erred in dismissing on summary judgment his claim of wrongful discharge in violation of public policy. He contends he was terminated in violation of the medical leave public policy established by the federal Family Medical Leave Act of 1993 (FMLA) (29 U.S.C. §§ 2601-2654), the Washington Family Leave Act (WFLA) (chapter 49.78 RCW), and the labor and industries statutes, including RCW 51.48.025.

Wrongful discharge in violation of public policy is a narrowly drawn exception to

the general rule of at-will employment. *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 207, 193 P.3d 128 (2008); *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002). This tort applies when an employer terminates an employee for reasons that contravene a clearly mandated public policy. *Danny*, 165 Wn.2d at 207. To establish a claim of wrongful discharge in violation of public policy, the employee must prove

(1) the existence of a clear public policy (the clarity element); (2) that discouraging the employee's conduct would jeopardize the public policy (the jeopardy element); and (3) "that the public-policy-linked conduct caused the dismissal" (the causation element). *Hubbard*, 146 Wn.2d at 707. Finally, the employer must not have an overriding justification for the dismissal (the absence of justification element). *Id*. (quoting *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996)). The public policy exception has been recognized in four situations: "where the employee is fired (1) for refusing to commit an illegal act; (2) for performing a public duty or obligation; (3) for exercising a legal right or privilege; and (4) in retaliation for reporting employer misconduct." *Id.* at 707-08. Mr. Fischer contends he was fired for exercising a legal right to medical leave.

"Whether Washington has established a clear mandate of public policy is a

question of law subject to de novo review." *Danny*, 165 Wn.2d at 207. Generally, public policy involves issues that affect the citizens of the state collectively. *Id.* at 208 (quoting *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989)). Mr. Fischer contends the FMLA and related state statutes like the WFLA establish a clear Washington public policy protecting a worker's right to take medical leave.[2]

One of the threats Congress addresses in the FMLA is "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4). To that end, one of the purposes of the act is "to entitle employees to take reasonable leave for medical reasons." 29 U.S.C. § 2601(b)(2). Washington's WFLA also declares "it to be in the public interest to provide reasonable leave for medical reasons." RCW 49.78.010. These legislative enactments establish a clear mandate of public policy protecting an employee's right to reasonable medical leave. *See Wiles v. Medina Auto Parts*, 96 Ohio St. 3d 240, 243, 773 N.E.2d 526 (2002) ("the FMLA manifests a sufficiently clear public policy to satisfy the clarity element of a wrongful-discharge tort claim").

[2] The City contends Mr. Fischer raises the WFLA for the first time on appeal. Although Mr. Fischer mostly discussed the FMLA at the trial level, he noted that Washington medical leave laws also protect this "strong public policy." CP at 316, Plaintiff's Memorandum in Opposition to Defendant City of Roslyn's Motion for Summary Judgment; *see also* CP at 315.

The City contends this public policy does not extend to Mr. Fischer because he is not entitled to relief under the FMLA or the WFLA. A qualified employee under these statutes is one who works for an employer with at least 50 employees. 29 U.S.C. § 2611(2)(B)(ii); RCW 49.78.020(4)(b). The City employs far fewer than 50 employees.[3] Because Mr. Fischer would not be entitled to recover under the FMLA or the WFLA, the City argues, the clear legislative mandate is that the requirements of the statutes do not extend to small employers. A similar argument was raised in *Roberts v. Dudley,* 140 Wn.2d 58, 68-69, 993 P.2d 901 (2000) regarding the exemption for small employers under the law against discrimination statute, chapter 49.60 RCW. *Roberts* noted that the legislative purpose of the law against discrimination statute did not limit the right to be free from employment discrimination merely to those working for large employers. *Id.* at 69-70. In fact, the legislature declared that the right to be free from discrimination in employment was a civil right. *Id.* at 69 (quoting RCW 49.60.030(1)). By narrowing the statutory remedy to only those workers whose employers have eight or more employees, *Roberts* continued, the legislature did not narrow the public policy: "Thus, the statutory

[3] At the time the City filed its motion for summary judgment, the City, with a population of 1,000, had four full-time employees, four part-time employees and a volunteer fire chief. The City paid only expenses for the mayor and city council members.

remedy is not in itself an expression of the public policy, and the definition of 'employer' for the purpose of applying the statutory remedy does not alter or otherwise undo to any degree this state's public policy against employment discrimination." *Id*. at 70.

An employee's entitlement to reasonable medical leave has not been declared a civil right. But the legislative concern for the job security of employees with serious health conditions seems to implicate "'what is right and just and what affects the citizens of the State collectively.'" *Danny*, 165 Wn.2d at 208 (quoting *Dicomes*, 113 Wn.2d at 618). Washington has a clear public policy under the FMLA and the WFLA entitling all employees to take reasonable medical leave. The existence of that public policy should not rely upon recovery under those statutes. Accordingly, Mr. Fischer has established the clarity element of a claim for wrongful discharge in violation of public policy.

For Mr. Fischer to establish the jeopardy element, he must show that he engaged in conduct that directly related to the public policy. *Hubbard*, 146 Wn.2d at 713 (quoting *Gardner*, 128 Wn.2d at 945). In particular, he must show that the threat of dismissal would discourage others from engaging in the conduct. *Id.* (quoting *Gardner*, 128 Wn.2d at 945). Additionally, there must be no other means for promoting the public policy. *Id*. (quoting *Gardner*, 128 Wn.2d at 945). To establish the causative element, Mr. Fischer

must present sufficient evidence that he was terminated because he engaged in the protected conduct. *Id*. at 718. He has not done so and the trial court properly dismissed this claim on summary judgment.

Summary judgment is appropriate only when no issues of material fact remain and reasonable minds could reach only one conclusion. *Hubbard*, 146 Wn.2d at 707. Mr. Fischer has satisfied the clarity element but has not raised issues of material fact regarding the jeopardy, causation, and absence of justification elements of a claim of wrongful discharge in violation of public policy. In particular, Mr. Fischer fails to show that he was terminated because he intended to take extended medical leave. The trial court did not err by granting summary judgment dismissing this cause of action. *Id*. at 718-19.

Mr. Fischer is not entitled to attorney fees because he has not prevailed on appeal.

We affirm summary judgment dismissal of the claim of breach of specific treatment in specific situations and on the claim of wrongful discharge in violation of public policy.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

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Sweeney, J. Korsmo, J.