IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL E. KELLAMS,	)	**No. 27811-5-III**
Appellant,	)	
v.	)	**Division Three**
NORCO, INC., an Idaho corporation,	)	**UNPUBLISHED OPINION**
Respondent.	)	

Brown, J. – Michael E. Kellams was fired by Norco, Inc. after testing positive for codeine without a prescription. He filed several claims against Norco; all were summarily dismissed. Mr. Kellams appeals, contending genuine issues of material fact exist regarding (1) whether Mr. Kellams was wrongfully terminated based on breach of an implied contract, (2) whether Norco discriminated against Mr. Kellams by failing to accommodate an on-the-job knee injury, and (3) whether Norco defamed Mr. Kellams by publishing his termination in Norco's newsletter. We disagree, and affirm.

FACTS

Norco employed Mr. Kellams as a production technician and team leader from

1977 to 2006. His duties included maintaining and operating the equipment for

acetylene gas production. Acetylene gas is extremely explosive and flammable.

In the employee handbook, it states that Norco "will not tolerate the illegal use of drugs anytime on or off Norco Property." Clerk's Papers (CP) at 142. Moreover, "An employee who abuses prescription medication (which can include . . . taking prescription medication from a prescription not written or authorized for the employee) is in violation and will be subject to disciplinary action, up to and including termination for misconduct." CP at 144. The handbook further states, "The employee may be terminated . . . for any other reason deemed necessary by the Company." CP at 141. Regarding employment agreements, the handbook states:

> No manager, supervisor or employee of the Company has any authority to enter into any agreement for employment for any specified period of time or to make any agreement for employment other than at-will. Only the President or Chief Executive Officer of the Company has the authority to make any such agreement and then only in writing.

CP at 104.

In early 2006, Mr. Kellams suffered an on-the-job knee injury and filed an uncontested Labor & Industries claim. Due to knee pain, Mr. Kellams began taking Canadian 222s, a drug from Canada containing codeine. Codeine is a controlled substance under the Drug Enforcement Administration's schedules and requires a prescription. Mr. Kellams informed both his physician and his Norco supervisor, Ron Oaks, that he was taking the medication. Mr. Oaks was not aware that Canadian 222s contained codeine.

In June 2006, Norco randomly tested employees, including Mr. Kellams, for drug use. Mr. Kellams tested positive for codeine. Without a prescription, the testing company notified Norco that Mr. Kellams failed the drug test. Mr. Kellams was terminated based on his failed drug test.

After Norco fired Mr. Kellams, the company stated in its newsletter:

> Two very talented long term employees with a combined total of 46 years of industry experience were terminated because of violations of the company substance abuse policy. This loss hurts us all. Please be aware that our firm takes a zero tolerance stance towards abuse and misuse of all drugs, both illegal and prescription drugs. One of these employees was terminated for taking a prescription drug without a prescription.

CP at 421. Mr. Kellams sued Norco for breach of contract, retaliation, disability discrimination, failure to accommodate, age discrimination, and defamation. Norco successfully requested summary dismissal of all claims. Mr. Kellams appealed.

ANALYSIS

The issue is whether the trial court erred in dismissing Mr. Kellams' claims for wrongful termination based on breach of contract, discrimination/failure to accommodate, and defamation.

We review a trial court's summary judgment grant de novo, engaging in the same inquiry as the trial court. *Lybbert v. Grant County,* 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material

fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R., Co.,* 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert,* 141 Wn.2d at 34. Further, "Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion." *Swinehart v. City of Spokane,* 145 Wn. App. 836, 844, 187 P.3d 345 (2008) (citing *Alexander v. County of Walla Walla,* 84 Wn. App. 687, 692, 929 P.2d 1182 (1997)).

1. Wrongful Termination/Breach of Contract. Mr. Kellams contends Norco breached an implied contract of continued employment. "Generally, an employment contract, indefinite as to duration, is terminable at will by either the employee or employer." *Thompson v. St. Regis Paper Co.,* 102 Wn.2d 219, 223, 685 P.2d 1081 (1984). An employer, however, may alter the at-will employment relationship by creating an implied contract. *McClintick v. Timber Prods. Mfrs., Inc.*, 105 Wn. App. 914, 921, 21 P.3d 328 (2001). "To prevail on a claim for wrongful discharge under this theory, an employee must establish that (1) the employer created an atmosphere of job security and fair treatment with 'promises of specific treatment in specific situations,' and (2) the employee justifiably relied on those promises." *Id.* (quoting *Thompson*, 102 Wn.2d at 230).

Norco's handbook contained a disclaimer regarding altering the at-will

relationship between the employee and employer. Mr. Kellams acknowledged his employment "may be terminated by me or the Company at any time, for any reason not prohibited by law." CP at 96. These disclaimers satisfy Washington's legal requirements to disclaim alleged oral or other promises of continued employment. *See McClintick*, 105 Wn. App. at 921-22 (employment letter and policy manual unambiguously specified at-will employment). Further, the handbook clearly stated Norco could terminate employment for "taking prescription medication from a prescription not written or authorized for the employee." CP at 144. Mr. Kellams chose to take medication from another country without a prescription. He was clearly notified this behavior could result in termination.

Mr. Kellams incorrectly argues Mr. Oaks' knowledge of Mr. Kellams' use of Canadian 222s was a non-termination promise. While Mr. Oaks admits he saw Mr. Kellams with Canadian 222s, he did not know Canadian 222s contained codeine. More importantly, even if Mr. Oaks assured Mr. Kellams he would not be terminated for taking codeine without a prescription, the employee handbook clearly states, "No manager, supervisor or employee of the Company has any authority to enter into any agreement for employment for any specified period of time or to make any agreement for employment other than at-will." CP at 104. Further, only the president or chief executive officer can authorize such agreements and it must be in writing. Thus, no evidence shows any promises of specific treatment in specific situations.

Mr. Kellams next argues Mr. Oaks orally assured him that he would not be terminated if he tested positive for codeine. But, no evidence supports this contention other than Mr. Kellams' self-serving statement. A party's self-serving statements of conclusions and opinions are insufficient to defeat a summary judgment motion. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988). Accordingly, reasonable minds could reach but one conclusion; no implied contract existed to preclude termination. The trial court properly dismissed Mr. Kellams' wrongful termination based on breach of contract claim.

2. Discrimination/Failure to Accommodate. Mr. Kellams contends the court erred in dismissing his discrimination and failure to accommodate claims. He argues his knee injury was a disability requiring accommodation with Canadian 222s. A prima facie discrimination case based on failure to accommodate consists of four elements:

> (1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) the employee was qualified to perform the essential functions of the job in question; (3) the employee gave the employer notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality.

Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004) (quoting *Davis v. Microsoft Corp.,* 149 Wn.2d 521, 532, 70 P.3d 126 (2003)).

Mr. Kellams fails to establish his physical impairment "substantially limited" one

or more of his major life activities. *Riehl*, 152 Wn.2d at 145. "To be 'substantially limited' in a major life activity, an individual must have an impairment that prevents or severely restricts the individual from engaging in the major life activity. The impairment's impact must also be permanent or long-term." *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 480, 205 P.3d 145, *review denied*, 166 Wn.2d 1038 (2009).

During Mr. Kellams' deposition, he testified that his knee injury did not affect his ability to do his job. No other evidence supports otherwise. Further, Canadian 222s contain codeine, a controlled substance that requires a prescription, which Mr. Kellams did not have. A reasonable accommodation cannot be something contrary to company policy and possibly illegal.[1] Thus, no nexus exists between his alleged disability and the requested accommodation. *See Riehl,* 152 Wn.2d at 148-49 (no nexus between disability and need for accommodation where the need was not obvious and required greater documentation to survive summary judgment).

Accordingly, Mr. Kellams does not establish a prima facie case for failure to accommodate. The trial court properly granted summary judgment on the discrimination/failure to accommodate claim.

3. Defamation. Mr. Kellams next contends the trial court erred in dismissing his

[1] Mr. Kellams invites this court to rule on the legality of the use of Canadian 222s in the United States. Since this issue is not pivotal to our determination (we instead focus on the clear language of the handbook), we decline to do so. We, however, note that in the dissent of *State v. Chambers*, 88 Wn. App. 640, 649 n.4, 945 P.2d 1172 (1997), Judge Armstrong noted that Canadian 222s are a controlled substance. Further, defendants in New York were convicted of distribution of codeine for the sale of Canadian 222s. *U.S. v. Betancourt,* 594 F. Supp. 686 (D.C.N.Y. 1984).

defamation claim. He argues Norco falsely published information about Mr. Kellams that caused him harm.

To establish defamation, a plaintiff must show falsity, an unprivileged communication, fault, and damages. *Caruso v. Local Union No. 690 of Intern. Bhd., of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.,* 100 Wn.2d 343, 352, 670 P.2d 240 (1983). "To survive a defense motion for summary judgment, a defamation plaintiff must allege facts that would raise a genuine issue of fact for the jury as to each element." *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005).

Following Mr. Kellams' termination, Norco's newsletter described the loss of "talented long term employees . . . because of violations of the company substance abuse policy. . . . One of these employees was terminated for taking a prescription drug without a prescription." CP at 421. The employee handbook states Norco may terminate for "illegal use of drugs," including misuse of "prescription medication." CP at 142, 144. Mr. Kellams took a prescription drug (codeine) without a prescription. He was terminated for violating Norco's anti-drug abuse policy. Thus, the statement in the newsletter was not false. Truth is a complete defense to a defamation claim. *Mark v. Seattle Times*, 96 Wn.2d 473, 494, 635 P.2d 1081 (1981). Therefore, the trial court did not err in summarily dismissing Mr. Kellams' defamation claim.

In sum, the trial court did not err in granting summary dismissal of all claims made by Mr. Kellams. Because Mr. Kellams has not prevailed, we do not address his

attorney fee claims.

Affirmed.

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.

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Brown, J.

WE CONCUR:

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Kulik, A.C.J.

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Sweeney, J.