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Payments in Lieu of Taxes: A Broad Brush Being Held by the (Sometimes) Wrong Painter

We have been confronted with this question many times in the last two years: Can a unit of local government that is not a city, county or town receive payments in lieu of taxes from the federal government for fire protection and emergency medical services, or other crucial services, without having a *contract* to receive a percentage of those payments from the county, city or town? No, but don't give up so easily.

Under 31 U.S.C. § 6902 (1)(a), hereinafter referred to as the "PILT Law," generally, "the Secretary of the Interior shall make a payment for each fiscal year to each *unit of general local government* in which entitlement land[1] is located." (emphasis added). Of course, "[A] unit of general local government may use the payment for *any* governmental purpose." 31 U.S.C. § 6902 (1)(a) (emphasis added). A "unit of local government" includes "a county (or parish), township, borough, or city (other than

[1] "Entitlement land" means land "that is in the National Park System or the National Forest System," which logically includes Mount Saint Helens National Monument, Mount Rainer National Park, Olympic National Park and Gifford Pinchot National Forest, to name a few. 31 U.S.C. § 6901 (1).

in Alaska) where the city is independent of any other unit of general local government." 31 U.S.C. § 6901 (2). In others words, the PILT Law does not apply to municipal corporations that do not have general police powers, including but not limited to fire districts, regional fire authorities, school or ports, etc. Consequently, a fire department[2] would not automatically receive PILT under 31 U.S.C. § 6902 (1)(a).

The Department of Interior itself recognizes that "Payments in Lieu of Taxes" (PILT) are "[F]ederal payments to local governments that help offset losses in property taxes due to non-taxable Federal lands within their boundaries." https://www.doi.gov/pilt. "PILT payments help local governments carry out such vital services as *firefighting* and police protection, construction of public schools and roads, and *search-and-rescue* operations." *Id.* (emphasis added). The question becomes: What if the unit of local government does not provide fire protection or emergency medical services? Where do PILT monies go? Shouldn't a responding fire department get a chunk of that change? The answer is likely yes, and it can be done.

Under the Interlocal Cooperation Act (ICA), "[A]ny two or more public agencies may enter into agreements with one another for joint or cooperative action." RCW 39.34.030 (2). A public entity may contract away certain powers to another public agency, under the ICA. For example, a county may contract with a fire department under the ICA for the fire department to perform building code/International Fire Code inspections. RCW 19.27.110. In other words, a county or city could contract away a "piece of the pie": a portion of the PILT it automatically receives from the federal government by virtue of having "entitlement land" within its boundaries.

But how could a fire department convince a county or city to do that? The answer: by contract. Importantly, counties and cities with buildings and equipment within a fire department *shall* contract with that fire department for fire protection. RCW 52.30.020. In other words, although a fire department is not automatically entitled to PILT, the fire department could use RCW 52.30.020 as a "bargaining chip" to receive PILT. After all, the Department of Interior specifically states that PILT are used to recoup the costs of providing fire protection. But again, what if the county or city does not *provide* fire protection? What are the PILT being spent on? (Law enforcement?) Perhaps the best way for your agency to find out would be to make a public records request. Something like this:

> "Pursuant to RCW 42.56.070, I am seeking any and all records evidencing payments made to [county or city] in lieu of taxes under 31 U.S.C. § 6902 (1)(a), including but not limited to receipts for such payments and

[2] Hereinafter, a "fire department" is a fire protection district or regional fire authority.

> all records demonstrating how these payments are or have been allocated by [county or city], be it toward law enforcement, fire protection, search-and-rescue operations, or construction of public schools and roads."

After making a determination of what PILT the local government receives, the fire department would drop a fire protection contract on the mayor or county executive's desk. The fire protection contract would state that the county shall contract for fire protection, pursuant to RCW 52.30.020. But the contract will further state that any payment for fire protection shall be off-set by the amount of money that the county pays over to the fire department for serving entitlement lands within the boundaries of the county. Hence the term "bargaining chip." In other words, a fire department is not powerless to receive PILT. Although the PILT Law is not immediately applicable to fire departments—they do not automatically receive PILT, as do counties and cities—fire departments can get a piece of the "PILT pie" through contractual negotiation.

A Reminder that Gender Discrimination Need Not be Explicit to be Actionable

The Washington Supreme Court ("Court") recently ruled that a person alleging gender discrimination after being terminated need not prove that she was replaced by an individual outside of her protected class—such as a female worker being replaced by a male worker. In *Mikkelsen v. Public Utility Dist. No. 1 of Kittitas County,* NO. 93731-1 (2017), the Court also found that a "corrective action" policy was "ambiguous enough" that the plaintiff was not merely an "at-will" employee. Instead, the Court found that the plaintiff had created a genuine issue of fact as to whether her termination should have been for just cause.

Facts

The plaintiff in *Mikkelsen* was a finance manager at a public utility district ("PUD"). She served under a general manager ("GM"). She was the only female member in management. According to the plaintiff, her supervisor, the GM, "regularly disregarded" her input and talked over her at management meetings.

The GM exhibited a "'my way or the highway' management style." He would call her "untrustworthy" during management meetings. Furthermore, she alleged that "the male members of the management team did not experience this same treatment." The GM began holding meetings without the plaintiff, with only the male members of management. The plaintiff further testified that the GM "would frequently refer to the women at the office as the 'girls,' 'gals,' or 'ladies,'" but he never referred to the men as "guys" or "boys."

The plaintiff and the GM had a meeting to discuss their "communication breakdown." The GM informed her that he trusted her and would change his behavior. The plaintiff did not feel that he did. The president of the Board asked the plaintiff to create a survey asking the Board whether they perceived that the GM exhibited a "gender bias" towards the plaintiff. She did not

send this survey to the GM, who was on vacation at the time she sent the survey out. When the GM returned from vacation, he found out about the survey. He promptly fired the plaintiff. He told her in a one-on-one meeting that "it's not working out." He did not provide the plaintiff with any other reason for her termination. The GM testified that the survey was only intended to "make the district look bad" and showed that the plaintiff was "out to get him."

The plaintiff had worked at the PUD for 27 years. She had not been disciplined once in her career at the PUD. The GM issued a memo to the Board stating that the plaintiff was fired because she was "disrupting the workplace and undermining his authority."

The "corrective action" policy at the PUD stated the following:

> Corrective action should be **fair.** This means, while the District retains the discretion to determine what action is appropriate in any particular situation, the corrective action should be equal with the misconduct or performance deficiency at issue, and whenever possible, performance issues typically should be addressed, at least initially, with an eye to improvement… Corrective action must be administered with due consideration of, and respect for, employee rights and expectations, whether those rights and expectations derive from employment policies, operation of law, or contract.

(emphasis added). Without going through the policy line-by-line, the policy essentially delineated various circumstances in which "corrective action," i.e. discipline, would be taken in a particular manner, for example the issuance of a verbal warning followed by a written warning. After all of these procedures were enumerated, the policy finally stated that "[T]he rules set out here are intended only as guidelines, and do not give any employee *a right to continued employment or any particular level of corrective action*."

The plaintiff applied for unemployment benefits. The PUD informed the Employment Security Department that the plaintiff "was an 'at will' employee and was terminated without cause." The plaintiff was 57 years old when she was terminated. She was replaced by a 51-year-old male.[3] The plaintiff sued the PUD for violations of the Washington Law Against Discrimination, and wrongful discharge, for failure to follow the PUD's "corrective action" policy.

Discrimination Analysis

The Court began by reiterating that "we have repeatedly emphasized that plaintiffs may rely on circumstantial, indirect, and inferential evidence to establish discriminatory action." In other words, discrimination can be inferred from the circumstances. The Court set forth the "*McDonnell Douglas* framework" for establishing discrimination. The *McDonnell Douglas* framework has three steps:

First, to establish a prima facie case ("PFC") of discrimination under *McDonnell Douglas,* the *Mikkelsen* plaintiff needed to prove that she (1) was within a statutorily protected class, (2) was terminated, (3) was doing satisfactory work;

[3] As a side note, the plaintiff's claim of age discrimination failed.

and she needed to prove that (4) after her discharge, the position remained open and the employer continued to seek applicants with qualifications similar to her. *Second*, if the plaintiff established the PFC, the defendant PUD had to prove that it had legitimate "nondiscriminatory reasons" for terminating the plaintiff. *Third*, if the PUD provided those legitimate, "nondiscriminatory" reasons, the plaintiff had to prove that the decision was either "pretextual" or that discrimination was a "substantial factor" that ultimately motivated the PUD's decision.

But other Washington courts have read in a "replacement element" into a claim of discrimination. For example, the Court of Appeals has held that the protected person must show that he or she "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). The court of appeals in *Mikkelsen* ruled otherwise, finding that the "replacement element" was not required for the plaintiff to prove the PFC. The Court affirmed the court of appeals.

The PUD did not dispute that the plaintiff had established a PFC. The PUD instead focused on steps two and three of the *McDonnell Douglas* framework ("nondiscriminatory reasons" and the "substantial factor" analysis). With respect to the "nondiscriminatory" analysis, the Court found that the PUD met its burden because the GM wrote a memo to the Board, detailing [the plaintiff's] alleged history of "disruptive and insubordinate behavior." Furthermore, the Court found that the GM's "own testimony" showed that he and the plaintiff "had a dysfunctional professional relationship."

As for the third step, the Court reminded us that the plaintiff need only prove that discrimination was "*a* substantial factor" that motivated the adverse employment action, not the *only* factor. The Court found that the plaintiff met this burden because she had been an "exemplary employee" for 27 years and the above facts (at page 3) demonstrate that the GM engaged in a pattern of isolating her from management. The above was enough to create a genuine issue of material fact as to whether gender discrimination was *a* substantial factor in the decision to terminate the plaintiff. This does not mean that the plaintiff "won." It only means that the Court remanded this case for a trial and jury determination.

Wrongful Discharge Analysis

Turning to whether the plaintiff was wrongfully terminated, the Court cited to the age-old doctrine that "[G]enerally, an employment contract indefinite in duration is terminable at will." But the Court underlined seminal case law for the proposition that "employers may be obligated to act in accordance with policies as announced in handbooks issued to their employees." *Thompson v. St. Regis Paper Co*., 102 Wn.2d 219, 223, 685 P.2d 1081 (1984). If the employer makes promises of "specific treatment" in the case of discipline, the employee may be deemed to have just cause protections. *See Thompson.* The crucial inquiry, the Court said, is whether the employee has a "reasonable expectation" that the employer would follow the disciplinary procedures established in written guidelines or by past practice. The Court found that the above involves questions of fact, and therefore the trial court should not have dismissed the plaintiff's wrongful discharge claim.

Ultimately, the Court found that portions of the "corrective action" policy at the PUD gave management broad discretion in implementing discipline, but that other portions of the policy "seem to promise fair treatment and arguably establish a for-cause requirement for discharge." Consequently, the Court found that the plaintiff could easily argue that she was not an "at will" employee. Most importantly, the Court found that the disclaimer in the policy stating that no employees had "a right to continued employment or any particular level of corrective action" was not sufficient to create at-will status.

From *Mikkelsen*, we are reminded that a policy can inform employees that they are "at will" or that they have "no right to continued employment" until the cows come home, but this does not matter if the employee is given further protections in other areas of the policy.[4]

Furthermore, according to the *Mikkelsen* Court, even broad assertions such as "corrective action should be fair"—which were contained in the "corrective action" policy—are sufficient to create "an obligation on the employer." Although the Court ultimately read this promise of "fair treatment" next to various other provisions in the policy at issue, a promise of "fair treatment" alone may create doubts as to the at-will status of an employee. In other words, under *Mikkelsen*, if you want your employees to remain at will, don't promise them "fair treatment." Furthermore, don't provide them with grievance procedures or any discipline protections. Such protections include but are not limited to undertaking impartial investigations prior to taking adverse employment action, or requiring that progressive levels of discipline be provided prior to termination (progressive discipline).

Case Note on Privacy Protections For Homeless People

The Washington Court of Appeals, Division Two, recently found that a homeless person had a constitutionally protected privacy interest in the contents of his opaque tent. *State v. Pippin,* No. 48540-1-II (2017). This protection is afforded by the Washington Constitution, Article I § 7, which the court reminded us contains stronger privacy protections than those established under the Fourth Amendment.

SAFETY BILL

Under WAC 296-305-04001 (7)(b), "[O]nly firefighters with a properly fitting facepiece shall be permitted by the fire department to function in a hazardous atmosphere with SCBA." Consequently, any head garments, facial hair or piercings etc. that would prevent the "proper fit" of an SCBA, as determined by pressure testing, will violate this regulation. A properly fitting SCBA is what one might call a "bona fide occupational qualification" under the "refusal to hire" provisions of the Washington Law Against Discrimination. *See* RCW 49.60.180 (1). Since being able to wear

[4] The *Firehouse Lawyer* has discussed this issue extensively:
http://www.firehouselawyer.com/Newsletters/March2016.pdf

http://www.firehouselawyer.com/Newsletters/October2015_FINAL%20.pdf

http://www.firehouselawyer.com/Newsletters/v04n01jan2000.pdf

an SCBA in IDLH atmospheres is an essential function of a working firefighter, we would consider the ability to don and use SCBA a condition of employment.

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