

*Owens v. House of Delegates*, 1 ROP Intrm. 320 (Tr. Div. 1986)  
**YOLANDA R. OWENS,**  
**Plaintiff,**

v.

**HOUSE OF DELEGATES (HOD),**  
**SANTOS OLIKONG, SHIRO KYOTA,**  
**IGNACIO ANASTACIO, officially and**  
**individually, jointly and severally, and**  
**MOSES ULUDONG,**  
**jointly and severally,**  
**Defendants.**

CIVIL ACTION 52-86

Supreme Court, Trial Division  
Republic of Palau

Judgment

Decided: May 6, 1986

BEFORE: MAMORU NAKAMURA, Chief Justice.

This matter was tried on April 23, 24, 25, and 26, 1986. Plaintiff was represented by John S. Tarkong, Esq., and defendants were represented by Kaleb Udui, Esq.

Plaintiff Yolanda Raleen Owens is a United States citizen currently residing in Koror State, Republic of Palau. On April 1, 1986, plaintiff filed an amended complaint with this court, claiming damages due to defendant House of Delegates (HOD) alleged breach of employment contract with her. Plaintiff also seeks damages for an alleged conspiracy by defendants Speaker Santos Olikong, Vice-Speaker Shiro Kyota, Chairman of the Committee on Judiciary and Governmental Affairs for the HOD, Ignacio Anastacio, and Moses Uludong, to terminate her employment with the HOD.

Plaintiff is a 1975 graduate of the University of California-Davis Law School and was admitted to the State of Louisiana bar in 1979. In the spring of 1985, plaintiff became aware of an employment vacancy with the HOD legal counsel's office and interviewed with the Vice-Speaker of the HOD, Shiro Kyota, in Washington, D.C. During the interview, the Vice-Speaker explained the requirements of being an assistant legislative counsel for the HOD, and the plaintiff expressed **L321** her willingness to perform them. Plaintiff orally agreed to accept the job with the mutual understanding that she was to receive as compensation the amount of \$28,000.00 as annual salary. Plaintiff shortly thereafter signed a written contract with the HOD, but made a change in the contractual duration of employment from 2 years to that of 1 year duration.

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On July 11, 1985, the HOD, represented by Speaker Santos Olikong, pursuant to House Rule No. 13, formally executed the employment contract with the plaintiff for the period of one year commencing July 21, 1985. The contract listed several conditions and terms that each party was bound to follow. Plaintiff thereupon left Washington, D.C. on July 29 and arrived in Palau on or near August 12. On August 15, Speaker Olikong signed plaintiff's personnel form approving her appointment to assistant legislative counsel. Speaker Olikong later introduced on September 3, and was subsequently passed, a House Resolution appointing plaintiff as assistant legislative counsel for the HOD of the Second Olbiil Era Kelulau (OEK) for the term of one year commencing July 21, 1985.

On October 16, 1985, Michael Finn, then-Chief Legislative Counsel for the HOD, left his position to become Assistant Attorney General. Plaintiff spoke with the OEK administrative officer, Gilbert Demei, to see if plaintiff would now be entitled to receive compensation at the same base pay as that of Chief Legislative Counsel. Demei stated that he needed confirmation from the Speaker for such an increase in salary. Plaintiff prepared a document for the Speaker to sign, but upon discussion with other HOD delegates, the Speaker declined to do so. Demei stated that he received no written authorization from the Speaker and never spoke to the plaintiff in regard to this matter again.

On February 4, 1985, at 3:40 p.m., House Bill No. 2-0091-4S, HD1, HD2 (the House Bill) was delivered to plaintiff's office by Hersey Kyota, Chief Clerk of the HOD, and was received by Linda Temol, Legal Secretary for the legislative counsel's office to the HOD. Attached to the House Bill was a cover letter from Hersey Kyota requesting plaintiff to review the House Bill "for legal form and style for third and final reading for tomorrow 4/5/86 [sic] at 10:00 a.m." Hersey Kyota testified that he saw plaintiff on the afternoon of February 4, 1986, outside on the sidewalk, and ran to her, informing the plaintiff of the necessity of making sure the House Bill was received by the HOD the next morning. Since the OEK is in session from the second Tuesday in January until 25 days thereafter, the session was due to end that week.

**1322** On February 5, the day the House Bill was to undergo a third and final reading, plaintiff failed to appear for work. She did not inform the legislative counsel's office that she would be late[,] and there was no word of her whereabouts. As a result of not informing the HOD that the House Bill would be late, an attorney from one of the HOD's committees, Martin Wolff, was immediately assigned to revise the House Bill. However, the House Bill was not received by the Senate for review in time, and it was therefore not considered before they adjourned.

That same day, Vice-Speaker Kyota instructed Martin Wolff to prepare a letter terminating the plaintiff. The Vice-Speaker signed it and testified that he was well aware of the plaintiff's right to cure any defaults, but that her failure to revise the House Bill as well as her "repeated unavailability, poor office supervision and lack of dedication to the needs of [the HOD members]" was incurable. The Vice-Speaker stated that pursuant to his authority as Acting Speaker, plaintiff was to be terminated for cause, effective April 1, 1986.

The following day, February 6, plaintiff responded to Vice-Speaker Kyota's letter by stating that she had a right to cure any defaults and without explaining how she had done so, that

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in this case she had cured the default. She requested and received a meeting with Vice-Speaker Kyota in which she explained to him that the reason she did not get the House Bill in on time was that she was sick on the morning of February 5. Plaintiff insists that she was vomiting and experiencing trauma and that she was physically incapable of leaving her apartment to inform the HOD that she would be unable to submit the House Bill by the stated time. Later in her testimony, plaintiff would add that she had suffered what she deemed to be a miscarriage. No medical evidence, however, was submitted by plaintiff. Plaintiff requested at the meeting a sick leave from Vice-Speaker Kyota to go to Guam for an abortion. The Vice-Speaker agreed and plaintiff subsequently flew to Guam. She returned on or about February 20, producing what appears to be a medical document signed on February 19 by one Vallop Boonprakong, MD, stating that plaintiff was under his “professional care” for an undisclosed “medical” reason. Plaintiff testified that during this period of sick leave she also went to Bali, Indonesia, for ten days. The Vice-Speaker stated that he had only authorized her to take sick-leave to have an abortion and was not aware that she used this opportunity to vacation in Bali. The Vice-Speaker also testified that February 6 was the last time he talked to plaintiff concerning her employment.

**¶323** Plaintiff testified that on February 21, 1986, she was approached by defendant Anastacio at a local nightclub. Plaintiff claims that Anastacio made threatening remarks relating to her continued employment with the HOD. There was conflicting testimony as to what was actually spoken between the plaintiff and Anastacio since the music was loud, and it was difficult to hear over the noise.

On February 22, plaintiff met with Speaker Olikong after he returned to Palau, urging that Vice-Speaker Kyota’s letter of termination was wrongful and that any alleged defaults were cured. The Speaker reiterated the Vice-Speaker’s reasons for the notice of termination, and said that the default was incurable. The Speaker testified that this was the last time he spoke to plaintiff in regard to her employment. On March 3, plaintiff was requested to vacate her office, whereupon she immediately removed her belongings and left the premises.

On March 4, 1986, a personnel action was filed and signed by the plaintiff stating that she would resign, effective March 14. The personnel action was initiated by the plaintiff. Both parties testified that the “resignation” did not change the fact that she was being terminated by the HOD pursuant to the Vice-Speaker’s February 5th letter. Plaintiff claims she filed and signed the form so she could receive her withheld paycheck and her accrued annual leave. Plaintiff admits that during the interim period from the time she filed the personnel action and the date of her “resignation”, she used the OEK facilities to draft her complaint with this court.

On April 1, the Chief Clerk of the HOD reminded plaintiff by letter that she was to vacate her apartment by 4:30 p.m. that day. Plaintiff immediately moved this court for a Temporary Restraining Order to keep plaintiff in the apartment[,] and it was granted.

On April 18, 1986, a House Resolution was passed confirming and approving HOD’s termination of plaintiff as former legislative counsel for the HOD.

The first issue this court considers is whether defendant HOD breaches its employment contract with the plaintiff. Plaintiff urges that she was terminated by the HOD in violation of the contract since she was not given sufficient written notice of her default of the contract and was not given any opportunity to “cure” the default. Defendant HOD claims **1324** that the default was in fact incurable and that the termination was therefore justified.

Section 6(b) of the employment contract states that:

Either party may terminate this Agreement whenever the other party has failed to perform its obligations under this Agreement. To terminate this Agreement under this subsection, a party must provide the other party with written notice at least 30 days prior to the date of termination. In the event the other party cures the default by performing its obligations under this Agreement within the 30 day notice period, the other party shall have no right to terminate this Agreement.

Vice-Speaker Kyota’s letter to plaintiff dated February 5, 1986, notified plaintiff that she was being terminated “for cause,” and that such termination would be effective April 1, 1986. The Vice-Speaker stated in the letter that plaintiff’s repeated failure to meet her responsibilities under the contract left him no choice but to terminate her. At first glance, it appears that the Vice-Speaker’s reasons were sufficient justification for terminating plaintiff, as it is quite clear from testimony at trial and the facts of this case that plaintiff was repeatedly unavailable when she was needed.

However, the contents of the Vice-Speaker’s letter do not disclose how plaintiff defaulted on the contract. Moreover, conversations plaintiff had with the Vice-Speaker on February 6 and the Speaker on February 22, indicated that she was not given an opportunity to cure the default of the contract. Where a contract provides a noticed party the right to avoid termination by correcting a default, it is essential that the terms of the contract be followed. Annot., 96 A.L.R.2d 272, 281 § 5. It is reasonable to conclude that once the employer bound itself through the terms of the contract, it must give notice and opportunity for the employee to correct any defaults. *Id.*

The evidence presented at trial indicates that without question the plaintiff was often late for work, inattentive to the needs of the HOD, and prone to playing tennis during work hours without taking leave from work. The Speaker and Vice Speaker both testified that for some time the HOD was unhappy with the plaintiff’s caliber of performance; however, no one from the HOD provided plaintiff with the requisite written **1325** notice that she was in default of the contract. Under the terms of the contract, once plaintiff received such notice, she must then have an opportunity to cure her default. In holding that the HOD breached the employment contract with plaintiff, this court notes that it is not in any way condoning the plaintiff’s actions. The law of contracts is on the plaintiff’s side in this case and this court is bound to uphold that law. Because the plaintiff was not given proper notice and an opportunity to cure her default, the HOD breached the employment contract.

II.

With regard to plaintiff's contention that she was entitled to receive compensation after October 14, 1985 at the same base pay as that of Chief Legislative Counsel, plaintiff urges that there was an oral understanding between the Speaker and her that she was to "take charge of the Legislative Counsel's Office," and that would entitle her to a raise in salary. Plaintiff, however, readily admits that she prepared a document for the Speaker to sign agreeing to the purported increase in salary, but that he refused to sign it. The Speaker testified that upon conferring with other HOD delegates, he declined to authorize such an increase. Plaintiff's claim for additional compensation is therefore denied.<sup>1</sup>

III.

The next issue is whether the individual defendants, Santos Olikong, Shiro Kyota, Ignacio Anastacio and Moses Uludong, conspired to cause plaintiff to be terminated from the contract. There was not a scintilla of evidence presented at **L326** trial that any such conspiracy existed.

To constitute a civil conspiracy there must be: (1) two or more persons, and for this purpose a corporation is a person; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof. The burden of proving these essentials by a preponderance of the evidence is upon him who asserts the claim under such circumstances.

*Mc Glasson v. Barger*, 431 P.2d 778 (Colo. 1967) (emphasis added).

A plaintiff in a civil conspiracy case has two ways of proving a conspiracy: direct evidence of an actual agreement or by the use of circumstantial evidence. 16 Am. Jur. 2d *Conspiracy* § 68. Since the plaintiff has not offered into evidence any direct evidence that an actual agreement existed, her only recourse is to prove the conspiracy through the use of circumstantial evidence. For plaintiff to prove her case by circumstantial evidence, the circumstances "must do more than create a mere suspicion of the existence of a conspiracy. They must be such that ordinary men of sound mind may reasonably deduce therefrom that there

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<sup>1</sup> Moreover, any testimony to the effect that there was an oral promise to pay her additional compensation is without merit. It is well established under the parole evidence rule that:

when parties put their agreement in writing, all previous oral agreements merge in the writing and a contract as written cannot be modified or changed by parole evidence, in the absence of a plea of mistake or fraud in the preparation of the writing.

*Black's Law Dictionary*, 580 (5th ed. 1983); *see also* 53 Am. Jur. 2d *Master and Servant*, § 68 n. 6.

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was a conspiracy”. *Id.*

Plaintiff has not demonstrated that any meeting of the minds took place between the defendants to conspire against plaintiff; nor has plaintiff shown any unlawful overt acts in furtherance of a conspiracy. Plaintiff has therefore failed to even state a cause of action with respect to her conspiracy claim.

#### IV.

With regard to plaintiff’s claim of sexual harassment, this Court finds that the plaintiff has failed to prove this issue by even a scintilla of evidence. Allegations of sexual harassment raises a very sensitive issue[,] and this Court strongly disapproves of plaintiff raising this issue without properly pleading specific facts and introducing evidence that reasonably could infer that such alleged wrongdoing existed. Mere general allegations, without setting forth specific facts demonstrating sexual harassment, are insufficient to state a cause of action. Therefore, plaintiff’s claim is totally without merit.

#### ¶327 V.

This Court now reaches the issue of damages. Plaintiff has prayed for both compensatory and punitive damages in her complaint. Generally, damages for breach of contract are limited to the pecuniary loss sustained. 22 Am. Jur. 2d *Damages* § 245. Punitive damages are not recoverable except in those exceptional circumstances where the conduct constituting the breach is also a tort for which punitive damages are recoverable. Restatement, *Contracts* 2d § 355; *see also* 22 Am. Jur. 2d *Damages* § 245. In this case, there has been a breach of contract unaccompanied by any evidence of a tortious act. The plaintiff’s claim for punitive damages is hereby denied.

With respect to compensatory damages, the Court finds and concludes that plaintiff is entitled to recover from HOD for damages resulting from the breach of the contract.

This Court takes the majority position that:

. . . the measure of damage for a breach of contract of employment for a certain time by wrongful discharge, before the expiration date of the contract period . . . is the contract price agreed upon the services to be rendered.

53 Am. Jur. 2d *Master and Servant* § 62; *see also* Annot., 91 A.L.R.2d 682.

The minority position adopted in some jurisdictions is that:

. . . where action is brought to trial before the expiration of the contract period of employment, limits the recovery by the employee to damage sustained up to the time of trial, the discharged employee being deemed to relinquish his claim for the balance of the term.

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53 Am. Jur. 2d *Master Servant* § 64. The problem with this position is that an employee wrongfully discharged must wait until the end of his contractual period of employment to recover damages for the entire contractual amount. Otherwise, the employee is “penalized” for filing suit earlier than the expiration of the contractual period. Thus, in most jurisdictions, “a wrongfully discharged employee may recover for any loss suffered by him during the entire unexpired term **1328** of the employment although he sues before the expiration of the time provided for in the contract and although trial is had before that time.” *Id.* citing *Pierce v. Tennessee Coal, Iron and R. Co.*, 173 U.S. 1, 19 S.Ct. 335 (1898). Plaintiff shall therefore be entitled to her salary up to and including July 21, 1986, which is \$9,692.28, less any amounts withheld for income taxes and social security.

Plaintiff shall also recover from HOD repatriation expenses from Koror, Palau to her original place of hire. This shall include her airfare as well as moving expenses that are not to exceed \$2,000.00. Plaintiff shall also receive the customary per diem for 2 days en[ ]route to her place of hire.

This court recognizes that the question of mitigation of damages often arises in breach of contract cases; however, it is well recognized that:

... in the absence of proof by defendant that the plaintiff might have obtained other employment, the plaintiff [is] entitled to recover the contract price unpaid.

Annot., 91 A.L.R.2d 682, 687. Defendant HOD has not introduced any evidence that plaintiff was able to mitigate her damages.

With respect to the defendant’s counterclaim, they are denied.

As to the matter of the plaintiff’s unpaid personal telephone bills raised in defendant’s counterclaim, this court finds and concludes that it shall be the responsibility of the HOD to pay any phone calls made by the plaintiff before December 1, 1985. While some of these “official” calls appear to be questionable, defendant never rebutted plaintiff’s testimony as to the nature of the calls. It shall be the responsibility of plaintiff, however, to pay for all phone calls made by her after December 1, 1985, as these were all personal calls.

Plaintiff is authorized to remain in her apartment until 4:30 p.m., May 15, 1986, in order to allow her sufficient time to receive her awarded damages.

It is therefore ORDERED, ADJUDGED, and DECREED that plaintiff shall have a judgment against the House of Delegates of the Second Olbiil Era Kelulau, Republic of Palau, for the sum of \$9,692.28, less any amounts withheld for income taxes **1329** and social security. Plaintiff shall also be entitled to repatriation expenses as stated above, and two days per diem en route to her original place of hire.

Plaintiff is awarded court costs.