BENEDICTA NGOTEL,
Appellant,

v.

DUTY FREE SHOPPERS PALAU, LTD., DFS PALAU LTD.,
Appellees.

CIVIL APPEAL NO. 12-014
Civil Action No. 11-124

Supreme Court, Appellate Division
Republic of Palau

Decided: October 29, 2012

[1] **Employment Law:** Breach of Contract

A breach of contract action arises out of a discharge from employment when an employee is terminated in a manner inconsistent with the terms of the employment contract.

[2] **Contracts:** Duration

Generally, a contract for services which does not specify the duration of the contract is terminable at will by either party at any time.

[3] **Employment Law:** Employment at Will

Contracts for employment that do not specify grounds for termination are terminable at will by either party at any time.

[4] **Employment Law:** Breach of Contract

A former employee may sustain a breach-of-contract claim against their former employer by establishing a breach of an implied-in-fact contract. In such an action, the burden of proving the terms and existence of the contract must lie with the employee.

[5] **Contracts:** Offers

An offer is not made when it is posted, but when it is received.

[6] **Employment Law:** Implied-in-Fact Contracts

To the extent that an employee seeks to establish an implied-in-fact contract predicated upon specific conduct, that employee must, at the very least, show knowledge of such conduct.

[7] **Employment Law:** Implied-in-Fact Contracts

A former employee establishes a breach of an implied-in-fact contract claim against her former employer by showing: (1) conduct by the employer constituting an offer of employment in abrogation of the at-will rule; (2) the employee accepted the offer by continuing her employment after learning of the offer-creating conduct; and (3) breach of the terms of the offer.

[8] **Employment Law:** Implied-in-Fact Contracts

Generally, a clear and unambiguous at-will provision in a written employment contract, signed by the employee, cannot be overcome by evidence of a prior or contemporaneous implied-in-fact contract requiring good cause for termination.

[9] **Employment Law:** Progressive Discipline

The promulgation of "progressive discipline" policies by an employer may bind an employer to those policies. Under such circumstances, a termination in contravention of the progressive discipline will be considered a breach of contract.

[10] **Employment Law:** Termination

'Good cause' in the context of implied employment contracts is defined 'as fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.

[11] **Employment Law:** Good Faith and Fair Dealing

Within in the context of an employment contract, a breach of the covenant of good faith and fair dealing is solely contractual.

[12] **Employment Law:** Good Faith and Fair Dealing

Where a termination is based on alleged wrongful conduct on the part of an employee, absent evidence of bad faith, where it is undisputed the employer has conducted an investigation and determined the issue against the employee, there is no breach of the implied covenant of good faith and fair dealing, even if the employee could subsequently prove that the factual finding of misconduct was a mistake.

Counsel for Appellant: Yuwiko Dengokl
Counsel for Appellee: Kevin N. Kirk

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This case concerns a wrongful termination and breach of contract action brought by Appellant Benedicta Ngotel against her former employer, Appellee Duty Free Shoppers Palau, LTD, DFS Palau, LTD. Ngotel challenges the Trial Division's decision granting summary judgment in favor of Appellee. For the following reasons, the decision of the Trial Division is affirmed.

BACKGROUND

Appellee DFS Palau (DFSP) is a Palauan corporation that controls three retail stores throughout the country. The corporation is owned wholly by DFS Ventures Singapore (PTE) Limited. Within the corporate structure of DFS Ventures, DFSP is considered a part of the "Midpac Division" and is overseen by a separate entity, DFS Saipan.

From approximately 1987 to 1998, Ngotel worked at DFS Saipan. On March 30, 1996, Ngotel signed a document acknowledging both receipt of a copy of a

"DFS Employee Handbook" and an understanding that "the Company c[ould] terminate the employment relationship at will, with or without cause, at any time."

Sometime in 1999, Ngotel was hired by Gregory Gordon, the general manager of DFSP, to work as a sales associate at DFSP's retail stores in Palau. Ngotel's employment was terminated on June 8, 2005. On June 8, 2011, Ngotel filed a two-count complaint in the Supreme Court, Trial Division, alleging "Wrongful Termination or Discharge" and "Breach of Contract" arising from her termination. DFSP filed a motion for summary judgment, arguing that Ngotel was an at-will employee and that, as such, her employment was terminable without justification.

In support of its motion for summary judgment, DFSP submitted an affidavit from Gordon in which he attested that, at the time he hired Ngotel, he "gave her a copy of the then current DFS Employee Handbook and went over with [Ngotel] the contents of the Handbook section by section, including the section regarding . . . employment status." Gordon also attested that Ngotel had been disciplined sixteen times and had been suspended for three days in June of 2004 "due to her having had four cash handling errors within one month."

On May 31, 2005, Gordon conducted a "cash handling" test in which he placed an additional twenty dollars in Ngotel's "change fund (the amount of change each employee is given to open their cash register at the start of their shift)." According to Gordon Ngotel failed to report the overage and, when questioned about the alleged failure, denied any wrong doing. Gordon terminated Ngotel after consultation with the DFS Saipan Human Resources Department.

In addition to the affidavit from Gordon, Appellee submitted into evidence a series of internal memorandums regarding Ngotel's termination and excerpts of versions of the DFSP Employee Handbooks from 1995, 2001, 2002, and 2008. The memorandums reflect that Ngotel was terminated following a cash-handling test in which she failed to count her change-fund as required by company policy.[1]

The 1995 version of the Handbook included a section titled "Your Employment at DFS" which provided that "[y]our employment at DFS is **'at will.'** This means that your employment is entered into voluntarily and you are free to resign at any time, for any reason, with or without notice." Emphasis in original. The 1995 version included a disclaimer that "[t]his Handbook is presented as a matter of information and its contents should not be interpreted as a contract between DFS and any of its employees. It is not intended to be an enforceable legal document, and it does not alter the employment at-will relationship between DFS and its employees. With the exception of at-will employment, DFS reserves the right to change any of the policies contained in this Handbook at any time."

[1] Gordon's affidavit explained that these documents were "records of regularly conducted business activities of the Defendant made at or near the time by, or from information transmitted by, a person with knowledge, and were all kept in the course of the Defendant's regularly conducted business activities." Accordingly, while hearsay, the termination memorandums are admissible under the business records exception to the hearsay rule. *See* ROP Rule of Evidence 803(6).

The 2001 and 2002 versions of the Handbook define at-will employment as that which "can be terminated, with or without cause, and with or without notice, at any time at the option of DFS."[2] However, there is no evidence that Ngotel was shown any version other than the 1995 version of the Handbook.

In response to the motion for summary judgment, Ngotel submitted an affidavit in which she claimed, in relevant part, that: (1) she did not remember meeting with Gordon at the outset of her employment with DFSP; (2) she only recalled making four "counting errors" during her employment, and that Gordon's statements to the contrary were not true because she could not remember them; (3) the reasons stated for her suspension were inaccurate; (4) DFSP had a cash handling policy which provided her certain rights prior to termination; and (5) the reason given for her termination "is not true or accurate because [she] follow[ed] established cash handling procedures." She also recounts in her affidavit events in which Gordon "either terminated . . . or recommended [the] termination of [an employee and t]hat termination was reversed by higher ups in Saipan." Finally, the affidavit identifies documents attached to the affidavit as Exhibit A ("the relevant pages of the cash handling policy, including those for retail operations over/short policy for the position that I held while employed by defendant") and Exhibit B ("the Leave & Termination Personal Action Form").

[2] The 2008 version, in contrast, defines "at-will" employment as employment which can be "terminated, with or without cause, and with or without notice by you or DFS."

The document identified as Appellant's Exhibit A includes two separate documents (the Policy Documents). The first document, a 1996 "Cash Handling Policy for Sales Associates" is printed on a DFS MidPacific-Region letterhead and sets forth thirteen procedures which would "lead to disciplinary action up to and including termination of employment." The second document, bearing an effective date of June 1, 1992, is titled "RETAIL OPERATIONS OVER/SHORT POLICY" and provides for escalating discipline for "any variance between the actual sales of any individual employee from the register versus the actual deposits on money turned in." Under the terms of the Over/Short Policy, "major infractions," defined as variances between ten and fifty dollars, would be punished in the following way: (1) first offense—first written warning; (2) second offense—second written warning; (3) third offense—third written warning with a notification to Security and the human resources department; (4) fourth offense—one week suspension (without pay); and (5) fifth offense—subject to termination. "Critical infractions," defined as variances greater than fifty dollars, were terminable after the fourth offense.

DFSP filed a timely reply, contending that Ngotel's response was insufficient to create a genuine issue of material fact. Addressing the Policy Documents, DFSP argued that the documents were not authenticated properly, and that, even if they had been, "the number [of] infractions committed by the Plaintiff over the course of her employment with the Defendant fully justifies her termination under the policies." The Reply also included an additional affidavit from

Gordon; fourteen warning notices issued to Ngotel by Appellee for various infractions; and a May 16, 2005, memorandum purporting to memorialize an incident in which Ngotel had been given a "notice for not following instructions."

On February 14, 2012, the Trial Division issued an order granting summary judgment in favor of Appellee. In its decision, the trial court found that DFSP's employee handbook created an at-will employment relationship between DFSP and Ngotel, and that Ngotel had failed to show a genuine issue of material fact as to the existence of an implied contract. Ngotel filed a timely appeal with this Court.

STANDARD OF REVIEW

We review a lower court's grant of summary judgment de novo. *See Becheserrak v. Eritem Lineage*, 14 ROP 80, 81 (2007). In considering whether summary judgment is appropriate, all evidence and inferences are viewed in the light most favorable to the non-moving party. *See Obeketang v. Sato*, 13 ROP 192, 194 (2006). Summary judgment is therefore not appropriate when genuine issues of material fact persist. *See id.*

ANALYSIS

Ngotel's complaint asserted two claims based on her allegedly wrongful discharge: (1) breach of contract and (2) "wrongful termination or discharge." The trial court granted summary judgment in favor of DFSP on both counts based upon a finding that Ngotel was an at-will employee. As her sole grounds for appeal, Ngotel asserts that the grant of summary judgment was in error because there was a genuine issue of material fact as to whether she was an at-will employee.

I. Breach of Contract

[1] Ngotel contends that DFSP was required to follow certain procedures when dealing with cash handling discrepancies and that its failure to do so constituted a breach of contract. A breach of contract action arises out of a discharge from employment when an employee is terminated in a manner inconsistent with the terms of the employment contract. *Owens v. House of Delegates*, 1 ROP Intrm. 320, 325 (Tr. Div. 1986). Where the grounds and procedures for termination are set forth in a signed contract of employment, the wrongful discharge analysis normally will be straight-forward. *Id.* Here, no such contract exists.

[2, 3] "Generally, a contract for services which does not specify the duration of the contract is terminable at will by either party at any time." *Ngiratkel Etpison Company, Ltd. v. Rdialul*, 2 ROP Intrm. 211, 221 (1990). Employment contracts are considered contracts for services. *See Foster v. Bucket Dredger S/S "Digger One,"* 7 ROP Intrm. 234, 235-36 (Tr. Div. 1997) (referring to an employment contract as "oral contract for services."). Thus, under general principles of contract law, contracts for employment that do not specify grounds for termination are terminable at will by either party at any time. *Rdialul*, 2 ROP Intr. at 221. This rule, establishing "at-will" employment in the absence of a contract to the contrary, is followed throughout the United States. *See e.g., Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 665, 765 P.2d

373 (Cal. 1988) (Under California law, "[a]bsent any contract . . . the employment is **'at-will'** and the employee can be fired with or without good cause.") (emphasis in original); *Sheets v. Knight*, 779 P.2d 1000, 1006 (Or. 1989) (describing Oregon as an "at will" jurisdiction); *Ford v. Trendwest Resorts, Inc.,* 43 P.3d 1223, 1226 (Wash. 2002) ("In Washington, the general rule is that an employer can discharge an at-will employee for no cause, good cause or even cause morally wrong without fear of liability.") (internal quotation marks omitted).

Despite the foregoing, American courts have recognized implied employment contracts that modify the at-will employment rule. *Vice v. Conoco Inc.*, 150 F.3d 1286, 1288-89 (10th Cir. 1998) (Under Oklahoma law, "an implied or express contract that restricts an employer's power to terminate the employee can alter the employment relationship."); *Fox v. MCI Communications Corp.*, 931 P.2d 857, 859 (Utah 1997) ("An at-will employee may overcome that presumption by demonstrating that [there] is an implied or express agreement that the employment may be terminated only for cause or upon satisfaction of another agreed-upon condition."). As the California Supreme Court has stated, despite the at-will rule,

> [t]he parties may define for themselves what cause or causes will permit an employee's termination and may specify the procedures under which termination shall occur . . . . The contractual understanding need not be express, but may be *implied in fact,* arising from the parties' *conduct* evidencing their actual mutual intent to create such enforceable limitations.

Guz v. Bechtel National, Inc., 100 Cal. Rptr. 2d 352, 365, 8 P.3d 1089 (Cal. 2000) (emphasis in original). Under this formulation, courts consider the policies and practices of an employer "as being in effect offers of a unilateral contract which offer is accepted if the employee continues in employment." *Id.* at 371.

[4] This Court has given effect to implied-in-fact contracts. *Loitang v. Jesus*, 5 ROP Intrm. 216, 218 (1996); *see also Ho v. Liquidation Comm. of Nanjing Orientex Garments, Co.*, 11 ROP 2, 5 (2003). Thus, we adopt the framework of the American Courts and hold that a former employee may sustain a breach-of-contract claim against their former employer by establishing a breach of an implied-in-fact contract. In such an action, the burden of proving the terms and existence of the contract must lie with the employee. *ROP v. Reklai*, 11 ROP 18, 18 (2003) (to state a claim for breach of contract the non-breaching party must establish the existence of a contract).

[5, 6] "An offer is not made when it is posted, but when it is received." 17A Am. Jur. 2d *Contracts* § 46 (2004); *see also Kuta v. Joint Dist. No. 50 (J)*, 799 P.2d 379, 382 (Colo. 1990) ("To be effective, an offer must be communicated."). Accordingly, to the extent that an employee seeks to establish an implied-in-fact contract predicated upon specific conduct, that employee must, at the very least, show knowledge of such conduct. *See Tritle v. Crown Airways, Inc.*, 928 F.2d 81, 85 (4th Cir. 1990) (declining to find a written policy created an implied contract where "there is

no evidence in the record . . . to indicate that the document was ever provided to employees . . . ."); *see also Kuta*, 799 P.2d at 382 (affirming summary judgment in favor of defendant employer because "prior to learning of [the] policy [plaintiffs] had no expectation that their assent to the bargain was invited by the employer and that the employee's assent would conclude the bargain."); *Manning v. Cigna Corp.*, 807 F.Supp. 889, 893-95 (D.Conn. 1991) (collecting cases).

[7] In summary, we hold that a former employee establishes a breach of an implied-in-fact contract claim against her former employer by showing: (1) conduct by the employer constituting an offer of employment in abrogation of the at-will rule; (2) the employee accepted the offer by continuing her employment after learning of the offer-creating conduct; and (3) breach of the terms of the offer. Here, Ngotel contends that the Policy Documents created a binding procedure on DFSP which governed its ability to terminate for cash handling errors. In the alternative, Ngotel argues DFSP's purported reversal of another employee's termination and its past decisions not to terminate her for cash handling errors created a policy whereby she "would not be terminated without good cause or reason." DFSP responds that the foregoing could not create an implied contract and that even if it could, an implied contract could not be created in the face of Ngotel's express acknowledgment of at-will employment during her employment with DFS Midpac or by the promulgation of the employee handbooks that state employment is only at will.

A. Do the Handbooks and DFS Saipan Contract preclude a finding of an implied contract abrogating the at-will rule?

[8] DFSP submits that the Handbooks and the DFS Saipan contract signed by Ngotel prohibit the implication of an implied contract to the contrary. Generally, a "clear and unambiguous at-will provision in a written employment contract, signed by the employee, cannot be overcome by evidence of a prior or contemporaneous implied-in-fact contract requiring good cause for termination." *Dore v. Arnold Worldwide, Inc.*, 46 Cal. Rptr. 3d 668, 671, 139 P.3d 56, (Cal. 2006).

As an initial matter, it is beyond clear that a previous employment contract between an employee and one entity does not control the subsequent employment terms between that person and a second entity. *See Perrin v. Remengesau*, 11 ROP 266, 268 (Tr. Div. 2004) ("Only a party to a contract can be liable for breaching it.") (citing 17A Am. Jur. 2d *Contracts* § 412 (2004)). Thus, the 1996 acknowledgment Ngotel signed while employed with DFS Saipan has no bearing on her subsequent employment rights with DFSP. *Id.*

Furthermore, even though it is undisputed that Ngotel was shown a handbook providing that her employment was "at will," the handbook went on to define at-will employment as meaning "that your employment is entered into voluntarily and [you] are free to resign at any time, for any reason, with or without notice." This language contains no provision, clear or otherwise, regarding DFSP's ability to terminate Ngotel at will. Thus, Ngotel's

acknowledgment of the 1995 Handbook cannot preclude a finding of an implied-in-fact contract abrogating the at-will doctrine.[3] *Id.* Because neither the Handbooks nor the DFS Saipan contract prohibit the existence of an implied-in-fact contract, we next consider whether, under the totality of the circumstances, DFSP's conduct created an implied-in-fact contract altering the default at-will relationship between itself and Ngotel.

B. Was there sufficient evidence of an implied contract abrogating the at-will rule?

Ngotel contends that the trial court erred in finding that she was an at-will employee because: (1) DFSP was bound by the terms of the Policy Documents; or, in the alternative (2) DFSP could only terminate Ngotel for "good cause or reason" because it had reversed a previous termination recommendation regarding another employee and had excused at least one cash handling error on the part of Ngotel.

1. Did the Policy Documents create an implied-in-fact contract that was violated?

[9] The promulgation of "progressive discipline" policies by an employer may bind an employer to those policies. *Mobil Coal Producing, Inc., v. Parks*, 704 P.2d 702, 705-07 (Wyo. 1985). Under such circumstances, a termination in contravention of the progressive discipline will be considered a breach of contract. *Id.* On appeal, Ngotel submits that DFSP was bound by the terms of the Policy Documents.

As explained above, to establish an implied-in-fact contract, Ngotel must establish: (1) conduct of DFSP sufficient to constitute an offer of employment abrogating the at-will rule; and (2) that she accepted such offer by continuing her employment after acquiring knowledge of the conduct. The Trial Division found that the Policy Documents failed to raise a genuine issue of material fact as to the existence of an implied-in-fact contract because Ngotel did not "state how she came by the[] documents, who gave them to her, when they were given to her, when they were applicable . . . who told her to rely upon them, or whether and when she relied on them." We disagree.

Ngotel submitted an affidavit to the trial court in which she attested the Policy Documents are "the relevant pages of the cash handling policy, including those for retail operations over/short policy . . . for the position that I held while employed by defendant." Although it is true that Ngotel did not attest that she received the documents from DFSP, two write-ups of Ngotel from October of 2000, both for twenty-dollar shortages, include language that "[y]ou have read and sign [sic] the Cash Handling Policy and you are aware that any overage or shortage will be written up." Thus, the uncontradicted evidence of record is: (1) the Policy Documents are the relevant pages of DFSP's cash handling policy from the time Ngotel was employed; and (2) Ngotel was given DFSP's Cash Handling Policy by DFSP. Drawing every inference

[3] Although the later versions of the handbook include provisions allowing DFSP to terminate employees at-will, such changes provide no relief to Appellee because there is no evidence that Appellant was ever shown the later versions. *See supra* Section III(A).

in favor of Ngotel, we conclude that the evidence was sufficient to conclude that she was given the Policy Documents by DFSP in 2000. We further conclude that DFSP's provision of the Policy Documents constituted an offer to abrogate the at-will rule with respect to cash handling errors and that Ngotel's continued employment constituted acceptance of this offer. Having found offer and acceptance, we conclude that Ngotel established an implied-in-fact contract with regard to the terms of the Policy Documents.

We now turn to the question of whether Ngotel established a breach of the implied-in-fact contract. In this regard, we note that the Cash Handling Policy for Sales Associates provides, in relevant part, that "[w]hen change fund is received, it must be counted immediately to verify accuracy of amount received. If any discrepancies are found, a supervisor must immediately be notified to address the situation." The Cash Handling Policy further provides that "[a]ny violation of the cash handling policies listed above will lead to disciplinary action up to and including termination of employment." This term controls over the progressive discipline set forth in the Over/Short Policy. *See Estate of Rechucher v. Seid*, 14 ROP 85, 90 (2007) ("A general principle of contract interpretation is that 'specific terms and exact terms are given greater weight than general language.'") (quoting Restatement (Second) of Contracts § 203(c) (1981)).

Here, Ngotel was terminated after she failed to count the change fund provided to her at the start of her shift.[4] This was an explicit grounds for termination under the Policy Documents. Thus, her termination was not a breach of the implied-in-fact contract based upon the Policy Documents' terms.

2. Did DFSP breach an implied promise to terminate Ngotel only for good cause?

Ngotel next contends that DFSP was limited to terminating her only for good cause by virtue of: (1) DFSP's reversal of the termination of another employee; (2) her general experience with DFSP; and (3) the fact that she was not terminated for four previous cash handling errors. We conclude that, even if such a contract existed, it was not breached.

> **[10]** Good cause' in the context of implied employment contracts is defined 'as fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond. *Cotran v. Rollins Hudig Hall Intern., Inc.,* 17 Cal.4th 93, 107-108, 69 Cal.Rptr.2d 900, 948 P.2d 412 (1998).

[4] Although Ngotel contends that she followed "established cash handling procedures," she does not deny that she failed to count the change fund, as alleged. Furthermore, when considering the propriety of a termination, "the focus must be on whether the employer reasonably determined it had cause to terminate." *Soalablai v. Palau Nat'l Communications Corp.*, 13 ROP 199, 201 (Tr. Div. 2005).

Pomeroy v. Wal-Mart Stores, Inc., 834 F.Supp.2d 964, 977 (E.D.Cal. 2011) (emphasis in original).

As explained above, Ngotel's employment was terminated for failing to count her change fund. It is indisputable that a failure to count and report errors in a change fund is related to DFSP's business needs and goals. Furthermore, the conclusion regarding Ngotel's error was reached in controlled circumstances, by employing a standardized test issued to all employees and after giving Ngotel an opportunity to respond. The internal memorandums also reflect that, when reaching the decision to terminate, DFSP considered Ngotel's "other work performance."[5] Accordingly, we conclude that Ngotel was fired with good cause and that, therefore, she may not sustain a breach of contract action based upon an implied contract to terminate only for cause. *Id.*

[11] Similarly, in the wrongful discharge section of her complaint, Ngotel invoked "a breach of good faith and fair dealing on the part of the defendant." Within in the context of an employment contract, a breach of the covenant of good faith and fair dealing is "*solely contractual*," and we treat it as such. *See Guz*, 100 Cal. Rptr. 2d at 377 (emphasis in original).

[12] Where a termination is based on alleged wrongful conduct on the part of an employee, "absent evidence of bad faith, where it is undisputed the employer has conducted an investigation and determined the issue against the employee, there is no breach of the implied covenant of good faith and fair dealing, even if the employee could subsequently prove that the factual finding of misconduct was a mistake." *Rodriguez v. International Business Machines*, 960 F. Supp. 227, 232 (N.D. Cal. 1997) (emphasis omitted). Ngotel has pointed to absolutely no evidence of bad faith. Thus, because we conclude that Ngotel was terminated in good faith, any claim based on the implied covenant of good faith and fair dealing must also fail.

In summary, we conclude that DFSP did not breach a contract with Ngotel when it terminated her for failing to count her change fund. Accordingly, we affirm the trial court's dismissal of Ngotel's breach of contract claim.

II. Wrongful Discharge

On appeal, Ngotel does not challenge the trial court's grant of summary judgment against her wrongful discharge claim or state the legal grounds on which such a claim rests. Her response to DFSP's motion for summary judgment also fails to address any grounds for wrongful discharge (apart from the breach of contract issues raised above). Thus, the wrongful discharge claim may be deemed waived. *Dalton v. Borja*, 12 ROP 65, 75 (2005) ("merely mentioning a claim in a complaint but failing to advance any

[5] DFSP's records reflect that Ngotel had been written up fifteen times for various infractions of company policy. Of these write-ups, seven were for "major" or "critical" over/short errors. Even though Ngotel contends that she can only recall four errors, there is no genuine issue of material fact as to whether DFSP reasonably believed that she had committed the infractions. *See Ace Rent-A-Car, Inc., v. Empire Fire & Marine Ins.*, 580 F.Supp. 2d 678, 690 n.5 (N.D. Ill. 2008) ("His inability to recall is not a denial, and is not sufficient to raise a genuine issue of material fact . . . . ").

argument on that claim, does not preserve that issue.”).

Nevertheless, we note that, although wrongful discharge claims sound primarily in contract, courts have held that a tort claim for wrongful discharge may be asserted “when an employer terminates an employee for reasons that contravene a clearly mandated public policy.” *Danny v. Laidlaw Transit Services, Inc.*, 193 P.3d 128, 131 (Wash. 2008). Ngotel does not allege that her termination violated public policy. Accordingly, we conclude that her wrongful discharge claim, to the extent it existed as an independent tort, was dismissed properly. *Id.*

CONCLUSION

For the foregoing reasons, the order of the trial court is **AFFIRMED.**