98867-6
NO. 79321-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK A. FRISBY,

Appellant-Cross Respondent,

v.

SEATTLE UNIVERSITY, a Washington non-profit Corporation, and J.J., a single individual,

Respondents-Cross Appellant

Unpublished Opinion Filed June 1, 2020

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. Frisby is a lifetime Seattle resident, highly regarded tennis professional in the Pacific Northwest, and at the time of the action giving rise to his case was employed by Seattle University as its Head Men's and Women's Tennis Coach when he was fired by the University.

B. COURT OF APPEALS DECISION

Petitioner seeks review of a decision by Division I of the Court of Appeals: *Frisby v. Seattle University,* No. 79321-7-I; unpublished decision filed June 1, 2020, motion to publish denied on July 7, 2020. A copy of the decision is attached.

C. ISSUES PRESENTED FOR REVIEW

1. Whether failure to participate in mediation prior to an assigned King County Superior Court trial date should result in dismissal of plaintiff's case?

2. Is balancing the seriousness of a violation of a case schedule obligation to attend mediation required before the trial court is free to dismiss plaintiff's case?

3. Is an employer's promise that an employment discharge process will allow the employee a 'full opportunity' to contest his discharge satisfied no matter what the substance of the 'process' utilized?

D. STATEMENT OF THE CASE

1. Background

Mark Frisby is a long time Pacific Northwest tennis professional and coach. At the time of the events giving rise to his case he was the head coach of the men's and women's Seattle University tennis teams. Mr. Frisby also operated summer tennis camps in Seattle and Sun Valley, ID, and sometimes employed varsity players as camp coaches. CP 269-273.

One such player, JJ, was invited to coach children's tennis camp in Sun Valley in the summer of 2014. She was about to enter her sophomore year at SU. Though a team member, due to injury she had not played competitively as a freshman. She had a partial scholarship associated with being on the tennis team. CP 274-275.

In Fall, 2014, JJ faltered badly during challenge matches. Her ranking was last, or next to last, on the women's team after competitive 'ladder' matches were conducted in Fall. By Christmas, 2014, Coach Frisby cautioned JJ that she was likely to lose her position on the team due to her poor performance. This would result in loss of scholarship, as well. CP 276-278.

In January, 2015, Coach Frisby confirmed JJ would be removed from the team. CP 278. Within a few days of learning this, JJ gave SU

administrators a 7 page letter in which she for the first time alleged—in the last few paragraphs—that Coach Frisby had touched her inappropriately in Sun Valley in summer the prior year.

Mr. Frisby worked under a written contract which could only be terminated without pay 'for cause.' An SU Employee handbook promised him a 'full opportunity' to contest any potential 'for cause' discharge decision. CP 1105. After the complaint from JJ, Seattle University assigned an investigator. The investigator had worked in other similar jobs. But her prior work (and her work at SU) had never included having her investigation 'findings' sustained after a fact-finding hearing presided over by someone besides herself. Her prior experience had never included her conducting or participating in any form of hearings at all. CP 151, 156-160.

After he was terminated--following a process the fairness of which he challenged--Mr. Frisby questioned the investigation, as well as the skill and experience of the investigator, and argued that he never received the 'full opportunity' process promised him. Part of his complaint was that he never received any form of notice or discovery materials. CP 601, 609, 610. Even the letter prepared by JJ and given to SU was withheld from him. CP 601, 609. The investigator withheld it after 'asking around the

office' whether she should give it to Mr. Frisby. The 'office' decided no. CP 641-642.

The investigator was also prosecutor and judge. CP 601, 611, 612. No hearing was conducted. No witnesses were called. Mr. Frisby was prohibited from having any contact with any team members, and any witnesses. CP 151, 164. The investigator concluded the alleged violation occurred and also concluded that Mr. Frisby had not 'retaliated' against JJ. CP 227. Mr. Frisby was fired.

Plaintiff sued SU, alleging that SU failed to provide the promised 'full opportunity,' and that the decision he had acted improperly was not supported by the facts. CP 1-8.

At a summary judgment hearing conducted shortly before trial, the trial court first orally indicated it would not grant summary judgment. A day later, it partially granted summary judgment. CP 748-750. It denied summary judgment on Frisby's 'full opportunity' claim---finding that questions of fact existed whether Frisby had received the opportunity promised. Notwithstanding that decision, the court also ruled that Frisby was foreclosed from contesting his termination---the result which had flowed from the process the trial court found flawed. CP 748-750.

Thus, the trial court concluded that Mr. Frisby did raise questions of fact regarding SU's denial of its promise to him. But after assailing the

process, the trial court blessed the result, and concluded Mr. Frisby could not contest it. This decision was reached just prior to trial. Problematic from plaintiff's perspective was that the form of split decision made by the court left uncertainty about what a 'trial' would be about: the text of the order prohibited plaintiff from bringing up at trial any of the complaining witness's history or conduct, or any of the substance of Frisby's rebuttal of the claims against him:

> 3. The Court finding in favor of Defendant Seattle University on the elements of 1) arbitrary and capricious, 2) adequate investigation, 3) substantial evidence, and 4) reasonably believed to be true as pertains to the sexual harassment and misconduct claim, the issues of character, credibility, credentials, motive, as well as the underlying allegations themselves may not be raised at trial as to the sexual harassment and misconduct claim.

CP 748-750. This order meant that while plaintiff could complain that the process used was not the one promised him, the jury would hear nothing about the events, the investigation, what plaintiff claimed was flawed about the investigation, Mr. Frisby's denials that any misconduct occurred, glowing character evidence about Mr. Frisby, nor any evidence of Mr. Frisby's experience during the process. The order was entered on October 24, 2018.

On November 1, 2018, plaintiff moved that the trial court either certify this unusual decision under CR 54(b), or grant reconsideration and

find that an unfair process cannot produce an incontestable result. CP 874-884.

Earlier--the day before the summary judgment hearing--the parties reported to the court that no mediation had occurred, though one was required under the case scheduling order. CP 975. The court reminded the parties of the obligation to participate in mediation on October 29, 2018. CP 969. Plaintiff's explanatory email to the court regarding why mediation had not occurred was intentionally excluded from the court record by the court. CP 978. Later plaintiff submitted the email with a declaration concerning its content. CP 960-978.

2. Dismissal of Plaintiff's Case for Failure to Attend Mediation

On November 9, 2018, the court denied plaintiff's CR 54(b) certification motion and plaintiff's motion for reconsideration. CP 942-943. Without a hearing, briefing, or any formality, and without making any findings regarding willfulness, prejudice, or consideration of lesser sanctions, because no mediation had occurred as required under the court's scheduling order, the court dismissed plaintiff's remaining claim on November 13, 2018. CP 944. The dismissal was without prejudice. However, the statute of limitations on the 'fair conduct' claim had expired so the dismissal terminated plaintiff's case. Appendix A.

3. Court of Appeals Sustains Dismissal Based on Warning from Court

The Court of Appeals affirmed the trial court. It held that Frisby's complaints about the full opportunity promise were unavailing, and that SU's process outcome could not be impeached in any way by plaintiff.

Regarding dismissal for failure to attend mediation, it held that since the court had reminded the parties of the obligation to participate in mediation dismissal should be affirmed without substantive discussion. The court of appeals focused on the trial court's 'warning' that mediation had to occur before trial. It thus found, without factual findings from the trial court, that plaintiff's failure was willful. It did not discuss whether defendant had been prejudiced by the lack of a mediation, nor did it discuss whether the trial court should have considered a lesser sanction.

E. ARGUMENT

1. The Court of Appeals Decision is in conflict with multiple decisions of the Supreme Court. RAP 13.4(b)(1)

This Court has never explicitly addressed whether a failure to attend mediation can support dismissing plaintiff's case. But it has multiple times addressed the requirements imposed on a trial court regarding discovery-based violations of a case scheduling order before it may use its ultimate power of sanction: termination of a party's case.

This Court has also amply addressed how a trial court is to analyze a party's failure to abide by a court scheduling order. It explicitly addressed a party's non-compliance with a King County Superior Court scheduling order in *Rivers v. Washington State Conference of Mason Contractors,* 145 Wash.2d 674, 41 P.3d 1175 (2002).

Rivers requires a three part analysis by the trial court before exercising its discretion to dismiss a case: 1) was the violation willful? 2) did the opposing party suffer any prejudice? 3) was consideration given to lesser sanctions before the harshest sanction was imposed? Not clear from *Rivers* is whether the party sanctioned is to be given due process notice before the sanction is imposed, though in *Rivers* the trial court gave plaintiff an opportunity to oppose dismissal before dismissing. Here, the court summarily dismissed plaintiff's case without hearing, briefing, or the required three part analysis. It made no findings.

Most of the pertinent cases decided by this court concern discovery violations, failures to provide discovery, failures to disclose witnesses, or frank withholding of discovery. Underlying the discussion in many is the cold truth that such misconduct thwarts the purpose of the discovery process itself.

No such effect was present here. Plaintiff did nothing which prejudiced the ability of SU to discover and defend. SU never claimed or

proved any prejudice. The trial court simply dismissed the plaintiff's remaining claim due to the lack of mediation before trial. The trial court never considered any other sanction, or at least never stated that it did. Plaintiff explained to the trial court why the failure to attend mediation occurred. The only response of the trial court was to refuse to place that explanation in the record.[1]

The Court of Appeals affirmed dismissal holding that 'warning' the parties about the lack of a conducted mediation was the trial court's only obligation. But that decision directly ignores this Court's ruling in *Rivers:*

> The law is well settled in this state concerning dismissal of a complaint as a sanction for discovery abuse. "Under CR 41(b), the trial court has the authority to dismiss an action for noncompliance with a court order or court rules (citations omitted)." "[I]t is the general policy of Washington courts not to resort to dismissal lightly (citations omitted)." When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a discovery order, it must be apparent from the record that)1 the party's refusal to obey the discovery order was willful or deliberate, 2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and 3) the trial court explicitly considered whether a lesser sanction would probably have sufficed (citations omitted). A party's disregard of a court order without reasonable excuse or justification is deemed willful. (citations omitted).

Rivers, at 686-687.

[1] The email explaining what plaintiff was doing, and why, regarding mediation is the email court staff stated would not be placed in the court file. CP 978. Plaintiff submitted it in a later declaration. CP 960-978.

When deciding *Rivers,* this Court cited to *Burnet v. Spokane Ambulance,* 131 Wash.2d 484, 933 P.2d 1036 (1997), and traced the holding in *Burnet* to the seminal decision in *Physicians Ins. Exch. & Association v. Fisons Corp.,* 122 Wash.2d 299, 858 P.2 1054 (1993). It noted: "Some of those guiding principles (from *Fisons)* are as follows: the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery; the purpose of sanctions generally are to deter, to punish, to compensate, to educate, and to ensure that the wrongdoer does not profit from the wrong. *Fisons,* 122 Wash.2d at 355-56, *Burnet,* 131 Wash.2d at 495-96.

A great concern is policing misconduct intended to obtain strategic advantage, with resulting prejudice to the opposing party. Nothing of the kind happened here. SU suffered no prejudice. Plaintiff obtained no 'discovery advantage' of any kind. And certainly plaintiff did not 'profit from' the lack of a mediation. Then, since, and now, this Court has reminded that "("[T]he law favors resolution of cases on their merits."), *Lane v. Brown & Haley*, 81 Wash.App. 102, 106, 912 P.2d 1040, *review denied* 129 Wash.2d 1028, 922 P.2d 98 (1996). *Burnet*, at 498.

This Court's continuation of the line of cases *Fisons* helped spawn informed the discussion of discovery abuse, intentional and deliberate

failures to produce discovery, and the appropriateness of defaulting a recalcitrant defendant in *Magana v. Hyundai American Motors,* 167 Wash.2d 570, 220 P.3d 191 (2009). There defendant Hyundai engaged in discovery misconduct of the highest order by providing limited and misleading information, while intentionally withholding obviously relevant discovery.

Magana applied the three part test for application of 'most extreme' sanctions (just as 'most extreme' for the plaintiff is dismissal, for a defendant entry of a default judgment is 'most extreme'), finding that willfulness was established and prejudice was as well since by the time Hyundai actually produced long withheld discovery its utility had been lost—other tardily identified claimants could not be found, did not respond, or the like: "Hyundai knew about these claims but willfully failed to disclose them thereby prejudicing Magana's ability to prepare for trial." *Magana, at 589.* Even then, the balancing test---that no other sanction short of judgment against Hyundai could cure the harm Hyundai's conduct created—had to be satisfied: "Before resorting to the sanction of dismissal, the trial court must clearly indicate on the record that it has considered less harsh sanctions under CR 37. Its failure to do so constitutes an abuse of discretion." *Rivers,* 145 Wash.2d at 696, 41 P.3d 1175. *Magana* at 590.

The decision also made the test for evaluating trial court action explicit:

> "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Mayer,* 156 Wash.2d at 684, 132 P.3d 115 *(internal quotation marks omitted)(quoting State v. Rohrich,* 149 Wash.2d 647, 654, 71 P.3d 638 (2002)).

Magana at 583.

As many times as this Court has addressed the various decisions of trial courts and courts of appeal regarding the need for the three part analysis before imposing draconian sanctions, in various iterations the resistance to understanding continued after *Magana.* In *Blair v. Ta-Seattle East No. 176,* 171 Wash.2d 342, 254 P.3d 797 (2011), after witnessing flawed witness disclosure the trial court struck a key plaintiff's witness and plaintiff, lacking that witness, then suffered dismissal on summary judgment: "[A]lthough a trial court generally has broad discretion to fashion remedies for discovery violations, when imposing a severe sanction such as witness exclusion, the record must show three things--- the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it." (citations omitted). *Blair* at 348.

> "We have quite clearly held that explicit findings regarding the *Burnet* factors must be made on the record when a court imposes the most severe discovery sanctions, like excluding a witness."

Teter v. Deck, 174 Wash.2d 207, 274 P.3d 336, 345-46 (2012). *Accord, Jones v. City of Seattle,* 179 Wash.2d 322, 340, 314 P.3d 380 (2013): "As this court noted in *Blair,* it has been clear since at least 2006 that trial courts must consider the *Burnet* factors before excluding witnesses. *Blair,* 171 Wash.2d at 349, 254 P.3d 797 *(citing Mayer,* 156 Wash.2d at 688, 132 P.3d 115). When Division One held otherwise, it misread *Mayer."* Of course *Mayer* held that the *Burnet* analysis need not be conducted when monetary sanctions, and not sanctions which impact a party's ability to present its case, are imposed.

When this Court discusses the need for *Burnet* analysis regarding witness exclusion at trial, witness exclusion at summary judgment, failure to abide local rule discovery rules, and even new witness disclosure during trial, a steady focus on adjudication on the merits persists. Here a plaintiff's claim survived summary judgment, only to suffer dismissal due to the lack of mediation. Even the absence of mediation was explained to the trial court which provided no hearing, engaged in no colloquy, and invited no briefing before imposing the harshest sanction a plaintiff could suffer.

None of this court's cases arose in the setting where a mediation required under local rule did not occur prior to the time trial was to begin. In the absence of an explicit ruling from this Court, neither the trial court nor the appellate court considered dismissal too harsh a remedy for the simple failure to mediate. It was not defiance which caused the absence of mediation, but only the futility of conducting a mediation when a case late in its development was ricocheting between dismissal and not, and further review or not.

The trial court's use of its power is startling when it is applied to a minor procedural default--which prejudiced no one---and produced defeat for plaintiff without a test of the merits of plaintiff's case. In another setting, but in language apropos here, this Court hewed back to the larger mission of the courts:

[B]ut "our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action." *Burnet,* 131 Wash.2d at 498 *(citing CR1). Keck v. Collins,* 184 Wash.2d 358, 369, 357 P.3d 1080 (2015).

In sum, the trial court's use of its powers under the case scheduling order cannot be reconciled with this court's past discussion of the application of its rules. *Harbor Enterprises, Inc., v. Gunnar Gudjonsson,* 116 Wash.2d 283, 293, 803 P.2d 798 (1991).

2. **The absence of any law in Washington regarding the scope of a promise of a 'full opportunity to respond' to a disciplinary claim, and the court's holding that plaintiff may make no contest concerning the process, is an issue of substantial public interest. RAP 13.4(b)(4)**

Mr. Frisby was promised a 'full opportunity to respond' in the SU Handbook. As described below, what he received was well less than that:

Typical Requirements of a Due Process Proceeding	**SU Process**
Written notice of claims or charges	Nothing
Specification of date, time and place of events	Nothing
Procedure for investigative process	Non-existent
Written discovery	Nothing
Employee access to letter by complainant to NCAA	Concealed from employee
Witness statements	Nothing
Full disclosure of scope of investigation	Intentional concealment by school investigator of 'insubordination' investigation questioning and content
Access to witnesses	Prohibited
Attorney access to witnesses	Prohibited
Attorney access to investigator	Prohibited
Separation of investigator from adjudicator	Non-existent
Contested hearing with cross-examination	Non-existent

Frisby raised many concerns about what that process lacked. In the private employment setting there is no law concerning what such a 'full opportunity' entails. In the public employment setting, however, this court has addressed the 'just cause' process and described elements of same which bear no resemblance to what SU supplied: "Whether there is just cause for discipline entails much more than a valid reason; it involves such elements as procedural fairness, the presence of mitigating circumstances, and the appropriateness of the penalty." *Civil Service Comm'n of Kelso v. City of Kelso,* 137 Wash.2d 166, 173, 969 P.2d 474 (1999).

What SU provided, and the trial and appeals court blessed, was a secretive process which frustrated Mr. Frisby's efforts to obtain a 'full opportunity' to respond. Perhaps the best example of his experience was SU's intentional withholding of a detailed letter prepared by the claimant and given to SU and, apparently, the NCAA. Preparation of the letter preceded the complainant coming forward but, still, SU kept it secret.

There is a robust body of procedural due process law in the public employment setting, where the ability to retain employment is recognized as a property right. The cases discuss pre and post termination procedures. Before a public employee's employment is terminated he is entitled to "oral or written notice of the charges against him, an explanation of the

employer's evidence, and an opportunity to present his side of the story." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). But even there the Supreme Court recognized that Ohio State law also provided the employee with a full evidentiary post-termination review. *Id. at 548.*

When there is minimal or no post termination process (as here), courts have held that the pre-termination review must be even more robust: "the general rule is that the less the pre-deprivation process, the greater must be the post-deprivation process." *Cassim v. Bowen*, 824 F.2d 791, 798 (9th Cir. 1987); see also *Carter v. Western Reserve Psychiatric Habilitation Center*, 767 F.2d 270, 273 (6th Cir. 1985)("[T]he required extent of post-termination procedures is inextricably intertwined with the scope of pre-termination procedures."). Even when pre-termination proceedings are provided, a court "must also independently assess the adequacy of the post-termination proceedings." *Clements v. Airport Authority of Washaoe Cnty*, 69 F.3d 321, 332 (9th Cir. 1995); see also *Taylor v. City of Cheney*, 11-CV-0170-TOR, 2012 WL 5361424 (E.D. Wash. October 31, 2012). ("[U]nder Ninth Circuit case law the Court *must* independently evaluate the post-termination process for due process violations.")(unpublished opinion)(Appendix C).

The assessment of the balance between pre-and post-termination hearings in other circuits is instructive. For instance, the Sixth Circuit held that, if only an abbreviated pre-termination hearing is provided, "due process requires that a discharged employee's post-termination hearing be substantially more "meaningful." *Mitchell v. Fankhauser,* 375 F.3d 477, 480-81 (6th Cir. 2004). At a minimum, this "requires that the discharged employee be permitted to attend the hearing, to have the assistance of counsel, to call witnesses and produce evidence on his own behalf, and to know and have an opportunity to challenge the evidence against him." *Id.,* quoting *Carter*, 767 F.2d at 273. Similarly, the Seventh Circuit held that a pre-termination hearing "must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirements of notice and an opportunity to be heard: if a public employee does not receive a post-termination hearing. *Baird v. Bd. Of Educ. For Warren Cmty. Unit. Sch.Dist. No. 205*, 389 F.3d 685, 692 (7th Cir. 2004).

Pre-termination Mr. Frisby received nothing resembling the rights accorded those discussed in the cases above. He had no rights at all post termination. To promise a 'full opportunity' to respond, while constricting and controlling the process in such a fashion as to morph 'full' into 'no' opportunity was the practical and legal effect of the process SU used here.

That the court of appeals described the process in lofty terms does not change the heart of the matter: nothing resembling a due process proceeding ever occurred. Perhaps most to the point, even after the trial court found questions of fact regarding the process accorded Mr. Frisby, the appeals court found that Mr. Frisby's termination was incontestable.

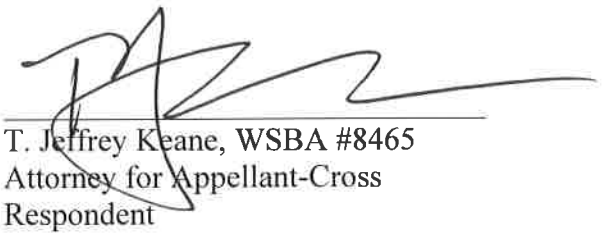
Though Frisby's outcome was insulated from attack, whether the law of this State should produce that result presents an issue of high importance.

F. CONCLUSION

In light of the foregoing, petitioner respectfully requests that this court grant his petition for review.

Submitted this 6th day of August, 2020.

KEANE LAW OFFICES



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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below a copy of the attached Petition for Review was served via the Court of Appeals e-portal to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 6th day of August, 2020.

Donna M. Pucel

APPENDIX A

FILED
6/1/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARK A. FRISBY, Appellant-Cross Respondent, v. SEATTLE UNIVERSITY, a Washington non-profit corporation, and J.J., a single individual, Respondent-Cross Appellant,	No. 79321-7-I DIVISION ONE UNPUBLISHED OPINION

LEACH, J. — Mark Frisby appeals an order of partial summary judgment and the order of dismissal that resulted in the dismissal of some of his claims against Seattle University with prejudice, and others without prejudice but barred by the statute of limitations. Seattle University appeals the denial of a motion for summary judgment. Frisby does not demonstrate any issue of material fact about his claim that Seattle University did not comply with Washington State law when it terminated him for cause. He also does not show the trial court abused its discretion when it dismissed his remaining claims without prejudice because he did not comply with the case scheduling order. And, this court generally does not review denials of summary judgment motions unless the request presents a pure question of law. So, we affirm.

FACTS

Seattle University (SU) hired Mark Frisby as head tennis coach in 2008. In

2014, Frisby signed an employment agreement extending his contract to 2018. J.J. joined the women's tennis team on a scholarship in 2013.

Frisby also operated a tennis camp at Sun Valley Resort. He hired J.J. to work as a counselor at the camp in the summer of 2014. J.J. injured herself in the fall of 2013. After J.J. did poorly during the 2014 fall season, Frisby began warning J.J. that she risked losing her spot on the team.

On January 14, 2015, J.J. told the SU Athletic Department that Frisby engaged in incidents of sexual harassment and retaliation against her. On January 16, 2015, SU put Frisby on administrative leave while the school investigated the alleged misconduct. The athletic director, Bill Hogan, told Frisby he was relieved of his duties pending the investigation, and during that time, he was not to communicate with or coach student athletes.

The school appointed Andrea Katahira, its Human Resource Compliance and Deputy Title IX Coordinator, to conduct the investigation. Before working at SU, Katahira worked as an investigator for the State Human Rights Commission for three years, as an investigator for the Seattle Office of Civil Rights for less than one year, and at the University of Washington as an investigation/ resolution specialist for over 10 years. Her work with the University of Washington included investigation of sexual harassment accusations.

Katahira investigated whether Frisby's alleged acts of sexual harassment and retaliation violated the University's policy on sexual harassment as described

in its Human Resources Policy Manual (HR Manual).[1] The manual stated,

> Sexual harassment…includes, but is not limited to, unwelcome sexual advances, requests for sexual favors, and other behavior of a sexual nature when…[s]uch conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creates an intimidating, hostile, or offensive working or educational environment.

The manual described examples of "[c]onduct and behaviors prohibited by the University's Sexual Harassment Policy."

> A pattern of conduct (not legitimately related to the subject matter of a course) that causes discomfort or embarrassment, including
>
> - Verbal or written comments of a sexual nature;
> - Sexually explicit statements, questions, jokes, or anecdotes;
> - Touching, patting, hugging, brushing against a person's body, or repeated or unwanted staring;
> - Remarks about sexual activity, experience, or orientation;
> - Remarks of a sexual nature about an individual's body, clothing, or physical appearance…

The manual stated that retaliation was prohibited.

> Individuals who report a complaint of alleged sexual harassment may not be reprimanded or discriminated against in any way for initiating an inquiry or complaint in good faith. Further, the laws pertaining to sexual harassment make it unlawful to retaliate or to take reprisal in any way against anyone who has articulated a concern about sexual harassment or has participated or cooperated in the investigation of a complaint.

Katahira interviewed Frisby, Mark Hooper, the assistant head coach of the tennis teams, J.J., and

[1] According to Katahira's report, J.J. "brought forth allegations regarding the Assistant Head Coach of the Women's and Men's Tennis Teams." But, "[b]ecause the allegations overlapped and involved many of the same facts and witnesses, one investigation was conducted regarding both complaints."

> 10 employees within the Athletics Department, 1 employee in Human Resources, 8 (of the 8 remaining) student athletes on the Women's Tennis Team, 1 student athlete on the Men's Tennis Team, 1 former student athlete of the Women's Tennis Team, and 1 individual who worked with the Complainant and Respondent during the relevant time period.

She also reviewed "documentation provided by the Complainant and Respondent, [and] other relevant documentation obtained during the course of the investigation."

At her initial interview with Frisby on February 2, 2015, Katahira "reviewed the Complainant's allegations with him, and provided him the opportunity to respond." Katahira asked Frisby "to share anything else, not directly asked about, that he believed was relevant to the investigation or thought important for the investigator to know as part of the investigation." She also said he could ask questions. They met again on March 5, and Katahira gave Frisby "the opportunity to respond to additional information obtained during the course of the investigation, as well as the opportunity to provide any additional information and clarification." Frisby took notes at these meetings.

According to Frisby, he and his counsel were told absolutely nothing about the specifics of what was alleged.

> Eventually I was told-during my interview-that the allegation involved misconduct in Sun Valley but I was given no date, no time, no place. I was prohibited from having my attorney present at my interview with the investigator. I was given no discovery materials, investigation materials, witness statements or anything else during the process. After inquiry my lawyer was told there would be no hearing, no witnesses at a hearing, no cross examination, no tribunal and no fact finder.

After completing her investigation, Katahira wrote a report summarizing her findings and conclusions. Katahira investigated four categories of behavior relating to J.J.'s sexual harassment allegations. She found, that more likely than not, Frisby engaged in three of the four.

First, she found J.J.'s assertion credible that Frisby made repeated comments about J.J. "loving boys" and/or "knowing a lot of boys" during the 2013 and 2014 academic year. She based this finding "on credible accounts of multiple witnesses… [the] overall credibility of [J.J.] and overall lack of credibility of Mr. Frisby."

She also found it was more likely than not that Frisby made comments about J.J.'s appearance on two separate occasions, and in one instance, made intimate physical contact of a sexual nature with her in the summer of 2014 when she was employed as a camp counselor. She based this finding on J.J.'s credibility and Frisby's lack of credibility.

Finally, Katahira found it was more likely than not J.J. told "Frisby she was 'uncomfortable with his way towards her,' and told him not to make further comments related to boys, her boyfriend, or her appearance, and not to 'touch [her] in that way' again." She based this on J.J.'s credibility, the lead camp counselor's statement that J.J. told Frisby to stop, and Frisby's lack of credibility.

Katahira found insufficient support for J.J.'s claim that Frisby "encouraged relationships between the camp counselors and older, male Sun Valley clients specifically, including Tony."

Katahira concluded that, more likely than not, Frisby engaged in

inappropriate actions toward J.J. that were "unwelcome…undesirable and offensive [and their] impact created an intimidating and hostile environment." As a result, Frisby violated SU's nondiscrimination and sexual harassment policies.

She found insufficient evidence to support the claim that Frisby engaged in retaliation. She concluded that his suggestion that J.J. would not remain on the team were consistent with concerns about her level of commitment, lack of demonstrated effort, "lack of putting in 'extra time'", and Frisby's concerns about her physical condition. She based this conclusion, in part, on the witness support for the concerns raised by Frisby. But, she concluded that given the context, it was reasonable for J.J. to perceive Frisby's warnings as retaliatory.

Katahira also investigated whether Frisby's actions while on administrative leave constituted insubordination. She found the university provided clear written and verbal notice of the prohibition on contacting student athletes during Frisby's administrative leave. She found it more likely than not that Frisby engaged in four types of insubordinate actions. First, he placed a team travel list on his office door the day after he was placed on leave. Second, he was involved with text communications sent by his wife to student athletes. Third, he was involved in the placement of a second travel list on the door and the addition of another player to the "away" roster, and he more likely than not "played a role" in this new student being added to the Boise trip. Finally, he communicated with a coach from another university about an upcoming match. She concluded these actions "all of which took place after his notification of the original complaint and placement on paid administrative leave" demonstrated that "Frisby failed to adhere to the University's

direction." He "willfully disregarded" Hogan's instructions and "compromised the integrity of the investigation." She concluded that Frisby engaged in insubordination.

After reviewing the file and meeting the athletic director, vice president of SU, and the human resources manager collectively, determined that Frisby violated SU's nondiscrimination and sexual harassment policies through his conduct toward J.J., and he had willfully disregarded the directive to refrain from coaching or communicating with students while on administrative leave. Hogan decided to terminate Frisby because each violation alone was a serious act of misconduct that justified termination under the employment agreement.

In his letter terminating Frisby's employment, Hogan summarized Katahira's conclusion that more likely than not Frisby's actions "created an intimidating and hostile educational environment for J[.]J[.] based on sex, and thus, limited her ability to participate in and receive benefits and opportunities in the University's tennis program." Based on this, he concluded Frisby's "conduct is a violation of the University's Nondiscrimination and Sexual Harassment policies and [Frisby's] Department of Athletics Head Coach Employment Contract." Hogan's letter also summarized the report's finding that Frisby's actions during the investigation willfully disregarded [the] directive to [him] upon notification; compromised the integrity of the investigation; potentially influenced witnesses; complicated and lengthened the investigation; and could reasonably be viewed as retaliatory toward J[.]J." Because of this, Hogan concluded that this conduct was "insubordinate" and "a violation of university policy and [Frisby's] Department of Athletics Head

Coach Employment Contract."

In his letter, Hogan stated that in his "judgment that [Frisby's] actions [were] a material breach of [his] Employment Contract and constitute[d] 'cause' for termination under Sections 7(a)(c)(d) and (e) of that agreement." According to Hogan's letter, Frisby's "actions in violation of the university's Sexual Harassment Policy" and his "conduct after being notified of the complaint [were] serious acts of misconduct. [They] were not reflective of the moral and ethical standards that are expected of a Head Coach at Seattle University."

Frisby appealed to the provost. The provost gave Frisby the opportunity to meet so he could provide the provost with any additional information he wanted considered. Frisby's attorney declined. The provost upheld the termination decision and it became effective on May 14, 2015.

On April 3, 2017, Frisby filed a complaint against SU for breach of contract based on the employment agreement and breach of promises of specific treatment based on the sexual harassment investigation procedure described in the HR Manual. SU moved for summary judgment. The trial court granted Frisby's motion to continue SU's motion for summary judgment.

On October 24, 2018, the trial court granted SU's motion for summary judgment as to Frisby's breach of contract and wrongful withholding of wages claim. It found no genuine issue of material fact or legal insufficiency of the evidence for the following for cause elements: arbitrary, capricious, or illegal reason, adequate investigation, substantial evidence, or a basis reasonably believed to be true. But, the court denied SU summary judgment on the issue of

the HR Manual. It concluded that, as a matter of law, SU was required to comply with the procedure described in the HR Manual for handling sexual harassment and sexual misconduct complaints when it pursued termination for cause. Because the court found a genuine issue of material fact about whether SU complied with the manual's procedure, and whether SU breached a promise for specific treatment in specific situations, it denied summary judgment on that issue.

On October 29, 2018, SU submitted a letter asking the trial court to waive the alternative dispute resolution (ADR) requirement in its case scheduling order and allow the case to proceed to trial because Frisby never provided SU with a written settlement demand required by the scheduling order and needed for ADR. That same day, the court sent an email to counsel reminding them that the case was noncompliant with the court's case scheduling order and was not being prepared for trial, and it was at risk of dismissal on the scheduled trial date in two weeks.

Frisby asked for CR 54(b) certification or, in the alternative, for reconsideration of its summary judgment decision. The trial court denied both. On November 13, 2018, the trial court dismissed the case without prejudice because the parties had not complied with the case scheduling order.

Both Frisby and SU appealed. Frisby asked this court to consider his appeal because the statute of limitations barred refiling his claims dismissed without prejudice. A commissioner of this court decided that he properly appealed under RAP 2.2(a)(1) and/ or RAP 2.2(a)(3).

STANDARD OF REVIEW

This court reviews summary judgment orders de novo.[2] Summary judgment is appropriate if, after viewing the evidence in the light most favorable to the nonmoving party, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[3]

This court reviews a trial court's order dismissing a case and imposing terms for noncompliance with court orders for abuse of discretion.[4] A court abuses its discretion when it makes a manifestly unreasonable decision or bases it on untenable grounds or reasons.[5]

ANALYSIS

Frisby claims the trial court should not have dismissed his claim that SU lacked adequate cause to fire him. Frisby also contends the trial court should not have dismissed his remaining claims without prejudice because the parties failed to comply with a scheduling order. SU contends the trial court should have dismissed with prejudice Frisby's claim that SU did not follow its HR Policy Manual.

Discharge for Cause

Frisby contends the record shows a genuine issue of material fact about whether SU improperly dismissed him for cause.

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[2] Life Designs Ranch, Inc. v. Sommer, 191 Wn. App. 320, 327, 364 P.3d 129 (2015).

[3] Life Designs Ranch Inc., 191 Wn. App. at 327.

[4] Apostolis v. City of Seattle, 101 Wn. App. 300, 303, 3 P.3d 198 (2000).

[5] State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Frisby's employment agreement governed his termination. "The usual rules of contract interpretation govern interpretation of an employee contract."[6] Frisby's agreement required the University have cause to fire Frisby. "Cause" under section 7 of the employment agreement included the following.

> (a) A material breach, as determined by the University, of this Agreement by Employee;
>
> (c) Any serious act of misconduct by Employee, including but not limited to, a felony or other unlawful conduct, fraud, dishonesty, theft or misappropriation of University property, moral turpitude, insubordination, or any act injuring, abusing, or endangering others;
>
> (d) Any act that, in the sole good faith judgment of the University, brings Employee or the University into public disrepute, contempt, embarrassment, scandal, or ridicule, or that negatively impacts the reputation or high moral or ethical standards of the University;
>
> (e) Violation of any law, policy, rule, regulation, constitutional provision, bylaw or interpretation thereof of the University . . . which violation may, in the sole good faith judgment of the University, reflect adversely upon the University or its athletic program…

According to the agreement, "'Cause' sufficient to satisfy the provisions of this section shall be determined by the Director or University President or his designee."

The contract gave SU the authority to determine cause. The evidence before SU at the time it fired Frisby included Katahira's report and the documentation and interviews she used in her analysis.

Katahira concluded that, more likely than not, Frisby engaged in inappropriate actions toward J.J. that were "unwelcome…undesirable and offensive [and their] impact created an intimidating and hostile educational

[6] Nye v. University of Washington, 163 Wn. App. 875, 882, 260 P.3d 1000, (2011).

environment." She concluded that Frisby violated SU's nondiscrimination and sexual harassment policies.

Katahira also found Frisby's actions that "took place after his notification of the original complaint and placement on paid administrative leave" demonstrated that "Frisby failed to adhere to the University's direction," "willfully disregarded" Hogan's instructions and "compromised the integrity of the investigation." She concluded that Frisby engaged in insubordination.

At a minimum, Katahira's findings supported SU's determination that Frisby committed insubordination under section 7(c) of the contract. Because the University determines what constitutes a material breach of the employment agreement, and the Director and the Provost concluded that Frisby's actions constituted a material breach, SU's decision to terminate Frisby for cause met the requirements of section 7(a) of the employment contract.[7]

Frisby asserts that SU's decision was unlawful, arbitrary and capricious, unsupported by substantial evidence and not based on SU's reasonable belief that Frisby's actions created cause for his dismissal.

Washington State courts review an employer's termination of an employee for cause to ensure that the employer acted based upon a "fair and honest cause

[7] SU terminated Frisby for cause based on its conclusion that his actions triggered Sections 7 (a)(c)(d) and (e) of the employment agreement.

or reason, regulated by good faith."[8] Under Baldwin,[9] "a discharge for 'just cause' is one which is not for any arbitrary, capricious, or illegal reason and which is based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true." This analysis applies to contracts that include specific grounds for dismissal.[10] "[T]he issue is whether at the time plaintiff was dismissed defendant reasonably, in good faith, and based on substantial evidence believed plaintiff had done so."[11]

SU relied upon Katahira's report to determine that cause existed to fire Frisby. Katahira's determination of insubordination relied upon witness testimony and documents identifying multiple actions by Frisby where he "contacted" and "coached" students via his wife in violation of SU's directive against this behavior during administrative leave. This report provided substantial evidence of "just cause" that SU reasonably relied upon. SU did not fire Frisby based upon an arbitrary, capricious, or illegal reason.[12] SU complied with Washington State law and the employment agreement when it terminated Frisby for cause.

Frisby asserts the contract did not give SU sole discretion to terminate his employment. But, the contract provided "'Cause' sufficient to satisfy the provisions

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[8] Baldwin v. Sisters of Providence in Washington, Inc., 112 Wn.2d 127, 139, 769 P.2d 298 (1989). SU contends this court should not follow Baldwin, because this case involves a private employment agreement between Frisby and the school and not an implied contract under an employee handbook. But, it cites to no cases suggesting the Baldwin standard does not apply in cases with express written agreements defining cause for termination.

[9] 112 Wn.2d at 139.

[10] Gaglidari v. Denny's Restaurants, Inc., 117 Wn.2d 426, 438, 815 P.2d 1362 (1991).

[11] Gaglidari, 117 Wn.2d at 438.

[12] Because insubordination alone is sufficient to support SU's decision, we do not analyze its alternative basis for firing Frisby.

of [Section 7] shall be determined by the Director or University President or his designee." So, Frisby's argument fails.

Frisby also contends that Washington State law does not allow an employer to retain sole discretion to determine whether cause exists for termination. He claims that SU was required to exercise its authority "consistent with Frisby's reasonable expectations." He asserts the athletic director's letter telling Frisby not to contact players was not a "rule" and he could not reasonably anticipate his actions during the administrative leave would result in termination of his employment. We disagree.

The athletic director's letter provided clear instructions to Frisby. His employment contract included insubordination as a cause for termination. Undisputed evidence shows he did not follow the athletic director's written instructions. So, he could reasonably anticipate that not complying with his employer's direction could result in his termination for cause.

Frisby also asserts that SU relied on an inadequate investigation that it could not in good faith rely upon to terminate him for cause. To discharge its duty of good faith, "the employer should conduct an objectively reasonable investigation to ascertain the facts"[13] before firing an employee for cause.

SU hired Katahira to conduct the investigation. Katahira had experience in conducting this type of investigation. She interviewed J.J., Frisby and many other witnesses. She provided Frisby the opportunity to respond to other witness testimony. She analyzed documentary evidence, such as texts between Frisby's

[13] Gaglidari, 117 Wn.2d at 459.

wife and the players, and evidence Frisby provided regarding the flipping-off motorists incident. Katahira described the evidence, drew findings, and explained her conclusions. She explicitly weighed the credibility of Frisby and J.J. and based her conclusion on reasons identified in the report. Frisby fails to show any genuine issue of fact about the sufficiency of the investigation.

Frisby provides the following reasons for why the investigation was insufficient.

- The investigator failed to obtain evidence concerning the extent of the financial impact that J[.]J[.]'s removal from the team would have on her.
- The investigator considered all evidence of J[.]J[.]'s powerful motive for fabrication to be irrelevant.
- The investigator considered all evidence of Frisby's fifty year history of good character, integrity and upright behavior to be irrelevant.
- The investigator failed to pursue information concerning J[.]J[.]'s history of deceit and manipulative behavior, and then gave no weight to the evidence that she did obtain.
- When interviewing other team members, the investigator wanted to hear nothing about J[.]J[.]'s background and the team members' experience with her in Sun Valley... Instead, it appeared…that "the investigator had her mind made up." … conclusion about [another] interview with the investigator was similar. "The investigator was clearly biased against Coach Frisby."
- In determining that Frisby had committed "insubordination," investigator unreasonably exaggerated the significance of the communications with team members, and failed to consider the circumstances that made those communications necessary.

These assertions rely upon conclusory statements by Frisby and the team members, and for most of them, Frisby fails to cite to the record. Conclusory facts

presented by the nonmoving party will not defeat summary judgment.[14] And, an appellant must include reference to the record for each factual statement he makes.[15] Frisby's assertions do not establish any issue of material fact.[16]

HR Manual

SU asserts that the trial court erred in denying SU's motion for summary judgment on Frisby's claim that the school owed him specific treatment in specific situations through the HR Manual's sexual harassment procedure. This court normally does not review a denial of a request for summary judgment when the trial court finds disputed issues of material fact.[17] Here, the trial court found there were disputed issues of fact. So, we decline to review this issue.

Dismissal for Failure to Comply with Court Order

Frisby also challenges the trial court's dismissal of his remaining claims for failure to follow a scheduling order.

KCLR 4(g)(1) states, "Failure to comply with the Case Schedule may be grounds for imposition of sanctions, including dismissal, or terms." KCLR 16(b) also required the parties in this case to "participate in a settlement conference or other alternative dispute resolution process conducted by a neutral third party."

[14] Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988), abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County, 189 Wn.2d 516, 528, 532, 404 P.3d 464 (2017).

[15] RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[16] Frisby claims SU violated GR 14.1. But, he does not explain why he expects this court to reprimand parties for these citations in their briefing.

[17] City of Redmond v. Hartford Accident & Indem. Ins. Co., 88 Wn. App. 1, 667, 943 P.2d 665 (1997).

That did not happen in this case. When a party disregards a court's order "without reasonable excuse or justification" the act "is deemed willful."[18]

The trial court warned the parties on October 24, 2018 that if they did not comply with the ADR requirement in the scheduling order, or obtain a waiver of the requirement from the court, the case was out of compliance with the case scheduling order. On October 29, 2018, the trial court sent the parties a "final reminder" that the case was noncompliant with its scheduling order, was not being prepared for trial, and under KCLR 4(g) and KCLR 16(b)(4) was at risk of dismissal on November 13, 2018, which was the date scheduled for trial. On November 13, the trial court dismissed the case without prejudice under KCLR 4(g).

The record makes clear the court reminded the parties twice they had not complied with the scheduling order's ADR requirement. And, Frisby does not dispute that he failed to provide SU with the written settlement demand required by the order and needed for mediation. He does not dispute the court warned the parties it might dismiss the case because they had not complied with the scheduling order.

Frisby suggests "the record evidences no weighing or consideration of any kind by the trial court before entry of the dismissal order." But, the record establishes the trial court warned the parties twice they had not complied with its order. Frisby also asserts that the trial court was required to make written findings. But, the record is sufficient for this court to review the trial court's decision. Frisby does not suggest otherwise.

[18] Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 698, 41 P.3d 1175 (2002).

Frisby also assigns error to the trial court's denial of his motion for reconsideration and his motion for certification under CR 54(b). But, he fails to provide an argument to support these challenges, so we do not address them.[19]

CONCLUSION

We affirm. Frisby does not establish any genuine issue of material fact about his claim that SU did not comply with Washington State law when it terminated him for cause. Frisby also fails to establish the trial court abused its discretion by dismissing his remaining claims without prejudice for failure to comply with its scheduling order after repeated reminders of the consequences of noncompliance.

WE CONCUR:

[19] Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 385 (2011).

APPENDIX B

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January 22, 2019

Mr. Richard D. Johnson
Court Administrator
600 University Street
Seattle, WA 98101

RE: *Frisby v. Seattle University*
Case No.: 79321-7-I

Dear Mr. Johnson:

In response to your letter dated January 10, 2019, Appellant/Cross Respondent, Mark Frisby provides the following:

The trial court has completely dismissed plaintiff's case. Mr. Frisby is entitled to pursue his appeal as a matter of right.

Plaintiff filed three claims within his complaint: wrongful discharge/breach of contract under a written contract, breach of promises of specific treatment in specific situations (e.g., a 'fair' hearing process--post adverse job action before termination—was promised and not supplied by defendant, and defamation. Exhibit 1, Complaint. The specific treatment claim, though it sounds like a contract claim, is not considered a frank contract claim. *Korslund v. Dyncorp Tri-Cities Services, Inc.,* 156 Wn.2d 168, 125 P.3d 119 (2005).

In a series of differing rulings the trial court initially and orally ruled that only the first, plaintiff's breach of written contract claim, would be dismissed on summary judgment. After further argument from defendant, the trial court then entered an order dismissing plaintiff's breach of contract claim and entered an order which miscast the law and compromised plaintiff's promise of specific treatment claim (Exhibit 2). This order, essentially, purported to leave intact plaintiff's second claim but in legal fact altered, compromised and effectively dismissed that claim. Neither plaintiff, nor any court attempting to allow trial on this altered and 'remaining' claim would have any idea what proof was permitted given the ruling. When, later, the court acted to dismiss the balance of plaintiff's claims 'without prejudice' it did so in response, apparently, to the parties' not participating in pretrial mediation. Dismissal Order, Exhibit 3.

This last and most curious order was the court's response to both parties not participating in pretrial mediation. Yet the effect of that order was to punish the plaintiff and reward the defendant for, essentially, the exact same conduct. Not only is this disparate treatment unlawful and inequitable, the court made no findings which would support analysis of the decision under *Jones v. Seattle* and other, similar, 'violation of court scheduling order' cases. The order is completely silent on that point and appears void for that reason alone.

Still, that order dismissed whatever remained of plaintiff's case. In the absence of any written support for its position, defendant claims that the dismissal order was solely directed at plaintiff since plaintiff 'did not supply a written settlement demand.' This borders on the fantastical, and ignores, as counsel for defendant well knows, that plaintiff did provide oral settlement demands to defendant during the relevant time frame. Defendant was as complicit in bringing about the lack of a mediation as plaintiff was. And, as the record reflects, defendant made no effort to obtain an order excusing it from mediation. Having been rewarded by the trial court while the plaintiff was punished, defendant distorts these past events and arrives at its present position: plaintiff should now be required to engage in pointless pursuit of an already dismissed case.

This Court's query re whether appeal is available as a matter of right is understandable given the path taken to this point. At best, the trial court's actions are confusing. But the oddity of the dismissal 'without prejudice' masks the fact the trial court ended plaintiff's case. Were plaintiff to now file a case with newly restated claims for 'breach of promise of specific treatment,' and for defamation (of course not being able to pursue breach of contract claims since they were already dismissed with prejudice), such newly stated claims would be summarily dismissed on summary judgment on the basis of the statute of limitations. The breach of specific promise claim has a three year statute of limitations. *DePhillips v. Zolt Construction Company, Inc.,* 136 Wn.2d 26, 959 P.2d 1104 (1998). The defamation claim also has a three year statute of limitations. Since plaintiff was terminated in May, 2015---and more than three years have passed since May, 2015---it is now too late to file such claims. Absent reversal on appeal, plaintiff's claims have all either been dismissed, or have expired from the passage of time.

That was one reason plaintiff declined, when invited by defendant to stipulate to a final judgment in favor of defendant, that plaintiff was constrained from doing so: he would be stipulating to dismissal of claims after the statute of limitations expired. The trial court 'fixed' that problem by summarily dismissing the case itself.

In light of the foregoing, plaintiff should be permitted to proceed with his appeal since the trial court has frustrated any ability to move forward absent success on appeal. Appellant/Cross Respondent respectfully requests that this Court permit the appeal to proceed.

Very truly yours,

T. Jeffrey Keane

enclosures

cc: Mr. Michael Porter, Esq.

EXHIBIT 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MARK A. FRISBY, a married individual, Plaintiff, vs. SEATTLE UNIVERSITY, a Washington non-profit corporation, and JACQUELINE JACQUES, a single individual, Defendants.	No. 17-2-08465-4 SEA **COMPLAINT FOR VIOLATION OF BREACH OF CONTRACT, BREACH OF PROMISES OF SPECIFIC TREATMENT IN SPECIFIC SITUATIONS, AND DEFAMATION**

Plaintiff, Mark A. Frisby, by and through his attorneys the Keane Law Offices and T. Jeffrey Keane, for his complaint against defendant, alleges as follows:

1.0 PARTIES

1.1 Plaintiff

Plaintiff Mark A. Frisby is a resident of King County who at all times material hereto has resided in King County, Washington.

1.2 Defendants

Defendant Seattle University is an educational institution which at all times material hereto has been located in King County, Washington. It entered into an employment contract ("the contract") with plaintiff in King County, Washington.

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1.3 Defendant

Defendant Jacqueline Jacques is a single individual who, upon information and belief, has at all times material hereto has resided in King County, Washington.

2.0 JURISDICTION AND VENUE

2.1 Defendant Seattle University's principal place of business is Seattle, Washington.

2.2 Defendant Seattle University entered into the contract with plaintiff in King County, Washington. The events giving rise to plaintiff's complaint occurred in King County, Washington. Venue is properly laid in this court.

2.3 Upon information and belief, defendant Jacqueline Jacques is a resident of King County, Washington.

3.0 BACKGROUND FACTS

3.1 Defendant Seattle University entered into a written contract for employment with plaintiff Mark Frisby ("Mr. Frisby"), providing for Mr. Frisby's employment for four years as the Seattle University Men's and Women's Tennis Head Coach beginning in January 2014. This contract allowed defendant Seattle University to terminate Mr. Frisby only "for cause."

3.2 Mr. Frisby has worked as a tennis coach in the Pacific Northwest for nearly fifty years. Prior to the subject dispute, Mr. Frisby had been serving as Seattle University Men's and Women's Tennis Head Coach for approximately six years. Mr. Frisby also runs summer tennis camps separate from his work at Seattle University. Until defendant Jacques's allegation, Mr. Frisby has never been accused of inappropriate sexual conduct or otherwise suggestive behavior.

3.3 Mr. Frisby recruited Jacqueline Jacques to attend Seattle University on a tennis scholarship. The school offered her an athletic scholarship worth approximately $20,000, and

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an academic scholarship worth approximately $12,000. Ms. Jacques enrolled as a freshman in fall 2013.

3.4 Defendant Jacques claims that the alleged sexual harassment occurred, at least in part, at a Summer 2014 tennis camp facilitated by Mr. Frisby in Sun Valley, Idaho. Mr. Frisby has run many of these camps in the past, and he commonly hired players form his Seattle University teams to staff the camps as counselor/coaches because it gave them extra tennis practice and training in an organized setting. Ms. Jacques was one of these camp coaches at the 2014 camp. Ms. Jacques and three other Seattle University Women's Tennis Team members shared a residence in Sun Valley during this camp. Ms. Jacques's camp roommates noticed Ms. Jacques engaging in some troubling behavior during the camp. Ms. Jacques would often skip her obligations to hang out with some of her many boyfriends she apparently had that summer. According to one of her roommates, Ms. Jacques once told her roommates that "I would sleep with any professor if it meant I could get an A." Further, she verbally bullied one of her younger roommates to tears at least once.

3.5 Beyond the summer 2014 camp, Ms. Jacques's work ethic, maturity, and dedication did not endear her to her teammates or coaches. During challenge matches in her first year at Seattle University (Fall 2013) she finished 9th out of 11—only the top six players play in matches. In October 2013 she injured her ankle in the weight room and did not return to the team until March 2014 thanks to a less than stellar rehabilitation effort. Her conditioning and skill level were subpar upon her return. She was cautioned by Coach Frisby about missing practice without an excuse in April 2014 (this had become a pattern). After additional disciplinary issues pertaining to the Summer 2014 camp and other events, Ms. Jacques was not selected to play in an October 2014 tournament at Stanford University. Mr. Frisby informed her that she needed to improve her work ethic and conditioning to be selected for future tournaments. Players not selected for tournaments were still expected to attend

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team training sessions during tournaments. Ms. Jacques nevertheless skipped two training sessions during the tournament. In December 2014, Mr. Frisby warned Ms. Jacques that her scholarship was in jeopardy based on her lack of dedication, failure to adhere to team conduct policies, and inadequate performance in matches.

3.6 Soon thereafter, on January 8, 2015, teammate Madison Maloney was left in tears after practice and reported that Ms. Jacques had been bullying her. After this incident and another 8-0 loss in a reserve team match, Mr. Frisby was planning to dismiss Ms. Jacques from the team.

3.7 A few days after the January bullying incident, Ms. Jacques reportedly told another teammate "if coach doesn't play me on the match, I'm going to make a lawsuit." Following that statement of intent, on January 16, 2015, just before Mr. Frisby was to revoke her scholarship, Ms. Jacques fabricated and reported the allegations against Mr. Frisby. In essence, once her dismissal from the tennis team (and thus forfeiture of her scholarship) was imminent, Ms. Jacques made the subject false accusations.

3.8 Defendant Seattle University selected a member of its own internal staff, Andrea Katahira, to investigate the subject accusations. This violated typical industry practice whereby employers commission an independent outside investigator to adjudicate disputes of this magnitude against employees of Mr. Frisby's stature (i.e. Division I head coach). Ms. Katahira was selected as "investigator" despite having, no legal or adjudicatory experience, minimal background in conducting such investigations, and whose facilitation of the investigation was rife with procedural inconsistencies and prejudices towards Mr. Frisby. While any serious investigation into alleged workplace misconduct would use an independent investigator, defendant Seattle University used an in-house human resources officer with virtually zero experience in fairly investigating and adjudicating disputes as serious as the accusations made against Mr. Frisby. Indeed, plaintiff's legal research shows that Ms.

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Katahira has never been involved in any legal proceeding whatsoever. As evidenced by the procedural deficiencies she engineered, the investigator was wholly incompetent to adequately evaluate the subject dispute. Mr. Frisby suffered substantial harm as a result of those deficiencies.

3.9 The investigation was completely deficient and violated the terms of Mr. Frisby's employment agreement and accompanying employee manual. Its procedural deficiencies were myriad. Mr. Frisby never received written documentation of the charges made against him. Further, the investigator refused to disclose the dates, times, and places of the alleged sexual harassment. Mr. Frisby never learned (and indeed still does not know) the identities of the witnesses that allegedly provided evidence against him. As a result, he had zero opportunity to cross-examine, refute, or otherwise address the evidence presented against him. The investigation refused to make any documents or written evidence available to Mr. Frisby. Instead, Mr. Frisby's knowledge of the accusations was based solely on a single, informal, verbal summary recited by a Seattle University representative during a meeting conducted without counsel present. Accordingly, Mr. Frisby and his counsel were never adequately apprised of the basic facts underlying the accusations leveled against him.

3.10 Many team members and other witnesses provided statements in support of Mr. Frisby and questioned Ms. Jacques' credibility and obvious motives in concocting the subject accusations. But the investigator, with neither a detailed explanation nor any corroborative evidence, concluded that Ms. Jacques was "more credible" than Mr. Frisby despite Ms. Jacques's obvious motive in fabricating such accusations and documented pattern of dishonesty. Mr. Frisby was terminated from his employment by Seattle University based on the findings of this "investigation."

3.11 Seattle University uses a Human Resources Manual ("Manual") to announce rules, regulations, policies and procedures of employment at Seattle University. Appendix C

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of the Manual provides in relevant part that "[t]he investigation affords the alleged harasser the full opportunity to respond to the allegations." Because Mr. Frisby was not told who provided statements to the investigator, nor did he know the substance of those statements, he never received a full opportunity to respond. As a direct and proximate result of this failure to adhere to either a baseline level fairness or the Manual itself, Mr. Frisby has suffered damages in the nature of lost wages and benefits, pain, suffering, and emotional distress.

3.12 As a direct and proximate result of Ms. Jacques's fabricated allegations and Seattle University's incompetent investigation, Mr. Frisby was left unemployed and his reputation in the tennis community was destroyed. Because of this damage to his reputation, Mr. Frisby's private tennis camps have lost considerable business. These camps were predicated on Mr. Frisby's expert instruction, and the clout of these fabricated allegations damaged the value of Mr. Frisby's brand, reputation, and personal business.

4.0 CAUSES OF ACTION

4.1 Breach of Contract and Wrongful Withholding of Wages

4.1.1 Plaintiff realleges as if restated paragraphs 1.1 to 3.12, above.

4.1.2 Mr. Frisby has performed all duties required under his contract(s) with defendant.

4.1.3 Under the contract and Washington law, Seattle University owed Mr. Frisby a fundamentally fair misconduct investigation prior to terminating Mr. Frisby with "just cause." "Whether there is just cause for discipline entails much more than a valid reason; it involves such elements as procedural fairness, the presence of mitigating circumstances, and the appropriateness of the penalty." *Civil Serv. Comm'n of City of Kelso v. City of Kelso*, 137 Wn.2d 166, 173, 969 P.2d 474, 478 (1999) (emphasis added). "'[J]ust cause' is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power....[D]ischarge for 'just cause' is one which is not for any arbitrary, capricious, or

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illegal reason and which is one based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true." *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 139, 769 P.2d 298 (1989).

4.1.4 Defendant has defaulted in its contractual obligations by both (1) terminating Mr. Frisby's employment without cause, and (2) failing to meet its obligations to conduct a "procedurally fair" investigation under the "for cause" provision of the contract.

4.1.5 Mr. Frisby has suffered pecuniary and emotional harm proximately caused defendant's breach of the contract.

4.2 Breach of Promises of Specific Treatment in Specific Situations

4.2.1 Plaintiff realleges as if restated paragraphs 1.1 to 4.1.5, above.

4.2.2 Plaintiff justifiably relied on the promises contained in the Seattle University Human Resources Manual, and those promises were breached. Specifically, the Manual stated that "[t]he investigation affords the alleged harasser the full opportunity to respond to the allegations." Mr. Frisby received no legitimate or "full" opportunity to respond. As such, defendant Seattle University has breached promises of specific treatment in specific situations. *See Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 104, 864 P.2d 937 (1994).

4.2.3 Mr. Frisby has suffered pecuniary and emotional harm proximately caused by defendant's breach of promises of specific treatment in specific situations.

4.3 Defamation

4.3.1 Plaintiff realleges as if restated paragraphs 1.1 to 4.2.3, above.

4.3.2 Defendant Ms. Jacques made false statements about Mr. Frisby's conduct, and those statements have caused Mr. Frisby substantial harm in the form of, but not limited to, lost wages, harm to reputation, and emotional distress.

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5.0 PRAYER FOR RELIEF

5.1 WHEREFORE, having stated their complaint against defendant, plaintiffs pray for the following relief against defendant:

5.2 For an award of back pay from the date of plaintiff Mr. Frisby's termination through the date of reinstatement;

5.3 For an award of severance "without cause" pay equal to the balance of wages to be paid to Mr. Frisby for the remainder of his employment contract;

5.4 For an award of damages proportional to the emotional harm, emotional distress, and lost business suffered by Mr. Frisby and proximately caused by Ms. Jacques's defamatory statements and Seattle University's wrongful conduct;

5.5 Any and all other damages provided for in the employment contract;

5.6 For any other relief the Court deems equitable and proper.

Dated this 31 day of March, 2017.

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EXHIBIT 2

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK A. FRISBY, Plaintiff, v. SEATTLE UNIVERSITY, a Washington non-profit corporation, Defendant.	Case No. 17-2-08465-4 SEA ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT SEATTLE UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on Defendant Seattle University's Motion for Summary Judgment, and the Court having considered:

I. EVIDENCE AND PLEADINGS REVIEWED

1. Defendant Seattle University's Motion for Summary Judgment and supporting documents;

2. Plaintiff Mark A. Frisby's Opposition to Defendant Seattle University's motion, and all supporting documents thereto;

3. Defendant Seattle University's reply in support of its motion;

4. Plaintiff Mark A. Frisby's supplemental documents in support of his Opposition to Seattle University's Motion for Summary Judgment;

5. Defendant Seattle University's supplemental reply in support of its motion;

6. The pleadings, records, and files herein; and

7. Oral argument of the parties.

II. ORDER

The Court, having heard the arguments of the parties, considered the Court file, including all papers filed in relation to the motion, and being fully advised, determines that Seattle University's Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART as follows:

1. Seattle University's Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART as to Mr. Frisby's breach of contract and wrongful withholding of wages claim. As to termination for insubordination, the Court finds that a genuine issue of material fact exists as to whether Seattle University terminated Mr. Frisby's employment "for cause." As to termination for sexual harassment and misconduct, the Court finds there is no genuine issue of material fact or the evidence is legally insufficient on the following elements of "for cause": arbitrary, capricious, or illegal reason, adequate investigation, substantial evidence, basis reasonably believed to be true. The Court concludes, however, as a matter of law, Seattle University was required to comply with the procedure set forth in the university's Human Resources Policy manual for handling sexual harassment and sexual misconduct complaints in pursuing termination "for cause". The Court finds that there is a genuine question of material fact whether such procedure was complied with by Seattle University. Hence, the Court finds that there is a genuine issue of material fact as to whether Mr. Frisby's termination was procedurally fair as required by law.

2. Seattle University's Motion for Summary Judgment is DENIED as to Mr. Frisby's claim for breach of promise for specific treatment in specific situations. The Court concludes, as a matter of law, Seattle University's Human Resources Policy Manual promised specific treatment in the specific situation of allegations of sexual harassment and or misconduct. There is a genuine issue of material fact as to whether Mr. Frisby relied on this promise of specific treatment in the specific situation of allegations of sexual harassment and or misconduct. There is

also a genuine issue of material fact as to whether Seattle University breached this promise of specific treatment in the specific situation of allegations of sexual harassment and misconduct.

3. The Court finding in favor of Defendant Seattle University on the elements of 1) arbitrary and capricious, 2) adequate investigation, 3) substantial evidence, and 4) reasonably believed to be true as pertains to the sexual harassment and misconduct claim, the issues of character, credibility, credentials, motive, as well as the underlying allegations themselves may not be raised at trial as to the sexual harassment and misconduct claim.

DATED this 24th day of October, 2018.

Judge Catherine Moore

EXHIBIT 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

Frisby,

Plaintiff,

vs.

Seattle University,

Defendant.

Cause No. 17-2-08465-4 SEA

ORDER DISMISSING ACTION WITHOUT PREJUDICE

(Clerk's Action Required)

Upon the date set for trial in this cause by order of the court dated February 7, 2018, the parties being noncompliant with the Case Scheduling Order, THIS COURT HEREBY DISMISSES THIS CAUSE WITHOUT PREJUDICE per KCLCR 4(g).

SO ORDERED on November 13, 2018.

Judge CATHERINE MOORE

ORIGINAL

APPENDIX C

2012 WL 5361424
Only the Westlaw citation is currently available.
United States District Court,
E.D. Washington.

Michael A. TAYLOR, Plaintiff,
v.
CITY OF CHENEY; Allan Gainer and Jane Doe Gainer, Defendants.

No. 11–CV–0170–TOR.
|
Oct. 31, 2012.

Attorneys and Law Firms

Michael David Kinkley, Scott M. Kinkley, Michael D. Kinkley PS, Spokane, WA, for Plaintiff.

Michael C. Bolasina, Summit Law Group, Seattle, WA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THOMAS O. RICE, District Judge.

***1** BEFORE THE COURT is Defendants' Motion for Summary Judgment (ECF No. 25). This matter was heard with oral argument on October 11, 2012. Michael D. Kinkley and Scott M. Kinkley appeared on behalf of the Plaintiff. Michael C. Bolasina appeared on behalf of Defendants. The Court has reviewed the relevant pleadings and supporting materials, and is fully informed.

BACKGROUND

Plaintiff brings a § 1983 claim against Defendants for violating his Fourteenth Amendment right to procedural due process. Plaintiff also alleges violations of Washington's wage withholding statute (RCW 49.52) and Washington's Open Meetings Act (RCW 42.30). Presently before the Court is Defendants' Motion for Summary Judgment on all three of Plaintiff's claims.

FACTS

Plaintiff was an unpaid reserve police officer in the mid–1990s in Southern California. Defendant's Statement of Material Facts, ECF No. 28 ("Def.SOF") at ¶ 4. He graduated from reserve police academy in California, but did not attend a basic law enforcement academy. *Id.* In 1998, Plaintiff became an unpaid reserve police officer for the City of Medical Lake in Washington, and attended the Criminal Justice Training Commission's ("CJTC") Reserve Academy.[1] *Id.* at ¶ 5. He was then granted a "special" limited commission to serve as a fulltime police officer in Medical Lake when the city was short-handed after September 11, 2001. *Id.* at ¶ 6. Plaintiff was given the authority to serve as a police officer within city limits, however, he was not certified as a peace officer by the CJTC. *Id.* In 2002, Plaintiff graduated from the CJTC's Equivalency Academy,[2] and was then certified as a fulltime peace officer by the CJTC. *Id.* at ¶ 7. At this time, he signed a form certifying that he met the training requirements to become a peace officer. Sale Decl., ECF No. 32–1, Ex. C. The form also included a disclaimer that his certification could be revoked or denied if the certification was previously issued due to an administrative error by the CJTC. *Id.* Taylor testified that he understands now that he would only have qualified for the Equivalency Academy if he had attended CJTC's Basic Law Enforcement Academy ("Basic Academy") or the equivalent academy in another state. Bolasina Decl., ECF No. 29–1 at 65:15–66:9.

In 2003, Plaintiff was hired as an unpaid reserve police officer by the City of Cheney's ("Cheney") former chief of police Greg Lopes. Def. SOF at ¶ 11. In 2005, he was hired as a lateral fulltime police officer by new chief of police Jeff Sale ("Chief Sale") based on a mutual understanding that he was certified as a fulltime peace officer in Washington.[3] *Id.* at ¶ 12, 15. Plaintiff testified that he applied for a lateral position, and that he represented he was already certified as a peace officer in his application for that position. Bolasina Decl., ECF No. 29–1 at 89:9–22. Based on documentation issued to Plaintiff by the CJTC that he was certified as a fulltime

peace officer, Chief Sale assumed that Plaintiff had graduated from the CJTC's Basic Academy or equivalent in another state. Def. SOF at ¶ 15. Cheney paid for Plaintiff to attend the Equivalency Academy and in October 2005[4] he began as a fulltime police officer in Cheney. *Id.* at ¶ 17.

***2** In the spring of 2008, Captain Bill Bender of the Cheney Police Department reviewed Taylor's personnel file after conducting an investigation into alleged misconduct by Plaintiff during two traffic stops. *Id.* at ¶ 18. Captain Bender noticed that Plaintiff's file lacked documentation that he attended the Basic Academy in Washington or the equivalent in another state. *Id.* He contacted the CJTC for clarification, and the CJTC conducted its own investigation. *Id.* On June 30, 2008, Plaintiff was placed on administrative leave while his certification status was investigated. Sale Decl., ECF No. 32–2, Ex. G. Chief Sale met with Plaintiff and explained the discrepancy in his certification. Def. SOF at ¶ 18. Plaintiff was unable to provide documentation supporting his certification. *Id.* On July 10, 2008, the CJTC issued a letter to Chief Sale informing him that Plaintiff was incorrectly certified as a fulltime peace officer and should not have been sent to the Equivalency Academy because he never graduated from the Basic Academy, and this issue could only be corrected if Plaintiff successfully completed Basic Academy. Sale Decl., ECF No. 32–2, Ex. I.

In order to send Plaintiff to the Basic Academy, Cheney would have been required to pay the cost of attendance in addition to Plaintiff's salary, benefits, and living expenses for five months; as well as keeping his job open and unfilled during this time. Def. SOF at ¶ 22. Chief Sale and Arlene Fisher, Cheney's City Manager, decided they were unwilling to incur the expense to send Plaintiff to the Academy when he was hired with the understanding that he was already fully certified. *Id.* at ¶ 23, 35. On July 22, 2008, Cheney Mayor Allan Gainer sent Plaintiff written notice of a "pre-disciplinary/termination hearing" notifying Plaintiff that Cheney was considering termination based on his lack of certification as a fulltime peace officer, as well as possible suspension for unprofessional behavior on several traffic stops. Fisher Decl., ECF No. 30–2. He was informed that he had the right to attend the meeting with an attorney and he was given the opportunity to provide a written response at any time. *Id.* On July 31, 2008, Plaintiff attended the "pre-disciplinary/termination hearing" with his attorney; and Ms. Fisher and Mayor Gainer appeared on behalf of Cheney. Fisher Decl., ECF No. 30–3. During the hearing Plaintiff affirmed that he did not graduate from the Basic Academy in Washington. *Id.* After this hearing Mayor Gainer terminated Plaintiff's employment with the City of Cheney, effective August 4, 2008. *Id.*

Plaintiff was a member of the civil service, and was therefore entitled to a hearing to determine whether his termination was for good cause. Wash. Rev.Code 41.12.090.[5] Under Cheney Civil Service Rule 5.03, a petition for hearing must:

> be in writing, signed by the petitioner, giving the mailing address, the ruling from which the petition appeals, and in plain language and detail, the facts and reasons upon which the petition is based. A hearing on the merits may be denied if the petition fails to state specific facts and reasons or if, in the opinion of the Commission, the facts or reasons stated, if true, would not entitle the petitioner to any relief.

***3** Showalter Decl., ECF No. 31–1. On August 14, 2008, Plaintiff's attorney sent a "demand for investigation" to Defendants requesting, among other things, an investigation of whether the termination of his employment was for good cause. Showalter Decl., ECF No. 31–2. According to Defendants, Plaintiff's letter did not request a hearing, or state any facts or reasons supporting the request, as required under the Cheney Civil Service Rules. ECF No. 26 at 8. On September 3, 2008, Diane Showalter, secretary for the Cheney Civil Service Commission ("Commission"), sent a response letter to Plaintiff and his attorney indicating that "the City [was] construing [Plaintiff's demand for investigation] as a petition for hearing" and asking him to supplement the demand for investigation with answers to very detailed questions within ten days of receiving the letter.[6] Showalter Decl., ECF No. 31–3. Plaintiff maintains that he did respond with a letter dated September 9, 2008,[7] indicating that the "facts and circumstances" of his demand for investigation "is the termination of his employment as detailed in the letter decision from the City of Cheney." Kinkley Decl., ECF No. 41–2.

On October 16, 2008, Showalter sent another letter to Plaintiff indicating that she did not receive a response to her previous letter and extending the deadline by an additional six days for Plaintiff to respond before taking the information to the Civil Service Commission "for a decision on how they want to proceed." Showalter Decl., ECF No. 31–4. According to Defendants, neither Plaintiff nor his attorney responded to either letter. ECF No. 26 at 9. On December 8, 2008, the Commission held a meeting in the mayor's conference room and the minutes indicated that "[w]e sent [Plaintiff] a letter notifying him of this meeting as he had requested a hearing. We did not receive a response from either [Plaintiff] or his attorney. The Commissioners discussed the issue and recommended that

due to lack of response the Commission deem the issue closed."[8] Showalter Decl., ECF No. 31–5.

SUMMARY JUDGMENT STANDARD

The court may grant summary judgment in favor of a moving party who demonstrates "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). In ruling on a motion for summary judgment, the court must only consider admissible evidence. *Orr v. Bank of America, NT & SA,* 285 F.3d 764 (9th Cir.2002). The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

***4** For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Id.* at 248. Further, a material fact is "genuine" only where the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id.* The court views the facts, and all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris,* 550 U.S. 327, 378 (2007).

DISCUSSION

I. Section 1983 Claim

A cause of action pursuant to 42 U.S.C. § 1983 may be maintained "against any person acting under the color of law who deprives another 'of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Southern Cal. Gas Co., v. City of Santa Ana,* 336 F.3d 885 (9th Cir.2003) (citing 42 U.S.C. § 1983). The rights guaranteed by § 1983 are "liberally and beneficently construed." *Dennis v. Higgins,* 498 U.S. 439, 443, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). The Supreme Court has held that local governments are "persons" who may be subject to suits under § 1983. *Monell v. Department of Social Servs.,* 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). However, a municipality may only be held liable for constitutional violations resulting from actions undertaken pursuant to an "official municipal policy." *Id.* at 691.

Thus, in order to prevail on a § 1983 claim against a municipal government, a plaintiff must prove the following elements by a preponderance of the evidence: (1) action by an employee or official under color of law; (2) deprivation of a right guaranteed by the U.S. Constitution or a federal statute; and (3) action pursuant to an "official municipal policy." *Id.* at 690–692. In this case, Plaintiff has alleged violations of his rights to procedural due process under the Fourteenth Amendment.[9] For the purposes of this motion Defendants argue (1) Plaintiff was not deprived of a right guaranteed by the Fourteenth Amendment, and (2) Plaintiff has produced no evidence that his termination was pursuant to official municipal policy.

A. Procedural Due Process

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law ." U.S. Const. amend. XIV, § 1. It is well-settled that a public employee with a constitutionally-protected interest in his or her continued employment is entitled to due process prior to being terminated. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Generally, due process requires that an employee facing termination receive "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. As the Supreme Court emphasized in *Loudermill,* an employee's opportunity to be heard must occur *before* the employee is terminated. *Id.* (emphasis added).

Furthermore, the Court stated that the Due Process Clause requires a hearing "at a meaningful time" which indicates that "[a]t some point, a delay in the post-termination hearing would become a constitutional violation." *Id.* at 547 (internal citations omitted); *see also Gilbert v. Homar,* 520 U.S. 924, 935–36, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997) (remanding for consideration of

whether employer violated due process by failing to provide a prompt post-suspension hearing). Moreover, the Court rejected the argument that it need not consider whether post-termination procedures were adequate because, in part, "the existence of post-termination procedures is relevant to the necessary scope of pretermination procedures." *Loudermill,* 470 U.S. at 547 n. 12. The Court specifically held that due process required a pre-termination opportunity to respond "coupled with" post-termination administrative procedures under the applicable state statute. *Id.* at 547–48. Following this line of reasoning, the Ninth Circuit has held that the court *"must* also independently assess the adequacy of the post-termination proceedings. For not only is such an assessment usually required to determine the necessary scope of pre-termination procedures, but the inadequacy of post-termination process may itself by a source of a distinct due process violation." *Clements v. Airport Authority of Washoe County,* 69 F.3d 321, 332 (9th Cir.1995) (emphasis added).

***5** The parties in this case do not dispute that the Plaintiff had a property interest in his continued employment or that his property interest was deprived when he was terminated. Plaintiff does not claim a violation of his pre-termination due process rights, and acknowledges that he was afforded a constitutionally adequate *Loudermill* hearing before he was terminated. ECF No. 43 at 4. Thus, the only question remaining for the Court is whether Plaintiff's procedural due process rights were violated when he failed to receive a post-termination hearing before the Civil Service Commission.

As an initial matter the Court rejects Defendants' argument that Plaintiff's procedural due process claim should be summarily dismissed solely based on Defendants' compliance with the *Loudermill* by providing an adequate pre-termination hearing. ECF No. 26 at 7. This is a blatant misstatement of the law under *Loudermill* where the Supreme Court recognized the importance of post-termination procedures when evaluating procedural due process afforded to an employee, and noted that defects in a post-termination hearing could be constitutional violations. *See Loudermill,* 470 U.S. at 547–48; *see also Bignall v. North Idaho College,* 538 F.2d 243, 246 (9th Cir.1976) (hearings regarding a termination decision should be granted "at a meaningful time and in a meaningful manner."). Rather, as noted above, under Ninth Circuit case law the Court *must* independently evaluate the post-termination process for due process violations. See *Clements,* 69 F.3d at 332.

The Court also rejects Defendants' argument that Plaintiff cannot claim a constitutional violation for failure to receive a post-termination hearing in front of the Commission because he failed to respond to several requests for additional information from the Commission's Secretary. ECF No. 26 at 7–11. Plaintiff's first letter demanded an investigation and was in fact construed as a request for a hearing. ECF No. 31–3; *see also* Wash. Rev.Code 41.12.090. It matters not whether Defendants received Plaintiff's second letter dated September 9, 2008, because Plaintiff's claim is that the denial of his demanded post-termination hearing violated his *federal* due process rights. Furthermore, the Commission minutes erroneously reflect that Plaintiff was notified of that very hearing and he did not respond.

Defendants' last argument is that any failure by Defendants to provide an appeal hearing is not a protected constitutional right because the Constitution does not guarantee that employers will follow their own internal rules regarding procedures for termination. *See Williams v. City of Seattle,* 607 F.Supp. 714, 720 (W.D.Wash.1985) ("[t]he process constitutionally due [Plaintiff] prior to deprivation of that property interest is determined not by the procedures set forth in the SPD Manual, but rather by the requirements of the Due Process Clause."); *Harris v. Birmingham Bd. of Educ.,* 817 F.2d 1525, 1528 (11th Cir.1987) ("we emphasize that the violation of a state statute outlining procedures does not necessarily equate to a due process violation under the federal constitution."). Thus, Defendants contend that even if they failed to follow their own rules, this does not equate to a "prima facie" violation of procedural due process. Rather, Defendants argue that in order to determine whether due process was violated, the Court must analyze the process received under federal law. *Id.*

***6** Plaintiff responds that his constitutional due process rights should mirror those prescribed under Washington law, which include the right to a post-termination hearing in front of the Commission when timely requested by a civil service employee. Wash. Rev.Code 41.12.090 (a discharged civil service employee "may within ten days from the time of his or her [discharge] file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation."). The Court rejects Plaintiff's unsupported argument that the Court should unilaterally adopt the process afforded under the Washington state statute as defining the scope of process due to Plaintiff under *federal* law. Rather, the Court must analyze the process received under federal law to determine if Plaintiff had a federal due process right to a post-termination hearing.[10]

Defendants fail to follow their own reasoning in their

motion for summary judgment. They do not cite the *Mathews v. Eldridge* balancing test, nor do they make any attempt to weigh the facts of this case under that standard. They make no attempt to establish an absence of material facts as to whether the lack of a post-deprivation hearing was a violation of Plaintiff's federal due process rights. Instead, Defendants rely exclusively on the erroneous argument that no post-deprivation procedural due process was due Plaintiff as a matter of federal law. The Court finds that Defendants failed to sustain their burden to show the lack of any genuine issues of material fact regarding whether the failure of the Commission to provide a post-termination hearing was a deprivation of Plaintiff's *federal* procedural due process rights.

B. Municipal Liability

A municipal entity may only be held liable under 42 U.S.C. § 1983 for constitutional violations resulting from actions undertaken pursuant to an "official municipal policy." *Monell*, 436 U.S. at 691. The Ninth Circuit recognizes four categories of "official municipal policy" sufficient to establish municipal liability under *Monell:* (1) action pursuant to an express policy or longstanding practice or custom; (2) action by a final policymaker acting in his or her official policymaking capacity; (3) ratification of an employee's action by a final policymaker; and (4) a failure to adequately train employees with deliberate indifference to the consequences. *Christie v. Iopa*, 176 F.3d 1231, 1235–40 (9th Cir .1999). A plaintiff must also establish a direct causal link between the municipal policy and the alleged constitutional deprivation. *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir.1996).

Defendants argue Plaintiff's § 1983 claim fails because he is unable to prove that his termination was the result of any identifiable policy or custom of the Defendant. ECF No. 26 at 15. All of Defendants' arguments focus solely on the termination itself as an isolated and unique situation that Defendants have never encountered before; namely, discovering several years after hiring an employee that the employee lacked the minimum qualifications for the job. *See Trevino*, 99 F.3d at 918 (a policy or custom should not be based on "isolated or sporadic incidents; it must be founded on practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy.").

***7** As an initial matter, Plaintiff does not dispute that the pre-termination hearing he was afforded complied with the due process requirements of *Loudermill.* Therefore, all of Defendants' arguments regarding the policy and practices of the Defendants' decision to terminate the Plaintiff's employment are essentially moot. The only issue remaining is whether the actions by the Civil Service Commission and its Secretary Ms. Showalter, were taken pursuant to a longstanding policy or custom of the Defendants. Defendants' sole mention of this discrete issue is one conclusory statement made in their reply brief that Plaintiff "failed to establish any unconstitutional policy or practice in his not receiving a Commission hearing." ECF No. 45 at 8–9. Defendants offer no legal or factual analysis in support of this bare assertion. Moreover, Defendants fail to challenge alternate categories under which Plaintiff could establish municipal liability, including: action by a final policymaker acting in his or her official policymaking capacity, and ratification of an employee's action by a final policymaker. See Christie, 176 F.3d at 1235–40. The Court is not satisfied with Plaintiff's lack of responsive briefing on this point. Yet, the Court finds that Defendants have failed to meet their burden to establish a complete absence of genuine issues of material fact as to whether the events surrounding the denial of the post-termination Commission hearing were pursuant to official policy and custom of Defendants.

Last, Defendant Allan Gainer argues that he cannot be liable because Plaintiff has failed to establish that he had anything to do with the operations or decision of the Commission. The only evidence offered by Plaintiff is a mention by counsel during oral argument that the letter sent by Ms. Showalter to Plaintiff asking for more information so the Commission could "investigate the matter and otherwise decide how to proceed," was on City of Cheney letterhead indicating it was from the "Office of the Mayor Allan Gainer." Showalter Decl., ECF No. 31–3. That said, while the record before the Court indicates that Mayor Gainer was heavily involved in the decision to terminate Plaintiff's employment, the Court finds absolutely no evidence that Mayor Gainer had any personal involvement in the post-termination hearing process. Therefore, Allan Gainer and Jane Doe Gainer are dismissed from this action.

For the foregoing reasons, the Court finds that the City of Cheney failed to establish the absence of genuine issues of material fact as to whether the failure to provide a post-termination hearing was a violation of Plaintiff's Fourteenth Amendment procedural due process rights. Summary judgment on Plaintiff's § 1983 claim is denied.

II. Unpaid Wages Claim (RCW 49.52)

Under RCW 49.52.050(2) an employer is guilty of a misdemeanor if it "wilfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by statute, ordinance, or contract." Wash. Rev.Code § 49.52.050(2). This statute is to be construed liberally to advance the intent of the Legislature to protect employee wages and assure payment. *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 159, 961 P.2d 371 (1998). The critical determination in these cases is whether non-payment is "wilfull," in other words, when it is the "result of knowing and intentional action by the employer, rather than a bona fide dispute as to the obligation of payment." *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1050 (9th Cir.1995); *see also Schilling*, 136 Wash.2d at 161, 961 P.2d 371 (to qualify as "bona fide" dispute it must be "fairly debatable" as to whether an employment relationship exists or whether the wages must be paid). Washington courts have found that an employer does not willfully withhold wages under the meaning of this statute where he has a "bona fide belief that he is not obligated to pay them." *See e.g., McAnulty v. Snohomish School Dist. No. 201*, 9 Wash.App. 834, 838, 515 P.2d 523 (Ct.App.1973) (finding no evidence in the record that employer did not genuinely believe that employee was legitimately discharged and that wages could be properly discontinued).

***8** Defendants argue that Plaintiff was timely paid all salary and benefits owed to him through his termination date, and the statute is not intended to cover future wages that would have been earned if he had not been terminated. *See Hemmings v. Tidyman's Inc.,* 285 F.3d 1174, 1202–1204 (9th Cir.2002) (rejecting plaintiffs' claim for prospective wages pending a jury verdict and noting that RCW 49.52.050 has been applied when an employer withholds a "quantifiable and undisputed amount of accrued pay," but not when "there is a bona fide dispute as to whether the employer is obligated to pay the amounts in question."). Plaintiff does not respond to Defendants' challenge.

Generally, the issue of whether the withholding of wages was "wilfull" is a question of fact, however, if reasonable minds could reach but one conclusion from those facts, the issue may be decided as a matter of law. *Moore v. Blue Frog Mobile, Inc.*, 153 Wash.App. 1, 8, 221 P.3d 913 (Ct.App.2009). Plaintiff identifies no specific facts showing a genuine issue of material fact exists as to whether Defendants knowingly and intentionally withheld wages. On the contrary, the record before the Court indicates that Defendants had a genuine belief that they were not obligated to pay Plaintiff after his employment was terminated. *See McAnulty*, 9 Wash.App. at 838, 515 P.2d 523. Even when viewed in the light most favorable to Plaintiff, the Court finds that a reasonable jury could only reach the conclusion that there was no violation of RCW 49.52.050(2). Summary judgment on this claim is granted.

III. Open Meetings Act Claim (RCW 42.30)

Under the Washington's Open Meetings Act ("OPMA") "[a]ll meetings of a governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency...." Wash. Rev.Code § 42 .30.030. The purpose of the OPMA is to ensure open decision-making by public bodies, and courts apply its provisions liberally in order to further this purpose. *Clark v. City of Lakewood*, 259 F.3d 996, 1012–13 (9th Cir.2001). In order to avoid summary judgment on an OPMA claim, "plaintiff must produce evidence showing (1) members of a governing body (2) held a meeting of that body (3) whether that body took action in violation of OPMA, and (4) the members of that body had knowledge that the meeting violated the statute." *Eugster v. City of Spokane*, 118 Wash.App. 383, 424, 76 P.3d 741 (Ct.App.2003).

Plaintiff alleges that Defendants violated the OPMA because the Commission meeting during which Plaintiff's termination was discussed was not held open to the public. *See* Wash. Rev.Code 42.30 *et seq.* Defendants contend that this allegation is false because the Commission meeting on December 8, 2008 was open to the public, and the time and place of the meeting was posted in compliance with state law and Commission policy. Def. SOF at ¶ 52. Minutes from the Commission meeting on this date show that Plaintiff's termination was briefly discussed, and "due to the lack of response" from the Plaintiff after requests for supplemental information "the Commission deem[ed] the issue closed." Showalter Decl., ECF No. 31–5.

***9** Once again, Plaintiff produces no evidence to show a genuine issue of material fact as to whether the meeting on December 8, 2008 was open to the public. Defendants' counsel admitted at oral argument that Plaintiff was not notified that this meeting was taking place. However, the OPMA only addresses the general requirement to hold a meeting open to the public, it does not impose the additional burden to ensure that interested parties are individually notified. Even in the light most favorable to the Plaintiff, the Court finds absolutely no evidence in the

record that the meeting on December 8, 2008, was not open to the public, or that Plaintiff was not permitted to attend the meeting. Summary judgment on this claim is granted.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Defendants' Motion for Summary Judgment, ECF No. 25, is **GRANTED** as to the claim for Willful Withholding of Wages (section VI of the Complaint) and the claim for violation of Washington's OPMA (section VII of the Complaint); and **DENIED** as to the claim for violation of Civil Rights, 42 U.S.C. § 1983 (section V of the Complaint).

2. Defendants Allan Gainer and Jane Doe Gainer are **DISMISSED** from this action.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5361424

Footnotes

1 The CJTC is the executive agency responsible for training and certifying peace officers in Washington State. Def. SOF ¶ 1.

2 The purpose of the Equivalency Academy is to educate out of state officers with Washington's laws. Def. SOF ¶ 2.

3 Despite Plaintiff's testimony that he did apply for a lateral position, he heavily disputes that he was hired as a lateral police officer. Plaintiff contends that due to an administrative error by the CJTC he was listed as a lateral hire instead of "properly" as a police trainee which he argues is the position he applied for. Plaintiff's Response to Defendant's Statement of Facts, ECF No. 42 ("Pl.Response") at ¶ 12, 17.

4 Taylor had previously graduated from the Equivalency Academy in Medical Lake but he was required to attend again because more than 24 months had lapsed since he previously served as a fulltime police officer. Def. SOF at ¶ 17.

5 Plaintiff contends "the lynch pin of this case is whether, at the time [he] was hired, was pre-certification a requirement of the job description." ECF No. 43 at 2. Thus, Plaintiff argues that the sole question is whether his discharge was in "good faith for cause ." ECF No. 43 at 10. That may be an issue considered by the Civil Service Commission, but it has no bearing on this cause of action under § 1983 which only examines whether Plaintiff was afforded procedural due process.

6 The letter also indicates that the decision to hold an actual hearing is in the discretion of the Civil Service Commission.

7 In their reply brief, Defendants contend they have never seen this letter before now. ECF No. 45 at 2. It was not part of Plaintiff's initial disclosures, nor was it produced in response to a request for production asking for all correspondence sent to or received from the Commission. Defendants ask that it be excluded from consideration on the basis that it was improperly withheld during discovery. ECF No. 45 at 11. As indicated in the discussion below, whether Plaintiff adequately responded to the additional request for information is immaterial to an analysis of whether the process afforded to Plaintiff was constitutionally adequate.

8 The Court finds no evidence in the record that Plaintiff was ever "notified of the meeting" on December 8, 2008. Defendants' counsel conceded at oral argument that this was an erroneous statement in the minutes; no letter was actually sent to Plaintiff notifying him of the December 8th hearing.

9 At oral argument Plaintiff clarified that he did not intend to pursue a substantive due process claim.

10 Generally, the amount of process due in a particular situation depends upon a balancing of the competing interests at stake. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Specifically, a court must balance, "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Id.*

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