

No. 49720-4 II

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

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RODNEY J. BAKER,

Appellant,

v.

PIERCE COUNTY PUBLIC TRANSPORTATION BENEFIT  
AREA CORPORATION

Respondent.

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**RESPONSE BRIEF**

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## **A. INTRODUCTION**

The trial court in this matter properly applied the summary judgment standard and granted summary judgment in favor of Respondent Pierce County Public Transportation Benefit Area Corporation (“Pierce Transit” or “Respondent”). Even considering the record in the light most favorable to Appellant Rodney Baker (“Appellant” or “Baker”), reasonable minds can reach but one conclusion: that there was no contract for employment between Baker and Pierce Transit and, in any event, Baker was clearly terminated for “just cause” where he knowingly violated agency payroll rules and practices by instituting an unauthorized “salary” system for certain chosen liaison police officers, failed to inquire into the impact this “salary” system would have on the agency, disregarded specific direction regarding the officers’ timecards, unilaterally modified agency contracts without authority, and neglected his job duties by failing to review and rubber stamping the liaison officers’ timecards. There was no error. Respondent requests that this Court affirm the trial court’s summary judgment order.

## **B. STATEMENT OF THE CASE**

### **1. Pierce Transit’s Personnel Manual.**

Pierce Transit is a municipal corporation that provides public transit in Pierce County. Pierce Transit maintains a personnel manual which sets forth certain guidelines for its employees. *See* CP 663-737. The Personnel

Manual (drafted in 2004) contains multiple disclaimers. On the very first page, under “Purpose,” it states:

The purpose of this manual is to provide general procedures and guidelines for the administration of the Agency’s personnel program. This manual is an overview and summary of the Agency’s policies and procedures that are presently in effect. As policies, benefits, and procedures are revised, changes will be communicated through standard communication channels. Advance notice may not always be possible.

The policies, procedures, and rules contained in this manual constitute guidelines only. They do not constitute an employment contract, nor are they intended to make commitment to any employee concerning how individual employment action can, should, or will be handled. These guidelines are not to be interpreted as promises of specific treatment.

CP 669 (emphasis added). The same disclaimer is repeated in Section 2.0 (“General Provisions”) of the Personnel Manual. CP 679. Section 2.2 also specifically states that the “guidelines pertaining to discipline and the appeal procedure shall not apply to the Chief Executive Officer....” *Id.* (emphasis added).

Section 8.0 of the Personnel Manual governs discipline. CP 728-731. The Discipline section contains yet another disclaimer that specifically reserves agency discretion in handling disciplinary matters. It provides: “These guidelines will be used in determining discipline. The Agency reserves the right to decide specific actions based upon individual

**circumstances and facts of each case.**” CP 728 (emphasis added). There is no reference to “progressive discipline” in the Discipline section, nor throughout the entire Personnel Manual. *See* CP 663-737. The Manual does not require CEO consultation or approval before termination of any employee. *See* CP 730. The guidelines set forth in Section 8.0 provide that a disciplined employee should be provided with notice and an opportunity to respond. CP 728. They further state that “[t]he hiring authority should utilize the disciplinary procedure to the extent that such utilization is reasonable under the circumstances.” *Id.* Section 8.0 then goes on to provide that “[a]ny regular employee may be disciplined for cause by a hiring authority,” and sets forth a non-exhaustive list of the bases for discipline. CP 728-730. It concludes: “The hiring authority may discharge a regular employee for disciplinary reasons including but not limited to those set forth above.” CP 730.

During his employment, Baker supervised a number of subordinate employees. CP 523. Although he claims he was advised to use “progressive discipline” in disciplining his employees, in fact the record shows that Baker did not do so. For example, in March 2011, he issued discipline to

Barbara Morrison. CP 584-589. His disciplinary letter makes no mention of “progressive discipline.”<sup>1</sup> *Id.*

**2. Pierce Transit hires Rodney Baker.**

Pierce Transit hired Baker as Assistant Transit Security Manager (a regular employee position, not subject to any union or contract) in June 2000. CP 44-45. In March 2006, Pierce Transit established its Department of Public Safety (“DPS”), and Baker’s title changed to Chief of Public Safety and Transit Police. CP 51; 62. The terms of Baker’s employment remained otherwise unchanged. *See id.*; CP 44-45. In his self-authored Position Description Questionnaire, which never indicates Baker had any contractual rights to his employment, CP 526-545, Baker reported that his job duties included “monitor[ing] and authoriz[ing] expenditures in accordance with budgetary limitations, Agency policies and sound fiscal management principles.” CP 534. Baker’s job duties did not include executing or negotiating contracts.<sup>2</sup> *See* CP 526-545.

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<sup>1</sup> In fact, it shows that Ms. Morrison received the same disciplinary process as Baker himself received, as further explained in Section (C)(4) of this brief, *supra*.

<sup>2</sup> Although absent from his Appellate Brief, Baker initially argued that the Pierce Transit Code created a basis for his breach of contract claim. *See* CP 3-4. Respondent notes for the record, however, that the Pierce Transit Code in effect at the time (the version available online was updated after Baker’s termination, *see* CP 290-295) did not create any contract for employment between Baker and Pierce Transit, nor did it grant him any authority to execute, amend or negotiate contracts. *See* CP 295. In fact, to the extent the Pierce Transit Code governed Baker’s employment relationship with Respondent, it did not contain any representations or directions as to discipline or termination. *Id.* Instead, it referred to Pierce Transit “internal policy”; *i.e.*, the Pierce Transit Personnel Manual. *Id.*

At the time Baker became Chief of Public Safety and Transit Police, he reported to Pierce Transit CEO Lynne Griffith (“Griffith”).<sup>3</sup> CP 60-61; 84; 87-88. Griffith, in turn, reported to the Pierce Transit Board of Commissioners. CP 60-61. In mid-2013, Baker started reporting directly to Chief Operations Officer Doug Middleton (who in turn reported to Griffith). CP 509.

**3. Pierce Transit’s Department of Public Safety Relies on Off-Duty Officers from the Tacoma and Lakewood Police Departments, to be Paid on an Hourly Basis, According to Their Contracts.**

In order to fulfill its policing needs, the Pierce Transit DPS relied in large part on off-duty officers from the Tacoma and Lakewood Police Departments (“Tacoma PD” and “Lakewood PD,” respectively) who would work part-time for Pierce Transit outside of and in addition to their full-time employment at Tacoma PD or Lakewood PD. CP 51-53. These off-duty officers were overseen by supervisory “liaison officers” from those

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<sup>3</sup> On December 17, 2013, the Washington State Auditor’s Office issued a report regarding Griffith’s award of incentive-based leave to management level employees who reported to the CEO. *See* CP 93-104. The State Auditor found that this award of incentive-based leave did not comply with Pierce Transit policies. CP 101. If such policies had been adopted, however, there would have been no such finding. In fact, the award of incentive-based leave was a longstanding administrative practice at Pierce Transit, awarded not only by Griffith but by her long-serving predecessor, CEO Don Monroe. CP 89-90; 107-108. The leave awards were given to high-performing employees, in lieu of pay raises (which would have increased Pierce Transit’s budget, particularly problematic during the recession). CP 85-86. The Pierce Transit Board of Commissioners—to whom Griffith reported—took no disciplinary action against Griffith in connection with the technical issues raised in the State Auditor’s report. CP 111. Rather, in response to the State Auditor’s investigation, the Board adopted a reward and recognition system on December 9, 2013, specifically formalizing a portion of the incentive-based leave awards that had been granted by Griffith and Monroe. *See* CP 113-132.

agencies, who reported to Baker. CP 49-50. The liaison officers for Tacoma PD were Lieutenant Mark Feddersen (“Feddersen”) and Officer James Smith (“Smith”), and the liaison officer for Lakewood PD was Sergeant Andy Estes (“Estes”). CP 65; 67.

Each off-duty officer executed a contract with Pierce Transit. CP 134-136. The contract specified that the officers were to be paid directly by Pierce Transit on an hourly basis. CP135. Chief Baker was specifically aware of the officers’ hourly pay status since at least 2009. CP 138. To receive their pay, officers were required to fill out Daily Field Activity Reports (“DFARs”), on which they recorded the actual time worked each day, allowing Pierce Transit to verify and track the work each officer performed (which often occurred in remote locations). CP 71-72. This was an important aspect of ensuring the officers’ accountability and transparency, and Baker was specifically aware of these requirements since at least 2008. CP 645; 648.

**4. Baker Improperly Allows Feddersen and Smith to be Paid on Salaried Basis, Instead of the Contractually-Required Hourly Basis.**

In 2012, Tacoma PD liaison Feddersen approached Baker and suggested that he and fellow Tacoma PD liaison Smith (but not Lakewood PD liaison Estes) be paid a flat salary rate for their administrative liaison duties. CP 65-66; 68-69. Baker consented, permitting Smith and Feddersen

to report twenty hours of liaison work per week—ten hours each Saturday and Sunday—in addition to any additional hours worked mid-week on additional projects such as background checks, and regardless of when or *whether* such work was performed, so they could be paid on a “salary” basis. CP 63-65; 68; 147. Thus, Smith and Feddersen proceeded to report at least twenty hours of work every weekend, but never submitted any DFARs or any other documentation of their time actually spent working. *See* CP 149-191 (pay transactions lists for Feddersen and Smith, 2003-2013). Baker made this decision unilaterally and without authority; he never discussed this “salary” system with CEO Griffith, or with COO Middleton. CP 69-70.

**5. Pierce Transit Discovers Baker’s Improper Salary System and Conducts an Audit of the Officers’ Timecards.**

On or about September 12, 2013, Baker’s assistant, Katie Marcelia (“Marcelia”), approached Finance Assistant Manager Liz Passmore (“Passmore”) to report that the officers’ time cards were not being reviewed by anyone in DPS, and that she had been instructed by Baker (whose job duties included reviewing and, if accurate, approving the liaisons’ timecards) to use a rubber stamp of Baker’s signature to “sign” the timecards. CP 142-145. Marcelia reported that Baker had told her not to question this practice, and that she felt the officers (especially Smith and Feddersen) were reporting excessive hours that did not match the schedule

and were not being worked. *Id.* Marcelia did not feel comfortable rubber-stamping the timecards.<sup>4</sup> CP 143. Based on Marcelia’s concerns, Passmore commenced an internal audit of the officers’ timecards. CP 144; 193.

On October 21, 2013, Passmore finished a draft report of her audit results. *See* CP 195-196. The report raised multiple concerns about the off-duty officers’ pay:

1. Timecards were not reviewed by Baker, who instead used a rubber signature stamp;
2. DFARs for Feddersen and Smith did not match the time listed on their time cards or the amounts paid;
3. Hours reported by Lakewood PD and Tacoma PD were “significantly higher than the hours scheduled by Pierce Transit”;
4. Hours reported by Smith for interviewing and performing a background check on an employee appeared excessive; and
5. Smith and Feddersen each reported “between 40 and 75 hours every pay period in 2013.”<sup>5</sup>

CP 195. That same day, Passmore met with Baker, Finance Manager Kathy Sullivant (“Sullivant”), and Chief Financial Officer Wayne Fanshier (“Fanshier”). CP 211; 215. They discussed the draft report, and Baker was given an opportunity to provide additional information and explanations.

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<sup>4</sup> Because of the system for reviewing timecards—*i.e.*, the liaisons would review and approve the off-duty officers’ hours and submit them to Baker for approval, and Baker himself was supposed to review and approve the liaisons’ timecards—this meant that Baker was permitting Smith and Feddersen to submit their timecards for payment completely unreviewed. CP 77-78; 147.

<sup>5</sup> This was *in addition to* the officers’ full-time jobs at their home agencies.

*Id.* They agreed to meet again after Baker discussed the report with his liaison officers. *Id.*

On October 23, 2013, Passmore emailed the draft report to Baker, who forwarded it to Smith and Feddersen. CP 217-220; 222-225. On October 26, Feddersen wrote to Baker, explaining that he and Smith considered themselves to be “de facto salaried employees.” CP 227 (emphasis added). On October 28, Baker wrote to Passmore, asking if there was a way for her to find “a way to reword these comments so they don’t come across so accusatory,” and stating that “[a]nything that resembles [challenging an officer’s integrity] is taken very seriously and can come back to haunt us in court and may have *career blemish* implications.” CP 229 (emphasis original).

Responding to Baker’s comments, Passmore revised her report and circulated it to Baker, Sullivant and Fanshier on October 28, 2013. CP 217-220. She removed the finding regarding excessive hours for interviewing, but left in the rest of her recommendations. *Id.* The revised report included several recommendations to ensure DFARs were used properly and that time cards were actually reviewed by Baker or another designated Pierce Transit employee. CP 219.

On October 31, 2013, Baker set up a meeting with Passmore, Fanshier, Sullivant, Feddersen and Smith to discuss Passmore’s report. CP

146; 211; 215. Sullivant's notes from the meeting state that: "The Liaison Officers stated that they filled out their time cards like that [reporting 10 hours each Saturday and Sunday] because [Baker] had instructed them to do it that way...[Baker] indicated that he considered them to be salaried employees...." CP 215 (emphasis added). She further noted: "Based on the contract, the officers clearly are not salaried." *Id.* (emphasis added).

Passmore continued her audit. On November 7, 2013, she had another discussion with Baker's assistant, Marcelia, who reported that both she and the Deputy Chief of DPS felt the hours being reported and paid were excessive. CP 212. Marcelia noted that when one of the liaison officers was on family vacation in Las Vegas he reported 50 hours on his timecard as work. *Id.* Marcelia felt very uncomfortable stamping this card and questioned Baker about it, who said it was okay and signed the card.<sup>6</sup> *Id.*

6. **Baker is Placed on Paid Administrative Leave, and a Formal Investigation is Conducted Into the Unauthorized Salary Scheme.**

In November 2013, due to the severity of the allegations of Baker's improper and unauthorized salary scheme and over concerns about loss or

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<sup>6</sup> Baker later testified that he just accepted the notion that Smith had put in twenty hours of work on a weekend while he was on vacation with his family, based on the fact that *Fedderson* told him this was what Smith had done (Baker did not investigate the matter himself). CP 73.

theft of public funds, Pierce Transit contacted the Washington State Auditor as required by RCW 43.09.185, and hired Jeff Coopersmith (“Coopersmith”) of Davis Wright Tremaine LLP to conduct a thorough investigation. CP 200-201. On November 19, 2013, Baker was placed on paid administrative leave pending completion of the investigation. CP 207; 231.

Coopersmith spent several months investigating the allegations (during which Baker was interviewed twice, CP 235; 521), resulting in a February 5, 2014 report. CP 233-258. Coopersmith concluded that “Chief Baker likely exceeded his authority under the Pierce Transit Code when he authorized the Tacoma PD liaisons to work ‘on salary,’ without obtaining approval from the CEO or the Board.”<sup>7</sup> CP 258. He noted that “Chief Baker’s approval of the salaried approach thus altered the existing contractual relationship between Pierce Transit and the Tacoma PD liaisons,” and that although the Pierce Transit Code authorized the Pierce Transit CEO to make contracts valued under \$200,000, there was “no evidence that Ms. Griffith delegated her contracting authority to Chief

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<sup>7</sup> Although Coopersmith also noted that he did not find evidence that Baker “over-reported, falsified, or improperly approved hours for off-duty officers,” he qualified this finding, noting that: “there is no documentation supporting Lt. Feddersen and Officer Smith’s statements that they are [never working less than the 20 hours recorded on the time cards]. Indeed, there is no way to know how long any of their administrative management tasks take, because no one is tracking that information, including Lt. Feddersen and Officer Smith.” CP 254 (emphasis added).

Baker.” CP 257. Coopersmith also found that “since the Tacoma PD liaisons began preparing the multiple, task-based DFARs [after being advised they could no longer report twenty hours per week on a ‘salary’ basis], the total liaison hours have been significantly lower than 40 hours per pay period, per liaison.” CP 256. And Coopersmith concluded that Baker had in fact disposed of his responsibility to review timecards entirely, having Marcelia “take over the entire task of reviewing and approving time cards.” CP 248. He noted that Baker “was not concerned [about the timecards] because everything was already vetted by the liaisons,” and that “no one was directly reviewing the liaisons’ work or ensuring that they submitted accurate time cards...Chief Baker said the liaisons were self-policing and that he relied on their honesty.” *Id.*

7. **Pierce Transit Offers Baker Multiple Opportunities to Respond to the Allegations Against Him.**

On February 13, 2014, Baker and his personal attorney met with COO Middleton (Baker’s supervisor) and Chief Administration Officer and Head of Human Resources Alberto Lara (“Lara”). CP 78; 260. Baker was given the opportunity to discuss and explain his decisions as to the salary scheme, but he failed to do so. CP 260. Instead, according to Middleton: “In that meeting I heard nothing that justified your decisions to give up oversight of payroll and to unilaterally change the terms of Agency

contracts. Additionally, you did not seem to understand or appreciate that the scope of your authority is limited.” CP 260-261. Middleton remained extremely concerned about Baker’s conduct, untrustworthiness and lack of judgment, leadership, and oversight. *See id.*; CP 203-205. Middleton was particularly concerned about the fact that Baker had changed the liaisons’ employment status, in secret, without authority or any analysis to determine whether it was a prudent decision from a budgetary standpoint or any concern for other legal or practical implications, and in disregard of his job duties. *Id.*

On February 25, 2014, Middleton sent a letter to Baker, advising him that Pierce Transit was considering taking disciplinary action against him, up to and including dismissal, based on:

1. Changing the terms of the liaisons’ contracts without authority;
2. Failing to follow directions regarding payroll;
3. Lack of understanding of the limits of his administrative authority for contracting, lack of awareness of Agency contracting authority under the Pierce Transit Code, and lack of nature of the awareness of the binding nature of contract terms;
4. Use of a signature stamp to sign timecards that were not verified; and
5. Conduct revealed in the Coopersmith investigation that did not reflect well on a Chief of Police, including failure to exercise appropriate judgment and leadership.

CP 273-274. Middleton invited Baker to submit a written response, or attend a pre-disciplinary meeting. *Id.*

On March 7, 2014, Middleton and Lara held a pre-determination meeting with Baker and his private attorney (by then Baker's fourth in-person meeting and opportunity to respond to the allegations against him). CP 260. At the meeting, Baker submitted a lengthy written response setting forth his responses to the allegations and stating that he "believed [he] had the authority" to move the liaison officers to a salary system, and that "[he] did not see this decision regarding Tacoma PD Liaisons as entering into a new contract." CP 276-279. Baker did not provide any information in his letter or at the meeting to rebut the bases for disciplinary action. CP 260-262. In fact, Baker made several representations at the meeting that Middleton later found to be untrue, further demonstrating Baker's untrustworthiness and lack of judgment. CP 262. At no time during any of these meetings, or in his written response to Pierce Transit, did Baker or his counsel point to any alleged contract for employment as governing or precluding Baker's termination. *See* CP 260; 276-279.

**8. Pierce Transit Terminates Baker's Employment.**

On March 20, 2014, Pierce Transit terminated Baker's employment based on his unauthorized "salary" system for the Tacoma PD liaison, which Baker instituted without authority or any budgetary analysis to

determine whether it was a prudent decision, nor any concern for other legal or practical implications, and in disregard of his job duties. CP 260-262. The decision to terminate was made by Baker's supervisor, Middleton. CP 202. At the time, Middleton had no involvement with the State Auditor's investigation of or findings pertaining to CEO Lynne Griffith's award of incentive-based leave to employees, or with Pierce Transit's response thereto. CP 358-361. Neither Griffith nor the Board of Commissioners took any action in making the decision to terminate Baker's employment. CP 656; 740-741. Baker's termination was based on violation of sections 8.2.2 ("Willful violation of the provisions or policies of the Agency"), 8.2.5 ("General incompetency or inefficiency in the performance of your duties"), and 8.2.15 ("Mishandling of employer revenues") of the Personnel Manual. CP 261.

**9. Baker Sues Pierce Transit.**

On February 27, 2015, Baker sued Pierce Transit in Pierce County Superior Court, asserting claims for (1) sex discrimination in violation of RCW 49.60, and (2) breach of contract/wrongful termination, based on "the Pierce Transit Code and the contract between Plaintiff and Defendant by terminating Plaintiff without cause." CP 1-4. On November 7, 2016, the

Superior Court granted summary judgment to Respondent on both claims.<sup>8</sup> CP 758-763. As to his breach of contract/wrongful termination claim, Baker never produced any evidence in discovery or on summary judgment reflecting a traditional employment contract, instead relying solely on his arguments regarding alleged “progressive discipline.” See CP 609-612. Indeed, the trial court found that that: (1) Baker “failed to produce any evidence that would allow a rational inference that he could only be fired for cause,” and (2) that Pierce Transit had “produced substantial evidence supporting that it had cause for terminating Chief Baker’s employment.” CP 759-761.

### C. ARGUMENT

#### 1. Summary Judgment Standard.

The trial court properly granted summary judgment for the Respondent in this case. Summary judgment should be granted where that there are no genuine issues of fact and the moving party is entitled to a judgment as a matter of law. CR 56(c); see also *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). A genuine issue of material facts exists only if reasonable minds could differ on the facts that control the result of the litigation. *Ranger Ins. Co. v. Pierce County*, 164

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<sup>8</sup> Pierce Transit understands Baker is not appealing the trial court’s decision as to his sex discrimination claim. See Appellant’s Brief, pg. 2, fn. 1.

Wn.2d 545, 552, 192 P.3d 886 (2008). Considering the facts in the light most favorable to the nonmoving party, the motion should be granted if reasonable persons could reach only one conclusion. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). The nonmoving party “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or consideration of its affidavits, at face value[.]” *Pain Diagnostics & Rehabilitation Assoc., P.S. v. Brockman*, 97 Wn. App. 691, 697, 988 P.2d 972 (1999), *rev. granted*, 140 Wn.2d 1013, 5 P.3d 8 (2000). If the nonmoving party “‘fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,’ then the trial court should grant the motion.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). On appeal, a grant of summary judgment is reviewed de novo. *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987, 991 (2014).

2. **Pierce Transit Never Made Any Specific Promise to its Employees that Discipline and Termination Would be Only “For Cause.”**

Under Washington law, employment of indefinite duration generally is terminable at will by either the employer or employee. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 223, 685 P.2d 1081, 1084

(1984); *see also Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 393, 879 P.2d 276, 278 (1994). “However, such a contract is terminable by the employer only for cause if...there is an implied agreement to that effect.” *Id.* There are generally two ways for this to occur. First, the relationship can be contractually modified, which requires the traditional elements of offer, acceptance, and consideration. *Thompson*, 102 Wn.2d at 228-29. There is no evidence that this occurred here, and Appellant does not appear to argue this approach. *See* Appellant’s Brief, pg. 10. Second, an equitable claim may exist where the employer makes promises of specific treatment in specific situations, thus precluding the enforcement of the at-will aspect of the employment relationship. *Thompson*, 102 Wn.2d at 230. This is Appellant’s argument. Thus, in order to prevail on his claim, Baker must prove that: (1) the statements in Pierce Transit’s Personnel Manual amounted to promises of specific treatment in specific situations; (2) he justifiably relied upon any such promise; and (3) the promise of specific treatment was breached. *Id.*; *see also Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 729–30, 75 P.3d 533, 540 (2003).

- i. The statements in Pierce Transit’s Personnel Manual regarding discipline and termination did not create an implied contract where they did not amount to “promises of specific treatment in specific situations.”*

Written terms of a personnel manual or policy that amount only to “general statements of company policy’...[do] not create an implied contract modifying the at-will relationship, nor [do they] support an equitable claim of reliance on a specific promise.” *Quedado v. Boeing Co.*, 168 Wn. App. 363, 369, 276 P.3d 365, 369 (2012) (emphasis added) (citing *Thompson*, 102 Wn.2d at 231; *Drobny v. Boeing Co.*, 80 Wn. App. 97, 101, 907 P.2d 299, 302 (1995)). Rather, “[o]nly those statements in employment manuals that constitute promises of specific treatment in specific situations are binding.” *Id.* (emphasis added) (quoting *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613, 762 P.2d 1143 (1988)).

Although the question of whether an employer has made a promise specific enough to lead to the creation of an implied agreement may be a question of fact, “if reasonable minds cannot differ as to whether language sufficiently constitutes an offer or a promise of specific treatment in specific circumstances, as a matter of law the claimed promise cannot be part of the employment relationship.” *Id.* (emphasis added) (quoting *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522, 826 P.2d 664 (1992)). The burden of proving the existence of an implied contract is on the party asserting its existence; here, Baker. *Id.* at 368. Because reasonable minds cannot differ that there is no implied contract between Baker and Pierce Transit, Baker’s

claim fails, and the trial court appropriately granted summary judgment in Pierce Transit's favor.

In support of his argument, Appellant claims that the "logical inference" from the Pierce Transit Personnel Manual's statement that employees "may be disciplined for cause" is that employees "may not be disciplined without cause." Appellant's Brief, pg. 10. This simply is not the case. If Pierce Transit wanted to provide that employees "may not be disciplined without cause," it easily could have stated that employees "may be disciplined only for cause." It did not. In fact, Pierce Transit specifically reserved for itself the right to discipline and terminate employees for reasons other than those set forth in the Manual, *see* CP 728-730, and thus Appellant's assertion that the trial court made a "factual error and impermissible inference" in making this same finding, Appellant's Brief at pg. 11, should be dismissed. The clear, unambiguous language of the Personnel Manual—"Although discipline may be based upon other causes, any one or more of the following shall be sufficient," and "The hiring authority may discharge a regular employee for disciplinary reasons including but not limited to those set forth above," and "The Agency reserves the right to decide specific actions based upon individual circumstances and facts of each case," CP 728-730 (emphasis added)—can lead only to the trial court's conclusion that Pierce Transit specifically

reserved for itself the right to discipline and terminate employees for reasons *other than those set forth in the Manual*.

Furthermore, the Personnel Manual does not specify that discipline or termination will result from any of the enumerated reasons, nor does it promise that other conduct will not lead to discipline or termination. And Pierce Transit reserved discretion to terminate or suspend employees *immediately* for any “situation” in which it believes such termination or suspension is warranted. CP 728. Where, as here, “an employer retains the discretion to decide what types of offenses will be serious enough to merit immediate dismissal, the employer makes no promise of specific treatment.” *Drobny*, 80 Wn. App. at 105 (emphasis added); *see also Stewart*, 111 Wn.2d at 613-14 (holding as a matter of law that employer made no definite promise when it distributed written policy providing that in layoff determinations “consideration should be given” to certain factors, because language was not mandatory); *Hill v. J.C. Penney, Inc.*, 70 Wn. App. 225, 852 P.2d 1111, *review denied*, 122 Wn.2d 1023, 866 P.2d 39 (1993) (employee failed to make out *prima facie* case that employer could terminate her only for good cause where employee handbook permitted employer discretion in stating that certain conduct would result in immediate discharge and violation of other rules “may” result in termination, and plaintiff was discharged without warning for a reason not

among those listed). Thus, no reasonable juror could find that the Personnel Manual amounted to promises of specific treatment in specific situations, and there was no implied contract.

**ii. *There is no evidence that Baker justifiably relied on any promise contained in Pierce Transit's Personnel Manual regarding discipline or termination.***

Moreover, Baker presents no competent evidence that he justifiably relied on any specific promise of specific treatment in specific situations. Instead, he offers mere conclusory assertions, stating in a self-serving declaration, submitted with his Response to the Defendant's Motion for Summary Judgment<sup>9</sup> that "I...relied upon Section 8 of the personnel manual...as applying to my own employment relationship with Pierce Transit. The existence of a provision...that 'cause' be required to discipline any regular Pierce Transit employee was one of the reasons that induced me to continue to work at Pierce Transit..." CP 523. The test of justifiable reliance is "whether the employer made a promise of specific treatment in specific circumstances that induced the employee to stay on the job and not seek other employment." *Carlson*, 116 Wn. App. at 735. But other than

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<sup>9</sup> "A declaration that contains only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment." *Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 288, 227 P.3d 297, 301 (2010) (citing *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993)).

the conclusory assertions in his declaration, Baker presents no actual evidence of any such “reliance.” For instance, he has provided no evidence or testimony that he ever contemplated seeking other employment, either when the 2004 Personnel Manual was implemented or at any other time. Moreover, as explained, the statements contained in Section 8 of the Personnel Manual are not sufficiently specific to justify *any* reliance upon them as a matter of law.

*iii. There was no breach of any alleged promise regarding discipline or termination for “cause” where Baker’s employment was indisputably terminated for “cause.”*

Finally, and as more fully set forth in Section (C)(4) of this brief, *supra*, Pierce Transit indisputably terminated Baker for cause (specifically, pursuant to sections 8.2.2, 8.2.5, and 8.2.15 of the Personnel Manual). *See* CP 261. Thus, Baker cannot show the final element of this claim—that Pierce Transit’s alleged promise of “specific treatment” in “specific situations” was breached.

Here, Pierce Transit unambiguously retained discretion to determine what behavior would merit discipline or termination, and further retained

discretion to determine how such discipline or termination would occur.<sup>10</sup> As a matter of law, this cannot amount to a promise of “specific treatment” in a “specific situation.” Moreover, Baker presents no actual evidence of justifiable reliance on any such “promise,” and even if he *could*, he cannot show breach of any such promise where he was undeniably terminated for cause. Because reasonable minds can reach only one conclusion, and no reasonable jury could find the existence of an “implied contract” between Baker and Pierce Transit, the trial court properly granted summary judgment in Respondent’s favor.

**3. The Multiple Disclaimers in Pierce Transit’s Personnel Manual Were Effective and Were Not Voided by Any Conduct.**

Even if Appellant could show the existence of an “implied contract” between himself and Pierce Transit based on alleged promises of “specific treatment in specific situations” pertaining to discipline and termination, his claim nonetheless fails because of the multiple clear disclaimers in Pierce Transit’s Personnel Manual. Washington law provides that employers may disclaim any intent to make the provisions of an employee manual part of

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<sup>10</sup> Baker’s allegation, again found in his self-serving declaration filed with his Response to Respondent’s Motion for Summary Judgment, that Alberto Lara and Kristine Dupille told him that “it was Pierce Transit’s policy to follow Progressive Discipline,” CP 523, is based on inadmissible hearsay and should not be considered in the context of a motion for summary judgment. ER 801; CR 56(e); *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842, 846 (1986). Moreover, his claim is specifically belied by the overwhelming weight of evidence; *i.e.*, the Personnel Manual itself makes no reference whatsoever to “progressive discipline,” and Baker himself did not use or refer to “progressive discipline” when disciplining his *own* subordinate. See CP 584-589; 663-737.

the employment relationship. *Thompson*, 102 Wn.2d at 230. To be effective, Washington law merely requires that disclaimers convey the message “in a conspicuous manner that nothing contained therein is intended to be part of the employment relationship and are simply general statements of company policy.” *Id.* (emphasis added). A disclaimer also must be communicated to the employee. *Swanson*, 118 Wn.2d at 529. The effect of a disclaimer may be decided as a matter of law when reasonable minds cannot differ. *Nelson v. Southland Corp.*, 78 Wn. App. 25, 30, 894 P.2d 1385 (1995).

Here, reasonable minds could reach but one conclusion: the disclaimers in the Personnel Manual were clear and unambiguous and were communicated to Baker. Notably, Baker has never claimed—anywhere in the trial court record or now on appeal—that he did not read or was not aware of the disclaimers. He also has never claimed that he did not see or have access to the entire Personnel Manual. In fact, Baker was a management-level employee with numerous subordinates. He admits that he regularly consulted the Manual’s guidelines in dealing with his own employees. CP 523-524. As such, he can be (and was) expected to be familiar with the entirety of Pierce Transit’s 63-page Personnel Manual, including its multiple disclaimers. *See, e.g., Quedado*, 168 Wn. App. at 374 (“It is not plausible that [employee] was aware of what the documents said

about how to conduct an investigation and take corrective action, yet remained unaware of the conspicuous disclaimer.”); *and compare Swanson*, 118 Wn.2d at 529 (question of fact as to whether disclaimer was communicated where it was contained on a single page in a more than 200-page packet).<sup>11</sup> As noted, the disclaimers here appears **twice** in the Manual (the same document in which the alleged promises were located). First on the very first page of actual text in the Manual, on page v under “PURPOSE,” and again in Section 2.0 (“General Provisions”) on page 5. *See* CP 669; 679. No reasonable person could find that the disclaimers were in any way “buried.”

Moreover, Section 8.0 (“Discipline”) contains its own disclaimer and reservation of discretion in its very first paragraph: “These guidelines will be used in determining discipline. The agency reserves the right to decide specific actions based upon individual circumstances and facts of each case.” CP 728 (emphasis added). Washington law does not require that an employer discuss each individual section of a Personnel Manual with its employees in order to give it effect. Nor does Washington law require that each separate section of a Personnel Manual contain its own, individual disclaimer in order for the disclaimers to be effective. But even if the law

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<sup>11</sup> The Supreme Court in *Swanson* also was concerned that the disclaimer at issue appeared in a “specialized benefits manual,” not, as here, in a personnel manual, which is a logical and reasonable place for a disclaimer to be found. 118 Wn.2d at 529

so required, Baker claims that Section 8.0—including its disclaimer—was specifically discussed with him on numerous occasions. CP 523-524.

Finally, Baker's citations to *Payne v. Sunnyside Cmty. Hosp.*, 78 Wn. App. 34, 894 P.2d 1379 (1995) and *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 75 P.3d 533 (2003) are inapposite. In *Payne*, the Court of Appeals noted that a disclaimer was negated where the personnel manual began by “noting the Hospital’s ‘obligation to retain employees who are qualified,’” set out a mandatory “progressive discipline” policy, and provided that the procedures were not subject to waiver or modification without the CEO’s written consent. 78 Wn. App. at 42. No such facts are present here. In *Carlson*, the evidence at trial established that the employer’s management viewed the handbook procedures as “enforceable obligations.” 116 Wn. App. at 733. Here, Pierce Transit management did not view the Personnel Manual as creating “enforceable obligations,” and in fact the record demonstrates that the Personnel Manual did not do so (it retains explicit discretion for Pierce Transit in discipline and termination decisions and procedures, *see* CP 728-730). The disclaimer unequivocally states that the Manual contains “guidelines only,” “[does] not constitute an employment contract,” is not “intended to make commitment to any employee how individual employment action can, should, or will be handled,” and that its guidelines “are not to be interpreted as promises of

specific treatment.” CP 669 (emphasis added). No reasonable person could be confused or misled to its effect.<sup>12</sup>

As noted, Washington law merely requires that disclaimers “state in a conspicuous manner that nothing contained in the handbook, manual, or similar document is intended to be part of the employment relationship and that such statements are instead simply general statements of company policy.” *Swanson*, 118 Wn.2d at 527 (citing *Thompson*, 102 Wn.2d at 230). The only possible conclusion here is that the multiple disclaimers in Pierce Transit’s Personnel Manual meet this minimum requirement. Thus, the trial court did not err in granting summary judgment in Respondents’ favor.

4. **Pierce Transit Did Not Violate Any “Promise” Where it Disciplined and Terminated Baker for “Cause” and in Accordance with its Disciplinary Guidelines.**

Ultimately, even if Baker could show the existence of an employment contract, the record clearly and indisputably demonstrates that his employment was terminated for “cause”; *i.e.*, his serious and continued violations of Pierce Transit rules, which raised significant concerns about his trustworthiness and lack of judgment, leadership and oversight. Further, the record demonstrates that Pierce Transit followed its disciplinary

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<sup>12</sup> Baker argues that the disclaimers are ambiguous, Appellant’s Brief at pg. 13, but he does not actually explain how or why Baker or any other Pierce Transit employee would be misled by their language. In fact, Washington courts have enforced disclaimers similar to those at issue here. *See, e.g., Quedado*, 168 Wn. App. at 373–74.

guidelines precisely, providing Baker with multiple notices and opportunities to be heard. Thus, *even if* Baker could show the existence of an implied agreement pertaining to his employment under the Personnel Manual, no reasonable juror could find that Pierce Transit breached any “promise” related to his discipline or termination. Summary judgment in Respondent’s favor was entirely proper.

In cases involving an actual or implied employment contract (though, as explained *infra*, Baker fails to show the existence of any such contract here<sup>13</sup>), an employer has a right to discharge an employee for cause. “[J]ust cause’ is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power...a discharge for “just cause” is one which is not for any arbitrary, capricious, or 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, 304 (1989). In determining whether an employer has “just cause” to terminate an employee, the question of whether an employee actually committed the violation is “irrelevant.” *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 177-178, 914 P.2d 102, 112 (1996), *modified*, 932 P.2d 1266 (Wash. Ct.

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<sup>13</sup> Respondent also notes that there is no “good faith” requirement in connection with at-will employment. *See Thompson*, 102 Wn. 2d at 227–228.

App. 1997). Likewise, the question is not whether the employee's conduct was a "legitimate basis" for discipline. *Id.* Rather, the question is whether "at the time plaintiff was dismissed defendant reasonably, in good faith, and based on substantial evidence believed plaintiff" had committed the violation. *Id.* (citing *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 438, 815 P.2d 1362, 1369 (1991)).<sup>14</sup> Whether just cause exists is a question of fact "unless there is no genuine dispute under CR 56(c)." *Lund v. Grant Cty. Pub. Hosp. Dist. No. 2*, 85 Wn. App. 223, 230, 932 P.2d 183, 186 (1997).

- i. Baker's employment was terminated for cause, and the undisputed evidence shows that Pierce Transit acted "reasonably, in good faith, and based on substantial evidence."*

There is no genuine dispute here that Pierce Transit terminated Baker's employment for cause, or that the agency's actions were taken "reasonably, in good faith, and based on substantial evidence." Baker was terminated, after a lengthy and comprehensive investigation of the allegations against him by Jeffrey Coopersmith, for willfully violating Pierce Transit policies by changing the terms of Agency-issued contracts

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<sup>14</sup> Appellant's reliance on *Civil Serv. Comm'n of City of Kelso v. City of Kelso*, 137 Wn.2d 166, 173, 969 P.2d 474, 478 (1999), Appellant's Brief at pg. 15-16, is misplaced. *City of Kelso* is a labor case, involving police officers covered under civil services rules and disciplined under a collective bargaining agreement for "just cause" as defined therein. The case cites neither *Baldwin* nor *Gaglidari*. Its reasoning and discussion of the "just cause" standard do not apply here.

without approval or authorization or any analysis to determine whether it was a prudent decision from a budgetary standpoint or any concern for other legal or practical implications. *See* CP 260-262; 273-274. He also allowed others to rubber stamp the liaisons' timecards in complete neglect of his job duties. *Id.* Pierce Transit could not tolerate this lack of judgement, leadership, stewardship and oversight, especially as the leader of a law enforcement agency. *Id.* In Baker's termination letter, Pierce Transit specified the "cause" provisions of the Personnel Manual pursuant to which it was terminating his employment: 8.2.2 ("Willful violation of the provisions or policies of the Agency"), 8.2.5 ("General incompetency or inefficiency in the performance of your duties"), and 8.2.15 ("Mishandling of employer revenues"). CP 261. In light of this, reasonable persons could reach only one conclusion: Baker was terminated for cause.

Furthermore, the Coopersmith investigation was unquestionably "fair." Coopersmith was an independent third party investigator. Baker was interviewed twice. CP 235; 521. The liaison officers, Smith and Feddersen, also were interviewed, CP 235-236, and they were included in an in-person meeting with Pierce Transit personnel during Liz Passmore's timecard audit, during which they had an opportunity to offer their statements. CP 146; 211; 215. There is no legal or reasonable basis for Baker's claim that Middleton should have been required to conduct yet a

*third* investigation (in addition to Passmore’s audit and Coopersmith’s investigation) into Baker’s conduct before issuing discipline. Appellant’s Brief, pg. 17. And yet, despite Appellant’s incorrect assertion to the contrary, Middleton testified that “there were a number of things that [he] looked into further that stemmed from the Coopersmith report” before terminating Baker’s employment. CP 744-745. No reasonable person could conclude that the multiple investigations into the allegations against Baker were procedurally unfair.

***ii. Pierce Transit followed its suggested guidelines in connection with Baker’s termination, and provided him with multiple notices and opportunities to be heard.***

Furthermore, Pierce Transit strictly complied with its suggested disciplinary guidelines in terminating Baker’s employment. The guidelines in the Pierce Transit Personnel Manual suggest that employees should be:

1. Given notice of the action which includes a statement of the reasons for the action;
2. Provided, if practical, with a copy of the materials or documents upon which the action is based; and
3. Given the opportunity to respond, either orally or in writing, to the authority imposing the discipline prior to the effective date of the intended disciplinary action.

CP 728. Here, Baker was provided with multiple notices of the allegations against him and opportunities to be heard regarding his proposed discipline. He also was provided with a copy of Passmore’s audit report. CP 217-220.

Baker attended four in-person meetings with Pierce Transit personnel (including two meetings with his personal attorney) at which he was afforded the opportunity to present argument and mitigating information in his favor. CP 78; 146; 211; 215; 260. And he received written notice of the allegations against him and was able to submit a lengthy written response. CP 273-274; 276-279. No reasonable person could conclude that Pierce Transit failed to comply with its procedural guidelines for issuing discipline.

*iii. Comparison to CEO Lynne Griffith is inappropriate and irrelevant as a matter of law, where she and Baker held two vastly different positions and engaged in completely dissimilar conduct.*

Finally, any comparison to CEO Lynne Griffith to show that Baker's termination was not "even handed" is inappropriate and irrelevant, because Baker and Griffith are not comparable as a matter of law. First and foremost, unlike Baker, Griffith as CEO was not subject to the Pierce Transit Personnel Manual. CP 679. Griffith and Baker also held extremely different positions. Griffith was the CEO, employed pursuant to an employment contract, who reported to the Board of Commissioners and exercised broad oversight and administrative control of the entire agency. Baker, a middle manager, reported to COO Middleton, exercised limited authority over the Department of Public Safety, had no independent

contracting authority, and was further subject to agency policies and contracts and his supervisor's discretion. Griffith even supervised Baker for a period of time. Moreover, Middleton was totally uninvolved in the State Auditor's investigation of Griffith's incentive-based leave awards, or Pierce Transit's response thereto, at the time he terminated Baker's employment.

The record likewise demonstrates that Baker and Griffith engaged in extremely different conduct. Griffith was carrying on a longstanding and widely-known practice from her predecessor which did not violate any agency directive. This practice had even been used by the Board of Commissioners to grant leave to Griffith herself on several occasions. CP 655. Baker, by contrast, was not carrying on any past practice. He knowingly (on his own, and in secret) violated contract provisions, disregarded specific direction regarding the liaisons' timecards, unilaterally modified agency contracts without seeking or obtaining authority to do so, failed to investigate the impact a "salary" system would have, and neglected his job duties by literally allowing someone else to rubber stamp timecards. This behavior demonstrated a serious lack of judgment, leadership and oversight. Any comparison between Griffith and Baker for the purpose of assessing whether Pierce Transit's termination of Baker's employment was "even handed" is therefore inappropriate and irrelevant. Compare *Lund*, 85

Wn. App. at 226 (question of fact existed where employee presented evidence that the conduct for which she was terminated was “common” and “frequently occurred” at the hospital, and that none of her peers had been previously disciplined for the same conduct). Unlike in *Lund*, there is no evidence that Baker’s conduct was “common” or “occurred frequently” at Pierce Transit, nor is there any evidence that any “peer” of Baker’s (which Griffith unquestionably was not) engaged in similar conduct but was not disciplined. No reasonable person could find that Baker and Griffith are in any way comparable, and likewise no reasonable person could conclude that Baker’s termination was not “even handed” or was arbitrary or capricious.

Where an actual or implied employment contract exists, Washington law provides that employers may terminate employees for “just cause.” All this requires is that a termination be: (1) based on a fair and honest cause or reason, regulated by the good faith of the employer; (2) not be for any arbitrary, capricious, or illegal reason; (3) be based on facts supported by substantial evidence; and (4) be based on facts that are reasonably believed by the employer to be true. *Baldwin*, 112 Wn.2d at 139. Whether an employee actually engaged in the alleged conduct is irrelevant; the proper question is whether “at the time plaintiff was dismissed defendant reasonably, in good faith, and based on substantial evidence believed plaintiff” had committed the violation. *Gaglidari*, 117 Wn.2d at 438. Based

on the overwhelming and undisputed evidence in this case, reasonable persons could reach only one conclusion: Baker's employment was terminated for just cause. Pierce Transit exhaustively investigated the allegations against Baker on multiple levels—including a months-long investigation conducted by an independent third party investigator who interviewed Baker twice—and concluded reasonably, honestly and in good faith that Baker committed serious and continued violations of Pierce Transit policy, which raised significant concerns about his trustworthiness and lack of judgment, leadership and oversight. Pierce Transit's decision was based on substantial evidence, in both the Passmore audit and the Coopersmith investigation, as well as the multiple meetings and written communications with Baker. Thus, even if Baker could show the existence of an implied employment agreement with Pierce Transit that was not negated by the multiple clear disclaimers in the agency's Personnel Manual (though he cannot), no reasonable person could find that he was not terminated for "just cause" under Washington law. Even viewing the evidence in the light most favorable to Baker, his claims fail as a matter of law, there was no error, and the trial court properly granted summary judgment in Respondent's favor.

#### **D. CONCLUSION**

The trial court properly applied the summary judgment standard in finding that no reasonable juror could find that an implied employment contract existed between Baker and Pierce Transit. The trial court likewise properly applied in the summary judgment standard in finding that Baker's employment was terminated for cause and in good faith. For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment in Respondent's favor.

DATED this 14<sup>th</sup> day of June, 2017.

MICHAEL & ALEXANDER PLLC

A handwritten signature in blue ink, appearing to read "C. Kelly Michael", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing Response Brief with the Washington State Appellate Courts' Portal which will send notice of the filing to the following counsel of record:

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DATED this 14<sup>th</sup> day of June, 2017.

  
\_\_\_\_\_  
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