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DIVISION III  
STATE OF WASHINGTON  
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Court of Appeals No. 287432

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STATE OF WASHINGTON, COURT OF APPEALS  
DIVISION III

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CHERYL BECKER,

Appellant,

v.

WASHINGTON STATE UNIVERSITY ET AL,

Respondents.

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REPLY BRIEF OF BECKER

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## I. REPLY TO WSU'S COUNTERSTATEMENT OF THE CASE

### A. Reply to WSU's Central Assertions

Despite WSU's assertions to the contrary, this appeal does not center on Becker's alleged failure to meet academic expectations, her alleged refusal of faculty offers to assist her in progressing towards her PhD, and any alleged abandonment of her program of study. *See* WSU brief at p. 1. WSU's unfounded attempt to mischaracterize Becker as someone who squandered WSU and taxpayer resources is belied by the record.<sup>1</sup> Her internal and external complaints were filed to ensure that her progress through the Experimental Psychology PhD program would not be further impeded, CP218, 967. This complaint is about WSU's failure to allow an accomplished student with a proven track record progress toward a PhD in her established field, CP003.

Throughout Becker's WSU career until her final semester, WSU's written feedback, CP353, 356, 360, and grade point average, CP414, affirmed she exceeded WSU expectations in her scholarship and research performance, *see* Section A1 *infra*; yet, over the course of that same career, Becker's attempts to pursue her own professional research goals,

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<sup>1</sup> *See* WSU Brief at p.72. Ironically, one could say that WSU has extensively used taxpayer resources in an attempt to prevent Becker's progress, necessitating this litigation. A careful reading of Becker's background reveals a highly motivated, committed, and excellent student, not a student with academic deficiencies (CP 235; 681; 271).

consistent with WSU policies, were thwarted for reasons not of her choosing. See Opening Brief at pp. 4-28. On February 24, 2004, Becker raised concerns of age bias, based on faculty exploitation of her academic and research skills for their own benefit, unlike their treatment of younger students. *See* CP187-192, 687-693. She understood that the faculty's conduct violated rights as promised by the Graduate Student Code. *See* CP 558-562 & CP citations at Appendix (hereinafter App.) I, p. 1 and particularly those reproduced at CP559 #2, 560 #13, 562 #9 & App. II.

After Becker used WSU's existing grievance procedures to address this conduct, CP 691, 695-697, 563-565, it is undisputed that WSU took active steps to undermine her graduate student status, CP 414, 215, 226, and ultimately had her disenrolled, CP 228-229, 231, 233. Whether these actions were honest, unbiased evaluations of her entire academic record, or inconsistent with WSU's policy and past practices, or based in substantial part on bias and retaliatory motives involves assessment of this entire record by a jury.

**1. WSU's Admissions Establish that Becker Met the Academic and Research Performance Expectations for Graduate Students**

Before her enrollment at WSU, Becker completed a master's degree consistent with her planned doctoral program, graduating with a 4.0 grade

point average (GPA), CP269, 920. Paul Whitney, Chair of the  
Department testified:

Cheryl, who had a strong academic record from her graduate work at the University of Wisconsin-Stout, came highly recommended. Her research with Professor Budd was related to research I was doing in the area of cognition. She expressed an interest in working with me and I was happy to take her on as my graduate student when she started our Program in the fall 2001. CP235

Becker accepted WSU's offer because of Whitney's indication of interest, CP235, and once enrolled, faculty feedback on her evaluations from fall 2001 through spring of 2004 consistently affirmed her performance, scholarship, and research:

**2001-2002**

Cheryl is a very conscientious student in ....class work and in her research [and] is making good progress. ... She is coordinating our research protocol involving older adults and I anticipate increasing her responsibilities in the coming semester. Whitney CP353

Cheryl is doing very well in the course, [especially] given the difficulty level of the information. She is also doing well on the exams and her performance indicates that she can understand, integrate and critically evaluate information that we have discussed in class. Fournier CP353

She is performing at a high level and it is a pleasure working with her. She completes her TA assignments correctly and on time. ...[S]he is putting in a lot of time helping set up my lab for a research project on visual attention and motion processing (also involving Lisa F.). Patterson CP353

**2002-2003**

She has been a model student ... She is always extremely well prepared for class, and offers good insights in class.... Cheryl is an excellent student. Joireman CP356

With respect to her TA duties, Cheryl's performance has been very good—she is willing to take on various duties ...including grading exams and running ... stat labs. [Re] research, Cheryl's performance is also very good- she has helped on a very important project and I fully expect the data to eventually be published with her as coauthor. .... Patterson CP356

**2003-2004**

For her assistantship, Cheryl graded brief essays ....ran exams....and conducted a lab study [for me] on aggression. Cheryl did a good job in these areas... [and] will be presenting [an] aggression study at a national conference this May.... Joireman CP360

Becker was enrolled full-time and until her final semester, Spring 2005, Becker's cumulative grade point average (hereinafter GPA) was 3.68, well in excess of the minimum 3.0 required to remain in continuous enrollment under the Graduate School's only criteria for measuring continuing progress, CP414, 552-553. She had revised Programs of Study approved by the Experimental Psychology Program, (hereinafter "EPP"), Psychology Department (hereafter "PD" or "Department") and Graduate School (hereinafter "GS ") See CP163, 176, 248 & App VI. The last was approved on 4/30/2004, a week after that year's evaluation criticizing her progress. See CP358, 248.

She relied on rights in WSU publications to be "free of reprisal" due to changes in mentors. See CP562, App. II. Unlike WSU's characterization in its brief at p.72, she understood that she could expect to "design a program of study that [was] *suited to* ..... *her particular interests*

*and career objectives*” CP569. She reasonably expected to accomplish that goal by “participating in already existing research projects [and] *developing [her] own research interests in collaboration with appropriate faculty...*” CP 814, 582. She also understood that WSU provided choices for conducting doctoral research, “*depending on the student’s needs... previous experience, and other circumstances*” *Id.* at 582, emphasis added<sup>2</sup>.

After Becker’s February 24, 2004 complaint of age discrimination to the Department Chair, Program Director and her advisor, her next evaluation, April 23, 2004, was very critical in tone, CP358. Becker reasonably perceived that her complaint impacted faculty perceptions, as the evaluation placed blame on Becker for the unforeseeable delays impacting her progress, CP358. While she was scrutinized for multiple advisors, CP358, faculty comments from those advisors incongruously indicated satisfaction with her accomplishments, CP353, 356, 360.

**2. Becker did not Reject Offers of Assistance from Faculty. Rather, she was Forced to Reconfigure her Program of Study due to Favored Treatment of Younger Students**

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<sup>2</sup> WSU does not offer the full record of Becker’s testimony in suggesting she admitted otherwise. The Court must look at CP101-104; the whole discussion demonstrates the reasonableness of expectations regarding her planned research trajectory. Becker wanted and expected to collaborate with faculty. She wanted and expected mentoring and collaboration with faculty such as Paul Whitney, Lisa Fournier and Jeff Joireman. *See* Opening Brief at pp. 8-30.

Despite WSU's characterization that Becker rejected assistance from the faculty, it was the faculty like Paul Whitney, Lisa Fournier, Jeff Joireman, and ultimately Robert Patterson, who did not allow her to progress or develop research consistent with her established area and professional goals. Instead, they chose to favor younger students by requiring Becker to assist in their advancement at the expense of her own, CP691-692, and/or required that she conduct faculty research **outside** her area, at the expense of advancing her own program of study, CP 682-692. A jury could credit Becker's testimony that faculty placed ongoing onerous and disparate expectations on her that repeatedly impeded her progress. Further, a jury could believe that her complaint about such conduct motivated the following adverse action, in violation of policy:

- 1) to give her five months to prepare and complete her preliminary exams at a PhD level in a novel, unfamiliar, subject, CP358, 404, 695;
- 2) to terminate her TA employment when she was a student in good standing, CP150, 410, 414;
- 3) to alter her GPA from 3.68 to 2.21 in May 2005, CP 414;
- and
- 4) to then disenroll her from WSU, CP 231.

### **3. Becker Did Not Abandon Her Program of Study**

At pages 1 and 63, WSU asserts that Becker abandoned her "program of study" in the fall of 2004 and spring of 2005. In fact, after Becker advanced her complaint to the GS on July 12, 2004, CP 218-219, the GS failed to take appropriate action on it, see fn. 17 *infra*, despite its

own policy. Becker retained an attorney, Laurel Siddoway, CP695, who communicated with WSU beginning July 22, 2004, CP904-905, 909. It is undisputed that EPP faculty terminated Becker's TA employment on October 12, 2004 and at that time also directed her to communicate **exclusively** with the GS, CP410. On January 13, 2005, Ms. Siddoway sent a letter to GS Dean Howard Grimes, highlighting some concerns that needed to be addressed to ensure Becker's progress in the EPP, CP911-928, App. VII. In February 2005, CP930, WSU sent a "skeleton of their proposal" and counsel discussed *proposals* in the spring of 2005 so that Becker could *advance* her program of study, CP930-934. This exchange gave Becker no indication that the GS and EPP were contemplating her disenrollment, *Id.* Rather than abandon her studies, Becker was actively engaged in an effort to have her concerns addressed precisely because of her commitment to continue toward her professional goals through the EPP at WSU, CP 933, 697.

**B. Reply to Standard and Scope of Review, Forms of Evidence, and Becker's Evidentiary Burdens Under De Novo Review**

**1. Standard of Review**

WSU minimizes its burden on de novo review of the Court's original order of summary judgment. See WSU Response at p. 36-38. It is WSU's burden to establish that there *are no genuine issues of material*

*fact* on any of Becker's claims and judgment as a matter of law is warranted. *See* Opening Brief at p. 38. At pp. 38-41 of her Opening Brief Becker has discussed the opposing party's burden, the construction of the facts in her favor, see pp. 40-41, and the general impropriety of summary judgment in cases like this one. Despite WSU's assertions, Becker's evidence does not rest on conclusory allegations but on reasonable inferences from documentary and testimonial evidence of both parties. Just as for the trial court, the issue is "not whether [this Court] thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury *could* return a verdict for the plaintiff on the evidence presented" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)., emphasis added.

## **2. Evidence Generally Admitted to Show Pretext, Arbitrariness, Capriciousness, and Bad Faith**

### **a. Evidence of Pretext**

Resolution of Becker's claims turn on questions of reasonableness, good faith, the motive and intent of various University actors, and circumstantial evidence of pretext. Discrimination case law provides standards for showing pretext. Evidence that WSU's alleged legitimate decisions are pretextual is also probative of WSU's alleged good faith and/or arbitrariness and capriciousness.

It is undisputed that WSU decided to effect Becker's disenrollment knowing that she was over forty, older than similarly situated EPP students, CPs 691-692, 115, and knowing she opposed what she believed were illegal educational/employment practices, e.g. CP 967. Thus, the Court must remand if there are inferences from Becker's "evidence that the stated basis for [WSU] decision[s are] actually untrue, in fact did not motivate the decision[s], or [are] otherwise unworthy of credence" such that retaliation and/or age discrimination could be substantial factors. Inconsistent and/or incompatible reasons for decisions also are indicia of pretext. *See Sellsted v. Washington Mutual Bank*, 69 Wn. App. 852, 862, 851 P.2d 716 (1993), other citations omitted [reversing summary judgment in employment-based age discrimination case]. Other evidence of pretext can be found through comparators, i.e. disparate treatment and imposition of different performance expectations on Becker as an older, nontraditional, EP student than similarly situated younger EP students, in violation of policy, Id., CP562 #1. Departures from past practice and failing to uniformly follow policies also can support pretext. *See, e.g. Spulak v. Kmart*, 894 F.2d 115, 1155 (10<sup>th</sup> Cir. 1990), ["inference that [the employer] selectively enforced its rules against [the plaintiff] and that the rules were but a pretext to mask age discrimination" quoting *Cooper v Asplundh Tree*, 836 F.2d 1544, 1547 (10<sup>th</sup> Cir. 1988)]. Becker need not

produce evidence beyond her prima facie case to raise an issue of pretext if the totality of her evidence is sufficient for a jury to disbelieve WSU's reasons for its actions and find that a substantial motivation was discrimination and/or retaliation, *Reeves v Sanderson Plumbing*, 530 U.S.133 (2000).

**b. Evidence of Arbitrary and Capricious Decision-making**

Both parties agree that Becker had a procedural due process right to “a decision-making process that is careful, deliberate and consistent with WSU policies and procedures.” *See* Response Brief at p. 44 and authority therein. These §1983 cases emphasize that failure to make clear and deliberate decisions upon a *full review of Becker’s academic record* is prima facie evidence of arbitrary, capricious and bad faith decision-making, and in violation of her due process rights. *See Schuler v. University of Minnesota*, 788 F.2d 510, 516 (8<sup>th</sup> Cir 1986), *infra, emphasis added*.

**II. ARGUMENT AND AUTHORITY**

**A. There are Genuine Issues of Material Fact as to whether WSU Fulfilled the Obligations Contained in their Policy and Publications**

WSU's Response Brief reveals that the parties do agree on the standard for construing any university-student contract. Construction of a “university-student contract is that of reasonable expectations, i.e. *what*

*interpretation a university should reasonably expect the student to give to its representations.” See WSU Brief at p. 60; emphasis added, other citations omitted. The parties also agree to the following sources for the enforceable student expectations found in these WSU publications:*

Graduate Student Code, (hereinafter GSC) CP558-568 (also App. II), Experimental Psychology Program Description (hereinafter EPPD), CP569-592 (also App.III), Graduate School Policies and Procedures (hereinafter GSPP), CP514-547 (also App. IV), (WSU brief p. 6) and WSU Course Catalogs CP771-807 (also App. V) (WSU brief p. 8).

Ironically, WSU fails to note that these documents do not only guide student conduct. They also create student rights, CP 559-560, and outline expectations and responsibilities of Program and Departmental advisors, and faculty as mentors CP 562, as well as expectations of the Graduate School itself, CP 305-348. In her Opening Brief, at pp. 4-6, Becker outlined some of the explicit promises WSU published that created reasonable student expectations. A summary of the most relevant obligations that Becker expected WSU actors to comply with, consistent with her testimony, is attached at App. I. Becker read these and relied upon them to guide her progress through the EPP, CP101.

WSU argues there is no material factual dispute as to whether EPP faculty fulfilled their obligations of trustworthy and professional mentoring, clear and justifiable expectations, and in their grading of

research credits, for examples. See CP 559 #1, 561-563, 800-802. Yet, that is precisely what is at issue in this appeal.

WSU claims that its publications contain WSU's expectations of Becker that were clearly articulated and consistently applied. *See* WSU Brief at p. 60-61.<sup>3</sup> WSU's assertions must be weighed against Becker's competing evidence that WSU agents consistently acted with blatant disregard of its promises of an academic environment free of discrimination, or reprisal for changing mentors or for following WSU's own grievance procedures, *See* CP 559 #2, 559 #4. 562. Against this backdrop, the Court can examine whether WSU has satisfied its obligation to establish on uncontroverted evidence that its agents acted in good faith, deliberately and carefully in their decision-making surrounding Becker's termination as a student at WSU. If it finds that Becker has produced sufficient evidence to the contrary, or inferences from undisputed facts, such that a jury could find that agents of WSU failed to act deliberately and carefully in reviewing Becker's academic record, or discriminated or retaliated against Becker in these adverse actions, then summary judgment was improper.

**B. There are Issues of Fact as to the Clarity of Expectations for Completing Preliminary Exams and in the Evaluations of Progress**

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<sup>3</sup> This is a tacit admission that the documents created enforceable expectations. They cannot have it both ways. If the policies contain dictates that govern Becker's conduct, these expectations are also enforceable against WSU.

## 1. Preliminary Exam Expectations

WSU asserts that no reasonable person could conclude that WSU failed to fulfill the right of graduate students “to be governed by clearly stated and justifiable academic procedures, rules and regulations” CP559. *See* WSU brief at 60. WSU asserts that all the “expectations for successful completion of a PhD” were clearly stated and justifiable. WSU emphasizes the clarity of the alleged *mandatory requirement* that “the preliminary examinations *must be taken* before the sixth semester of graduate study. . .” *Id.* at 61 citing CP286.<sup>4</sup>

Whether this deadline was a requirement for Becker that justified their actions is clearly disputed on this record. First, the very passage cited for the inflexibility of this “requirement” demonstrates the ambiguity. WSU ignores the remainder of CP286 which contemplates and provides for *exceptions* if approved by the student’s Program and Graduate School. Becker followed the requirements for obtaining approval for her programs of study, CP244, 246, 248. A jury could concur with Becker’s reasonable understanding that as a result of that approval, the timing of the preliminary exams would logically be in sync with the approved program.

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<sup>4</sup> Becker testified that she initiated efforts to communicate with advisor Joireman to discuss opportunities for her to have time to study towards her preliminary exams, CP689, in light of the time demands of Joireman’s aggression study. This was one of several reasons motivating the 2/24/04 meeting CP189-192, 691-693.

Becker also testified without contradiction from Craig Parks, EP Program Director, that he advised her that students have up to 12 months, and sometimes longer, to prepare for their exams after receiving their last reading list, CP690.<sup>5</sup> WSU misleadingly suggests Becker admitted in her deposition that “by December 2003,” she had completed all her reading lists necessary for her preliminary examination process, i.e. December 1. *See* WSU Brief at p. 19 n.32. Becker notes that the full context of her deposition testimony does not contain such an admission and is more equivocal.<sup>6</sup> Joireman also admits that as of February 27<sup>th</sup> 2004, Becker had yet to finish two books on Brigham’s list, CP198, and confirms Becker’s testimony that she only received his list in December 2003, CP689, 154.

Additionally, the GSPP states that the “time limit for use of graduate credit toward a doctoral degree *is ten years from the beginning date of the earliest course applied toward the degree*” CP338 emphasis added. Becker’s doctorate could have been “completed within three years

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<sup>5</sup> Becker’s contemporaneous understanding of this is also reflected in Joireman’s notes of the 2/24 /04 meeting. *See* Appendix VII, CP189-192. The GSC also promises students that faculty will provide “realistic estimates” of deadlines CP559 #12. Given Joireman’s continued emphasis that his own research be performed as well as the 4/04 reconfiguration of her preliminary exam committee, the evidence suggests that the 4/04 evaluation/ultimatum given to Becker was an arbitrary and capricious act.

<sup>6</sup> Q. You had received your reading list from Tom Brigham in the fall of ’03; is that right? A. Yes. Q. And you had completed that? A. *Pretty much*. Q. And you had done most, *although not all*, of your work with Paul Strand; is that right? A. Yes. CP99 emphasis added.

of satisfactory completion of the preliminary examinations” and easily be within the ten years to apply her WSU credits. *Id.* A reasonable inference from all of these representations and documents is that, given the circumstances causing revisions to her program of study and committee composition, Becker could reasonably expect to be provided time beyond the arbitrary Fall 2004 deadline that was set for the examination process, CP691-694.<sup>7</sup> As there are genuine issues of fact as to the mandatory nature of this expectation, which are probative of WSU’s true motive for imposing this deadline, summary judgment was inappropriate.

**2. Lack of Clarity and Inconsistency in Becker’s Evaluations is also Probative of Motive and Good Faith**

WSU’s GSC promised timely feedback on work and unbiased annual evaluations, CP 559 #9-12 in App.II. WSU asserts it acted consistent with these promises in Becker’s annual evaluations. Becker agrees with WSU’s assertion that, “[the] review *should consider the student’s cumulative record, their progress in research and relevant work assignments and expectations for the next review period*” WSU Brief at 64, emphasis added. However, the formal evaluations contained in Becker’s official review do not include the elements above; instead they are contained in the faculty comments not made part of the permanent

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<sup>7</sup> All these issues were addressed by her counsel before the ultimate disenrollment CP911-928

record. See e.g. CP352 v. 353, 355 v.356.<sup>8</sup> A jury can credit Becker's assertions that the summary statements in the evaluations were not always consistent with the faculty comments. *Id.* Also, the failure to create a review that incorporates evaluation of coursework, work assignments, and progress on the extensive research she conducted on Parkinson's (Whitney), motion processing (Patterson), and aggression (Joireman) into her permanent record, prevented Becker from receiving an unbiased evaluation. As those assessments were not included, a jury could believe that her entire record was not considered before her disenrollment. Given the inconsistencies between the required feedback and the summaries placed in her permanent record,<sup>9</sup> there are factual disputes as to the clarity of WSU's academic expectations and communications with Becker as to her progress.

### **3. Inconsistent Timing of Becker's Evaluations Before and After Becker's Complaint Creates Inferences Relevant to Pretext**

WSU's departure from past practice in providing her with the final evaluation, May 17, 2005, creates triable inferences relevant to pretext.<sup>10</sup>

Becker typically received an evaluation shortly after the faculty meeting.

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<sup>8</sup> "...return one copy of this evaluation for your student file....Keep the other copy, along with the specific faculty comments, for your records." CP 352

<sup>9</sup> See Opening Brief at p. 11 for further discussion of the two sections of Becker's annual student review.

<sup>10</sup> Previous meeting dates and written evaluations were within a week of one another: 2002 April 22 & April 24 (2 days) CP352; 2003 April 28 & May 5 (7 days) CP355; 2004 April 19 & April 23 (4 days) CP358.

Yet, Becker received her final evaluation, indicating that she had been terminated from the Program, *twenty-three days* after the faculty met, CP362, and almost *a week after* her receipt of GS correspondence from Grimes notifying her that her cumulative GPA required immediate disenrollment, CP231. That GS correspondence also included an illusory offer of potential reenrollment.<sup>11</sup> This action, coupled with inconsistent grading decision related to research credits, discussed *infra*, raises questions as to whether the evaluation procedures were fairly applied or relevant to pretext and retaliation<sup>12</sup>. A jury could conclude from this evidence that the disenrollment decision was not a deliberate careful one based on an unbiased review of Becker's entire record.

#### **4. There was No Stated Criteria for Research Progress**

At pages 64-65, WSU argues that criteria for "evaluating performance in Psych 800... were also clearly stated." Both Becker and her expert (*See Opening Brief p. 44-46*) have raised concerns about the clarity of any evaluative criteria WSU contends were the basis of her disenrollment, CP480-487. In addition, review of her entire academic record shows inconsistent application of S or X grades, CP414. WSU's

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<sup>11</sup> WSU policy precludes reinstatement for anyone with a GPA of 2.75 or less (CP345 6.2.4.3) (Becker's GPA was now at 2.21).

<sup>12</sup> This GS correspondence from Grimes was dated May 12<sup>th</sup>. As discussed below, the GS received two notifications of Becker's EEOC complaint prior to May 9<sup>th</sup>. One notification was sent directly to Grimes, the GS dean.

reference of CP807 as an explanation of the “criteria” and procedure for evaluation of 600 and 800 credits is misleading; it reveals simply a title and the phrase “varied credit, S/F grading” CP807. There were no criteria provided. See CP 481-482, 807.

Becker’s transcript reflects that throughout her WSU career, not just spring of 2005, Becker enrolled in independent study 600 and 800 research credits **as required**, CP 833. She received X, S or no grade at all on research credits, as early as her first year.<sup>13</sup> There was no indication as to why or for what Becker received an X, S, or no grade at all. Although research was a central focus of the EPP, “special projects” or “research,” as referenced in the 600 and 800 series in the Catalog were not distinguished. Without criteria for measuring “satisfactory progress” for an “S” grade versus “continuing progress” for an “X” grade, WSU had only an arbitrary indicator for progress. See CP800.

In the fall of 2004, Becker received an “S” in 600 and “X” in 800 credits. See fn.13, *supra* and CP414. WSU’s brief at 46 implies disingenuously that WSU faculty only used an “X” that fall to “carr[y] over credits” as a good faith gesture. However, Becker’s testimony was that the “X” grade always served as a placeholder to be changed to an “S”

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<sup>13</sup> Fall 2001: Psych 600 —S, Psych 600 —X||; Spring 2002: Psych 502 —S, Psych 600 —S; Fall 2002: Psych 600 No Grade; Spring and Fall 2003 Psych 600 —S||; Spring and Fall 2004 Psych 600 —S||, Psych 800 —X||; Spring 2005 Psych 800 —F|| *Id.*

upon completion of the dissertation, CP 698, CP 800. That understanding is consistent with the Catalog, CP 800, which states that an X is changed to an S upon completion of special problems, research, or dissertation, CP800. A jury could credit Becker that unambiguous criteria were not clearly communicated, and thus WSU failed to give Becker notice that termination of her TA appointment and the "F" grade on 16 research credits could follow. The Fall 2004 grades were consistent with the X and S grades she received previously. A jury could conclude that the true motive to depart from past practice and use the F grade was to lower her GPA and effect her disenrollment in retaliation for her complaint, as opposed to a decision made on the basis of any established criteria or in light of her entire record.

Becker and Patterson agree that she informed him of her complaint early in Fall 2004; he concurred with her understanding that she would not be completing preliminary examinations that fall CP696, 147-148. Patterson concurs that she satisfactorily performed all TA responsibilities that Fall, CP696, 147. Given this evidence, an inference is raised as to the faculties' true motives for altering her GPA, terminating her employment, and other adverse actions that academic year.<sup>14</sup> WSU offers no credible

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<sup>14</sup> Becker continued to get dictates to take the preliminary examination by the October, 2004 date, CP406, 408, and was terminated from her appointment as a TA despite

explanation as to why the 800 level X credit was not assigned in spring 2005 pending the complaint's resolution, consistent with the use of placeholder grades. A jury could conclude that WSU acted arbitrarily and capriciously when it chose to assign Becker the "F" grades to ensure her expedited exit.

### **C. Becker's Retaliation Claim is Actionable in Both Employment and Education**

As discussed in Becker's Opening Brief at pp. 58 and 62, the anti-retaliation provisions of state law are not limited to the employment setting. *See* fn. 17, *infra*. Hence, expulsion from a graduate program based on protected activity is actionable under RCW 49.60.210.<sup>15</sup> Our Supreme Court has already held that WSU's discriminatory treatment of students is actionable under the WLAD, RCW49.60.030. *See Blair v. WSU*, 108 Wn.2d 558.566. 740 P2d 1379 (1987) [gender discrimination of student athletes at WSU].

Moreover, even if this Court were to limit Becker to asserting that termination of her TA employment was an adverse action under the WLAD, it is equally specious for WSU to argue that Becker did not suffer

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Patterson's satisfaction with her TA work and her status as a student in good standing. This action was later reversed, CP238 & 252.

<sup>15</sup> This Court can take judicial notice that termination from a graduate school program can have profound career-damaging and even career-ending consequences. In this way, it can be as harmful as termination from a career position in the employment context.

an adverse employment action shortly after her protected activity. See Opening Brief discussion (pp. 65-66) regarding Becker's age discrimination claim in employment under RCW 49.60.180 *infra*. The same liberal construction of the employer-employee relationship applies to her retaliation claim.<sup>16</sup>

**D. There is Sufficient Evidence of a Nexus between Becker's Complaints and the Adverse Actions.**

WSU asserts that there is no evidence linking decision makers' knowledge of Becker's complaints when taking adverse actions. See Respondents' Brief at 50. Given Patterson's knowledge of her internal complaint process (CP 148), it is highly implausible that Parks' and Whitney's decision to terminate her TA appointment was made without that knowledge. The fact that they later reversed that decision because of the complaint process confirms their knowledge, CP 252. It also supports an inference that faculty were predisposed against Becker in seeking a basis to remove her from the Program because of the complaint.<sup>17</sup>

Similarly, WSU asserts that neither the GS nor EPP had knowledge of Becker's external EEOC charge when making the decision to lower her

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<sup>16</sup> See *Galbraith v. TAPCO Credit Union*, 88 Wn. App 939,946 P 2d 1242 (1997)

<sup>17</sup> Additionally, the GS violated WSU policy when it failed to advance Becker's July 2004 complaint to the Committee on Graduate Student Rights and Responsibilities, CP564. In the same time period Grimes testifies to unsigned correspondence dated 9/1/04, requiring Becker's action by 8/30/04. These credibility issues preclude summary judgment on Becker's claim under RCW 49.60.210. See Grimes Testimony at CP213 & letter at CP224.

GPA and then disenroll her, CP977, 979; cf. CP 231. The EEOC sent the charge on **May 5, 2005**, with two separate letters; one was delivered directly to Grimes and the other to the GS office, CP971, 973. WSU's attorney, who was then forwarded the document, acknowledged receipt of the charge on **May 9**, CP975 & App. X. Grimes informed Becker of her altered GPA and disenrollment in a letter dated **May 12<sup>th</sup>** CP 977.

Whitney and Parks issued the late evaluation allegedly justifying the grade decision even later on **May 17<sup>th</sup>** CP 979. Given all of this evidence, a reasonable fact finder could conclude that Grimes and the GS had notice of the charge well before the final grading decision was made, and **not on May 16, 2005** as asserted by WSU, CP 215 & WSU Brief at p. 28.

**E. Judgment as a Matter of Law is Inappropriate on Becker's Constitutional Due Process and Equal Protection Claims**

**1. Other Federal and State Decisions Involving Disenrollment from Graduate Programs that Rest on Deference to Academic Judgment are Distinguishable**

WSU urges the Court to follow the many academic dismissal cases involving deference to faculty but minimizes the standard for deferring to academic decision-making which requires undisputed evidence of a "careful, deliberate review of the student's entire academic record." *See e.g. Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U. S. 78 (1978).

Becker's case can be distinguished from federal and Washington decisions resting on these Supreme Court cases. First, they often involve academic decisions made on the basis of undisputed student performance failings, e.g. failed preliminary examinations, unsatisfactory performance of clinical assignments and rotations, academic probation, and consistently low GPAs. Becker's academic success, performance on course work, assistantships, and research, and her resulting high GPA contrasts with these cases. Academic deference is also warranted when, as in many of these cases, a graduate student has been given multiple opportunities to succeed. Fair and careful reviews of a student's entire record, often with input from the student, before disenrollment, are significant factors impacting these decisions. None of that occurred here.

a. ***Schuler v. University of Minnesota* 788 F.2d 510 (8<sup>th</sup> Cir.1985)**

After extensive research for a case arising in a context similar to this one, applying these principles to assist the Court, *Schuler v. Minnesota*, 788 F.2d 510 (8<sup>th</sup> Cir 1986), was the closest. As here, Schuler brought §1983 claims based on her dismissal from a graduate Experimental Psychology Program and alleged causes of action "grounded in procedural and substantive due process, discrimination on the basis .... of age [under] the Equal Protection clause, misrepresentation and breach of contract," *Id.* at 512. As here, the completion of preliminary exams was

a condition precedent of advancement to the PhD. Like Becker, Schuler also filed a grievance claiming that “her advisors had misdirected her and obstructed her” and asserted that the University had failed to follow its own grievance policy, *Id.* at 513.

Yet, unlike Becker, Schuler had failed a preliminary oral examination and was given a second opportunity *two years later*. She maintained her student status for eight years, *Id.* The Court held that, among other reasons, as Schuler received a 7 hour Departmental hearing, any due process interest was satisfied, *Id.* at 513. The *Schuler* Court concluded that she had provided insufficient facts from which they could distinguish *Ewing* and *Horowitz* because “University actions were careful and deliberate and *based on an evaluation of her entire academic career*,” *Id.* at 516, other citations omitted. The *Schuler* Court also noted that the consequences of failing preliminary examinations were clearly articulated in faculty and university publications, *Id.* at 514.

Unlike *Schuler*, here there is a clear dispute as to whether WSU’s disenrollment decision involved evaluation of her entire academic record as opposed to her alleged failings in Spring 2005, CP414. Similarly since Becker was not provided any opportunity to be heard, as was Schuler, Becker’s situation is distinguishable. Since a jury could conclude that WSU’s actions did not involve the kind of deliberate decision-making

evidenced in *Schuler*, there are triable issues of arbitrary, bad faith, and capricious decision-making, supporting reversal, unlike *Schuler*.

**b. State Cases Cited by WSU**

**1) *Enns v. Board of Regents*, 32 Wn. App. 898 650 P.2d 1113, (1982)**

In *Enns*, a mathematics graduate student failed virtually all the preliminary exams offered him in the course of his academic career, a total of 23 of 24 exams, *Id.* at 899- 900. Multiple appeal opportunities through the Dean and the Provost were afforded *before* the University terminated his student status. None of those appeal mechanisms were provided to Ms. Becker despite her attempts to invoke the University's stated grievance process for addressing her concerns. Instead, her dismissal letter misrepresented her rights to petition for reinstatement despite WSU's own policy which barred reinstatement of students with Ms. Becker's newly reduced cumulative GPA. *See* CPs231, 486, 553 6.2.4.3.

**2) *Maas v. Gonzaga*, 27 Wn. App. 397 618 P.2d 106, (1980)**

In *Maas*, although the student failed to meet the GPA necessary to maintain enrollment in its law school, the facts are significantly different from this case. After failing to meet the required GPA, Maas obtained credits from other schools and sought to compel Gonzaga to award her a law degree, *Id.* at 400. The Court held that there were no such contractual obligations. Becker has never asserted that WSU owed her a degree but

only an opportunity to progress and to have her progress evaluated in the same manner as the other students, and based on fair and unbiased criteria that is clearly articulated and applied uniformly.

**3) *Marquez v. University of Washington*, 32 Wn. App. 302 648 P.2d 94 (1982)**

*Marquez* involved a claim of reliance on provisions of a national, as opposed to University-specific pre-law handbook identifying academic assistance for students. The Court properly found that its language did not bind UW to any particular form of aid. As in *Enns*, the student had been given multiple opportunities to achieve the required GPA before termination. As such, the evidence is wholly inapposite to this one. Becker more than met the required cumulative GPA throughout her enrollment except for the end of spring 2005. Unlike that case, WSU's publications do permit a Court or jury to find enforceable expectations, creations of rights and promises not present in the *Marquez* case.

**2. WSU's Brief Misconceives the Basis for Becker's Equal Protection Claim Arising in Education**

As in *Schuler*, Becker's equal protection claim arises in the educational context and WSU's reliance on the *Ahlmeyer* decision under 42 U.S.C §1983 is thus misplaced.<sup>18</sup> See *Ahlmeyer v. Nevada System of*

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<sup>18</sup> Becker concedes that *Ahlmeyer* would prevent her assertion of a 1983 claim as a substitute for any federal employment discrimination claim but as discussed *infra*, that is not the sole basis for Becker's equal protection claim; it provides for the preemptive

*Higher Education*, 555 F3d 1051. (9<sup>th</sup> Cir. 2009) and the case law cited by WSU's Response Brief, p. 48. Becker's equal protection claim based on age discrimination arises from her treatment *as a student*. If WSU believes that Becker has not stated a claim for employment discrimination because of the academic nature of her TA and RA employment, as it states at pp. 52-53 of its brief, then Ahlmeyer's rationale equally does not apply to this claim. The rationale for the *Ahlmeyer* decision rests on the premise that "it is implausible that Congress would have intended to preserve the private cause of action under § 1983 for age discrimination when that cause of action would severely undermine, if not debilitate, the enforcement mechanism created by Congress under the ADEA" *Id.* at 1056, other citations omitted.

Becker agrees with WSU's assertion that under *Killian v. Atkinson*, 147 Wn.2d 16, 50 P.3d 638 (2002), her sole claim for age discrimination *in employment* arises under the Washington Law Against Discrimination, RCW 49.60.180 [WLAD].<sup>19</sup> See p. 52 of WSU Brief. However, WSU also acknowledges that Becker's claims do not solely rest on employment decisions. See WSU brief at p. 52-53. WSU cannot have it both ways. If

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effect of the Age Discrimination in Employment Act (ADEA) as the sole federal remedy for addressing age discrimination in *employment*.

<sup>19</sup> Ms. Becker broadly pled claims for violation of equal protection arising out of "arbitrary, capricious, and discriminatory actions" against her in both education and employment. See Complaint at CP 19-20.

she was treated in a dissimilar manner from similarly situated younger graduate students in the inflexible expectations imposed on her for completion of her preliminary exams, CP695, 358-359 for example, or by being required to perform research for which a younger student received the benefit, CP89-90, 684, these educational decisions would state a claim under the Age Discrimination Act of 1975.<sup>20</sup> Unlike the ADEA, the ADA has no comprehensive federal remedial and enforcement scheme but provides primarily for limited injunctive relief, 42 U.S.C. §6101 and specifically 42 U.S.C. §6104. As Becker's §1983 claim is a vehicle for enforcing her federally protected right to be free of age discrimination *in education*, a right without a meaningful remedy, *Ahlmeier's* rationale and other Circuit decisions do not foreclose Becker's §1983 equal protection claim.

**F. Becker's Employment-Based Age Discrimination Claim is Actionable Under 49.60 and her Allegations are Distinguishable from *Grimwood v. University of Puget Sound***

**1. Becker's Employment Claims are Within the Statute**

As indicated above, in attempting to defeat Becker's equal protection claim, WSU relies on cases pre-empting §1983 in federal claims of age-based employment discrimination. However, in attempting

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<sup>20</sup> Counsel concedes that as she has not conclusively established the conditions precedent for an independent ADA claim, she will concede the propriety of the trial court's dismissal of that claim. Thus, the issue of whether the exclusive jurisdiction of such claims is in the federal court is moot and not subject to review.

to defeat Becker's RCW 49.60.180 claim, WSU also asserts that Becker's claim arises only from her status as a graduate student. Becker's dual statuses as employee and student support different claims. While TA and RA appointments are unique positions found in the academic environment, they remain statutory and common law employees, *See e.g. Pope v. University of Washington* 121 Wash. 2d 479, 852 P. 2d 1055, (1993). WSU's assertion that Becker's allegations regarding her workload are outside the coverage of WLAD is a strained and narrow construction in a statute mandating liberal construction, RCW 49.60.020. "Employer" and "employee" are broadly defined. *See* RCW 49.60.040.<sup>21</sup> Likewise, this Court must construe Becker's claims as to her TA assignment overloads and the termination from her TA, as within the ambit of discrimination in the terms and conditions of her employment and discharge under RCW 49.60.180.<sup>22</sup>

Despite WSU's attempt to distinguish Becker's claims, her WLAD age claim *is about a 40 plus year old graduate student performing satisfactorily on TA work assignments, only to be abruptly discharged*

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<sup>21</sup> Moreover Becker's employment status was not questioned by the EEOC or WSU. The EEOC took jurisdiction under the ADEA which has more restrictive definitions of employer and employee, CP969-972. It is clear that WSU's Assistant Attorney General was prepared to answer the charge, CP 975.

<sup>22</sup> WSU's reference to RCW 49.60.200 is a red herring and the codification of Initiative 200, a 1998 initiative measure passed to prevent what its framers believed was race and gender-based preferences in benign affirmative action practices in public education, employment and contracting; it is separately codified as the "Washington Civil Rights Act" at RCW 49.60.401 and is not part of the WLAD.

*from those duties.* WSU acknowledges that Becker was significantly older than similarly situated students in the EPP performing TA duties and performing satisfactorily according to Patterson when she was terminated from that position. She was clearly discharged in the fall of 2004 for no legitimate reason under WSU policy as she was a student in good standing. It is not necessary for her to establish that she was replaced by a younger person. As our Supreme Court noted in *Grimwood, infra*, there is no inflexible method for establishing discrimination. To prove age discrimination, she need only produce evidence from which the jury can find more favorable treatment to younger EP students.<sup>23</sup> *See* Section 2, *infra*.

## **2. This Case Does Not Involve Mere Conclusory Allegations, Unlike Grimwood**

WSU's assertion that Becker has only provided conclusory allegations that others received more favorable treatment is not supportable. Comparing Becker's evidence to that rejected by the Washington Supreme Court in *Grimwood v. University of Puget Sound*, 110 Wash. 2d 355, 753 P. 2d 517, (1988), reveals the speciousness of that argument. Grimwood's testimony was insufficient to withstand a

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<sup>23</sup> *Grimwood, infra*, 110 Wn.2d at 3622, "the element of replacement by a younger person or a person outside the protected age group is not absolute" other citations omitted.

summary judgment motion because he, unlike Becker, did not produce specific factual occurrences and concrete examples from which a jury could find the required disparate treatment between him and younger coworkers. Instead, his record was simply his own assertion that he met his employer's performance standards, *Id.* at 358, 360-365. That is not the record here. Becker does not simply offer her own self-serving opinions; she offers admissions of WSU's own agents that demonstrate her ability to meet or exceed WSU's expectations in her TA role throughout the course of her academic career.

Similarly, WSU also claims that "Becker offers *no* evidence of comparators," i.e. graduate students who received more favorable treatment, in an effort to minimize this evidence's importance in establishing both Becker's prima facie case and its relevance to pretext as well. In response to questioning from WSU's counsel on this issue, Becker gave specific examples of identifiable comparators, younger peers in the EPP who had less onerous TA duties, CP105-106. They included Joireman's requirement that Becker perform ten additional TA hours per week so that a younger student "would have time to focus on .... her academic goals," CP110. In her declaration, she also outlined in detail the favored treatment of Kara, a younger master's degree candidate, who was permitted to progress on research work that Becker had performed and

anticipated using for preliminary examinations and her dissertation, CP616. Becker identified several students who were able to progress through the program without the overload assignments of Statistics Labs and research expectations for the benefit of others, imposed on her. See CP106-110. This is substantively different than Grimwood who asserted his employer's treatment of him was "petty" and "much ado about nothing," *Grimwood, supra*, 110 Wn. 2d at 365.

As there was no specific evidence offered by WSU to rebut this prima facie evidence or as to legitimate reasons for the disparate assignment practices, Becker's testimony alone is enough for a jury question to be presented.

**G. WSU has not Rebutted Becker's Prima Facie Claims Under Common Law**

WSU has not disputed Becker's reliance on the representations that its agents made, that they would not exploit graduate students and cause delay in progress because of personal benefits, CP 562, #9, as well as provide and discuss "a written policy guid[ing] collaborative projects and authorship" before students undertake them. See CP 561 #7 562 #5. Becker has produced sufficient evidence to state equity-based common law beyond the legal claim of breach of contract particularly in the context of the Lisa Fournier project.

### **1. Becker's Promissory Estoppel & Negligent Misrepresentation Claims Are Actionable**

WSU asserts that Fournier's representations regarding Becker's role in the interdisciplinary project do not rise to the level of a promise (WSU Brief at 73). However, Becker's testimony is at odds with that (CP 685) and for summary judgment purposes that is sufficient to create a jury question. Her testimony is clear that she did reasonably rely on Fournier's representations and they were not simply an offer of an "opportunity for authorship" on publications, CP 897. Fournier's own declaration comports with Becker's testimony. It establishes Becker's reasonableness in believing that a promise or "a commitment had been made."<sup>24</sup> See Opening Brief at pp. 13-17.

### **2. The Education and Employment Setting Do Not Preclude Negligent Misrepresentation Claims**

WSU policy describes the responsibility of mentors and advisors as to authorship policy for collaborative projects lending further support to Becker's negligent misrepresentation claim, *see fn. 24*. Such language creates a faculty duty to take reasonable care to ensure that students'

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<sup>24</sup> "Kara... would be the lead author on our eventual publication and play a lead research role in all aspects of the cognitive portion of the study—**this was precisely the role I had envisioned and discussed with Cheryl**" CP255 emphasis added. These actions violate GS directives that departments are to "Have a written policy to guide collaborative projects and authorship" (CP561) and that mentors are to—"Discuss...authorship policy with graduate students in advance of entering into collaborative projects" (CP562).

pecuniary interests in publications, grant opportunities, teaching appointments, etc. are safeguarded, see fn. 24. These expectations support a negligent misrepresentation claim.

WSU makes an assertion that any representations made by agents of WSU to graduate students are not business transactions. *See* Respondent Brief at pp. 67. The standard actually embraces “any other transaction in which [a person has a pecuniary interest] in the course of dealings in their “profession.” The Court can take judicial notice that faculty in a major research institution such as WSU are engaged professionals making representations related to their often fiercely competitive research undertakings.

WSU is also mistaken that Becker must establish that WSU agents such as Fournier must know the falsity of their representations to be negligent. Knowledge that the representation is false is not an element for negligent misrepresentation; it simply requires that “false information” was supplied. Knowingly disseminating false information is the standard for fraud.<sup>25</sup> Here, Fournier’s representations to Becker of lead authorship and dissertation research did turn out to be untrue after Becker justifiably

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<sup>25</sup> [Fraud] is a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter’s reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage. *Lent v. MacIntosh*, 29 Wn. 2d 216, 219, 186 P. 2d 626 (1947).

relied on her statements in undertaking extensive research duties over a period of 8 months and was denied the promised benefit.<sup>26</sup>

### III. CONCLUSION

For all the reasons asserted herein and in her Opening Brief, Cheryl Becker's claims present disputed issues of fact that can only be resolved by a jury's considered evaluation of all the evidence and not by summary judgment. This Court must remand this case to the trial court for trial.

Respectfully submitted this 16<sup>th</sup> day of July, 2011

**LAW OFFICE OF PATRICIA S. ROSE**



Patricia S. Rose, WSBA #19046  
Attorney for Cheryl Becker

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<sup>26</sup> Becker's reliance on Fournier's promises and/or representations in this collaborative project is just one of many actions where faculty failed to honor representations made to Becker regarding her academic career at WSU. They included development of an independent program of research CP 569, CP 576, CP 582, through supportive mentoring, CP562-563, communication of Program expectations and requirements with clear justifiable procedures, CP559-561 with realistic estimates for completion of requirements CP559 #12, and avoiding delay in the student's program of study, CP562 #9. Should there be problems, WSU led her to believe that there were internal procedures to permit timely resolution of grievances, CP563-565.

**DECLARATION OF MAILNG AND SERVICE**

I am a citizen of the United States, of legal age, not a party interested in the above entitled matter, and competent to testify

That on July 17<sup>th</sup> 2011, I arranged for delivery this day of an addressed envelope, containing an original and copy of this document, Reply Brief of Becker, to be filed on July 18<sup>th</sup> 2011:

1. Reply Brief of Becker :

Office of the Clerk  
Division III, Washington State Court of Appeals  
500 Cedar Street  
Spokane, Washington 99201

and also arrange for a true and correct copy of the same to be delivered by messenger to counsel for Respondent on July 18, 2011 at the address that follows:

+ Kathryn M. Battuello, Assistant Attorney General  
State of Washington  
800 Fifth Avenue, Suite 2000  
Seattle, Washington 98104

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

Dated at Seattle, Washington this 17th day of July 2011.



Patricia S. Rose