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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 293611

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

ROBERT J. FISCHER,

Appellant,

v.

CITY OF ROSLYN,

Respondent.

APPELLANT'S REPLY BRIEF

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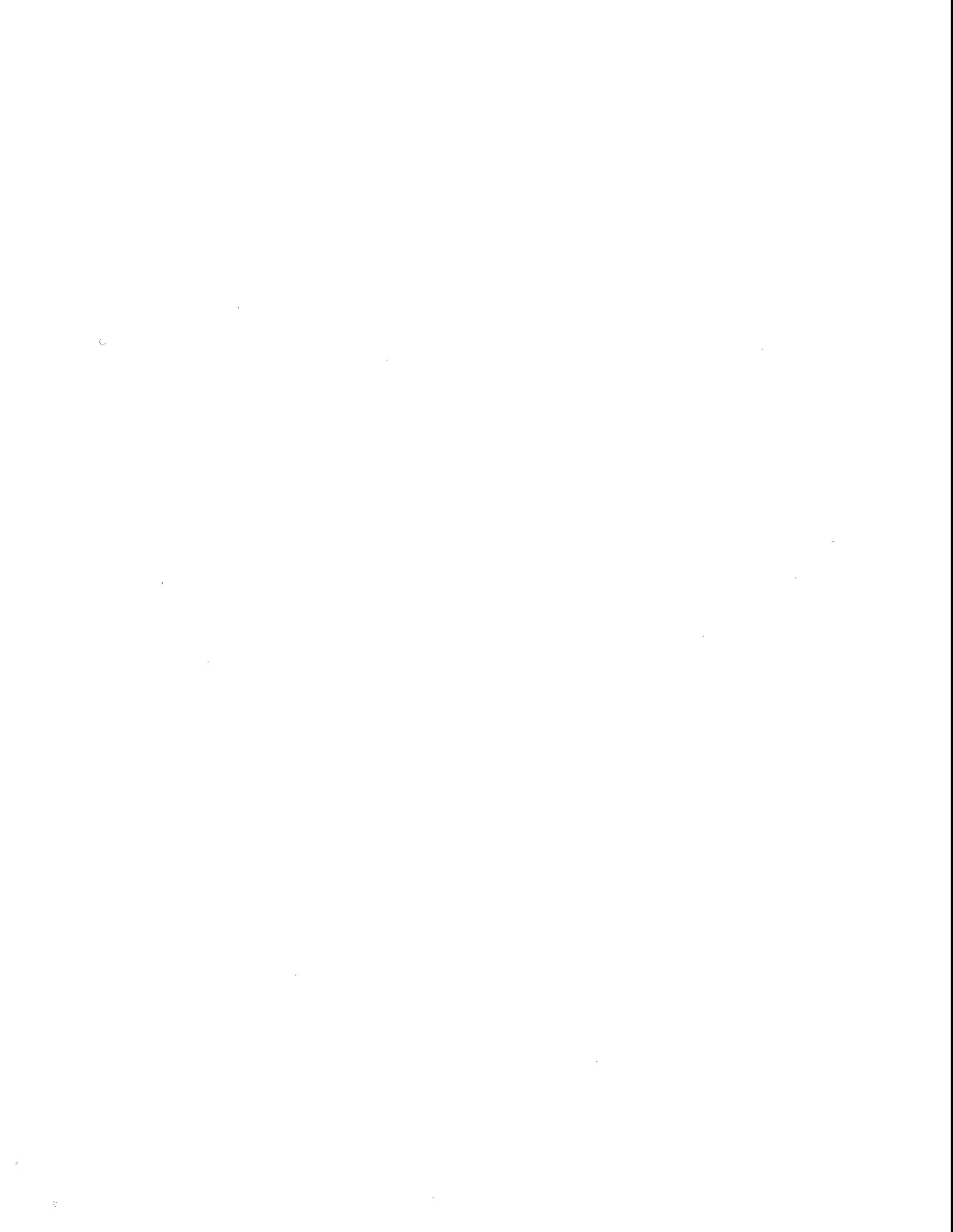


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(CP 942-944)

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I. ARGUMENT

A. City Misstates the Facts and the Basic Legal Standards

The city's response brief ("Resp. Br.") rests upon numerous misstatements of basic, highly-contested material issues of fact, and misinterpretations of fundamental legal authority. The standard is not, as the city tries to argue, whether Mr. Fischer "established" the elements of his third and fourth causes of action at the summary judgment stage. The only question is whether he presented enough evidence to have a *jury* decide whether he had established his claims. Clearly he has.

B. First Assignment of Error (Third Cause of Action)

The trial court improperly substituted its fact finding for that of the jury in dismissing Mr. Fischer's "*Thompson*" claim because, in his view, "the City's employment policies clearly advised Mr. Fischer of his employment status and cannot be read to imply he was to receive some specific treatment greater than that afforded an at-will employee." CP 923. *See Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 664 (1984). This question (and the other elements of this claim) is quite fact-intensive. It is not surprising, then, that the city devotes its brief to factual arguments.

For example, the city's brief is centered on these conclusory, self-serving factual assertions:

1. The Personnel Policy Retains Disciplinary Discretion in the City.
2. The City's Personnel Policies are not "Promises" because they are Written as General Statements.

3. The Disclaimer in the City Policy Ensures the Policy does not Modify the At-will Relationship.

4. The City has not Breached any “Promises” found in the Personnel Policy.

5. Fischer has not Shown that He Justifiably Relied upon the City’s Policy.

Resp. Br. at i-ii. It is well-established, however, that “each of these elements presents an issue of fact.” *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 525, 826 P.2d 664 (1992). It is also well-settled that all of the statements in the policy must be evaluated in context including in light of extrinsic evidence. *Id.* at 522-23 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)). This includes an employer’s self-serving “disclaimers” in its progressive discipline policies (e.g., that they are only a “guideline” or not “contractually” binding). They are not dispositive, do not allow for summary judgment, and are but one factor to be considered by the jury in making its findings. *See* App. Opening Br. at 28 and n.18.

Likewise, with regard to the city’s argument that its personnel policies are not enforceable because they are allegedly written as general statements: this too, is a question for the jury. Contrary to the lower court’s ruling, and unlike in the cases the city tries to rely upon, nowhere in the city’s progressive discipline policy (nor in any other city document) does it state that employees are terminable “at-will.” Nor does the progressive discipline policy say its procedures are merely “general,” “discretionary,” or aspirational. Quite the contrary, as even the city’s

mayor has acknowledged, the city's policy lays out a detailed, very specific, four-step progressive discipline procedure much more consistent with a "just cause" standard for termination than an "at-will" standard. *See* CP 359 (at 133:4-13). The city's policy specifically assures employees they will *always* receive at least two documented (written) warnings, and a third step of investigative suspension, before being terminated – *except* in instances of "extremely serious offenses" such as "theft, violence, or gross insubordination." Appendix 1 (at CP 535-537). Indeed, the city, through its mayor, has admitted that the understood interpretation of the progressive discipline policy is that the city had to follow each of these procedural steps before it could terminate an employee, with the sole exception of "extremely serious offenses." CP 366, 367, 369 (at 133:4-13, 176:15-25, 178:3-13, 186:4-10).¹

Accordingly, as discussed in more detail in Mr. Fischer's Opening Brief, the city's progressive discipline policy is very different from those

¹ Even if this is not a party admission, this is at least strong evidentiary indicia of the meaning of the policy and intention of its (city) drafters. *See Swanson*, 118 Wn.2d at 522-23 (citing *Berg*, 115 Wn.2d at 667).

The city also mischaracterizes a sentence in Mr. Fischer's application for unemployment benefits, where he indicated the mayor told him he served at her "pleasure." Resp. Br. at 25. Mr. Fischer has explained that it was not his "understanding that he worked at the 'pleasure of the mayor,'" or that he was an at-will employee, as alleged by the city. Resp. Br. at 33. He was trying to answer the question of the unemployment agency by stating what the mayor told him. That is why the statement is in quote marks. *See* CP 82 (at 36:20-37:11); CP 494 (at ¶ 10). Indeed, on the very same page of the application he made it clear that he understood he was *not* terminable simply at the "pleasure" of the mayor and without adherence to the steps specified in the city's progressive discipline policy. CP 109 ("I did not receive my rights under the city personnel policy regarding three (3) notices before being fired."). As the city notes, language in a progressive discipline policy "cannot be changed by a supervisor's comments." Resp. Br. at 25. And there is nothing in the policy stating employees serve merely at the "pleasure" of the mayor (or that they are "at-will").

at issue in the cases cited by the city, in which *reasonable minds could not possibly differ* that the employer had *not* made enforceable statements creating a sense of security among employees regarding specific treatment in specific situations.² At minimum, there exists a genuine issue of material fact as to whether the city's policy constitutes adequately specific promises to create an obligation and justify employee reliance. *Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 190, 125 P.3d 119 (2005) ("Plaintiffs have at least raised a question of fact as to whether DynCorp made promises of specific treatment in specific situations."); *Swanson*, 118 Wn.2d at 525 ("whether statements in employee manuals, handbooks, or other documents amount to promises of specific treatment in specific situations, . . . present material issues of fact").

The jury is also entitled to find that the alleged transgressions the city has asserted as reasons for Mr. Fischer's termination are plainly not

² The policy in *Birge* provided that employees could be terminated immediately for reasons listed or "to be determined *by the company* to be of an equally serious nature." *Birge v. Fred Meyer, Inc.*, 73 Wn. App. 895, 897, 872 P.2d 49 (1994) (emph. added). It lacked any language addressing a specific progressive discipline procedure to be followed in the case of less serious offenses. *Id.* Likewise, the policy in *Drobny v. Boeing Co.*, 80 Wn. App. 97, 907 P.2d 299 (1995), was written in far more general terms and with much more room for discretion than the city's policy. See App. Opening Brief at 30-35. The *Stewart* case cited in the city's response brief is similarly inapposite. The policy there was also broadly discretionary, merely aspirational, and generally worded, quite unlike the city's. Here, as even the city's mayor has admitted, immediate dismissal is permissible *only* in the event of an "extremely serious offense" and in all other cases the city must follow all of the other steps. See CP 359, 366, 367, 369 (at 133:4-13, 176:15-25, 178:3-13, 186:4-10). Thus, as in *Korslund*, "this case is . . . unlike *Stewart v. Chevron Chemical Co.*, 111 Wn.2d 609, 613-14, 762 P.2d 1143 (1988), where the court held that a termination policy stating that management 'should' consider certain factors in layoff decisions was too indefinite to create an obligation" and no reasonable minds could possibly differ on that question. *Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 190, 125 P.3d 119 (2005).

“extremely serious offenses;” and the city otherwise failed to follow the progressive discipline policy as it was obligated to do (and, indeed, as even the city’s mayor and speaking agent concedes it was obligated to do). For example, the jury may find that the assertion that one constructive comment buried in a positive performance review is the required “memo documenting” corrective action or warning under “step one” of the progressive discipline policy defies credulity and common sense. *See* CP 536 (corrective action warning must be documented by memo to employee’s personnel file with copy to personnel committee). *See also* App. Opening Br. at 2-17, 20-26.

Likewise flawed is the city’s argument that Mr. Fischer has not “shown” that he was “aware of” the progressive discipline policy and relied upon it. All facts and inferences must be construed in his favor and his testimony must be believed. This case is very different from cases like *Bulman*, where the only thing the employee could say is he was “probably” aware of the policy and had not demonstrated “*any*” familiarity with it. *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 348, 27 P.3d 1172 (2001). Mr. Fischer has made clear (at least enough to present this question of disputed material fact to the jury) that he was not only aware of this policy but relied upon it. CP 109 (noting he was not given his rights under the policy before termination); CP 493 (at ¶ 8). *See also* App. Opening Br. at 35-36.³

³ The city also mischaracterizes the (contested) facts in its contention that Mr. Fischer’s “knowledge of the policy is evidenced by the fact that he was not aware the City’s policy mandated a grievance procedure for any dispute

The city is also wrong in its argument that Mr. Fischer failed to “exhaust his [alleged] remedies” under the “grievance” procedures contained within the city’s personnel policies and this bars his *Thompson* claim. Resp. Br. at 34. As a threshold matter, the city has failed to establish for purposes of summary judgment that the grievance procedures are even available to former/terminated employees. It references only an “employee” – i.e., persons still employed at the city.⁴

The cases cited by the city, such as *Moran v. Stowell*, 45 Wn. App. 70, 724 P.2d 396 (1986), and *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 769 P.2d 298 (1989) (citing *Moran*), are inapplicable. First, they do

regarding the city policy.” Resp. Br. at 33. First, the “grievance” procedure is not part of the progressive discipline policy but rather exists in a separate section. CP 529, 534-537 (§§2.48.120, 2.48.130). There is also nothing to suggest the grievance procedures are “mandatory” ones which employees must exhaust. The procedures are described as a discretionary “right,” not a requirement. CP 534 (“employee’s decision to implement the right to follow grievance procedures ...”). In fact, in almost 20 years of employment, Mr. Fischer could not recall ever hearing of anyone using this allegedly “mandatory” “right” to these procedures. See CP 302; CP 493-494 (at ¶ 9). The city council’s Personnel Committee Chair, David Porter, testified he was not familiar with the grievance procedures the city now tries to argue were “mandatory.” And city councilmember Frank Sikon likewise testified he had never read this supposedly “mandatory” grievance policy. Councilmember Sikon also testified that he did not believe the city council had any role in ever questioning or reviewing the decision of a mayor to terminate an employee; the city’s attorneys advised him and his fellow councilmembers that it “would not have been proper” for the council to question or review the mayor’s termination decisions; and employees ***did not have any avenue for challenging their termination by the mayor before the city council.*** CP 702 and 747 (J. Porter at 364:5-18); CP 765 (D. Porter at 81:1-22); CP 801 and 812 (Sikon at 108:10-21 and 167:1-169:8).

⁴ The policy nowhere states that it is available to (let alone mandatory for) former employees. See *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009) (“Words in a contract should be given their ordinary meaning.”); *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966) (“[C]ontract language subject to interpretation is construed most strongly against the party who drafted it”).

not involve a “*Thompson* handbook claim.” The principle articulated in *Moran* is limited to claims (for unpaid sick leave) under a bilateral, negotiated **collective bargaining agreement** requiring such a union grievance procedure.⁵ Quite unlike *Moran* and *Baldwin*, the city has presented no evidence, let alone established as a matter of law for purposes of summary judgment, that its grievance policy section is a mandatory “exhaustion” type procedure like that in collective bargaining agreements.

Moreover, the plain language of the provision reveals it is not a mandatory exhaustion procedure such as those in collective bargaining agreements. For example, the provision refers to the [current] employee’s “**decision** to implement the **right** to follow grievance procedure.” See CP 534 (emph. added). The provision does not state this discretionary “right” of the employee to use these procedures is a mandatory requirement.

In addition, as noted above, in almost twenty years at the city, Mr. Fischer cannot recall ever hearing of anyone actually using these internal grievance procedures, nor did anyone at the city ever explain the procedures to him, let alone advise him they were “mandatory.” CP 302; CP 493-494 (at ¶ 9). Likewise, the long-time city clerk, Maria Fischer,

⁵ Federal labor law and policy requires employees who allege violations of a collective bargaining agreement (aka “labor contract” or “CBA”) to attempt to use the contract’s grievance procedure before seeking a judicial remedy. See, e.g., *Ervin v. Columbia Dist., Inc.*, 84 Wn.App. 882, 887, 930 P.2d 947 (1997) (and authorities cited therein). And thus, under Washington law as well, an action to obtain the benefits of a **collective bargaining agreement** generally may not be maintained if a plaintiff has not first exhausted his contractual remedies through the grievance procedure provided for in the CBA. See *Moran*, 45 Wn. App. at 75.

cannot recall seeing the council challenge or reverse any decision by the mayor on personnel matters pursuant to a “grievance.” CP 481 (at ¶ 5). Furthermore, the mayor, long-time councilmember and chair of the Personnel Committee David Porter, and councilmember Frank Sikon, have each acknowledged they have never seen any employee (let alone a terminated one) successfully challenge a personnel decision made by the mayor through a “grievance” procedure.

Indeed, the Personnel Committee Chair, David Porter, testified he was not familiar with the grievance procedure that the city now tries to argue was “mandatory.” And his fellow councilmember, Frank Sikon, testified he had never read the grievance policy. Mr. Sikon further testified, contrary to what the city argues in its response brief, that he did not believe the city council had any role at all in questioning the decision of a mayor to terminate an employee; the city’s attorneys advised him and his fellow councilmembers it “would not have been proper” for the city council to question the mayor’s termination decisions; and employees *did not have any sort of avenue for challenging their termination by the mayor before the city council*. See CP 702, CP 747 (J. Porter at 364:5-18); CP 765 (D. Porter at 81:1-22); CP 801 and 812 (Sikon at 108:10-21 and 167:1-169:8). One would certainly expect the procedure would have been at least explained to employees, and city council-members would be familiar with it, if it was actually deemed a mandatory procedure.

Further, as made clear in the cases cited by the city, *Moran* and *Baldwin*, even assuming this provision may be considered a “mandatory”

one applicable to a former employee like Mr. Fischer, exhaustion procedures are not required “if resort to the administrative or collective bargaining agreement would be futile.” *Moran*, 45 Wn. App. at 77. And this is normally a question for the jury. *Baldwin*, 112 Wn.2d at 131-132 (affirming denial of motion for summary judgment and denial of motion for directed verdict because “defendants have not carried their burden of showing that there are no issues of fact with respect to the possible futility of plaintiff’s efforts to exhaust contractual remedies.”).

It would clearly have been futile for Mr. Fischer to try to use the city’s grievance procedures, even if they were mandatory and available to him as a former employee. This is not just his “subjective belief,” as the city argues. Resp. Br. at 34. As in *Baldwin*, ample other evidence also indicates the bias, prejudice and predetermination of the decisionmakers.

For example, the first step of the grievance provision is for an employee to submit a grievance to the mayor. She is the one who fired Mr. Fischer and insisted that in her view he served at her whim or “pleasure.” She has confirmed that had he tried to use these procedures, she would not have reversed her decision. CP 343-344 (at 57:12-14).

Following that step, the grievance procedures state that the employee may submit his grievance to the Personnel Committee of the city council. CP 535. The mayor’s husband, David Porter, chaired this committee. It was obviously reasonable to think he would be biased and not reverse his wife’s decision. He has also confirmed he would not have. CP 770 (at 107:2-20).

The third step of these procedures is supposedly a joint review by the mayor and city council. CP 535. In addition to the mayor's husband, the council included a disgruntled former tenant of Mr. Fischer's, Frank Sikon, whom Mr. Fischer had to evict for failing to pay his rent. He bore a grudge against Mr. Fischer. CP 497 (at ¶ 21). As noted above, he has also testified he does not believe the council has any role in reviewing or reversing the decision of a mayor to terminate an employee; the city's primary attorneys advised him and his fellow councilmembers that it "would not have been proper" for them to question the mayor's termination decisions; and that employees *did not have any avenue for challenging their termination by the mayor before the city council*. CP 801 and CP 812 (at 108:10-21, and 167:1-169:8). Further, it is undisputed that the council had already assured the mayor that it would back her decisions regarding Mr. Fischer, no matter what they were. CP 741 (J. Porter Dep. 338:22-339:12); CP 770 (D. Porter Dep. 106:25-107:14); CP 796 and 812 (Sikon Dep. at 86:24-87:3, and 167:1-169:8).

In short, the overwhelming evidence (and not just Mr. Fischer's "subjective opinion") shows the council abdicated any role it could possibly be said to have had under the grievance procedures, at least relative to Mr. Fischer. It is obvious this procedure would have been futile for him even if it can be said to apply to former employees (which there is no evidence it does). *See, e.g., Montegudo v. Asociacion de Empleados Del Estado Libre Asociado de Puerto Rico*, 554 F.3d 164 (1st Cir. 2009). Indeed, through its mayor, the city has admitted the futility of Mr. Fischer

filing a grievance about his termination. *See* CP 343-344 (at 57:12-58:14) (if he had filed a “grievance” she would not have reversed her decision; in her view her husband “could not” reverse her decision; and the city council would not have reversed her decision).

C. Second Assignment of Error (Fourth Cause of Action)

Similarly flawed is the city’s position concerning the trial court’s summary judgment dismissal of Mr. Fischer’s fourth cause of action, his common law claim of wrongful discharge in violation of public policy. The city urges this court to repeat the trial court’s error in ruling that Mr. Fischer’s state common law claim for wrongful termination in violation of public policy was necessarily and completely duplicative of his WLAD (age and/or disability) claims under RCW 49.60. The city also urges this Court to usurp the fact-finding role of the jury as to this claim.

Even an at-will employee cannot be terminated in contravention of a clear mandate of public policy. *Thompson*, 102 Wn.2d at 232.⁶ To establish a claim for wrongful discharge in violation of public policy, the terminated employee must show:

- (1) the existence of a clear public policy (the *clarity* element);
- (2) that discouraging his conduct would jeopardize the public policy (the *jeopardy* element); and

⁶ Under this exception to the general presumption of employment at-will, “an employer does not have the right to discharge an employee when the termination would frustrate a clear manifestation of public policy.” *Ford v. Trendwest Resorts*, 146 Wn.2d 146, 153-154, 43 P.3d 1223 (2002). By recognizing this exception, the Washington Supreme Court has “expressed [its] unwillingness to ‘shield an employer’s action which otherwise frustrates a clear manifestation of public policy.’” *Id.* (quoting *Thompson*, 102 Wn.2d at 231).

- (3) that the public-policy-linked conduct caused his dismissal (the *causation* element).

After those elements are shown, the burden shifts to the employer to show (4) that it had an overriding justification for the dismissal (the *absence of justification* element). *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). *Accord, Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002); *Korlund*, 156 Wn.2d at 178.

Whether the clarity element exists is a question of law. *Dicomes v. State*, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989). But the existence of the remaining elements are each generally questions of fact. *Hubbard*, 146 Wn.2d at 718-19 (jeopardy, causation, and absence of justification are questions of fact). Moreover, while the clarity element inquiry – i.e., whether a particular statute contains a clear mandate of public policy – is a question of law, the plaintiff need only establish a clear statement of public policy. He need not show that the public policy was violated. *Hubbard*, 146 Wn.2d at 708-09. And, courts are to “inquire whether the employer’s conduct contravenes the letter *or purpose*... of a...statutory...scheme.” *Roberts v. Dudley*, 140 Wn.2d 58, 73, 993 P.2d 901 (2000) (emph. in original) (citing *Thompson*, 102 Wn.2d at 232).

Mr. Fischer’s public policy claim is clearly *not* simply “duplicative of his WLAD claims” under RCW 49.60, as the city argues and the lower court erroneously ruled. *See* Resp. Br. at 2. As Mr. Fischer stated in his complaint, and as was discussed at summary judgment, this claim is based on the clear public policies embodied in state and federal medical leave

statutes “*including but not limited to* the Family Medical Leave Act (FMLA), 29 U.S.C § 2601, *et seq.*; and RCW 51.48.025.” CP 6-7 (complaint at 7.4) (emph. added).⁷

Federal statutes may be the source of public policy (as was the case in *Thompson* itself). It is also well-established there is a clear public policy in protecting employees in the exercise of, and the expression of their intention to exercise, their medical leave rights as embodied in laws like the FMLA. *See e.g., Arthur v. Armco, Inc.*, 122 F. Supp.2d 876 (S.D. Ohio 2000) (plaintiff may pursue a claim for wrongful discharge on the basis of the public policy expressed in the FMLA). This is plainly a public interest that exists separate and distinct from those policies embodied in Mr. Fischer’s WLAD claims (i.e., that employees be free from age and disability discrimination). That is why there are state and federal medical leave statutes reflecting this public policy interest, entirely separate from the state and federal anti-discrimination statutes.

As discussed in more detail in Mr. Fischer’s Opening Brief, the clear public policy of allowing employees to take medical leave is expressed in statutes such as the FMLA (and its state analogue, the

⁷ *See also id.* (at 7.5) (“Fischer was saving his vacation and sick time in order to take an extended medical leave. . . . He made Mayor Porter aware of this. She then terminated him before he could actually take his planned leave. This termination of . . . discouraged the exercise of his rights and privileges”); *id.* (at 7.6) (“Discouraging Fischer’s conduct . . . jeopardizes and/or violates clearly established public policies including but not limited to policies promoting public health and preventing discrimination against employees for taking or planning to take legitimate medical leave.”); CP 311-317 (“The jury may also reasonably find that Mr. Fischer was wrongfully terminated in violation of public policy – that is, in violation of the clear public policies reflected in *such medical leave laws as* the FMLA and state L&I regime”) (emph. added).

WFLA, which *tracks* the same policy). *See* App. Opening Br. at 42-43. The FMLA applies to public agencies such as the City of Roslyn, regardless of size.⁸ Yet Mr. Fischer is not eligible to bring a claim under the statute (or its state analogue, the WFLA), *per se*, for enforcement or remedial purposes, because the city has fewer than 50 employees. 29 U.S.C. § 2611. *See also* RCW 49.78.020(4)(b).⁹

It is well-settled that the minimum-employee requirements of the FMLA does not prevent Mr. Fischer from seeking a remedy through the common law tort of wrongful termination in violation of public policy, based on the clear public policies embodied in this medical leave statute. In fact, the law is the opposite. The tort exists exactly for this type situation, where a public policy embodied in a state or federal statute is

⁸ *See* 29 CFR § 825.104(a) (“public agencies are covered employers without regard to the number of employees employed”); RCW 49.78.020(5) (“employer” includes “any unit of local government” without regard to size).

⁹ The “Washington-FMLA” (aka the “WFLA”) mirrors the FMLA. Its stated purpose is also to “provide reasonable leave for medical reasons, for the birth or placement of a child, and for the care of a family member who has a serious health condition.” RCW 49.78.010. It provides employees with the right to take up to 12 weeks of medical leave annually, and makes it unlawful for an employer to “interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this chapter.” *See* RCW 49.78.220; RCW 49.78.300. The WFLA also states it does not provide a remedy, or *per se* coverage, to those who work for employers who employ “less than fifty employees if the total number of employees employed by that employer within seventy-five miles of that worksite is less than fifty.” RCW 49.78.020. Thus, this case is fundamentally unlike the *Sedlacek* case cited by the city. The policies embodied in the FMLA and WFLA are not in fundamental conflict with regard to a public policy choice, as was the case in *Sedlacek* regarding the statutes in that case – the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, and Washington Law Against Discrimination, (WLAD), RCW 49.60; and the basic policy choice of whether protection against disability discrimination should cover able-bodied persons “associated with or related to a disabled person,” as well as persons who are themselves disabled. *Sedlacek v. Hillis*, 145 Wn.2d 379, 36 P.3d 1014 (2001).

threatened (in either letter or purpose) yet the statutes themselves do not provide an adequate avenue of enforcement and remedy to the employee.

As the Washington Supreme Court explained in *Korlund*, if an “adequate alternative means of promoting the public policy” at issue exists (through an enforcement mechanism under the statute reflecting the policy itself), the employee is, as a matter of law, barred from pursuing a common law cause of action for wrongful termination of public policy. Instead, he would have to utilize the enforcement mechanism already available through the statute embodying the public policy, itself.¹⁰

The city’s tortured effort to distinguish the basic principles reflected in the *Roberts* case is without support in law or logic. Mr. Fischer’s case is clearly controlled by the analysis in that case. *See Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000) (holding WLAD embodied clear mandate of public policy against sex discrimination, affording those employed by employers with fewer than eight employees a

¹⁰ Thus, the *Korlund* Court held that the “jeopardy” element was not met, as a matter of law, because the enforcement scheme in the public policy statute in that case was itself adequate to protect the public policy at issue. *See also, e.g., Viera v. Costco Wholesale Corp.*, 2009 WL 564369, at *8-9 (E.D. Wash. Feb. 27, 2009) (cited by the city at summary judgment) (following *Korlund* to hold that “[p]laintiffs may not base their wrongful discharge in violation of public policy claim on the FMLA, WFLA, or WFLA” but rather, must use those statutory remedies themselves, which were adequately available to them). Unlike plaintiffs in the cases cited by the city, Mr. Fischer has *no alternative avenue* for redress or remedy for the city’s violation of the public policies embodied in medical leave laws such as the FMLA, let alone an “adequate” one – *except for* the common law claim of wrongful termination in violation of public policy.

public policy tort remedy for violations of the policy even though the statute itself applies only to employers with eight or more employees).¹¹

In sum, Mr. Fischer's *only* enforcement mechanism for the city's violation of the letter and/or purpose of the clear public policies embodied in medical leave statutes, such as the FMLA, is the common law tort of wrongful termination in violation of public policy. Under the erroneous ruling of the trial court and position advocated by the city, he would be left with no avenue for redress and remedy for the city's subversion of the clear public policy embodied in these medical leave laws. The city (and any other public or private employer in the state with fewer than 50 employees) would be free to terminate any employee with impunity for giving notice of his intention to exercise and/or exercising his medical leave rights. This is plainly contrary to Washington law. *See, e.g., Blinka v. Wash. State Bar Assoc.*, 109 Wn. App. 575, 586, 36 P.3d 1094 (2001) (public policy tort exception to presumption of employment at-will should

¹¹ As noted above, *Sedlacek* is inapposite and its holding has been misconstrued by the city. At issue there was a fundamental *conflict* between the relevant federal and state statutes. The plaintiff's claim was based on the public policy in the federal ADA, whereby Congress chose to protect from discrimination not only the disabled but also able-bodied persons associated with disabled persons. There was a direct policy conflict between the ADA and WLAD in this regard. *Sedlacek*, 145 Wn.2d at 390-392. Quite unlike the situation here, where the comparable state statute, the WFLA, *is entirely consistent with and tracks the FMLA in all relevant respects*, the *Sedlacek* opinion turns on the conflict between the comparable federal and state laws at issue. The state created a law comparable to the ADA (the WLAD) but specifically chose not to make the policy choice to expand it so as to protect persons associated with the disabled, "despite the decade since Congress chose to do so" in the ADA. *Id.* at 392. On this basis, alone, the Supreme Court distinguished Ms. Sedlacek's case from *Dudley*, which was otherwise applicable.

be recognized “when offensive conduct *would otherwise go unredressed.*” (emph. added).

The city cites a number of completely inapposite (and even subsequently rejected) cases, concerning the common law of other states. Resp. Br. 41-42. For example, the *Upton* and *Lloyd* cases do not even involve medical leave laws like the FMLA. They concern parents called in to work unexpected hours when they did not have child care at home. Both courts simply held that there was no clearly established public policy implicated by this situation.¹²

Similarly inapplicable are the *Dorricott* and *Hundley* cases cited by the city. The courts in *Dorricott* and *Hundley* (following *Dorricott*) concluded that the FMLA’s one-year of employment requirement “forms an *essential part of the public policy*” embodied in the FMLA, and thus a short-term employee simply could not avail himself of the policy protections of the FMLA. *Hundley v. Dayton Power & Light Co.*, 148 Ohio App.3d 556, 561-62, 774 N.E.2d 330 (Ohio Ct. App. 2002) (emph. added) (citing *Dorricott v. Fairhill Ctr. for Aging*, 1999 WL 591453 (6th

¹² *Lloyd* involved plaintiff’s claim that being called in to work a different shift when he had no one to care for his children forced him to commit a criminal act under the child abuse and neglect statutes. *Lloyd v. AMF Bowling Centers, Inc.*, 195 Ariz. 144, 145-146, 985 P.2d 629 (Ariz. Ct. App. 1999). The court held that “unexpectedly requiring an employee to come in to work does not constitute a wrongful act” in violation of the criminal statutes. *Id.* at 147. *Upton* is the same. *Upton v. JWP Businessland*, 425 Mass. 756, 758, 682 N.E.2d 1357 (1997) (“There is no clearly established public policy which requires employers to refrain from demanding that their adult employees work long hours”). Moreover, Arizona’s law is limited to those employees who have been “fired for either refusing to commit a wrongful act or for refusing to condone a wrongful act by the employer.” This is a different standard from that under Washington common law. See *Roberts*, 140 Wn.2d at 73 (courts inquire “whether the employer’s conduct contravenes the letter *or purpose*... of a...statutory...scheme”).

Cir. July 27, 1999). Even assuming Washington courts would follow this rule under our common law standards, Mr. Fischer was not a short-term employee of the city.

In addition, the *Dorriscott* opinion was based on the analysis that the plaintiff there had available to her an alternative remedial scheme under the FMLA, and her claim for wrongful termination in violation of public policy was estopped or preempted as a matter of law. *Dorriscott v. Fairhill Ctr. for Aging*, 2 F. Supp.2d 982, 993 (N.D. Ohio 1998). Mr. Fischer has no alternative remedial scheme for enforcing the public policies embodied in the medical leave statutes because of the size of his particular employer (less than 50 employees), except through the public policy tort. Furthermore, subsequent Ohio cases (indeed, those from the *same court* (N.D. Ohio)) have rejected *Dorriscott's* analysis. See *Maxwell v. GTE Wireless Service Corp.*, 121 F. Supp.2d 649, 660 (N.D. Ohio 2000) (plaintiff can assert state law wrongful discharge claim based upon alleged violation of the FMLA). See also *Arthur v. Armco, Inc.*, 122 F. Supp.2d 876 (S.D. Ohio 2000) (plaintiff may pursue a claim for wrongful discharge on the basis of the public policy expressed in the FMLA, and noting contrary decisions in cases like *Dorriscott* “disregarded the Ohio Supreme Court’s pronouncements”); *Chenoweth v. Wal-Mart Stores, Inc.*, 159 F. Supp.2d 1032, 1039-40 (S.D. Ohio 2000) (denying employer’s motion for summary judgment on claim for wrongful discharge in violation of the public policy embodied in the FMLA); *Hunt v. Honda of Amer. Mfg. Inc.*, 2002 WL 31409866 (S.D. Ohio Sept. 4, 2002), at *1-*2 (rejecting

employer's argument that a claim for wrongful termination in violation of public policy based on the public policies in FMLA is barred because the remedial scheme in the FMLA is "exclusive");¹³ *Wiles v. Medina Auto Parts*, 2001 WL 615938 (Ohio App.), 144 Lab. Cas. P 34,345, 17 EIR Cases 1115, 7 Wage & Hour Cas.2d (BNA) 379 (June 6, 2001), at *1 (trial court "committed reversible error when it determined that 'there is no action based upon Ohio public policy on the alleged violation of the Family and Medical Leave Act,'" and "an action properly lies for wrongful termination in violation of public policy unless there is complete relief available under a relevant statute, and in this case, there is no such complete relief available under the FMLA for wrongful discharge").

D. Credibility/Pretext and the City's Issue Preclusion Argument

The city's argument regarding pretext and collateral estoppel should be dismissed out of hand. First, the city fundamentally misunderstands pretext. Pretext is not a "claim" made by plaintiff. *See* Resp. Br. at 46 ("Fischer does not have a Claim for Pretext"). The concept of pretext is part of the familiar summary judgment burden-shifting analysis in employment matters, rooted in the basic principle that the jury must always assess witness credibility.

In addition to being wrong on the law, the city is wrong on the record. It represents that "Fischer did not assert or argue that his specific

¹³ The court in *Hunt* also noted that the "savings clause" in the FMLA, 29 U.S.C. § 2651(b), reveals Congress's intent that the remedies available under that Act are not to be considered exclusive and that federal law is not to preempt state claims; and held that plaintiff could assert a state law wrongful discharge claim based upon alleged violation of the policies embodied in the FMLA.

treatment claim, or his wrongful discharge claim should survive summary judgment because of pretext.” Resp. Br. at 46. In fact, in his opposition to summary judgment, Mr. Fischer clearly states with respect to his “*Thompson*” claim that the “justifications now given by the city are lacking in credibility and appear plainly pretextual.” CP 297. He also plainly asserted issues of pretext as to his public policy tort claim. CP 7 (complaint at 7.8) (“There exists no overriding justification for Fischer’s dismissal. Any justification for Fischer’s discharge proffered by defendant is pretextual.”); CP 710 (summary judgment opposition stating with respect to the public policy tort claim, the “jury is entitled to believe Mr. Fischer, and find that he had been saving up his sick leave to take an extended medical leave for surgery”).

As even the cases cited by the city make clear, collateral estoppel may be applied to preclude only those issues “that have been actually litigated and *necessarily determined in the prior action.*” *City of Arlington v. Central Puget Sound Growth Mngmt. Hearings Bd.*, 164 Wn.2d 768, 792, 193 P.3d 1077 (2008) (emph. added) (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 858 (1987)). *See also, e.g., Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004) (collateral estoppel limited to only “those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding.”). As made abundantly clear by the Special Verdict Form, the jury presented with Mr. Fischer’s WLAD claims decided *only* that (1) age was not a significant factor in Fischer’s

termination; and (2) disability was not a significant factor in Fischer's termination. It made *no* determinations or findings regarding whether he did or did not tell the mayor of his intentions to take an extended medical leave after the winter season was over; nor did it render any findings about the credibility of the city's various proffered excuses for his termination. The jury on his WLAD claims certainly made no determinations as to the city's credibility or pretext *relative to his "Thompson" claim or his public policy claim* – which were not even before it. Indeed, the jury deciding Mr. Fischer's WLAD claims was not even given a pretext instruction, let alone a charge asking for any sort of pretext or credibility finding. *See* Appendix 2 (at CP 942).¹⁴

A jury presented with Mr. Fischer's third and fourth causes of action, and all the facts and circumstances relative to them, may well find that the city's articulated reasons for terminating Mr. Fischer are pretexts for (1) violating the public policy embodied in medical leave laws such as the FMLA; and/or (2) for violating or breaching enforceable promises under the progressive discipline/termination policy. No jury has been presented with these issues, let alone decided them.

¹⁴ Under a WLAD (RCW 49.60) claim, if an employee succeeds in proving that discrimination was a significant factor in the defendant's decision, then the jury necessarily must have determined that it disbelieved the defendant's proffered reason. But if the plaintiff is found to have failed to establish that discrimination was a significant motivating factor in his termination, that does not imply anything about whether he failed to show that the defendant's proffered reason was lacking in credibility. A jury may well have rejected both parties' proffered explanations. Or a jury might favor the plaintiff's explanation when compared to the defendant's, but still conclude that the plaintiff failed to meet his burden of showing discrimination was a significant motivating factor as to his termination.

By way of illustration, as to his public policy claim, the facts and circumstances would plainly support a jury's finding that Mr. Fischer's articulated intent to take medical leave and his termination were linked (*causation* element). See, e.g., *Liu v. Amway Corp.*, 347 F.3d 1125, 1137 (9th Cir. 2003) ("proximity in time between the leave and her termination also provides supporting evidence of a connection between the two events"). The facts and circumstances are also more than ample to support the jury's finding that the threat of dismissal/dismissal "will discourage others" from engaging in the same sort of essential and desirable conduct related to the public policy of the medical leave laws (*jeopardy* element). Obviously, employees will be discouraged from taking medical leave or even discussing it with their employers if it could lead to their dismissal. The jury is also entitled to find that the city's articulated reasons for his termination are not credible or sufficient to satisfy the city's burden of establishing an "overriding justification" for his termination (*absence of justification* element).

By way of further illustration, with respect to Mr. Fischer's "*Thompson*" claim, it is quite possible that the jury presented with all the relevant facts and circumstances may conclude that the city's articulated reasons for his termination lack credibility (e.g., because the position of the city that a constructive remark in a positive performance review was the required documented memo required for a "step one" warning, and/or that his alleged transgressions amount to "extremely serious offenses," defy credulity). Under this claim, it may also find the city's articulated

reasons to be subjectively honest, but still reject the city's self-serving factual assertions that it followed the requirements of the progressive discipline policy.

In short, the jury on Mr. Fischer's WLAD claims was not asked to make any findings regarding pretext (even relative to the age and disability claims before it). It was not presented with any issues regarding his specific treatment/"*Thompson*" claim or his public policy claim. No findings regarding those fact-intensive claims were "necessarily and finally determined" by the jury presented with the WLAD claims. Accordingly, collateral estoppel simply does not apply.

Moreover, Washington law regarding "*Thompson*" claims and public policy claims is clear that all the relevant facts and circumstances, including extrinsic evidence and evidence relating to witness credibility, must be presented to the jury deciding such claims. *See supra* at 2-13. To deprive the jury considering these claims of any relevant facts and circumstances would deprive Mr. Fischer of any meaningful ability to present his claims to a jury. Thus, even if applicable (which it is not), application of issue preclusion to these claims would plainly "work an injustice against" Mr. Fischer. *See City of Arlington*, 164 Wn.2d at 792 ("collateral estoppel requires application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied").

This is also not a case like those upon which the city tries to rely, in which the courts ruled – after a full presentation of all the evidence at trial – that there was "no evidence" presented by a plaintiff sufficient to

create a jury question on the issue(s) of whether the reasons provided by the employer for termination were not the real or sufficient reasons. *Cf. Douglas v. Anderson*, 656 F.2d 528, 533-535 (9th Cir. 1981) (affirming ***directed verdict after presentation of all evidence at trial***).¹⁵ Nor is this a case like that cited by the city, in which the question of whether a plaintiff was qualified for the job is based solely on his “subjective belief.” *Cf. Grohs v. Gold Bond Building Prods.*, 859 F.2d 1283, 1287-1289 (7th Cir. 1988) (affirming findings of lack of pretext/qualifications ***after presentation of full evidence in a bench trial*** because there was no evidence plaintiff’s discharge was motivated by anything other than the fact he was no longer qualified for the job after employer adopted “new management policies,” thereby changing the job qualifications).¹⁶

As discussed above, in Mr. Fischer’s Opening Brief, and throughout the summary judgment record, the evidence of pretext is extremely strong in this case. This includes but is not limited to the ***non-subjective*** fact that just before he told the mayor of his plans to take an extended medical leave, she not only considered him to be performing satisfactorily, but to be the “top person” to lead the entire crew after a

¹⁵ The Court in *Douglas* also correctly cautioned that “summary procedures should be used judiciously, particularly in cases involving issues of motivation or intent.” *Id.* at 535.

¹⁶ The *Douglas* and *Grohs* cases cited by the city are also from the 1980s and pre-date the U.S. Supreme Court’s decisions in *Reeves* and *Costa*, which have made clear “direct evidence” of pretext is no longer necessary and the jury is entitled to make findings of pretext, motivating factor, and/or retaliation based solely on circumstantial evidence including based solely on its disbelief of the defendant’s explanation. *Costa v. Desert Palace*, 539 U.S. 90 (2003); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

contemplated reorganization. CP 338 (at 27:2-10, 28:5-29:2). It also includes substantial other, objective evidence, from which the jury may find the reasons given for Mr. Fischer's termination are not credible. See App. Opening Br. at 2-17, 20-26.¹⁷

II. CONCLUSION

Mr. Fischer respectfully reiterates his request that this Court reverse the trial court's summary judgment rulings and remand this matter for jury trial on his third and fourth causes of action.

DATED this 16th day of February, 2011.

McNAUL EBEL NAWROT HELGREN PLLC

By: 

Leslie J. Hagin, WSBA No. 29186

Attorneys for Appellant Robert J. Fischer

¹⁷ The city also complains about references to Mr. Fischer's performance reviews from the WSDOT. The city made this same argument in a motion in limine at the trial court with regard to his WLAD claims, and the trial court correctly rejected the argument. The city asserts it fired Mr. Fischer after almost 20 years because he was a poor and "grossly insubordinate" employee who failed to get along with co-workers and the public. It has also made after-the-fact assertions in summary judgment affidavits that he paid insufficient attention to safety matters. He performs the same functions for the DOT as he did for the city. Evidence of his work performance history before and after his termination, in the areas raised by the city, is highly probative of whether its articulated reasons for firing Mr. Fischer are true or pretextual *relative to each of his separate, particular claims*. See *Barr v. Arco Chemical Co.*, 585 F. Supp. 470, 471, 473 (S.D. Tex. 1984) (evidence regarding employee's award-winning work subsequent to discharge probative of fact that employer's explanation for discharge, of "laziness," was pretextual); *Gage v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 365 F. Supp.2d 919, 932 (N.D. Ill. 2005) (evidence of employee's prior and subsequent performance reviews admissible).

APPENDIX 2

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Hon. Scott R. Sparks

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JOYCE L. JULSRUD, CLERK
KITITAS COUNTY WASHINGTON

SUPERIOR COURT OF WASHINGTON
FOR KITITAS COUNTY

ROBERT J. FISCHER,

Plaintiff,

v.

CITY OF ROSLYN,

Defendant.

No. 08-2-00557-0
SPECIAL VERDICT FORM

We the jury, find as follows:

QUESTION 1: Do you find that a significant motivating factor in Plaintiff

Robert Fischer's termination was his age?

ANSWER: Yes _____ No X

QUESTION 2: Do you find that a significant motivating factor in Plaintiff

Robert Fischer's termination was his disability?

ANSWER: Yes _____ No X

If you answered "no" to Questions 1 and 2, do not answer any further questions.

Have the foreperson sign the verdict form and notify the bailiff you have a verdict.

If you answered "yes" to Questions 1 or 2, answer Questions 3, 4, and 5.

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QUESTION 3: What amount of past wage and/or benefit losses do you award to Mr. Fischer with respect to his claims (lost wages or benefits to date)?

Answer: \$ _____ . [If no such damages, put \$0]

QUESTION 4: What amount of future wage and/or benefit losses do you award Mr. Fischer with respect to his claims?

Answer: \$ _____ . [If no such damages, put \$0]

QUESTION 5: What amount of compensatory damages do you award Mr. Fischer with respect to his claims (emotional distress or other non-wage and benefits damages)?

Answer: \$ _____ . [If no such damages, put \$0]

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The foreperson should sign at the end of the verdict form and contact the bailiff.

DATED this 3rd day of August, 2010.

Brandi Larsen
Presiding Juror

FILED

FEB 17 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 293611

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

ROBERT J. FISCHER,

Appellant,

v.

CITY OF ROSLYN,

Respondent.

PROOF OF SERVICE

600 University Street, Suite 2700
Seattle, Washington 98101-3143
Telephone (206) 467-1816

McNAUL EBEL NAWROT &
HELGREN PLLC
Leslie J. Hagin, WSBA No. 29186

Attorneys for Appellant
Robert J. Fischer

I, Beth E. Zentz, declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of McNaul Ebel Nawrot & Helgren, PLLC, 600 University Street, Suite 2700, Seattle, Washington.

3. On February 16, 2011, I caused to be filed the following document: **Appellant's Reply Brief:**

ORIGINAL (plus one copy):

The Court of Appeals of the
State of Washington
Division III
500 North Cedar Street
Spokane, WA 99201-1905

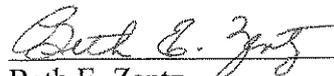
Via Messenger
Via U.S. Mail
 Via Overnight Delivery
Via Facsimile
Via E-mail

4. On February 17, 2011, I will cause to be served a true copy of **Appellant's Reply Brief** on the following:

Mr. Christopher Hilgenfeld
Ms. Selena C. Smith
Davis Grimm Payne Marra
701 5th Avenue, Suite 4040
Seattle, WA 98104

Via Messenger
Via U.S. Mail
Via Overnight Delivery
Via Facsimile
Via E-mail

The foregoing statements are made under penalty of perjury under the laws of the State of Washington and are true and correct. Signed at Seattle, Washington, this 16th day of February, 2011.


Beth E. Zentz