

FILED

DEC 16 2010

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 OPENING BRIEF

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Robert J. Fischer

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I. ASSIGNMENTS OF ERROR AND RELATED ISSUES

First Assignment of Error: The trial court erred by dismissing Mr. Fischer's claim based on promises of specific treatment in a specific situation (i.e., "Thompson claim") at summary judgment. It improperly substituted its factual determination for that of the jury.

Related Issue: Did the City of Roslyn establish beyond any question of fact, such that the jury could not find, it created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations; Mr. Fischer was induced thereby to remain on the job and not actively seek other employment; and it breached those promises of specific treatment of specific assurances to him – relative to his termination?

Second Assignment of Error: The trial court erred by dismissing Mr. Fischer's claim for wrongful termination in violation of public policy at summary judgment.

Related Issue: When a long-time employee tells his employer he intends to use his accumulated sick leave and vacation time for a medical leave to have knee replacement surgery and recuperate therefrom, and is fired soon thereafter for articulated reasons that are subject to serious credibility/factual dispute, has the employer met its burden on summary judgment for dismissal of a wrongful termination in violation of public policy claim?

II. STATEMENT OF THE CASE

This case arises out of the City of Roslyn's termination of Robert Fischer from his position as street superintendent. Bob Fischer worked for the City of Roslyn for almost twenty years before he was suddenly fired in March 2007. He had never received a poor performance review.

He was suddenly terminated soon after he informed his supervisor (the mayor) that he intended to use his saved sick leave and vacation to take off the next summer for an extended medical leave, to have knee replacement surgery and related recuperation and rehabilitation. Soon after he told the mayor this (i.e., as soon as the winter season was winding down such that he was no longer needed to run the heavy snow plowing and sanding heavy equipment), she abruptly fired Mr. Fischer.¹ She did so for articulated reasons that are plainly pretextual or otherwise lacking in credibility. And, she did so in violation or breach of the City's specific promise regarding progressive discipline and termination. At the very least, the evidence is more than adequate from which the jury may so find.

A. Mr. Fischer's Employment and History of Good Performance

Bob Fischer joined the City of Roslyn's public works department in 1987. He was suddenly fired on March 19, 2007. He was in his early 50s. At the time of his abrupt termination, Mr. Fischer was just a few

¹ It is undisputed that at the time, Mr. Fischer was the only member of the three-man crew who possessed a Commercial Drivers License ("CDL"), and he was the one primarily responsible for operating the heavy equipment necessary to plow snow, sand, and keep Roslyn's streets, parks, water plant and other areas clear and safe during the long, harsh winter seasons there.

months from being eligible to take early retirement under the State employee (PERS) retirement system. And he had recently told the mayor he would be planning to use his accumulated sick leave and vacation time to take an extended medical leave for surgery and recuperation. *See* CP 492, 495 (R. Fischer Decl. at ¶¶ 2, 12).²

For a number of years, Mr. Fischer held overlapping roles as a police officer and street superintendent. CP 76, 78 (Fischer Dep. at 13:20-14:21, 23:25-24:11). Beginning around 1990, he solely held the position of street superintendent. *Id.* *See also* CP 513.

Mr. Fischer was part of a crew consisting of two other men, Stanley Georgeson and Joe Peck. CP 240 (at ¶2), 279 (at ¶2), 78-79 (Fischer Dep. at 24:6-25:11). Mr. Georgeson was a crew member, and Mr. Peck was the water and sewer superintendent. Mr. Fischer's and Mr. Peck's positions were both supervisory. *Id.* Mr. Peck was also a long-time City employee, and in fact had been Mr. Fischer's supervisor when

² This is one key issue of disputed material fact. Mr. Fischer says he told Mayor Porter this at a safety team meeting not long before she abruptly terminated him. Mayor Porter says she does not recall him doing so. *Compare* CP 495 (R. Fischer Decl. at ¶ 12) ("During the 'reorganization and safety meeting' held in December 2006, I told Mayor Porter that I was saving up my sick leave and vacation time to take the summer off to have surgery and to recuperate from the surgery"), *with* CP 346-347, 390 (J. Porter Dep. at 76:22-79:18, 310:24-311:7) (denying Mr. Fischer and she had conversation about his not having time to get water-certified because he would be using leave to get his knee repaired).

Mr. Fischer began working for the City. CP 78 (Fischer Dep. at 23:19-24:1).

In 2004, Jeri Porter became Mayor of Roslyn. CP 121 (J. Porter Dep. at 14:8-20). As Mayor, she supervised the City crew, including Mr. Fischer. CP 77 (Fischer Dep. at 18:12-19:2). Her husband, David Porter, was a Roslyn City Council member from 1999 until at least 2009 (and was chairman of the “Personnel Committee” at the time of Mr. Fischer’s termination). CP 232 (D. Porter Decl. at ¶ 1).

As street superintendent, Mr. Fischer was responsible for street and sidewalk maintenance, maintaining equipment, and sanding and snowplowing, among other duties. CP 430; 78 (Fischer Dep. at 21:9-22:21). His working hours varied. They were longest and most demanding during Roslyn’s long, harsh winter seasons. In the winter months, for example, he often had to start as early as 5:00 a.m. to plow and sand the streets and hills in and around Roslyn. CP 79 (Fischer Dep. at 26:5-27:24). *See also* CP 553-554. The winter season in Roslyn frequently stretched well into March, as it did in early 2007. *See e.g.*, CP 553-554, 556-558. As the City has admitted, Mr. Fischer always had discretion to determine whether it was necessary for him to plow or sand the streets, necessitating an early start, or be at a crew meeting at 7:00 a.m. *See* CP 359 (J. Porter Dep. at 130:18-20, 131:15-17).

The City argues that it fired this 20-year employee because it had “received numerous citizen and co-worker complaints about [him]” and he “was finally terminated . . . by Mayor Porter because of insubordination, including his failure to comply with [an April 2006] corrective action plan and continued longstanding performance issues.” CP 18. The City’s argument largely rests upon rank hearsay and other unsubstantiated statements. The evidence belies the City’s assertions. At minimum, the jury is entitled to find that the City’s articulated justifications for firing Mr. Fischer lack credibility (and reflect pretext), and that Mr. Fischer’s claims represent the more believable version of events.

In fact, it is undisputed that the Mayor, Mr. Fischer’s supervisor, wrote in his last performance review that all negative comments about him “*were answered to my satisfaction.*” CP 520 (emphasis added). Mayor Porter has further admitted that she found the complaints about Mr. Fischer to be unsubstantiated. These unsubstantiated complaints include the very same ones the City now tries to use as “examples” of complaints concerning Mr. Fischer (in the declarations and other exhibits it has submitted in support of its motion for summary judgment), which it asserts supported his sudden termination. *See e.g.*, CP 342 (J. Porter Dep. at 50:4-51:9) (noting her husband, city council member David Porter, urged her to terminate Mr. Fischer after she received a sexual harassment allegation about him, but admitting she found the allegation “not substantiated”); *see also e.g., id.* (51:24-52:5) (admitting she does not

know if complaints about Mr. Fischer being “harassing” were ever justified); CP 345 (at 72:23-25) (noting comments by city council members in the late 2006 executive session meeting did not result in any action with regard to Mr. Fischer); CP 380, 381, 384-385 (at 241:1-21, 246:3-248:13, 263:10-266:22) (acknowledging various complaints about Mr. Fischer, including the one in her husband’s declaration filed by the City in support of its motion for summary judgment about “throwing” gravel, were found by her at the time to be unsubstantiated and made by people who bore personal grudges against him and/or whom she describes as “harassing” and “stalking” of the entire crew). *See also* CP 497 (R. Fischer Decl. at ¶ 21) (noting the City’s summary judgment declarant Frank Sikon is a former tenant of his, whom Mr. Fischer had to evict for not paying his rent); CP 497-501 (*id.* at ¶¶ 22-23, 26-33) (rebutting and denying various other supposed “complaints” alleged by City in its summary judgment materials).

Further, it is clear that Mr. Fischer received at least as many (unsolicited) notes of praise and commendations from the public and those doing business with Roslyn as he did “complaints.” *See* CP 560-574. Indeed, the mayor has acknowledged that as late as November or December 2006, she still not only considered Mr. Fischer to be doing satisfactory work but considered him to be the **“top person” to lead the entire crew upon a contemplated reorganization of the department.** CP 338 (J. Porter Dep. at 27:2-10, 28:5-29:2).

So, what really happened between December 2006 and March 19, 2007, when Mr. Fischer was suddenly fired? He informed the mayor he intended to use his accumulated sick leave and vacation time (which he had been saving to the very maximum that could be held) to take an extended medical leave for knee surgery/replacement and recuperation. CP 495 (R. Fischer Decl. at ¶ 12). After that, as soon as he was no longer needed to run the heavy snow plowing and sanding equipment during the winter (that is, by mid-March when the winter season was coming to an end), the mayor fired him.

The vacancy left on the three-member crew after his termination was filled by a man in his 30s with no physical limitations or medical leave/surgery needs. And, the new “lead” supervisor crew position was given to the youngest man on the crew, Stan Georgeson (who has been Mr. Fischer’s subordinate), who was in his early 40s and likewise had no physical limitations or medical leave/surgery needs.

In short, it appears the City decided Mr. Fischer had become too old and broken down, and his anticipated surgery and extended medical leave needs too inconvenient, to keep around any longer. And it violated its own, very specific promises regarding progressive discipline and termination as reflected in its policies in the rush to terminate him. At minimum, the jury is entitled to conclude this makes more sense than the City’s articulated reasons for his termination.

In fact, Mr. Fischer received consistently positive performance reviews throughout his two decades of service to the City, including from

Mayor Porter. CP 77 (Fischer Dep. at 18:12-19:2); 492 (R. Fischer Decl. at ¶ 3).³ He was also widely acknowledged to be an expert in working with the type of heavy equipment required by his work for the City. *See e.g.*, CP 341 (J. Porter Dep. at 46:16-19).

More specifically, Bob Fischer worked for a number of mayors over the course of his two decades of service to the City. Under each of them he received excellent performance reviews. Contrary to the self-serving and conclusory statements the City now makes, his actual annual performance reviews contain comments such as the following with respect to his ability to get along with others and follow the directions of his superiors:

ABILITY TO GET ALONG WITH OTHERS IN THE WORK UNIT –
Exceeds normal requirements

CONTRIBUTES TO THE PROMOTION OF MORALE –
Exceeds normal requirements

ACCEPTS APPROPRIATE DIRECTION FROM SUPERIORS –
Exceeds normal requirements

CONTRIBUTES TO THE PRODUCTIVITY OF THE WORK
UNIT – Exceeds normal requirements

OTHER ELEMENTS . . . ABILITY TO GET ALONG WITH
PUBLIC – Far exceeds normal requirements

³ Since his termination, Mr. Fischer has been employed on a seasonal basis with the Washington State Department of Transportation (“WSDOT”), performing essentially the same duties as he performed for the City of Roslyn. His performance reviews continue to be excellent. CP 493 (at ¶ 6), 523, 525, 527.

CP 503-505, 507-510, 512-515.

His reviews also contain comments such as these:

QUALITY AND ACCURACY OF WORK COMPLETED – Far exceeds normal requirements

KNOWLEDGE OF WORK UNIT PURPOSES, GOALS AND DUTIES – Far exceeds normal requirements

COMMITMENT TO IMPROVING SERVICES TO THE PUBLIC – Exceeds normal requirements

DEPENDABILITY AND RELIABILITY REGARDING WORK INSTRUCTIONS – Far exceeds normal requirements

CP 508.

Mr. Fischer's performance reviews after his termination are likewise glowing. Following are just some of the comments in his 2008 evaluation from the Washington State Department of Transportation (for whom he works as a seasonal employee, performing similar public service functions of sanding and plowing the mountain passes):

Great work ethics.

Works safe and does anything that he is asked to do. Bob brings a lot of talent to the DOT.

Attendance is good, follows the rules and is great for morale. Bob has great work habits and is a self starter.

Bob is very easy to get along with and works well with the public. Bob has a positive influence on the crew.

Bob's experience and morale has been greatly appreciated. He has done a great job this winter.

CP 523.

Mr. Fischer's 2009 WSDOT annual evaluation (by a different evaluating supervisor) contains the following comments:

Bob brings an enormous amount of experience & skill to this job, he is a very talented equipment operator. He is capable of doing any job in snow/ice maint.

Bob knows what the end result needs to be and is willing to do what it takes to safely achieve those results. He looks out for the safety of other crew members.

Bob leads by example, will never expect others to carry his load. He is the biggest and best morale booster on night shift. He expects others to do their best also.

Maybe a little rough around the edges, but there is a lot to say about being brutally honest. He brings others back down to earth. He shows a very high concern for others on the crew.

An excellent employee, night shift would not be the same without him. He has taken the time with new employees to show & teach them all aspects of the job.

CP 525. *See also* CP 527 (WSDOT Individual Safety Certificate of Recognition).

Further, as noted above, in the last annual performance review he received from the City, at the end of 2005, Mr. Fischer received ratings of above average to excellent from Mayor Porter. He was rated poor or below average in no areas. Specific areas in which he was rated "excellent" by Mayor Porter included "**responsibility**" and "**reliability.**" CP 517-521 (at 518 and 520); 349 (J. Porter Dep. at 86:11-88:21). In an area for the standard constructive criticisms or comments in a performance

evaluation – “training needs or targets set for the employee” – Mayor Porter wrote: “Get along public, no get even attitude. Use safety equipment for trenching.” CP 520. She followed this up by writing: **“There were comments from public. All were answered to my satisfaction.”** *Id.*; CP 349 (J. Porter Dep. at 88:1-10) (emphasis added).

Her comments reflected the reality of working in public service in a small town like Roslyn. Complaints about Mr. Fischer and the rest of the crew from people who did not understand their work were common – and they were, by the mayor’s own admission, commonly unsubstantiated and meritless. *See* CP 497-501 (R. Fischer Decl. at ¶¶ 21-34). *See also* CP 122, 128, 177, 179, 183-184, 186 (J. Porter Dep. at 18:10-19:5, 44:15-20, 241:1-21, 246:3-248:13, 263:10-266:22, 276:17-277:3). *See also* CP 722 (Georgeson Dep. at 95:4-96:9).

There was also tension at times between Mr. Peck and Mr. Fischer. CP 341 (J. Porter Dep. at 48:2-22). Despite this tension, Mr. Peck and Mr. Fischer had been working together for nearly 20 years when Mr. Fischer was terminated. CP 78 (R. Fischer Dep. at 23:19-24:19); CP 240 (Peck Decl. at ¶ 2). As the Mayor, Mr. Georgeson, and Mr. Peck himself have all admitted, Mr. Peck is difficult to get along with. CP 341 (J. Porter Dep. at 49:2-6), 723 (Georgeson Dep. at 104:8-10), 728-729 (Peck Dep. at 27:6-13, 38:17-24). Moreover, in stark contrast to the self-serving assertions now made in the declaration from Mr. Peck the City filed in support of its motion for summary judgment, that “Bob Fischer was a very

difficult man to work with,” the above statements are from performance reviews in which Joe Peck was Mr. Fischer’s direct/evaluating supervisor and these ratings and comments bear his signature. The jury is certainly entitled to conclude that these facts greatly undermine Mr. Peck’s credibility.⁴

In April 2006, the Mayor gave Mr. Fischer a written notice addressing the working relationship between him and Mr. Peck. CP 539. The topic of the notice was described as “[t]he inability to get along with other employees or volunteers and abusive treatment of those doing business with Roslyn,” and it directed Mr. Fischer to meet daily with other crew members at the shop at 7:00 a.m. When Mayor Porter gave Mr. Fischer this notice, she told him she was giving Mr. Peck the same notice. CP 743 (J. Porter Dep. at 344:21-346:22), 496 (R. Fischer Decl. at ¶ 16).⁵

⁴ The jury is also entitled to discount or reject Mr. Peck’s statements about how Mr. Fischer allegedly “would not participate in the safety programs or properly use the safety equipment” and “plac[ed] Stan Georgeson in a nine-foot hole without a proper trench box in violation of the safety rules,” in light of Mr. Fischer’s own declaration testimony on these topics and in light of the performance reviews Mr. Fischer has received from the Washington State Department of Transportation. *See* CP 498 (R. Fischer Decl. at ¶ 27). *See also* CP 523 (“works safe”), 525 (Bob “looks out for the safety of other crew members”; “[h]e shows a very high concern for others on the crew”). It is further undermining of Mr. Peck’s credibility that he has rolled his pickup during work time and been admonished for not even maintaining his Commercial Driver’s License (“CDL”). *See* CP 343 (J. Porter Dep. at 56:10-57:11); 438. In addition, Mayor Porter herself has also acknowledged that *Mr. Peck* is difficult to get along with. CP 341(J. Porter Dep. at 49:2-6).

⁵ The notice to Mr. Peck was never produced. It is unclear whether it was actually given to him, or if the City has failed to maintain it. *See* CP 743 (J. Porter Dep. at 344:21-346:22).

Notably, this was the one and only written notice Mr. Fischer received during his two decades working for the City. CP 339-340, 370 (J. Porter Dep. at 41:22-43:11, 192:3-7).⁶ Contrary to what was written in this April 2006 notice, as discussed above, the mayor acknowledged that it was not possible during the winter months to hold a 7:00 a.m. crew meeting (because Mr. Fischer and Mr. Georgeson were out plowing and/or sanding), and she made it known to Mr. Fischer that he had the discretion as to where he actually needed to be at that time.⁷ Nonetheless, following the receipt of this April 2006 warning or notice, Mr. Fischer tried in good faith to follow the Mayor's requests in it, and as far as he knew, the Mayor was perfectly satisfied. CP 498 (R. Fischer Decl. at ¶ 25). The Mayor admittedly never indicated to him otherwise. CP 369 (J. Porter Dep. at 187:7-12).

More specifically, contrary to what the City argues in its motion for summary judgment, there was never a "corrective action plan" for Mr.

⁶ At a different time, the Mayor gave Mr. Peck a similar written notice instructing him to get a CDL. CP 754. *See also* 749-51 (J. Porter Dep. at 372:15-381:3). The City has attempted to characterize the April 19, 2006 notice to Mr. Fischer as a Step 2 warning under the City's progressive discipline policy, but the Mayor testified that she did not consider the similar notice to Mr. Peck to be either a Step 1 or Step 2 warning under the City's progressive discipline policy. CP 749 (at 373:5-12).

⁷ During a deposition, the Mayor for the first time asserted that she had directed the crew members to hold meetings by cell phone when it was impossible to meet in person. CP 353, 361 (J. Porter Dep. at 105:4-19, 142:3-12). But Mr. Fischer denies this, as do the other crew members. CP 496-497 (R. Fischer Decl. at ¶ 18), 720 (Georgeson Dep. at 61:4-22), 731 (Peck Dep. at 64:23-65:3). In fact, Mr. Georgeson did not even have a cell phone until shortly before Mr. Fischer was terminated. CP 496-497 (Fischer Decl. at ¶ 18), 720 (Georgeson Dep. at 61:9-11).

Fischer. There was the one written warning or a “request for correction” letter dated April 19, 2006, almost a year before he was suddenly fired. This is the only request for correction or any type of warning anywhere in Mr. Fischer’s entire personnel file, from a career with the City of two decades.⁸

Within days of firing Mr. Fischer, as part of her effort to have his request for unemployment benefits denied due to alleged “insubordination,” Mayor Porter told the Employment Security Department that she fired him because she had “found out from other people he was working the earlier shift without my permission; after I had told him he was to be starting at 7:00 a.m.” CP 423. During her deposition, however, Mayor Porter admitted that she did not expect Mr. Fischer to start the work day or hold crew meetings at the shop at 7:00 a.m. *when the winter season still required sanding or plowing of the city streets.* She also admitted that she left this decision *entirely to Mr. Fischer’s discretion* and did not expect him to “consult” with her about that. CP 359, 386-387, 389 (J. Porter Dep. at 130:18-20, 283:4-286:4, 287:8-289:24, 290:5-12). Thus, belying the mayor’s contemporaneously-articulated reason for firing Mr. Fischer, the evidence is actually un rebutted that he was still needing to sand and/or plow the streets at 7:00 a.m. and work the “winter shift” hours, and she left it to his discretion

⁸ The mayor has also admitted that she asked her predecessor mayors whether they had ever given Mr. Fischer any written or otherwise documented warnings, reprimands or corrective action notices. And none of them ever had. CP 339-341 (J. Porter Dep. at 41:19-46:19).

whether he could hold meetings at the shop at 7:00 a.m. (as purportedly “required” by the April 2006 corrective action request/warning). *Id.*, CP 359 (J. Porter Dep. at 130:18-20, 131:15-17). *See also* CP 496-497 (R. Fischer Decl. at ¶ 18), 553-554 (mayor’s winter advisory), 556-558 (Bob Fischer time sheets for 3/15/07, approved by Mayor Porter, reflecting his working the winter shift and still plowing and sanding).

Since giving her reason for firing Mr. Fischer to the state unemployment agency, and being confronted with the fact that the weather in March 2007 was actually such that Mr. Fischer could not hold meetings at the “shop” at 7:00 a.m., Mayor Porter has tried to change her reasons for terminating him. In her deposition she said she told Mr. Fischer to hold 7:00 a.m. crew meetings during the winter season (when he was still sanding or plowing the streets) by cell phone. Mr. Fischer denies she ever told him this, which by itself raises a genuine issue of material fact as to her credibility and that of the City’s articulated reasons for firing Mr. Fischer. CP 496-497 (R. Fischer Decl. at ¶ 18). Moreover, fellow crew member Stanley Georgeson did not even have a cell phone so he could not possibly have held a meeting by cell phone with him. Mr. Georgeson has also testified he has never been told to hold crew meetings by cell phone. CP 720 (Georgeson Dep. at 61:4-11).

The jury is entitled to find the City’s shifting reasons for terminating Mr. Fischer to lack credibility and indicate pretext. Conflicts in witness testimony, such as that between Mayor Porter and Mr. Fischer

concerning the cell phone meeting issue, are also classic credibility determinations for the jury to resolve.

The jury is entitled to find from the evidence that Mr. Fischer endeavored in good faith to comply with all instructions and directions from the mayor, including but not limited to seeking changes to his schedule after the winter season. For example, as soon as the mayor informed Bob Fischer and Stan Georgeson that they would need to put their requests for a changed schedule in writing and she would consider it, he and Mr. Georgeson did so. *See* CP 400 (email from Mayor dated March 15, 2007); 402 (written request dated March 15, 2007); 363-364 (J. Porter Dep. at 161:2-164:18). She fired Mr. Fischer anyway, the very next work morning after receiving the written request she promised Mr. Fischer that she would consider.

Upon examination, the mayor's reason(s) for firing Mr. Fischer after some 20 years of employment with the City boils down to her not being able to reach him on his cell phone as often as she wanted. *See* CP 364-365 (J. Porter Dep. at 165:11-167:10); CP 406 (handwritten notes of mayor kept as part of her personal journals, off city premises and not as part of Mr. Fischer's personnel file). She asserts Mr. Fischer purposely failed to carry his cell phone and keep it on as she had told him to do, and that this was "grossly insubordinate." Yet, the April 2006 "written request for correction" does not say anything about Mr. Fischer being warned about not answering his cell phone. *See* CP 539. Moreover, the mayor has admitted that it is "equally plausible" that the reasons she could not

reach Mr. Fischer on his cell phone as often as she liked was for the perfectly innocent reasons he told her: it sometimes ran out of charge; he occasionally misplaced it; and he was often working on heavy equipment such that he could not hear the phone. CP 364-365 (J. Porter Dep. at 165:11-167:10).⁹ Even if the jury were to believe Mayor Porter over Mr. Fischer, and find he purposely failed to always carry or answer his cell phone as she asked him to do, it may also find that this does not amount to the level of “gross insubordination” or “misconduct” (i.e., an “extremely serious offense”) specified by the City’s progressive discipline policy.¹⁰

B. City of Roslyn’s Progressive Discipline Policy

The City of Roslyn has well-established and detailed policies promising its employees that they will receive specific, “just cause” treatment with regard to discipline and termination. *See* Appendix 1 (at CP 535-537 (City of Roslyn Personnel Policy at 2.48.130)). *See also* CP 359 (J. Porter Dep. at 133:4-13) (agreeing she needed “just cause” to terminate Mr. Fischer and that in order to terminate him under the City’s personnel policy he would have had to have engaged in an extremely

⁹ *See also e.g.*, CP 718-720 (Georgeson Dep. at 52:11-54:22, 61:4-22) (noting he has lost his cell phone, they have quit working, and one cannot hear a cell phone ring, or even feel it vibrate, when working on heavy equipment, also noting the mayor has never complained to him about not answering his cell phone when she calls it); CP 733 (Peck Dep. at 82:2-83:19) (noting he has lost and “ruined” several of his work cell phones, they have run out of charge on occasion, and confirming one can “probably not” hear a cell phone ring when operating heavy equipment).

¹⁰ For purposes of summary judgment, of course, Mr. Fischer’s testimony must be believed.

serious offense). The City's progressive discipline/termination policy assures employees that they will be given multiple, documented warnings about any performance issues and meaningful opportunity to correct any issues, according to a detailed 4-Step procedure, before being terminated. The policy assures employees that they will not be terminated except according to these specific procedures, unless they have engaged in "an extremely serious offense" (such as theft, violence or gross insubordination). Appendix 1 (at CP 535-537). The policy lays out a specific four-step process, assuring employees that they will be given multiple, documented warnings about any performance issues and a meaningful opportunity to correct any issues before being terminated. *Id.*

More specifically, "Step 1" is "Oral/Written Instruction," "a verbal request for a correction of an unacceptable on-the-job practice." Though it is described as "the most informal step" of the process, it states that it "is essential that the employee recognize and understand both the problem and the need for corrective action." It also requires that a "memo documenting this discussion will be placed in the employee's file" and that the employee "will be requested to acknowledge the fact that the discussion took place by initialing the memo." Additionally, the policy specifically requires that a copy of any such memo "shall" go to the Personnel Committee. *Id.* (at CP 536).¹¹

¹¹ The "Personnel Committee" (which was chaired by David Porter) was apparently disbanded sometime after Mr. Fischer was terminated, and the City has not maintained its files. CP 232-233 (D. Porter Decl. at ¶ 2), 374-375, 745-746 (J. Porter Dep. at 217:15-218:4, 354:6-356:24).

“Step 2” is a “Written Warning,” a “written request for correction of an unacceptable on-the-job practice,” which “shall include a description of the problem and the corrective action the employee must take, as well as the date by which the action must be taken, and what the consequences of not correcting the situation will be.” A copy of the warning “shall be retained” in the employee’s personal folder, and a copy sent to the Personnel Committee. *Id.*

“Step 3” is “Investigative Suspension,” a period of up to two weeks in which the employee is off the active payroll. The suspension is to be accompanied by a letter “referring to any earlier oral and written warnings that have gone unheeded.” Upon completion of an investigation, “one of three courses of action may be taken: suspension for a definite period of time; other disciplinary [*sic*] action, including dismissal; [or] restitution for the employee for time lost if the investigation determines that no disciplinary action is appropriate.” *Id.*

“Step 4” is dismissal. The policy emphasizes that dismissal is a last resort and not properly understood as disciplinary action but instead, as a recognition that earlier attempts to “correct an unacceptable situation were unsuccessful.” *Id.* In the event of an “extremely serious offense,” and only then, the policy provides that “it may not be necessary and appropriate for the mayor to use all or part of the initial stages of the procedure.” As the mayor has acknowledged, in all other circumstances the policy requires that each of the initial stages of the procedure be

followed before an employee is terminated. CP 359, 366, 367, 369 (J. Porter Dep. at 133:4-13,176:15-25, 178:3-13, 186:4-10).

The mayor has admitted under oath that she needed to follow all four of the specific steps of the City's progressive discipline/termination policy. CP 366, 367, 369 (J. Porter Dep. at 176:15-25, 178:3-13,186:4-10). The evidence is also unrebutted that Mr. Fischer and other employees were well aware of the City's specific assurances about progressive discipline and termination and relied upon them. *See* CP 493 (R. Fischer Decl. at ¶ 8), 480-481 (M. Fischer Decl. at ¶¶ 3-4, 6)¹², 732 (Peck Dep. at 78:4-79:24). Indeed, just two days after he was terminated, Mr. Fischer noted in his unemployment application that he had not been afforded his rights under the City's policy. CP 494 (R. Fischer Decl. at ¶ 10), 108-110 (at 109).

As discussed in more detail below, it is well-settled that questions about whether such statements in the city's policies amount to enforceable promises of specific treatment in specific situations, whether Mr. Fischer justifiably relied upon any such promises, and whether any such promise was breached, all present material issues of fact for the jury to resolve.

C. Events Leading Up to Mr. Fischer's Termination

In the summer and fall of 2006, the City began to consider reorganizing the crew so that it would have one supervisor and two employees, instead of two supervisors and one employee. *See, e.g.*, CP

¹² Prior to her husband's termination, Maria Fischer worked for 17 years as the Clerk for the City of Roslyn. *Id.* (at ¶ 4).

233 (D. Porter Decl. at ¶ 3), 71 (Martinez Decl. at ¶ 4). The Mayor and City Council held a brief (five to ten minute) executive session in August 2006 at which this reorganization was discussed.¹³ During that meeting, the Mayor discussed making Mr. Fischer the new leader of the crew. *See* CP 740, 742-743, 746 (J. Porter Dep. at 335:4-8, 341:4-344:13, 359:3-11). The Mayor has since confirmed that she considered Mr. Fischer to be the **top candidate** for that position. CP 338 (J. Porter Dep. at 28:5-29:2).

Then, in December 2006, Mr. Fischer told the Mayor he planned to use his saved sick and vacation time to take an extended medical leave after the winter season was over, the following summer, for knee surgery/replacement and recuperation efforts.¹⁴ CP 495 (R. Fischer Decl.

¹³ The City initially refused to provide discovery related to this executive session, claiming privilege. CP 329 (at ¶ 29), 331 (at ¶ 37), 652 (at ¶ 7). During Mayor Porter's first deposition, she was instructed not to testify regarding discussions at the meeting. *See* CP 331 (Leslie Hagin Declaration at ¶ 37). In its motion for summary judgment, the City attempted to characterize this meeting as having been about "Mr. Fischer's performance and possible termination." CP 23. Later discovery compelled by the trial court, however, demonstrated unequivocally that this was not the case. Instead, the meeting was about the Mayor's concerns about "tension" within the City crew, in general, and the possibility of reorganization. CP 742 (J. Porter Dep. at 341:4-343:24). Far from discussing Mr. Fischer's alleged performance "problems" with an eye toward terminating him, she actually proposed making him the leader of the entire, reorganized crew. *Id.* (at 342:4-19). Notably, as well, the mayor has testified that she did not tell the attendees she intended to terminate Mr. Fischer; nor did she show them Mr. Fischer's November 2005 performance review in which she stated that all complaints had been answered to her satisfaction, the April 2006 warning, nor any other documentation whatsoever. *See* CP 742, 745, and 746 (J. Porter Dep. at 341:4-6, 352:6-13, 356:25-358:1).

¹⁴ The Mayor disputes that Mr. Fischer told her this. *See* n. 2, *supra*. But for summary judgment purposes Mr. Fischer's testimony must be believed. No witness has denied that Mr. Fischer told the Mayor this. *See e.g.*, CP 723 (Georgeson Dep. at 103:11-104:7), 735 (Peck Dep. at 122:20-25), 761 (D. Porter Dep. at 47:8-11), 814-15 (Sikon Dep. at 177:13-178:2).

at ¶ 12), 99 (Fischer Dep. at 106:19-108:13). Mr. Fischer originally injured his knee on the job, but was told by his then-supervisor (then-Mayor Denning) that he would be fired if he filed an L&I (worker's compensation) claim. CP 548 (Fischer Dep. at 91:23-92:12). *See also* CP 723 (Georgeson Dep. at 103:11-24). He had, therefore, worked through his knee pain and in spite of it for years while he saved his sick leave and vacation time to be able to take the necessary leave. By 2006, his knee was shot, and becoming more and more aggravated by his work duties. It was apparent that a knee replacement surgery would be necessary and he began to plan for it. *See e.g.* CP 495-496 (R. Fischer Decl. at ¶¶ 12-14), 541 (last pay stub of Mr. Fischer showing he had saved the maximum allowed of accumulated sick leave and vacation time by then).¹⁵

The winter of 2006-2007 was long and harsh, and Mr. Fischer was plowing and sanding well into March 2007. CP 496 (at ¶ 17), 553-54, 556-568. Thus, the City's explanations for the Mayor's actions between March 14 and March 19, 2007, when Mr. Fischer was terminated, ring hollow.

¹⁵ Mr. Fischer has been unable to obtain surgery since being terminated. He has only been able to obtain seasonal work with the WSDOT, and has been drawing unemployment during the months when he is not working. In order to get unemployment, he needs to be available to work. He cannot afford to take the time to get the surgery and lose his unemployment benefits. CP 495-496 (R. Fischer Decl. at ¶14).

For example, in its motion for summary judgment, the City alleged that the Mayor was surprised to hear, on March 14, 2007, that Mr. Fischer and Mr. Georgeson were not conducting daily shop meetings at 7:00 a.m. CP 26.¹⁶ The Mayor did send an email to Mr. Fischer and Mr. Georgeson on Thursday, March 15, regarding their working hours, but that email says nothing about daily 7:00 a.m. meetings. It reads:

Your hours of work are 7 am through 3:30 pm. If the need arises to alter this schedual [sic], for any reason, arrangements must be made ahead of time. Carry your cell phones during working hours and keep them on. I want to be able to contact you if the need arises.

CP 275, 400.

Following the Mayor's instructions, Mr. Fischer and Mr. Georgeson promptly submitted a written request to change their work hours to 6:00 a.m. to 2:30 p.m.—for “snow plowing and sanding” in the winter, “street cleaning” in the summer, and “to beat the heat.” CP 277, 402. They also explained that Mr. Georgeson's son returned home from

¹⁶ In a (hearsay) statement made to the Employment Security Department, Mayor Porter reported that “Mr. Fischer was seen every morning on the City work truck, sitting and watching elk being fed at 6:15 am.” CP 272. This is a disputed issue of fact. Mr. Fischer and Mr. Georgeson needed to drive down Fanhouse Road in order to get to the water treatment plant and check its status. *See* CP 721 (Georgeson Dep. at 89:11-20). Moreover, the water plant was at a slightly higher elevation and sanding was sometimes necessary in the area even when it was not necessary in town. CP 85 (Fischer Dep. at 49:11-50:20). *See also* CP 734 (Peck Dep. at 91:1-93:19). They could sometimes see a resident of that road, Dave Chase (and presumably he could see them) feeding elk on his property in the morning when they made this work-related drive. CP 684-88 (Peck Dep. at 28:4-32:3), 665-666 (Georgeson Dep. at 17:4-18:5), 500-501 (R. Fischer Decl. at ¶ 33), 649 (R. Fischer Decl. at ¶ 2).

school at 3:00 p.m., another reason the earlier shift would be better for Mr. Georgeson. *Id.* Mr. Fischer reported to work at 7:00 a.m. on Monday morning, March 19, 2007, and was shocked when the Mayor suddenly terminated him (as was his fellow crew member Stan Georgeson). CP 497 (R. Fischer Decl. at ¶ 20), 363 (J. Porter Dep. at 161:24-25), 193 (J. Porter Dep. at 303:13-15).

D. City's Articulated Reasons for Terminating Mr. Fischer Lack Credibility.

When Mr. Fischer was terminated, the Mayor gave him a letter stating her purported reasons. They included "Gross Insubordination, the inability to get along with other employees, and specifically, not following the corrective action outlines in a letter dated April 19, 2006," the latter an apparent reference to the lack of 7:00 a.m. in-person crew meetings (though any mention of such meetings is lacking in her March 15, 2007 email to Mr. Fischer and Mr. Georgeson). CP 104. She also complained of the fact that she could often not reach Mr. Fischer by cell phone, and complained that he and Mr. Georgeson were working the wrong shift. *Id.* As discussed above, the credibility of each these articulated reasons are disputed, and are for the jury to resolve.

First and foremost, 7:00 a.m. crew meetings were often impossible or at least highly impracticable during winter, as even the mayor has admitted. She admitted she "had given Bob [Fischer] latitude to make [the] decision" where he needed to be at 7:00 a.m. during the winter season. She has admitted she does not actually know whether the roads

still required plowing or sanding (and inspection for whether such was necessary), in the early morning hours in March 2007. CP 353, 356, 358, 359, 361 (Porter Dep. at 105:4-14, 118:4-119:14, 126:23-129:20, 130:18-20, 131:15-17, 142:3-9).

To try to cover up for this inconsistency, the City later changed its story – first in the mayor’s deposition and then in its summary judgment brief – and claimed that the mayor told Mr. Fischer to hold the meetings by cell phone when it was necessary to be out taking care of the roads in the morning. CP 353, 356, 357, 361 (J. Porter Dep. at 105:4-19, 119:15-121:16, 122:3-124:3, 142:7-12). But not only does Mr. Fischer dispute this, so do the other crew members and their current direct supervisor George Martinez. *See e.g.*, CP 496-497 (R. Fischer Decl. at ¶ 18), 659 (Georgeson Dep. at 5:17-21); 731 (Peck Dep. at 64:23-65:3). In fact, it appears Mr. Georgeson did not even have a cell phone when he worked under Mr. Fischer’s supervision and before Mr. Fischer was terminated. CP 496-497 (R. Fischer Decl. at ¶ 18), 659 (Georgeson Dep. at 5:22-24).

The mayor’s complaint that she could not reach Mr. Fischer by cell phone as often as she wanted wholly fails to suggest “gross insubordination” or other “extremely serious offense,” as required (by the mayor’s own admission) by the City’s specific promises of progressive discipline reflected in its personnel policy. At least, the jury may so find.

It is undisputed that Mr. Fischer was the primary operator of the City’s heavy equipment and he could not hear a cell phone call while on the equipment. It is also undisputed that losing a cell phone, or having its

battery go dead, was not at all uncommon among all of the crew. And the mayor has never accused any other crew member of “insubordination,” let alone “gross insubordination,” because of it. CP 718-720 (Georgeson Dep. at 52:17-54:22, 61:9-61:22); 732-733 (Peck Dep. at 81:21-83:19). In fact, even the mayor later admitted that it is “equally plausible” that she could not reach Mr. Fischer on his cell phone as often as she liked for the perfectly innocent reasons he gave her: it sometimes ran out of charge, he had on occasion misplaced it, and he was often working on heavy equipment such that he could not hear the phone or answer it when she called. *See* CP 364-365 (J. Porter Dep. at 165:11-167:10).

In fact, far from being “grossly insubordinate,” Mr. Fischer promptly complied with the mayor’s March 15, 2007 instructions regarding his shift. When she instructed him that her authorization was required for him to deviate from a 7:00 a.m. to 3:30 p.m. schedule after the winter season, he promptly sought that authorization in writing, explaining his (and Mr. Georgeson’s) reasons for doing so in a respectful manner. CP 277, 402. As he always did, Mr. Fischer tried in good faith to do what the mayor wanted him to do. CP 501 (R. Fischer Decl. at ¶ 34).¹⁷

¹⁷ The City has tried to back-fill additional “reasons” for the mayor’s abrupt termination of Mr. Fischer without following the steps of the progressive discipline policy and on the heels of his telling her of his extended medical leave plans. After the fact, it has tried to raise a litany of alleged negative public comments in a transparent effort to inflame the Court. The jury is certainly entitled to find these after-the-fact allegations lacking in credibility. They are mostly based on the rankest of hearsay. They are also disputed by Mr. Fischer. *See e.g.*, CP 497-501 (R. Fischer Decl. at ¶¶ 21-34). And they are otherwise highly suspect. For example, the allegations pre-date Mr. Fischer’s last performance review at the City, in which Mayor Porter stated that the same criticisms of him had been “answered to [her] satisfaction.” CP 517-521 at 520;

III. ARGUMENT

A. Standard of Review

In reviewing a trial court's grant of summary judgment, the appellate court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper only if the pleadings, affidavits, and depositions on file demonstrate an absence of any disputes of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and inferences from them must be viewed in the light most favorable to the nonmoving party. *Wilson*, 98 Wn.2d at 437. The trial court did not follow these basic principles, and instead substituted its fact-findings for that of the jury.

B. Mr. Fischer Presented Sufficient Evidence for His "Thompson" Claim to Go to the Jury.

In Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984), the court held that if an employer creates an atmosphere of job security and fair treatment by promising specific treatment in specific situations, and an employee is thereby induced to remain with the employer and not seek other employment, the promises are enforceable components of the employment relationship. *Thompson*, 102 Wn.2d at

349 (J. Porter Dep. at 86:16-88:7). *See also e.g.*, CP 342, 357 (J. Porter Dep. at 50:4-51:9, 124:23-125:8) (admitting she found any allegations of sexual harassment against Mr. Fischer to be unsubstantiated, and they had nothing to do with her reasons for terminating him). The City's allegations about Mr. Fischer's alleged poor performance or attitude is also contradicted by the mayor's deposition testimony that as late as November-December 2006, she actually considered Mr. Fischer to be the top candidate to lead the entire City crew.

230. The elements of a “*Thompson*” claim are: (1) a promise of specific treatment in a specific situation; (2) justifiable reliance on the promise; and (3) that the promise was breached. *See Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 184, 125 P.3d 119, 128 (2005) (reversing grant of summary judgment to employer). Whether the plaintiff has satisfied each of these elements is a **question of fact** for the jury. *See Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 525, 826 P.2d 664 (1992) (“the questions whether statements in employee manuals, handbooks, or other documents amount to promises of specific treatment in specific situations, whether plaintiff justifiably relied upon any such promises, and whether any such promise was breached present material issues of fact”). *See also, e.g., Korslund*, 125 Wn.2d at 191-92 (summary judgment inappropriate on *Thompson* claim because of fact questions); *Adler v. Ryder Truck Rental, Inc.*, 53 Wn. App. 33, 37-38, 765 P.2d 910 (Div. 3 1988) (same).

Moreover, all of the statements in the policy must be read in context and in light of all the other evidence.¹⁸ It is also well-settled that self-serving “disclaimers” in employment termination policies (e.g., that they are only a “guideline” or not “contractually” binding) are not dispositive. They do not allow for summary judgment. They are but one

¹⁸ *See, e.g., Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522-523, 826 P.2d 664 (1992) (“*Berg*” analysis including extrinsic evidence applies to *Thompson* questions about whether employer made enforceable promises of specific treatment in specific circumstances which modified what would otherwise be “at will” employment relationship (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) and *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984)).

factor to be considered by the jury in making its findings. *See, e.g., Swanson*, 118 Wn. 2d. at 532 (rejecting premise that a disclaimer can, “as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make.”).

The evidence is overwhelming that the City created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations relative to progressive discipline, and termination, that Mr. Fischer justifiably relied upon those promises, and that the City breached these promises.

1. City Made Specific Promises Re: Progressive Discipline and Termination.

Nowhere in the City’s progressive discipline policy, nor in any other City document, are employees told they are terminable “at will.” Quite the contrary, the City’s progressive discipline policy lays out a detailed, four-step progressive discipline procedure, specifically promising employees they will receive at least two documented 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). No language in the policy indicates that following the four-step procedure is optional, except in the event of an “extremely serious offense” *Id.* Only in the event of such an “extremely serious offense” does the policy provide that “it may not be

necessary and appropriate for the Mayor to use all or part of the initial stages of the procedure.” *Id.* (at CP 536).

The plain implication of this language is that in all other circumstances it is **required** that the City to utilize **each** of the initial stages of the procedure (Step 1, Step 2, and Step 3) before terminating an employee – just as Mayor Porter has admitted. CP 366, 367, 369, 375-376 (J. Porter Dep. at 176:15-25, 178:3-13, 186:4-10, 221:19-222:5). Moreover, the steps are described with words like “will” and “shall,” which indicate that they are mandatory, required, and necessary, not discretionary – just as the mayor has acknowledged. *See id.* *See also e.g., Duncan v. Alaska USA Federal Credit Union, Inc.*, 148 Wn. App. 52, 63, n.29, 199 P.3d 991 (2008) (reversing grant of summary judgment to employer on claim for breach of promises of specific treatment in specific situations). As such, Mr. Fischer’s case is very different from *Birge v. Fred Meyer, Inc.*, 73 Wn. App. 895, 872 P.2d 49 (1994), and *Drobny v. Boeing Co.*, 80 Wn. App. 97, 907 P.2d 299 (1995), which the City has cited – in which the court held that reasonable minds could not differ that the employer had not made promises of specific treatment.

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.” *See Birge*, 73 Wn. App. at 897 (emphasis added). Notably, the policy in *Birge* lacked any language whatsoever addressing a specific progressive discipline procedure to be followed in the case of less serious offenses. *See id.* The City’s policy gives the City

far less discretion: an employee may be terminated immediately only for an “extremely serious offense,” not for any reason the City deems sufficient. It also provides a detailed progressive discipline procedure to be followed in the case of less serious offenses.

The policy at issue in *Drobny* is also quite different. The *Drobny* policy was written in more general terms and with far more room for discretion than the City’s. It stated:

It is not always necessary, however, that the discipline process commence with a written warning or include every step. *Some acts, particularly those that are intentional or serious*, warrant more severe discipline on the first or subsequent offense. . . . The discipline process for other, less serious violations *will normally begin* with a written warning and proceed to more severe measures for subsequent violations.”

Drobny, 80 Wn. App. at 102-03 (emphasis added). The City’s policy is much more specific and mandatory. As the 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 (J. Porter Dep. at 133:4-13,176:15-25, 178:3-13, 186:4-10). In contrast, under the *Drobny* policy, the employer could skip steps for “some acts, particularly those that are intentional or serious.” *Drobny*, at 102-03. Moreover, under the *Drobny* policy, the discipline process for other, less serious violations would only “normally” begin with a written warning and then proceed through the other stages.

Id. Finally, whereas the City’s policy promises a specific Step 1 through Step 4 procedure in all instances not involving an “extremely serious offense,” the *Drobny* policy stated merely that it “**includes** the following measures,” (emphasis added) followed by a list of disciplinary actions.¹⁹ Thus, here, unlike in *Drobny*, there is, at the very least, a genuine material question of fact as to whether the City’s policy constitutes adequately specific promises, to create an obligation and justify employee reliance. *Id.* at 101-02 (“[W]hether or not an employer has made a promise specific enough to create an obligation and justify an employee’s reliance thereon is a question of fact. Only if reasonable minds could not differ in resolving this issue should a trial court decide it as a matter of law”). *See also Swanson*, 118 Wn.2d at 525 (“the questions whether statements in employee manuals, handbooks, or other documents amount to promises of specific treatment in specific situations, whether plaintiff justifiably relied upon any such promises, and whether any such promise was breached present material issues of fact”); *Korlund*, 125 Wn.2d at 191-92 (summary judgment inappropriate on *Thompson* claim because of fact

¹⁹ *Drobny* is also distinguishable in that the plaintiff in that case obviously committed a more serious act: intentionally accessing the private information of other employees for non-work reasons. The court noted that “parenthetically, reasonable minds cannot differ that *Drobny*’s misuse of Boeing limited financial data constituted serious misconduct.” *Id.* at 106 n.4.

questions); *Adler v. Ryder Truck Rental, Inc.*, 53 Wn. App. 33, 37-38, 765 P.2d 910 (Div. 3 1988) (same).

In dismissing Mr. Fischer's "*Thompson*" claim on summary judgment, the trial court substituted its fact-finding for that of the jury. The trial court stated: "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.

It is true that an entirely different section of the City's personnel policy states:

Purpose. The purpose of this chapter is to expressly establish equal working conditions for all employees of the City of Roslyn. This chapter is not, however, an employment contract. This chapter, therefore, pertains to employees in all city departments

Appendix 1 (at CP 529). In context, however, this language is at best ambiguous, and must be construed against the drafter. *See Swanson*, 118 Wn.2d at 537 (noting that the meaning of "contract of employment" in a similar disclaimer was "manifestly unclear"); *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").

It is well-settled that an employer's self-serving disclaimer such as this does not resolve the factually-intensive question of whether the employment relationship was modified to include specific requirements of

progressive discipline before termination. All of the language in the policy, and all of the surrounding facts and circumstances concerning such language, must be weighed by the fact-finder. *See, e.g., Swanson*, 118 Wn.2d at 522-523 (“*Berg*” analysis including extrinsic evidence applies to *Thompson* questions about whether employer made enforceable promises of specific treatment in specific circumstances which modified what would otherwise be “at will” employment relationship (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) and *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984)). *See also Swanson*, 118 Wn. 2d. at 528, 532-34 (“We reject the premise that this disclaimer can, as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make.”).

In *Swanson*, the disclaimer at issue was in a different document than the one serving as the basis for the employee’s claim, but the *Swanson* court specifically made the point that its ruling might well be the same even if that were not the case. *Id.* at 535. Accordingly, in *Kuest v. Regent Assisted Living*, the court of appeals reversed the trial court’s grant of summary judgment to an employer where the employer’s progressive discipline policy contained a broad disclaimer, because the “effect of the

disclaimer must be resolved by the trier of fact.” 111 Wn. App. 36, 52-54, 43 P.3d 23 (2002).

In short, this case is far more akin to *Swanson* and *Kuest* than *Birge*, in which the plaintiff attempted to rely on promises in a one-page document that concluded with language stating “EMPLOYEE ACKNOWLEDGEMENT . . . I . . . understand this summary does not constitute an employment contract,” followed by the employee’s signature. *Birge*, 73 Wn. App. at 898. Here, the disclaimer is buried in a different section of the personnel chapter than the part addressing progressive discipline, it was not signed by Mr. Fischer, and the language is far more ambiguous. The jury must determine the effect of the disclaimer, and, more generally, whether the City made promises of specific treatment in specific situations regarding progressive discipline and termination, such that it modified the at-will employment relationship.

2. Mr. Fischer Justifiably Relied on City’s Specific Promises.

Whether Mr. Fischer relied on the City’s promises of progressive discipline is also an issue of fact for the jury. Mr. Fischer’s declaration and deposition testimony that he was aware of these assurances and relied on them creates an issue of fact. *See* CP 493 (R. Fischer Decl. at ¶ 8). His knowledge and reliance is also corroborated by contemporaneous evidence. He remained on the job with the City without looking elsewhere for approximately two decades (and intended to stay even longer). And, on March 21, 2007 (just two days after he was fired), he explained in writing to the state unemployment insurance department that

he had not received the requisite warnings under the policy before being terminated. CP 494 (R. Fischer Decl. at ¶10), 108-110 (at 109).

3. City Breached Its Specific Promises Re: Progressive Discipline and Termination.

Finally, there is a clear dispute of fact over whether the City breached its specific, enforceable promises regarding progressive discipline and termination. The trial court usurped the role of the jury in this regard as well.

During his employment with the City, Mr. Fischer was given only one written notice of performance or behavior issues. CP 339-340, 370 (J. Porter Dep. at 41:22-43:11, 192:3-7). This was in April 2006, when he received a “corrective action notice” addressing, primarily, his relationship with Joe Peck. CP 257, 539; 370 (J. Porter Dep. at 192:3-7). Notably, this one written notice or warning given to Mr. Fischer approximately one year before his abrupt termination says nothing about the subjects now alleged to support his termination: the time of Mr. Fischer’s working shift; cell phones; safety; performance issues; or public complaints. Thus, to the extent it could even be considered one of the required Steps under the progressive discipline policy, it does not address the issues for which the City later claimed Mr. Fischer was terminated. Moreover, as discussed above, the evidence is that Mr. Fischer complied with the April 2006 notice or warning, and the mayor never told him she thought he was not.

Incredibly, the City argues that a standard constructive criticism comment in Mr. Fischer’s November 2005 performance review

constituted a Step 1 warning under the progressive discipline policy. The jury is certainly entitled to find it defies credulity and common sense that a standard comment about an area for improvement in a positive performance review can properly be considered a Step 1 warning. Mr. Fischer did not understand it as such. And the mayor never told him it was. *See* CP 494-495 (R. Fischer Decl. at ¶ 11). In fact, the mayor has admitted she has never told any crew member that any comment by her about an area for improvement in their performance reviews is to be considered a Step 1 warning under the City's progressive discipline policy. *See* CP 377 (J. Porter Dep. at 228:21-229:19). The other City crew members have also testified they have never been told and they never had any understanding that a comment in a performance review could be considered a Step 1 warning. *See* CP 661-663 (Georgeson Dep. at 13:10-15:21); 674-676, 681-683 (Peck Dep. at 11:2-13:5, 19:11-24:3).

Moreover, the progressive discipline policy requires that a Step 1 warning be documented in a memorandum that is to be sent to the Personnel Committee, and that the memorandum reflect the employee's understanding that he or she was getting a "warning." Appendix 1 (at CP 536). There is no evidence that either of these requirements were met.

Thus, if the April 2006 notice could be understood as progressive discipline at all, it would at best be a Step 1 rather than a Step 2 warning. Yet even that is dubious. The mayor issued Joe Peck a similar corrective action letter regarding his repeated failures to get his CDL license as she had told him to do, which she considered to be "insubordinate." CP 438,

754; 749-751 (J. Porter Dep. at 372:15-381:3). But contrary to how she has characterized Mr. Fischer's April 2006 "request for corrective action" letter, she says she never considered this corrective action notice to Mr. Peck to be either a Step 1 or Step 2 warning under the City's progressive discipline policy. CP 749 (J. Porter Dep. at 372:15-373:14).

Finally, it is undisputed that the mayor skipped Step 3. She has admitted "skipping" over this step, which she has also admitted she understood she was required to follow (and that she is "not sure" why she did so). CP 359, 366-369, 375 (J. Porter Dep. at 133:4-13,176:15-25, 178:3-13, 185:22-186:10, 218:5-219:23).

In its motion for summary judgment, the City self-servingly proclaims that Mr. Fischer was fired for "gross insubordination," one of the "extremely serious offenses" for which immediate termination is permissible under the policy. But the City cannot insulate its actions from scrutiny merely by making a conclusory argument that Mr. Fischer was fired for an "extremely serious offense." Whether the City breached its promises of specific treatment remains a question of fact. *Swanson*, 118 Wn. 2d at 525. The jury must determine whether the City truly, reasonably and in good faith, believed (based on substantial evidence), that Mr. Fischer engaged in "gross insubordination." *See Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 439-440, 815 P.2d 1362, 1369-70 (1991) (remanding for determination of fact issue of whether employer's conclusion that employee was fighting on premises was "reasonable and supported by substantial evidence at the time of

termination,” where employee handbook identified fighting as grounds for immediate dismissal). If it determines otherwise, the remaining issue is whether Mr. Fischer actually received the progressive discipline required for lesser offenses before he was terminated.

The mayor has admitted she understood she had to follow all four steps of the progressive discipline policy before she could terminate Mr. Fischer. CP 359, 366, 367-369 (J. Porter Dep. at 133:4-13, 176:15-25, 178:3-13, 185:22-186:10). She has also admitted that she skipped over Step 3 (at least). The jury is also entitled to find from the evidence that the reasons articulated by the mayor for Mr. Fischer’s firing lack credibility and/or do not rise to the level of “gross insubordination” or other “extremely serious offense” required for his termination absent adherence to all four steps under the policy.

In short, Mr. Fischer provided more than ample evidence to create factual disputes regarding whether the City created an atmosphere of job security and fair treatment by promising specific treatment regarding progressive discipline and termination; whether he justifiably relied upon those promises; and whether the City breached these promises. It was, therefore, error for the trial court to dismiss Mr. Fischer’s “*Thompson*” claim, for breach of promises of specific treatment in specific situations, at summary judgment. *See Swanson*, 118 Wn.2d at 525; *Korlund*, 156

Wn.2d at 191-192; *Adler*, 53 Wn. App. at 37-38; *Kuest*, 111 Wn. App. at 52-54.

C. Trial Court Improperly Granted Summary Judgment on Mr. Fischer’s Common Law Tort Claim for Wrongful Termination in Violation of Public Policy.

The elements of a claim for wrongful termination in violation of public policy are:

- (1) the existence of a clear public policy (the *clarity* element);
- (2) that discouraging the conduct in which plaintiff engaged would jeopardize the public policy (the *jeopardy* element);
- (3) that the public-policy-linked conduct caused the dismissal (the *causation* element); and
- (4) the defendant must not be able to offer 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). Whether the first element exists is a question of law, but the existence of the remaining elements is a question of fact. *See Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 207, 193 P.3d 128 (2008) (clarity element is a question of law); *Hubbard v. Spokane County*, 146 Wn.2d 699, 718-19, 50 P.3d 602 (2002) (jeopardy, causation, and absence of justification are questions of fact).

As a matter of law, the trial court erred in its ruling that Mr. Fischer’s common law claim for wrongful termination in violation of public policy was no different from or subsumed by his Washington Law Against Discrimination (“WLAD,” RCW 49.60) (age and/or disability)

claims. The trial court also usurped the fact-finding role of the jury by dismissing this claim on summary judgment.

In December 2006, Mr. Fischer expressed his intention to use his accumulated vacation and sick leave time for an extended medical leave for knee surgery and recovery in the summer of 2006. CP 495 (R. Fischer Decl. at ¶ 12), 541 (pay stub). On the heels of his having done so – as soon as his presence was no longer necessary to run the heavy snow plowing and sanding equipment, when the winter season was winding down in mid-March 2007 – the mayor abruptly fired him. Mr. Fischer has provided more than ample evidence that he was terminated in retaliation for his expressing the intention to take this medical leave, and to thwart it. As discussed above, he has also provided more than adequate evidence from which the jury may find the City’s articulated reasons for his sudden termination after almost two decades lack credibility and/or are pretextual.

This common law claim is not the same as, or subsumed by, his WLAD claims based on age discrimination and/or disability discrimination. The jury might well find (as it did) that the City did not terminate Mr. Fischer based in substantial part on age bias or disability bias. But it might still find the City terminated him in retaliation for and/or contravention of his expressed intention to exercise his medical leave rights – in violation of the public policy reflected in state and federal medical leave laws entirely distinct from the WLAD.

The existence of a clear public policy may be established by the existence of a constitutional, statutory, or regulatory provision or scheme,

or by a prior judicial decision. *Danny*, 165 Wn.2d at 207-08. Here, the City's conduct jeopardized and/or violated public policies promoting public health by allowing employees to take medical leave. These public policies are evidenced by a number of federal and state statutory schemes, including the Family Medical Leave Act ("FMLA"), 29 U.S.C. 2601 *et seq.*; the Washington Family Leave Act ("WFLA"), RCW 49.78 *et seq.*; and the state L&I regime, including RCW 51.48.025.

For example, a clear public policy of allowing employees to take medical leave is expressed in the FMLA and its state counterpart. The FMLA's stated purpose is: "to entitle employees ***to take reasonable leave for medical reasons***, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 26 U.S.C. § 2601 (emphasis added). The FMLA was enacted to respond to the "serious problem with the discretionary nature" of family and medical leave as existed prior to the passage of the Act. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 732 (2003). Any violations of the FMLA itself, or the regulations construing it, constitute unlawful interference with an employee's rights. *See, e.g., Xiu Lin v. Amway Corp.*, 347 F.3d 1125, 1133 (9th Cir. 2003). Moreover, it is well-established that such unlawful interference includes not only refusing to authorize medical leave, but also includes discouraging an employee from using such leave, and taking the use of medical leave into consideration as a negative factor in an employment decision (e.g., termination). *See* 29 C.F.R Part 285, § 825.220(b)-(c); *Xiu Lin*, 347 F.3d at 1133-1136.

The WFLA largely tracks the FMLA. Its stated purpose is 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 (emphasis added). 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; 49.78.300.

The FMLA and WFLA apply to public agencies such as the City of Roslyn, regardless of size.²⁰ Yet, Mr. Fischer is not eligible to bring a claim under either statute per se, for enforcement purposes, because the City of Roslyn has fewer than 50 employees. See 29 U.S.C. § 2611 2(B)(ii); RCW 49.78.020(4)(b). Nonetheless, that does not prevent Mr. Fischer from asserting a common law claim for wrongful termination in violation of public policy – based on the clear public policies evinced in these statutes. In determining whether a clear mandate of public policy is violated, courts “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) (emphasis in original) (citing *Thompson*, 102 Wn.2d at 232).

²⁰ See 29 CFR § 825.104(a) (“public agencies are covered employers without regard to the number of employees employed”); RCW 49.78.020(5) (defining “employer” to include “any unit of local government” without regard to size).

In *Roberts v. Dudley*, the Washington Supreme Court decided a highly analogous situation. A former employee brought an action for wrongful discharge in violation of public policy based on the WLAD's clear prohibitions against sex discrimination. She could not bring a statutory WLAD claim, because the clinic where she worked had never employed more than eight employees and was therefore exempted from an action under the WLAD, per se. *Id.* at 60-61. Despite the fact that she could not bring a claim under the WLAD, the Court ruled she had still stated a common law cause of action for wrongful discharge in violation of public policy. The Court held that there was a strong public policy against sex discrimination, as reflected in such statutes as the WLAD, and that the exemption for small employers from the WLAD statutory enforcement remedy did not foreclose the common law remedy. *Id.* at 72-73 ("The law against discrimination provides a strong public policy basis for the plaintiff's claim of wrongful discharge, and it certainly does not operate to bar her recovery").

Thus, under *Roberts*, the fact that Mr. Fischer is not eligible to bring a statutory claim under the FMLA or the WFLA does not bar a claim for wrongful termination in violation of the public policy expressed in those statutes. And, as noted before, this claim was not necessarily the same as or subsumed by his WLAD (age and disability discrimination) claims, as the trial court erroneously ruled. Mr. Fischer's wrongful termination in violation of public policy claim is rooted in the public

policies reflected in such medical leave statutes as the FMLA and WFLA, not simply the WLAD's prohibition against age and/or discrimination.

Mr. Fischer also presented more than enough evidence on the remaining elements for this claim to go to the jury. To establish jeopardy, "plaintiffs must show they engaged in particular conduct, and the conduct *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy." *Gardner*, 128 Wn.2d at 945. In addition, the plaintiff "must show how the threat of dismissal will discourage others from engaging in the desirable conduct." *Id.*

Here, Mr. Fischer expressed his intent to take an extended medical leave to obtain needed surgery and rehabilitation. He was terminated in the intervening months, before he could exercise that right as he intended, under circumstances from which a jury could infer that his intent to take leave and termination were linked. For example, as discussed in more detail above, he had been an employee at the City for almost twenty years when he was suddenly fired. He had never received anything but positive performance reviews. And just before he told the mayor of his medical leave plans, she considered him to not only be performing satisfactorily, but considered him to be her top candidate to lead the entire crew after a contemplated reorganization.

He plainly engaged in conduct – expressing an intent to take medical leave – that is directly related to the clear public policies reflected in such statutes as the FMLA and WFLA. Obviously, employees will be

discouraged from taking medical leave or even discussing it with their employers if it could lead to their dismissal.

The jeopardy element is also normally a question fact. *Hubbard*, 146 Wn.2d 699 at 718-719; *Korlund*, 125 Wn.2d at 182. In *Korlund*, the Washington Supreme Court decided that the jeopardy element was not met, as a matter of law, because the existing statutory scheme was sufficient to protect the public policy at stake. The situation here, however, is inapposite. In *Korlund*, the alleged public policy at issue was protection of “the health and safety of the public” and “against waste or fraud of public funds in the operations of the nuclear industry,” as evidenced by the federal Energy Reorganization Act (“ERA”). *Korlund*, 125 Wn.2d at 181-82. The plaintiffs argued that protection of their right to report on violations without fear of retaliation or reprisal was necessary to protect that public policy. *Id.* at 181. The Court held, however, that the federal ERA’s statutory scheme of whistleblower protection itself provided plaintiffs a remedial enforcement mechanism to enforce the articulated policy interest, and they were therefore relegated to bringing their claims under that cause of action and not the common law tort of wrongful violation in violation of public policy. *Id.* at 183. The key to the *Korlund* decision is that the plaintiffs had another adequate enforcement mechanism under the public policy statutes themselves. Here, however, as in *Roberts*, the public policies reflected in the FMLA and WFLA cannot be enforced by Mr. Fischer through those statutory regimes, per se, because the City employs fewer than 50 employees.

The other case the City has tried to rely upon, *Viera v. Costco Wholesale Corp.*, 2009 WL 564369 (E.D. Wash. Feb. 27, 2009), is likewise inapposite, for the same reasons. In this unpublished case, the federal trial court cited *Koroslund* in granting summary judgment against the plaintiff's claim of wrongful discharge in violation of public policy. The case involved claims implicating the Washington Family Care Act and the Washington Family Leave Act as well as the FMLA, as the plaintiff sought leave not only for his own medical condition but also to care for his wife. The court held that it "need not address all of Costco's arguments because the claimed offensive conduct is already redressed by the FMLA, WFLA, and WFCA," and therefore "[p]laintiffs may not base their wrongful discharge in violation of public policy claim on the FMLA, WFLA, or WFCA" – but rather, must use those statutory remedies that were already adequately available to them. *Id.* at *8-9 (citing *Koroslund*). Again, however, Mr. Fischer cannot bring a claim under the FMLA or its state counterpart, per se, because the City does not employ more than 50 employees.

Mr. Fischer's *only* enforcement mechanism for the City's violation of the public policies reflected in such important medical leave statutes as the FMLA and WFLA is the common law tort of wrongful termination in violation of public policy. Under the erroneous ruling of the trial court in Mr. Fischer's case, the City (and any other public or private employer in the state with fewer than 50 employees) is free to terminate Mr. Fischer or any other employee with impunity for expressing his or her intention to

exercise their medical leave rights (e.g., to use their accumulated sick leave and vacation time to take a medical leave) – plainly chilling and jeopardizing the clear public policies at stake.

Finally, as noted above, though the City has self-servingly articulated a number of reasons for terminating Mr. Fischer that are ostensibly unrelated to his expressed intention to exercise his medical leave rights, he has provided ample evidence from which a jury may find that the City's articulated reasons are lacking in credibility and/or pretextual. As discussed in more detail above, such evidence includes:

- Mr. Fischer's long history of good performance;
- The fact that just before Mr. Fischer told the mayor about his extended medical leave plans, and shortly before she abruptly fired him, she admits she considered him the top person to lead the entire City crew;
- The City's failure to document Mr. Fischer's alleged performance issues, despite the clear requirements of its own progressive discipline policy;
- The City's failure to afford Mr. Fischer the progressive discipline steps and other protections called for by its policies;
- The fact that the City's articulated reasons for terminating Mr. Fischer are inconsistent, and have shifted over time;
- And, the fact that Mr. Fischer's fellow crew members were not disciplined for engaging in the same behavior for which Mr. Fischer was allegedly terminated (such as requesting different work hours, failing to be available by cell phone at all times, or being difficult to get along with).

Numerous other issues of fact and credibility also exist, as discussed above.

Accordingly, the trial court erred by dismissing Mr. Fischer's claim for wrongful termination in violation of public policy at summary judgment.

IV. REQUEST FOR FEES AND COSTS INCURRED ON APPEAL

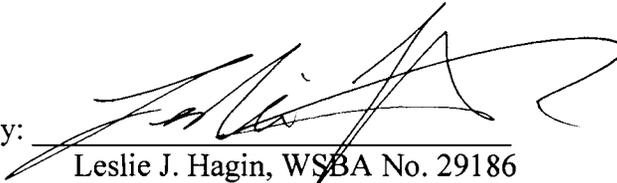
Pursuant to RAP 18.1 and RCW 49.48.030, Mr. Fischer requests an award of the attorneys fees and costs he has incurred on this appeal.

V. CONCLUSION

For the above reasons, this Court should reverse the trial court's summary judgment ruling and remand this matter for a jury trial. Mr. Fischer should also be awarded all fees and costs incurred on appeal.

DATED this 15th day of December, 2010.

McNAUL EBEL NAWROT HELGREN PLLC

By: 
Leslie J. Hagin, WSBA No. 29186

Attorney for Appellant Robert J. Fischer

APPENDIX 1

CHAPTER 2.48
PERSONNEL POLICY

Sections:

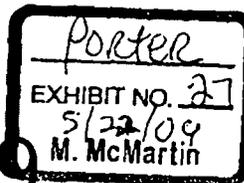
2.48.010	Title
2.48.020	Purpose
2.48.030	Work Schedule
2.48.040	Overtime
2.48.050	Holiday Schedule & conditions of pay
2.48.060	Vacations
2.48.065	Longevity Pay
2.48.070	Sick Leave
2.48.080	Sick Leave Buy Back
2.48.085	Benefits - Employee Choice
2.48.090	Compassionate Leave
2.48.100	Court time
2.48.110	Evaluations
2.48.120	Grievances Procedure
2.48.130	Constructive/progressive discipline
2.48.140	Jury duty
2.48.150	Personnel records
2.48.160	Discrimination prohibited

2.48.010 Title. The title of this chapter shall be "Personnel Policies". (Ord. 623, #1, 1986)

2.48.020 Purpose. The purpose of this chapter is to expressly establish equal working conditions for all employees of the City of Roslyn. This chapter is not, however, an employment contract. This chapter, therefore, pertains to employees in all city departments; provided, that where retirement provisions for law enforcement officers and firefighters differ from those of the City of Roslyn, that provisions for law enforcement officers and fire fighters shall apply to those employees covered thereunder. (Ord. 623, #2, 1986).

2.48.030 Work Schedule. The work week shall begin on Saturday at 8:00am The work week shall be determined for each position by the Mayor on recommendation from the Personnel Committee.

A. Lunch and breaks: Each employee shall receive a lunch period approximately one-half way through the work day. The lunch period shall not be compensable time. Each employee shall receive a relief period (i.e. coffee break) not to exceed fifteen minutes approximately one-half way through the morning shift, and approximately one-half way through the afternoon shift on each work day. The relief



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period shall be compensable time.

B. Non-standard "week-end": Two days a week shall be determined to be employee "Saturday and Sunday" days off for those employees who may work a week other than Monday through Friday. (Ord. 623, #3, 1986).

2.48.040 Overtime and Compensatory Time.

a. If an employee is compensated for forty (40) hours of work in a week, additional work that week will be only at time and one-half (1 and 1/2X). Unauthorized overtime shall not be paid.

Any work on a Holiday is considered holiday overtime at two times and one-half (2 and 1/2 X) the regular rate of pay, and must be approved by the Mayor.

Any call for service by an employee, except Police Department Employees, after regular working hours, on weekends, or holidays, shall be compensated at a one-hour minimum.

b. (1) Non-exempt employees entitled to overtime pay may elect to receive compensatory time off instead of cash payment. This is approved on a case-by-case basis by the employee's department head. If the compensatory time option is exercised, the employee is credited with one and one-half times the hours worked as overtime. Maximum accruals of compensatory time shall be limited to forty (40) hours for regular employees, seventy-two (72) hours for fire personnel and eighty (80) hours for uniformed police personnel. After maximum accrual, overtime compensation shall be paid.

(2) Employees may use compensatory time within a reasonable time period after making a request to their department head, unless doing so would unduly disrupt City operations. Compensatory time should be used for short-term absences from work during times mutually agreed to by the employee and his/her department head. Accumulation of compensatory time to be used as a substitute for extended vacation time off is not normally permitted.

(3) If an employee is unable to use accrued compensatory time within a reasonable period, usually ninety (90) days, the employee will be paid his/her original overtime wage. (Ord. 645, section 1, 1989; Ord. 623, #4, 1986; Ord. 788, sec. 1, 1995).

2.48.050 Holiday schedule and conditions of pay.

(a) The following days shall be holidays:

1. New Year's Day
2. Martin Luther King, Jr. Day
3. President's Day
4. Memorial Day

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5. Independence Day
6. Labor Day
7. Veterans' Day
8. Thanksgiving Day
9. Day After Thanksgiving Day
10. Christmas Day
11. Two floating holidays (employee's choice; must be asked for in advance)

(b) If holiday falls on a normal shift day for the majority of employees but not for others, then the others will observe the holiday during the nearest work shift to that holiday, provided, however, that employees of the Police Department shall not be subject to these provisions but shall be treated as follows: Holidays shall be credited to the Police Department employee as they occur, and the employee may take the credited holidays off at a time of his/her choice, with advance notice and approval of the Chief of Police, and if said employee does not take the credited time off by December 31st of the calendar year in which the credited time is earned, the employee shall receive regular pay (but not regular holiday pay) in lieu of time off.

© Full time employees will be paid straight time for holidays for the number of hours that the employee normally works on holidays. Regular part-time employees will receive straight-time holiday pay based on the length of his/her part time day, i.e., if the employee works a regular half-day, then he/she gets half-day holiday pay.

(d) If any Police Department employee must work on a holiday, the rate of pay shall be one and one-half their regular rate of pay, unless the work on a holiday is overtime as described in paragraph one of City Code 2.48.040, in which case the rate of pay shall be as described in paragraph two of the City Code 2.48.040.

(e) To qualify for pay on a holiday, employees must work the working day before and the working day after the holiday or be otherwise eligible for pay the day before or after a holiday. Such other circumstances include:

1. Illness
2. Attendance at a funeral for a member of the immediate family/household.
3. On authorized vacation.
4. Employees on extended leave of absence without pay do not receive Holiday pay.

(f) Temporary employees are not eligible for holiday pay. (Ord. 623.#5, 1986; Ord. 748, 1993, Ord. 911, 2001)

2.48.060 Vacations. Regular full-time employees, whether the employee

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works an eight-hour or a ten-hour day, shall be entitled to vacation with pay at their regular rate, according to the following schedule. Such vacation shall be accrued from the first day of employment and available for use by the employee after one calendar month from the first day of employment.

Years of Service (Average of more than 30 hours per week is performed)	Vacation Time
After 1 year	10 days per year
After 2 years	10 days
After 3 years	10 days
After 4 years	12 days
After 5 years	12 days
After 6 years	15 days
After 7 years	15 days
After 8 years	15 ½ days
After 9 years	15 ½ days
After 10 years	20 days
Over 10 years	20 days

An employee may carry over unused vacation time from one year to the next year provided that no employee may accumulate more than a maximum of six weeks of unused vacation time by the anniversary date of his/her employment with the City.

Anniversary date means the date of the first day of his/her current, continuous employment with the City, regardless of whether such employment was full or part time.

Regular part-time employees shall receive vacation with pay prorated by his/her regularly worked part-time day times rate of pay.

Upon termination, vacation days will be paid for the year if the employee has completed 140 compensated days of that year, counting from the anniversary date of employment.

Vacation time must be coordinated with the Mayor. (Ord. 623, 1986, Ord. 633, 1990, Ord. 733, 1992, Ord. 788, 1995, Ord. 807, 1996).

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2.48.065 Longevity Pay. Each regular full time employee shall be entitled to receive annually compensation in addition to his or her regular pay based on the number of years that employee has worked for the City of Roslyn as follows:

<u>Years of Service</u>	<u>Additional Compensation</u>
5 years to 9 years	\$60.00 per year
10 years to 14 years	\$120.00 per year
15 years to 19 years	\$180.00 per year
20 years +	\$240.00 per year

(Ord. 738, 1995, Ord. 911, 2001.)

2.48.070 Sick Leave. All regular full-time employees and the part-time librarian shall be entitled to sick leave with pay at the employee's regular rate when he/she is incapacitated for the performance of assigned duties by reason of sickness or injury resulting from causes beyond the employee's control, or when. Through exposure to contagious diseases, the presence of the employee at his or her post duty would jeopardize the health of others. The rate of sick leave pay will be at the employees regular rate of pay. That rate will be eight hours of sick leave at the regular rate of pay for those employees regularly scheduled for an eight-hour or a ten-hour day.

Further, a doctor's certificate may be required for verification of illness.

Such sick leave shall accrue at the rate of one regular work day per month per employee, with the exception of the librarian, who shall receive 3.5 hours of sick leave per month, and unused sick leave may accrue to a limit of 120 days. Notification of absence on account of illness shall be given to the department head on the first day of absence. Failure to notify the department supervisor on the first day of absence may constitute cause for loss of sick pay. (Ord. 623, 1986. Ord. 708, 1991., Ord. 807, 1996)

2.48.080 Sick Leave Buy-Back. Upon termination of employment with at least 10 years employment with the City of Roslyn, or death, employee or employee's estate shall be entitled to receive a lump sum payment for unused sick leave. For employees hired prior to January, 2001, to be paid at one-half of the rate of pay the employee was earning in his/her last year of service, up to 120 days. (For example, if employee was earning \$10 per hour in his/her last year of service, he/she would be entitled to receive a lump sum payment at the rate of \$5 per hour for all unused sick leave accrued.) For employees hired after January, 2001, upon termination of employment with at least 10 years employment with the City of Roslyn, or death, employee or employee's estate shall be entitled to receive a lump sum payment for unused sick leave, not to exceed 480 hours accrued sick leave, at 1/4 (25%) of the pay rate the employee was earning in his/her last year of service. (For example, if employee was earning \$10.00 per hour in his last year of service, he/she would be

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entitled to receive a lump sum payment at the rate of \$2.50 per hour for all unused sick leave accrued.) (Ord. 623, 1986. Ord. 911, 2001.)

2.48.085 Benefits - - Employee Choice. The City of Roslyn shall provide a lump-sum of money for the purpose of providing medical, dental, vision and life insurance benefits to each employee. Each employee may use the lump-sum as the employee chooses, but the employee must use the lump-sum amount for medical, dental, vision and/or life insurance benefits. This choice is available to the employee only if the required minimum enrollments are met in any benefit program. (Ord. 788, Sec. 4, 1995)

2.48.090 Compassionate leave. Employee will be granted up to five days leave with pay in the event of death in the employee's immediate family (spouse, parent, child, sibling, grandparent, grandchild, immediate in-law, or member of the immediate household).

On the first day of such absence, the employee must notify City Hall. (Ord. 623, #9, 1986; Ord. 788, Sec. 5, 1995).

2.48.100 Court time. An employee required to attend court on the City's behalf shall receive expenses and straight time pay. In cases where time unavoidably runs beyond the 40 hour work week, time and one-half will be paid. Overtime must be reported to the Mayor as soon as known. (Ord. 623, #10, 1986).

2.48.110 Evaluations. Each employee is required to meet a minimum of once a year, or more if requested, with the Mayor and a majority of the Personnel Committee to review and evaluate job performance, which may involve job-related items in his/her personnel file. (Ord. 623, #11, 1986).

2.48.120 Grievances procedures. The Mayor and/or the Personnel Committee and/or the City Council of Roslyn will try to settle grievances promptly and fairly. An employee's decision to implement the right to follow grievance procedure will be free from interference, discrimination or reprisal.

a. Definition of a grievance: An issue raised by an employee relating to an alleged violation of rights, benefits or conditions of employment. Copies of the original grievance report and all subsequent related reports shall go to (1) Mayor, (2) the employee's confidential personnel file, and (3) the Chairman of the Personnel Committee. All documentation will be treated as confidential initially.

b. Procedure:

Step 1. An aggrieved employee shall first refer the grievance to the Mayor within five (5) working days of the occurrence of the action from which the grievance stems, or the

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employee's knowledge of such action. This notice must be in writing and include (1) a statement of the grievance and relevant facts and dates, (2) remedy sought. The Mayor shall respond to the grievance in writing within ten (10) working days.

Step 2. If after thorough evaluation, the decision of the Mayor has not resolved the grievance to the satisfaction of the employee, the grievance may be submitted in writing to the Personnel Committee of the Roslyn City Council. All materials previously submitted shall be made available for review and consideration of the Personnel Committee. The committee will provide the opportunity to interview the employee and shall receive any additional related information. The Committee shall make a reasonable attempt to provide a written decision within fifteen (15) working days.

Step 3. If a decision of the Personnel Committee has not resolved the grievance to the satisfaction of the grievant, he/she may request in writing within five (5) working days of the decision that the City Council with the Mayor review the decision of the Personnel Committee in executive session. The Council shall make a reasonable attempt to have a written decision available within fifteen (15) working days.

c. General Ground Rules for Grievances: An aggrieved employee may be represented by any person in an advisory capacity to assist in presenting all facts relevant to the grievance, and necessary to the equitable solution of the grievance. If the employee chooses to be represented by an attorney, then the City Attorney need not be restricted to an advisory capacity, but may function in such matters as cross examination, weighing of evidence, etc.

All employee grievances must follow this chain of appeal. All references to number of days are understood as working days. Time limits may be waived upon consent of both parties. (Ord. 623, #12, 1986).

2.48.130 Constructive/Progressive Discipline. It is our hope that disciplinary action should rarely be necessary; however it is the policy to take appropriate action when an employee engages in a practice which is in conflict with the best interests, and impair the effective functioning, of the City of Roslyn.

The objective of disciplinary action is to avoid recurrence and achieve correction. Accordingly, all actions taken shall be toward this objective and not punitive in intent. Consistency in the application of disciplinary measures is essential in order to create a sound and constructive relationship between the City of Roslyn and its employees.

In determining the degree of disciplinary action to be applied, full consideration will be given to the seriousness of the offense, the intent and attitude of the individual, and the environment in which the offense took place.

Documentation of disciplinary action will not be placed in an employee's file without his/her knowledge. A periodic review of employee files will ensure timely removal of documentation that is no longer relevant.

Following is a specific analysis of each stage of the progressive disciplinary procedure:

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Step 1. Oral/Written Instruction is a verbal request for a correction of unacceptable on-the-job practice. This is the most informal step of the progressive discipline procedure. The oral step involves a supervisor discussing with the employee his/her "on-the-job" shortcoming(s) and what correction action(s) needs to be taken. It is essential that the employee recognize and understand both the problem and the needed corrective action.

A memo documenting this discussion will be placed in the employee's file. The employee will be requested to acknowledge the fact that the discussion took place by initialing the memo. It is not necessary that the memo contain specifics, only that a discussion took place, and the subject. A copy shall go to the Personnel Committee.

Step 2. Written Warning is a written request for correction of an unacceptable on-the-job practice. A written warning should be utilized when warranted by the seriousness of the offense or when an oral warning has been ineffective. Written warnings shall include a description of the problem and the corrective action the employee must take, as well as the date by which the action must be taken, and what the consequences of not correcting the situation will be. A copy of the written warning shall be retained in the employee's personnel folder, and another copy sent to the Personnel Committee.

Step 3. Investigative Suspension is a period of time, during which the employee is off the active payroll, that could result in severe disciplinary action. Such period shall not exceed two weeks duration. The suspension should be accompanied by a letter which refers to any earlier oral and written warnings that have gone unheeded. Upon completion of the investigation, one of three courses of action may be taken:

- suspension for a definite period of time;
- other disciplinary action, including dismissal;
- restitution to the employee for time lost if the investigation determines that no disciplinary action is appropriate.

Step 4. Dismissal is to be invoked when the severity of the offense dictates or when the employee fails to respond positively to the demands that an untenable situation be corrected. These demands will be in the form of documented verbal and written warnings. In essence, this dismissal is not disciplinary, and is not an admission an attempt to correct an unacceptable situation were unsuccessful. In the event of extremely serious offense, i.e., theft, violence, or gross insubordination, it may not be necessary and appropriate for the Mayor to use all or part of the initial states of the procedure.

DISCIPLINARY ACTION, INCLUDING DISMISSAL, may be taken for, but is not limited to, the offenses listed below:

- Excessive absenteeism, abuse of sick leave privileges, and/or related tardiness.
- Sale, purchase or use of illegal drugs.
- Dishonesty.
- Theft of City property.
- Being under the influence of alcohol, illegal drugs or narcotics.

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- Inability to get along with other employees or volunteers.
- Abusive treatment of those doing business with Roslyn.
- Neglect of duties or poor work performance.
- Misconduct or behavior not appropriate for a Roslyn employee while representing the City.
- Falsification of employment or personnel records.
- Misuse or abuse of property and equipment belonging to the City.
- Sexual harassment.
- On-the-job practices inconsistent with the ordinary, reasonable, common sense rules of conduct necessary to the mutual welfare of Roslyn, its taxpayers and employees.
- Misrepresentation or misuse of powers and authority as a City employee.
- Violation of the expectation to perform in a professional manner respecting citizens, other employees, city officials, and reflecting well upon the City of Roslyn.

2.43.140 Jury Duty. An employee must let the Mayor know immediately if he/she has been selected for jury duty. Depending on the needs of the city, the Mayor may request an occupational release from jury duty. If the employee is still required to serve, the City of Roslyn will pay the difference between jury fees received and straight time rate of pay. Driving time and expense will not be paid. Overtime will not be paid. On days an employee reports to jury duty and is not required to work as a juror, he/she must report to work at Roslyn City Hall in order to be compensated for that day. (Ord. 623, #14, 1986).

2.43.150 Personnel Records.

The City Clerk shall maintain a personnel record for each employee. The personnel committee shall also maintain duplicate files of each personnel file maintained by the City Clerk. The personnel record shall show employee's name, title, job description, department, salary, change in employment status, training received, employment history, incident reports, disciplinary actions, and other such information as may be considered pertinent.

All employee records shall be considered "CONFIDENTIAL", and shall be accessible only to the Clerk, the Mayor and the Personnel Committee. (Ord. 623, #15, 1986; Ord.788. Sec. 7, 1995)

2.43.160 Discrimination Prohibited. Discrimination against any applicants for employment, or against any employee, officer, agent or any other person with respect to any and all employment, contracts, activities and functions of the City of Roslyn, on the basis of race, color, age, sex, religion, national origin or minor status is hereby expressly prohibited. (Ord. 521, #2, 1974). S

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No. 293611

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

ROBERT J. FISCHER,

Appellant,

v.

CITY OF ROSLYN,

Respondent.

PROOF OF SERVICE

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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 December 15, 2010, I caused to be filed the following document: **Appellant's Opening Brief:**

ORIGINAL (plus one copy):

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

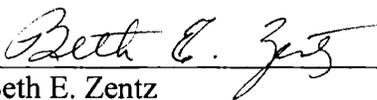
Via Messenger
Via U.S. Mail
 Via Overnight Delivery
Via Facsimile
Via E-mail

4. On December 16, 2010, I will cause to be served a true copy of **Appellant's Opening 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 15th day of December, 2010.


Beth E. Zentz