

Cause No. 316360-III

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**COURT OF APPEALS
STATE OF WASHINGTON
(Div. III)**

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

MICHAEL E. DORON, PH.D.

Appellant,

v.

**EASTERN WASHINGTON UNIVERSITY; UNITED FACULTY
OF EASTERN WASHINGTON UNIVERSITY; UNITED
FACULTY OF WASHINGTON STATE; WASHINGTON
EDUCATION ASSOCIATION**

Respondents.

Superior Court No. 11-2-02403-7
Spokane County
Honorable Judge Moreno

REPLY BRIEF

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I. ARGUMENT

A. EWU VIOLATED THE CBA BY WITHDRAWING DORON'S REAPPOINTMENT WITHOUT FOLLOWING THE CBA DISCIPLINARY PROCEDURES.

Summary. Three legal concepts underlie this case, each of which the Defendants attempt to ignore despite the substantial record on appeal. Although the Defendants assert straw-man arguments and contested inferences to support the lower court's summary judgment, the following three concepts are well supported in the record and controlling at summary judgment:

1. A Faculty Activity Plan ("FAP"), once approved, cannot be modified without the faculty-member's "mutual agreement." CP 242-43 (CBA), 1651, 1028. It is undisputed that the Defendants sought to unilaterally rewrite Professor Doron's FAP and did so without legal authority.
2. The Collective Bargaining Agreement ("CBA") does not give (United Faculty of Eastern Washington University ("UFE") or Washington Education Association ("WEA")) the authority to deem an approved FAP invalid. CP 998. There is no support in the record nor in the law allowing these Defendants to abandon a member's approved FAP.
3. The record at summary judgment shows that Doron was reappointed, that the decision vested Doron with rights under the CBA, Eastern Washington University ("EWU") sidestepped its obligations under the CBA by deeming the reappointment as "refused" and UFE — with WEA's urging — improperly failed to protect its member's rights under the contract.

Doron's Reappointment—With An Improvement Plan—Cannot Condition Acceptance on a Violation of the CBA Itself.

a. *EWU's response grossly overreaches the text of the CBA.*

EWU's nonsensical interpretation of the CBA would allow EWU to unilaterally terminate a faculty member's reappointment if the faculty member did not agree to waive his/her rights under the CBA, such as *mutual agreement* to any modification of the faculty member's previously approved FAP. See CBA §5.3.1(a). CP 242-243.

This is exactly what happened in this case. Nothing in the CBA allows EWU to make a "conditional" or "contingent" reappointment of a faculty member, CP 233-310, much less a condition that requires the member to abandon rights under the CBA itself.

It is undisputed that the word "contingent" does not appear anywhere in the CBA, except for §11.5.6(f) which discusses the granting of paid professional leave of absence for faculty. CP 274.

It is further undisputed that the word "conditional" does not appear anywhere in the CBA, much less anywhere in §5.3 which discusses the "Retention of Probationary Faculty."

It is undisputed that the words "conditional" or "contingent" do not appear anywhere in the December 1, 2010, letter of reappointment from EWU Provost Rex Fuller ("Fuller") to Doron. The December 1, 2010, letter of reappointment provides, in part:

I am pleased to inform you that I concur with the recommendations...and ***I approve you for appointment, with an***

improvement plan, to an additional year in your probationary appointment period through the 2011-2012 academic year.

CP 793¹ (emphasis added). The key language in the December 1, 2010, reappointment letter is unqualified, unconditional, and unequivocal. *Doron was reappointed for an additional academic year—with an improvement plan.*

b. EWU's response disregards the facts presented at summary judgment.

It is undisputed that Doron did not accept a teaching job at another university until April 16, 2011, which was *two months after* EWU Provost terminated Doron's reappointment on February 7, 2011. CP 1671, 853-854. Doron was "still trying to fight for [his] job" when EWU decided to terminate his reappointment. CP 1671.

It is undisputed that nothing in the CBA §5.6, or anywhere else in the CBA, explicitly allows EWU to withdraw a letter of reappointment absent written rejection by the faculty member. CP 233-310.

It is undisputed that the December 1, 2010, letter of reappointment from EWU Provost Fuller to Doron does not specify that Doron must sign the letter to indicate Doron's acceptance, and return it to Fuller within fifteen days. CP 793².

It is undisputed that the record is void of any written notice from EWU to Doron specifying that Doron must formally accept his reappointment. Doron's reappointment—with an improvement plan—was unqualified, unconditional, and unequivocal.

It is undisputed that *nothing* in Provost Fuller's February 7, 2011, termination letter to Doron explicitly or implicitly indicates that the basis for terminating

¹ Reproduced in Opening Brief Appendix as A-5.

² Reproduced in Opening Brief Appendix as A-5.

Doron's reappointment was because Doron did not formally accept his reappointment in writing within fifteen days as provided in CBA §5.6.2. CP 853-854. *As such, Doron's right to a third academic year vested* once Provost Fuller sent his December 1, 2010, reappointment letter to Doron. CP 793³.

EWU Violated Doron's Vested Contractual Rights by Failing to Follow the CBA's Disciplinary Procedures.

It is undisputed that EWU Provost *Fuller*, not Doron, *made the decision to terminate Doron's reappointment without following the disciplinary procedures in Article 13 of the CBA and without an arbitration hearing pursuant to Article 12 of the CBA.* CP 841-843, 853-854, 1671.

Once Doron's reappointment vested, it could not be terminated by EWU without following the disciplinary procedures in Article 13 of the CBA.

"Generally, a 'vested right' cannot be taken away once created." *Navlet v. Port of Seattle*, 164 Wn.2d 818, 828 n. 5 (2008) (citing *Leonard v. City of Seattle*, 81 Wn.2d 479, 487 (1972)). "Upon vesting, such a right becomes a proprietary interest, even though created by contract." *Id.*

After EWU reappointed Doron to a third year—with an improvement plan—EWU could not unilaterally decide to terminate or withdraw Doron's reappointment without following the CBA. "When one party acquires vested rights under a contract, the other party may not amend the terms of the contract so as to unilaterally deprive the first of its rights; such a change constitutes a modification of the agreement requiring mutual consent and consideration." *Zuelsdorf v. University of Alaska, Fairbanks*, 794 P.2d 932, 935 (Alaska 1990).

³ Reproduced in Opening Brief Appendix as A-5.
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“Once vested, the right cannot be taken away and will survive expiration of the [CBA]. *This vesting principle applies to our interpretation of the CBA.*” *Navlet*, 164 Wn.2d 841 (emphasis added) (citations omitted).

The purpose of contract interpretation is to determine the intent of the parties. We search for intent through the objective manifest language of the contract itself. We attempt to determine the parties' intent by focusing on the objective manifestations of the agreement. Contract construction involves the application of legal principles to determine the legal effect of contract terms.

Id. at 842. (internal citations and quotations omitted).

Clearly, the CBA can only be reasonably interpreted as guaranteeing a faculty member protection from discharge without “just cause” and the disciplinary procedures in Article 13 of the CBA after the faculty member has been reappointed.

EWU circumvented Doron’s right to formal disciplinary procedures under Article 13 of CBA after Doron refused to implement an improvement plan which *improperly* required Doron to modify his FAP. EWU backed off its threats to discipline Doron pursuant to Article 13 of the CBA; and instead EWU short-circuited Doron’s vested right to formal disciplinary procedures pursuant to CBA Article 13 and an arbitration hearing pursuant to CBA Article 12 by unilaterally “concluding” that Doron had rejected his reappointment. CP 853-854.

Doron offered at summary judgment sufficient evidence and argument to demonstrate that his reappointment to a third year—with an improvement plan—vested. As such, EWU violated the CBA by:

- (1) terminating Doron's reappointment without following the disciplinary procedures in Article 13 of the CBA, and
- (2) failing to afford Doron his right to an arbitration proceeding pursuant to Article 12 of the CBA.

Doron Attempted In Good Faith To Negotiate an Improvement Plan With EWU.

a. Initially EWU embraced Doron's FAP and gave him high marks.

It is undisputed that EWU approved Doron's FAP in December 2009. CP 313-319. It is further undisputed that Doron's FAP was approved by Accounting and Information Systems ("AIS") Department Chair Elizabeth Murff (later known as Elizabeth Tipton) ("Murff"), and Fuller, who was at that time the Dean of the EWU College of Business. CP 319. It is further undisputed that Doron's approved FAP contained specific goals and standards for Doron's academic and scholarly research which consisted of publishing articles in accounting history peer-review journals. CP 315-316.

It is undisputed that as of February 4, 2010, Business School Dean Rex Fuller's first year evaluation of Doron was entirely positive as to the expectations under the existing FAP and the Workplan derived from the FAP.⁴ This pattern of acceptance is repeated over and over.

⁴ "Dr. Doron completed his dissertation, published one peer review journal article, and presented one paper. *These scholarly works are directly related to his discipline and are appropriate in meeting accreditation expectations for academically qualified faculty.* In addition, he has several works in progress, suggesting an on-going research agenda. *At this juncture he is meeting expectations in this area of responsibility.*" CP 388 (emphasis added).

It is undisputed that on May 20, 2010, AIS Department Chair Murff review and signed Doron's Workplan for academic year 2010-2011, and on June 6, 2010, EWU Business College Dean *Fuller signed and approved it*. CP 390-392.

Doron's 2010-2011 approved Faculty Workload Plan included Doron's presentation of his paper to the Sixth Accounting History International Conference in New Zealand. CP 392. His paper was previously published in the *Accounting Historians Journal*. CP 392. It is further undisputed that Doron's approved Workplan included Doron submitting a second paper for publication in the journal *Accounting History*. CP 392. It is further undisputed that Doron's approved Workplan included a trip to the Library of Congress to study documents relating to the Securities Acts of 1933 and 1934. CP 392.

It is undisputed that Accounting Professor Arsen Djatej ("Djatej") returned to EWU campus to teach at the beginning of fall 2010. CP 745, 1439. It is undisputed that Djatej was a member of the AIS Department Personnel Committee ("DPC") which prepared Doron's second year evaluation. CP 750, 394-398.

It is undisputed that the DPC's second year evaluation of Doron dated October 18, 2010, included the following remarks in the "Research and Scholarship" portion: "In essence the committee is recommending a balanced approach between publications in accounting history and peer reviewed publications of accounting and auditing research to his teaching areas." CP 394.

b. When EWU backtracked on its positive reviews, Doron responded appropriately.

It is undisputed that on October 25, 2010, AIS Department Chair Murff sent a memorandum to Business College Dean Niel Zimmerman ("Zimmerman") which

acknowledged that Doron had completed the research as set out in his FAP, but also included the following remark: “I find Dr. Doron is not currently on track for completing his research expectations and is in fact in danger of losing his academically qualified faculty status.” CP 402 (emphasis in original).

It is undisputed that Doron promptly met twice with AIS Department Chair Murff and AIS DPC member Professor Djatej to discuss the terms of an improvement plan. CP 719, 722, 737. It is undisputed that the first meeting was attended by UFE President Gary Krug (“Krug”). CP 722, 737, 1011. Doron’s second meeting with Murff and Djatej was attended by Professor Dean Kiefer. CP 722, 737.

During his meetings with Murff and Djatej, Doron made several suggestions for an improvement plan, which included the following: a change to his evaluation indicating that Doron had met all of the standards in his FAP⁵; that Doron would coauthor with Djatej on academic research projects outside of accounting history to meet Association to Advance Collegiate Schools of Business (“AACSB”) standards; and that Doron would teach other courses as assigned by EWU; and Doron would take advice from Murff on techniques and methods to improve his teaching performance. CP 722, 737, 1452-1453. Doron’s suggestions made during his two meetings with Murff and Djatej were attempts by Doron to develop an improvement plan. CP 722, 737.

⁵ It is undisputed that the DPC changed its evaluation of Doron eight times after initially forwarding it to AIS Chair Murff—who sent it to EWU’s Human Resources and Legal Departments for review before finalizing it. CP 599, 667.

It is undisputed that while Djatej was teaching in Colorado during Doron's first year at EWU, Doron had sent Djatej articles and ideas for research projects they could coauthor; however, Djatej never responded with anything specific. CP 731-733, 1440-1442, 1467. Therefore, Doron had to move forward with his own research without Djatej. CP 731-732.

However, when Djatej returned to EWU at the beginning of Doron's second year at EWU, Murff and Djatej told Doron that his academic research as set forth in Doron's FAP "isn't working." CP 732. Nevertheless, after receiving his second year evaluation Doron remained willing to coauthor academic research with Djatej and try to improve his teaching skills as part of an improvement plan. CP 737.

c. In response, EWU attempted to modify Doron's FAP without his agreement.

Doron, however, did not want to implement an improvement plan which was inconsistent with his *approved* FAP. CP 737. Doron was open to making minor adjustments to his FAP and to coauthor papers with Professor Djatej as originally understood and agreed to when EWU hired Doron. CP 722, 737.

After reviewing his second year evaluation, Doron met with Murff and Djatej and offered to coauthor research papers with Djatej as originally agreed when EWU hired Doron. CP 732. Djatej never followed up with Doron regarding a specific academic research project they could coauthor. CP 732-734.

It is undisputed that on November 24, 2010, Murff sent an email to Doron with an attached new Workload Plan for Doron, which was unilaterally modified by Murff. CP 784-787. Doron's new Workload Plan which included new class teaching assignments and vague new academic research requirements for Doron,

which were simply described in the “Scholarship” section as, “Submit at least one article clearly related to current accounting/auditing practice to a peer-reviewed journal. Submit and present if accepted at least one paper clearly related to current accounting/auditing practice to an academic conference.” CP 787.

It is undisputed that on December 20, 2010, Doron attempted to continue negotiating an improvement plan with EWU by sending an email to EWU Business College Dean Zimmerman offering to reactivate his CPA license to help meet AACSB academic qualification standards. CP 814-815.

It is undisputed that on December 21, 2010, Doron sent an email to Murff, and Zimmerman expressing his objection to EWU’s unilateral modification of his Workplan in violation of the CBA. CP 795. It is further undisputed that Doron further expressed his concern to Zimmerman and Murff that his modified Workplan set vague standards and an unrealistic timeline for his academic research which made it practically impossible for him to identify, carry out, and write a suitable study to be published in a peer-review journal. CP 795.

It is further undisputed that despite his objections to EWU’s unilateral changes to his Workplan in violation of the CBA, Doron agreed to teach his new class assignments for the Winter 2011 Quarter as set out in in his Workplan modified by Murff, without waiving his legal rights and remedies. CP 795.

It is further undisputed that Business School Dean Zimmerman sent an email on January 20, 2011, to Doron threatening to take formal disciplinary action against Doron pursuant to Article 13 of the CBA if Doron did not develop an improvement plan by February 18, 2011, and if Doron did not agree to revise his FAP by

February 28, 2011. CP 413-414. It is further undisputed that, Zimmerman's January 20, 2011, email demanding that Doron modify his FAP was sent with EWU Provost Fuller's knowledge and consent hoping it "would trigger revisions in [Doron's] FAP." CP 1268-1269.

Doron Sought Assurances From EWU.

It is undisputed that on January 25, 2011, Doron sent an email to Dean Zimmerman seeking assurances that any further meetings between Doron and Murff to discuss the terms of an improvement plan would be good faith negotiations and not simply steps towards disciplinary action. CP 846. It is further undisputed that Doron further sought assurances from Dean Zimmerman that if Doron agreed to revise his FAP and Workplan that these documents would remain in force during the remainder of Doron's probationary period. CP 846. It is further undisputed that Doron asked Dean Zimmerman in his email if the administration reserved the right to unilaterally change the terms of Doron's employment whenever EWU sees fit. CP 846.

It is undisputed that on January 27, 2011, Dean Zimmerman sent a letter to Doron threatening to take disciplinary action against Doron pursuant to CBA §13.2 if Doron did not "develop" an improvement plan by February 18, 2011. CP 848-849.

It is further undisputed that on February 2, 2011, Doron sent an email to Dean Zimmerman expressing disappointment that Zimmerman ignored Doron's request for "good faith" assurances. CP 851. It is undisputed that Doron indicated in his email that he would not participate in any further meetings which required changes

to his approved FAP and Workload. CP 851. It further undisputed that in his February 2, 2011, email *Doron did not refuse to develop an improvement plan.* CP 851. Rather, it is undisputed that Doron indicated in his February 2, 2011, email that any process to change in his approved FAP or Faculty Workload Plan without his agreement was improper under the CBA. CP 851. Doron understands that the CBA allows for improvement plans only when the faculty member is not meeting the standards and goals in the approved FAP. CP 1651.

Doron Did Not “Reject” His Reappointment.

It is undisputed that Doron never indicated to EWU that he was unwilling to *develop an improvement plan.* The negotiations over the terms of an improvement plan broke down when Dean Zimmerman refused to provide Doron with the assurances he had requested. CP 1677. Doron was “still trying to fight for [his] job” when EWU decided to terminate his reappointment. CP 1671.

At best, it is a question of fact as to whether Doron had “rejected” his reappointment by refusing to participate in any further meetings with the EWU administration to develop an improvement plan after Dean Zimmerman refused to provide Doron with assurances that such a document would not be changed whenever EWU saw fit to do so. Such a question of fact should have been resolved by an arbitrator pursuant to Articles 12 and 13 of the CBA. However, EWU decided to circumvent the formal disciplinary and arbitration process by terminating Doron’s reappointment by unilaterally “concluding” that Doron had “rejected” his reappointment. CP 853-854.

EWU, Not Doron, Decided To Terminate Doron’s Reappointment Without Formal Disciplinary Procedures.

It is undisputed that EWU, not Doron, made the decision to terminate Doron's reappointment when Provost Fuller sent Doron written notice of Fuller's "conclusion" that Doron had "rejected" his reappointment. CP 1671, 853-854. *It is undisputed that no formal "disciplinary action" was taken against Doron pursuant to Article 13 of the CBA when Fuller terminated Doron's reappointment.* CP 853-854. If EWU Provost Fuller truly believed that Doron had violated the CBA by not collaborating in good faith to develop an improvement plan Fuller could have, and should have, followed the disciplinary steps in Article 13 of the CBA and allowed the arbitration proceedings pursuant to Article 12 of the CBA to take place. CP 276-280.

It is undisputed that EWU Provost Fuller's undisputed refusal to discuss an improvement plan with Doron even after Doron submitted a written "Counter-Improvement Plan" on March 16, 2011, evidences EWU's bad faith in collaborating with Doron in developing an improvement plan. CP 856.

It is undisputed that Doron proposed an improvement plan which included the following terms: Doron would coauthor one academic article with Djatej; Doron would teach the accounting class assignments as modified by his Department Chair Murff; and Doron would be professionally "mentored" by Accounting Professor Dave Gorton. CP 856. Doron's "Counter Improvement Plan Proposal" was delivered to Provost Fuller's office by Washington Educational Association ("WEA") Organizer Gary McNeil ("McNeil"). CP 1114. It is further undisputed that soon thereafter *Provost Fuller "rejected" Doron's proposed "Counter*

Improvement Plan Proposal” out of hand without meeting with Doron and refused to reinstate Doron’s reappointment. CP 841-843, 1114, 1120.

EWU could have imposed an improvement plan on Doron after the parties reached an impasse on its terms. EWU could have taken formal disciplinary action against Doron pursuant to CBA Article 13 if the administration believed that Doron’s suggestions for an improvement plan were unreasonable. Instead, EWU unilaterally terminated Doron’s reappointment for another year. As such, EWU violated the CBA.

Nothing in the CBA allows EWU to withdraw or terminate a reappointment, any appointment for that matter, without following the disciplinary procedures in the CBA. CP 233-310.

Doron Exhausted Administrative Remedies.

As set forth in the record in the Opening Brief and below herein, Doron is not barred from bringing an action for breach of contract against EWU because UFE repeatedly refused to file a grievance even after Doron’s multiple requests.

Washington Courts have recognized that where the union fails to pursue a public employee’s grievance, the employee is free to pursue an independent action against the public employer and the union. *Minter v. Pierce Transit*, 68 Wn. App. 528, 532 (Div. 2), *review denied* 121 Wn.2d 1023 (1993). Additionally, “an employee's failure to exhaust contractual grievance procedures does not bar an action by the employee for breach of contract if the employee has been prevented from exhausting his or her contractual remedy by his or her union's wrongful refusal to process the grievance.” *Id.* (citing *Lew v. Seattle Sch. Dist. 1*, 47 Wn. App. 575, 577-578 (Div. 1, 1987)). *See also*

Imperato v. Wenatchee Valley Coll., 160 Wn. App. 353, 358 (Div. 3), *review denied* 171 Wn.2d 1033 (2011) “This type of a claim... is ‘inextricably interdependent’ and forms a hybrid claim.” *Id.* at 358.

Doron may properly sue his former public employer EWU directly for breach of the CBA. Doron has also sued his former union UFE for breach of duty of fair representation. Doron has shown that a contract violation occurred when EWU terminated his reappointment without following the disciplinary procedures in Article 13 of the CBA and affording Doron an arbitration hearing pursuant to Article 12 of the CBA.

Section 12.2 of the CBA defines a “grievance” as “a dispute between the University and the UFE on its own behalf or on behalf of an employee” CP 276. EWU fails to point to any provision in the CBA which allows a faculty member to file a grievance on his own behalf without UFE participation. Indeed, UFE President Gary Krug’s (“Krug”) November 21, 2010, email to Doron affirms that Doron cannot file a grievance without the UFE’s assistance and states:

I strongly advise against your taking unilateral action in your case. You are always free to conduct your own case if you so desire, but UFE cannot represent you once you begin to do so. Be further advised that the filing of a grievance is solely the decision of the UFE based upon our assessment of the case.”

CP 1061.

As set out in the Opening Brief, and below herein, UFE’s refusal to file grievances on behalf of Doron was arbitrary and/or in bad faith thereby violating UFE’s duty of fair representation. The UFE refused and failed to file any grievance on behalf of Dr. Doron pursuant to the CBA.

Furthermore, the CBA does not provide Doron with any meaningful administrative remedy for his negative second year evaluations. The last sentence in CBA §5.5.2 specially provides, “The FRB [Faculty Review Board] shall not substitute its judgment on the merits [on a negative recommendation regarding retention, tenure or promotion] for that of the previous decision makers.” CP 248. Moreover CBA §5.5.2(c)(ii) provides, “The faculty member shall have no further right to reconsideration or appeal and cannot file a grievance.” CP 249.

Nothing in the CBA provides Doron with a meaningful administrative review of his negative second year evaluation by an independent decision maker or body which can afford Doron with any form of relief. Nevertheless, Doron attempted to “appeal” his negative second year evaluations. On November 15, 2010, Doron sent a memorandum to EWU Business College Dean Zimmerman setting out in detail where and how Doron disputed the merits of his second year evaluations. CP 767-772, 723, 729-730, 738. However, Dean Zimmerman did not bother to forward Doron’s memorandum, which showed that Doron’s scholastic research met the expectations set forth in his FAP, to Accounting Professor Djatej for review. CP 776, 778, 744-745, 751-752. Djatej was a member of the DPC which evaluated Doron. CP 750. Dean Zimmerman has no formal accounting education. CP 776, 777. Instead, Dean Zimmerman dismissed Doron’s memorandum and sent Doron an email on December 10, 2010, which summarily concluded, “Given confusion over the meaning of [Doron’s] FAP a new one should be created to more closely capture the relationship of research to teaching....” CP 815-816.

Moreover the CBA §7.5.6 does not provide a meaningful administrative remedy to dispute EWU's unilateral changes to Doron's approved Workplan. CBA §7.5.6(a)(v) provides, "The Chief Academic Officer's determination shall be final and binding, and may not be challenged through the Grievance Procedure in Article 7. [sic]" CP 258.

Nevertheless, Doron attempted to assert his rights under CBA §7.5.6 to dispute the unilateral changes to his Workload plan when EWU AIS Department Chair Murff sent Doron an email November 24, 2010, notifying him of the changes to his Workload Plan, and attaching a modified Workload Plan for Doron, which included changes to Doron's scholastic research expectations. CP 784-787. CBA § 7.7.6(a)(ii) requires the UFE to notify the dean and refer the dispute to the Faculty Review Committee ("FRC"). CP 257. By email on December 6, 2010, Dr. Doron requested UFE President Krug to refer his Workload Plan dispute to the FRC. CP 799-800. UFE President Krug refused to refer Doron's Workload dispute to the FRC because, "it would be a waste of time and wouldn't lead to a satisfactory resolution of the issue." CP 1025.

B. THE UNION VIOLATED ITS DUTY OF FAIR REPRESENTATION OWED TO DORON.

"A union breaches its duty of fair representation when its conduct is discriminatory, arbitrary, or in bad faith." *Womble v. Local Union 73*, 64 Wn. App. 698, 701, *review denied* 119 Wn.2d 1018 (1992) (citations omitted). "Conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." *Beck v. UFCW, Local 99*, 506 F.3d 874, 879 (9th Cir. 2007) (quotations omitted). "To establish that the

union's exercise of judgment was in bad faith, the plaintiff must show that substantial evidence of fraud, deceitful action or dishonest conduct." *Id.* at 880 (quotations omitted).

The UFE breached its duty of fair representation in two instances: (1) failure to grieve EWU imposing an improvement plan and unilaterally modified workplan which required Doron to modify his FAP previously approved by EWU; and (2) UFE's refusal to grieve the termination of Doron's reappointment without "just cause" and without following the disciplinary procedures in Article 13 of the CBA.

UFE's Conduct Towards Doron Was Irrational.

The CR 30(b)(6) representative of EWU testified at deposition that the CBA between EWU and the UFE does not allow the UFE to declare a faculty member's FAP as invalid. CP 998. The CR 30(b)(6) representative of EWU further testified at deposition that the CBA does not allow the university to modify an existing and approved FAP without the faculty member's consent. CP 998.

Doron was not invited to attend the November 9, 2010, meeting between UFE President Krug, UFE Chief Steward Chris Kirby ("Kirby"), EWU AIS Chair Murff, and a representative of the AIS Department DPC. This is evident in the November 5, 2009, emails exchanged between Krug and Tipton scheduling the November 9, 2010, meeting which does not include Doron as an addressee, nor do they indicate that Doron will be attending their November 9, 2010, meeting. CP 1054-1055.

Krug's email to Murff shows that he asked Murff if he could bring Kirby to the meeting. CP 1055. Murff's email to Krug shows that she asked Krug if she could bring EWU Business School Dean Zimmerman to the meeting. Neither Krug nor

Murff asked the other if they could invite Doron to the meeting or if Doron should attend the November 9, 2010, meeting. CP 1055.

In Krug's November 4, 2010, email to Doron Krug indicates that Krug and Kirby will speak with "the DPC next week." Krug's email does not mention anything about Doron attending the meeting next week, nor does it mention that Krug will be meeting with Murff and Zimmerman. CP 1058. DPC member Djatej also attended the November 9, 2010, meeting between Krug, Kirby, Murff, and Zimmerman. CP 1027.

The purpose of the November 9, 2010, meeting was to discuss Doron's "issues" and the EWU administration's desire to make changes to Doron's FAP. CP 1027-1028. At the November 9, 2010, meeting they (Krug, Kirby, Murff, Zimmerman, and Djatej) "we were in common agreement on that reading of the collective bargaining agreement" that any changes to a faculty member's approved FAP required the faculty member's approval. CP 1027-1028.

On November 18, 2010, Doron attended a meeting with Krug, Murff, and Djatej. CP 1011, 1017. Doron was concerned that the EWU's proposed improvement plan would modify his FAP. CP 725-726. They met for approximately one hour. CP 1011. Krug proposed that both parties should agree to re-write Doron's FAP, but Doron wanted his current FAP enforced. CP 1018.

Krug stated at the meeting that *he represents everyone in the room* at the meeting on November 18, 2010, with Murff, Djatej, and Doron. CP 1011-1012.

Later, Doron attended a separate meeting with Murff and Djatej in November, without Krug present, to attempt to negotiate an improvement plan with the EWU

administration. CP 722. Doron's concern was that the improvement plan demanded by EWU changed the direction of Doron's academic research and would also modify Doron's expectations in his FAP. CP 725

On November 19, 2010, Doron sent an email to Krug asking for confirmation that the UFE will ensure that Doron's rights under the CBA are protected. CP 1061.

On November 21, 2010, Krug sent a reply email to Doron stating that Doron had "misconceptions" about the UFE representation of Doron, but instead the "UFE represents and enforces the contract." CP 1061. Krug warned Doron that the UFE "cannot represent you once you begin to do so." CP 1061. Krug's November 21, 2010, email to Doron further states, "I will tell you frankly that after consultation with others in the UFE Executive Board I have deep concerns regarding your FAP as a document." CP 1061.

On November 22, 2010, Krug sent a reply email to Doron stating, "The mission of the UFE, again, is to clarify and enforce the contract, the FAP, being a document under that contract. As such, if the FAP does not meet the CBA it is not a valid document. *It does not matter who signed this document.*" CP 1060-1061 (emphasis added). Krug testified at deposition, "in our opinion no FAP existed." CP 1017.

On November 22, 2010, Krug sent an email to the EWU administration, Doron, and Gary McNeil ("McNeil") of the WEA, declaring the "opinion of the UFE" is that Doron's FAP, "is flawed, indefensibly vague, and not in compliance with the requirements for an FAP stated in the Collective Bargaining Agreement in effect 2009-2013." CP 1065.

Krug testified at deposition that he understood the CBA as providing him with the authority as the President of UFE to declare an existing FAP which has been signed by the faculty member and approved by EWU administration as an “invalid document.” CP 1019. *Nothing in the CBA mentions implies or suggests that the UFE has the authority to declare an existing FAP — signed by the faculty member and approved by the EWU administration — to be “invalid” or “vague” or “not in compliance.”* CP 233-310.

Krug is a communications professor, and has no training in accounting. CP 1003, 1021. Therefore, Krug has no rational basis to make judgment calls as to whether Doron’s FAP sufficiently sets forth specific academic research expectations for an accounting professor to remain academically qualified to teach accounting.

Neither the UFE nor the EWU administration had a template FAP for faculty members to use as a guide in drafting their FAP’s. CP 1022. When Murff sent an email to Krug on November 22, 2010, requesting a sample FAP to use in drafting a new FAP for Doron, Krug sent a reply email to Murff attaching a copy of Krug’s FAP. CP 1022-1023. Krug drafted his own FAP by taking another faculty member’s FAP and modifying it. CP 1022.

On November 22, 2010, Doron sent an email to Krug asking if Doron needed UFE’s “help” to file a grievance in order to enforce Doron’s existing and approved FAP. CP 1068. On November 22, 2010, Krug sent a reply email to Doron stating, “Article 12.2 of the CBA states that grievances are disputes between the UFE and the University....*Your FAP is, in our opinion, unenforceable and not in*

compliance.... Your complaint is, in our opinion, not grievable.” CP 1068
(emphasis added).

On December 1, 2010, EWU Fuller sent a written notice to Doron reappointing Doron to a third year “with an improvement plan” pursuant to CBA §5.3.1.b. CP 793.⁶ Doron never formally “accepted” or “rejected” his reappointment. CP 1662. The record is void of any evidence that the UFE advised Doron that it was necessary for Doron to formally accept his reappointment by signing the December 1, 2010, reappointment letter and returning it to the EWU administration within fifteen (15) days, pursuant to CBA §5.6.2.

On December 6, 2010, Doron sent an email to Krug to notify the UFE that Murff had unilaterally modified Doron’s Faculty Workload Plan without Doron’s input which included changes to Doron’s academic research expectations in violation of Doron’s FAP. CP 800. In his December 6, 2010, email Doron requested Krug to submit his Workplan dispute to the FRC. CP 800. Doron further pleaded in his December 6, 2010, email to Krug, *“I repeat my request that the union assist me in protecting my rights under the CBA. I request that the UFE bring a formal statement of grievance and request arbitration on my behalf over the violations I have outlined above.”* CP 800 (emphasis added).

Krug did not initiate any grievances after receiving Doron’s December 6, 2010, email notifying Krug that EWU had modified Doron’s Workload Plan and academic research expectations without Doron’s consent. CP 1024. Krug did not

⁶ Reproduced in Opening Brief Appendix as A-5.
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take any action to refer Doron's Workplan dispute to the FRC pursuant to CBA §7.5.6, because, "it would be a waste of time...." CP 1025, 257.

UFE and EWU Knew that a Unilateral Modification of the FAP Was "Exceedingly Difficult if not Impossible", Making its Conduct Towards Doron Dishonest And In Bad Faith.

On December 10, 2010, Krug met with EWU Provost Fuller, EWU Business School Dean Zimmerman, and EWU Associate to the President Laurie Connelly ("Connelly"). CP 1029, 1033, 996. Everyone in the meeting agreed, "That it was exceedingly difficult, if not impossible, to impose a modification [of Doron's FAP] given the wording of the collective bargaining agreement." CP 1029.

Yet Krug did not notify Doron of this meeting. CP 1030. It never crossed Krug's mind that it would be helpful to Doron to know that the EWU administration agreed that Doron's FAP could not be modified without Doron's consent. CP 1033. On December 15, 2010, Krug sent an email to Doron with the subject line "UFE current actions" to provide Doron an update. CP 1079. Krug wrote in his email to Doron, "UFE has been in multiple discussions with EWU Administration regarding your case." CP 1079. However, *Krug inexplicably failed to mention in his email to Doron that the EWU administration and the UFE both agreed that Doron's FAP could not be modified without Doron's consent.* CP 1034, 1079. Instead, Krug's email to Doron states, "In the meantime,...I would strongly encourage you to accept the request from your chair to renegotiate a new FAP...." CP 1079.

On December 22, 2010, Doron forwarded to Krug an email Doron had sent to AIS Department Chair Murff and College of Business Dean Zimmerman

complaining that Doron's new workload plan — as modified by Murff changed — Doron's academic research expectations in his FAP. CP 1081-1082. *Krug did not even bother to follow up with Doron after receiving Doron's email despite the improper incursion into Doron's rights under his current FAP.* CP 1034. Krug did not follow up because Krug and the EWU administration were acting together, "trying to get Doron to move to a point of rewriting an FAP." CP 1034-1035.

UFE's Conduct Is Beyond All Rational Basis Or Explanation Except as an Improper Incursion into Doron's Rights Under the CBA

UFE's decision to declare Doron's existing and previously approved FAP as "invalid," "unenforceable," "indefensibly vague," "flawed," and "not in compliance" is without any rational basis. CP 1065, 1020. *Nothing in the CBA allows the UFE to declare a faculty member's FAP approved by EWU as "invalid."* CP 998. Nothing in the CBA provides for the UFE to review and/or approve a faculty member's proposed FAP. CP 233-310. UFE had no FAP templates for faculty members to use in drafting their FAP's. CP 1022. Nothing in the CBA supports Krug's interpretation of the CBA that the President of UFE has the authority to declare an existing FAP as "invalid document," after it has been signed by the faculty member and approved by the EWU administration. CP 1019. Nothing in the CBA provides the President of the UFE the discretion to declare an approved FAP as "not a valid document. *It does not matter who signed this document.*" CP 1060-1061 (emphasis added). Nothing in the CBA allows the UFE to determine whether a FAP "existed" for enforcement purposes. CP 1017.

It is the UFE's duty to enforce the CBA and Doron's FAP, which is incorporated into the CBA after EWU and Doron approved it. UFE's judgment is

not entitled to deference, no matter how many UFE board members were involved in the decision, because it is “so far outside a wide range of reasonableness that [it is] wholly irrational and arbitrary.” *Id.* at 879 (citing *Air Line Pilots Ass’n. Int’l v. O’Neill*, 499 U.S. 65, 78, (1991)).

**C. WEA TORTUOUSLY INTERFERED WITH DORON’S
LEGITIMATE BUSINESS EXPECTANCIES WITH HIS
EMPLOYER EWU AND HIS UNION UFE.**

A defendant’s liability for tortious interference may arise from improper motives or means. *Pleas v. City of Seattle*, 112 Wn.2d 794, 804 (1989).⁷ “A valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value.” *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158 (Div. 1, 2002), *review denied* 148 Wn.2d 1021 (2003).

Interference may be “wrongful” by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession. *Id.* at 158.

Often, whether interference was improper is a question for the trier of fact. *Id.* at 158-159. However, under certain circumstances, “‘identifiable standards of business ethics or recognized community customs as to acceptable conduct’ have developed, such that ‘the determination of whether

⁷ “To prove tortious interference with a business expectancy, a plaintiff must show (1) the existence of a valid contractual relationship or business expectancy, (2) that the defendant had knowledge of that expectancy, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) that the defendant interfered for an improper purpose or used improper means, and (5) resulting damage.” *Newton Ins. Agency & Brokerage, Inc.* 114 Wn. App. at 157-158.
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the interference was improper should be made *as a matter of law*, similar to negligence per se.” *Id.* at 159 (emphasis added) (quoting *Restatement (Second) of Torts § 767, cmt. 1*).

WEA Organizer McNeil signed the CBA on behalf of the UFE as its Chief Negotiator. CP 288. As such, McNeil was fully aware of the contents of the CBA including the “just cause” and disciplinary procedures in Article 13, and the “mutual agreement” requirement to modify an existing FAP in CBA §5.3.1(a). WEA’s advice to UFE regarding Doron’s rights under the CBA went far beyond mere negligence, but rather was an intentional and gross breach of the standards of acceptable customs and conduct for an organization in the business of providing labor relations advice.

There is ample evidence that WEA’s interference with Doron’s business expectancies with his union and his employer was wrongful because it was arbitrary and capricious. The improper means arises from WEA’s advice to UFE to not file a grievance on behalf of Doron given that fact that WEA’s McNeil was intimately familiar with the CBA. “[A]rbitrary and capricious actions can be considered evidence of tortious interference with a business expectancy.” *Pleas*, 112 Wn.2d at 805 (citing *King v. Seattle*, 84 Wn.2d 239, 247-48 (1974)).

There is ample evidence that WEA’s improper motive was to interfere with Doron’s CBA rights protect by RCW 41.76 *et seq.* by singling Doron due to his demands that his CBA rights be protected by UFE. “The second Restatement does not say that interference must be the actor’s primary motive before liability will attach. To the contrary, the authors suggest that the plaintiff be required to show

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only that ‘the actor was motivated, in whole or in part, by a desire to interfere . . . The desire to interfere with the other's contractual relations need not, however, be the sole motive.’” *Pleas*, 112 Wn.d at 806 (quoting Restatement (Second) of Torts § 767, comment *d*, at 32.). “The second Restatement further states that impropriety may be more easily found if the means of interference was wrongful, even if the actor had no specific purpose to interfere.” *Id.*

As a direct result of McNeil’s advice to the UFE and McNeil’s own actions taken on behalf of the WEA and the UFE, Doron was unlawfully deprived of grievance and an arbitration hearing pursuant to Articles 12 and 13 of the CBA.

WEA Continuously Involved Itself in Advising and Consulting UFE’s Efforts to Declare Doron’s FAP “Invalid,” “Unenforceable,” and “Indefensibly Flawed.”

UFE President Krug consulted with WEA Organizer McNeil in determining whether Doron’s FAP was “enforceable.” CP 1023-1024. Krug and McNeil had phone conferences discussing Doron’s case. CP 1013. Krug and McNeil met face-to-face two or three times to discuss Doron’s case. CP 1013. Krug kept McNeil apprised as to the development of Doron’s case throughout its progress. CP 1013.

Krug wanted to “keep [McNeil] in the loop...So, he understands, so he has knowledge of the activities of UFE and our thinking on issues.” CP 1025. As the President of the UFE, Krug “certainly looked to benefit from anything [WEA] had to say” in dealing with labor disputes. CP 1025-1026. Krug kept McNeil apprised of the UFE’s handling of Doron’s case, “Certainly to hear what he had to say about my plans and my read of the case, bounce ideas off.” CP 1013. Krug further testified at deposition, “Because I valued [McNeil’s] advice and I found him—I

found him to be a good person to sound ideas from, *particularly the idea of the—of understanding the role of the FAP in all this.*” CP 1014 (emphasis added).

Krug copied McNeil on Krug’s emails from and to Doron regarding Doron’s complaints about EWU imposing an improvement plan upon Doron which effectively modifies Doron’s FAP. CP 1057-1058, 1060-1061, 1071-1072.

Krug and McNeil discussed that any changes to Doron’s FAP required Doron’s consent. CP 1028.

On November 22, 2010, Krug sent an email to McNeil with subject line “Draft letter,” with the introduction, “Here’s what I’m planning to send to everyone from God down. Let me know what you think.” CP 1063. In the text of Krug’s November 22, 2010, email to McNeil was a draft of Krug’s email which Krug sent later that day to the EWU administration and to Doron declaring the UFE “opinion” that Doron’s FAP was “flawed, indefensibly vague, and not in compliance with the requirements for an FAP stated in the Collective Bargaining Agreement in effect 2009-2013.” CP 1063, 1065. Krug first sent his draft email to McNeil to review before sending it to Doron and the EWU administration, “For consultation and advice on the wording and contractual accuracy of the letter.” CP 1021.

McNeil never advised Krug that the UFE must file a grievance on Doron’s behalf after Krug copied McNeil on his December 8, 2010, email to Doron which stated, “Michael, you are attempting to defend a fatally flawed FAP. *We decline to follow your request to file a grievance in this matter.*” CP 1025, 1071-1072 (emphasis added).

On December 15, 2010, Krug sent an email to McNeil providing an update on Doron's case. CP 1077. In Krug's email, he notifies McNeil that Krug had been meeting with the EWU administration, and warned the administration that the UFE would file a grievance if the EWU administration "pushes an improvement plan on any particular [area] except teaching...." CP 1077. However, Krug never bothered to copy Doron on the same email, or to notify Doron that Krug had warned the EWU not to impose an improvement plan on Doron on any issue other than teaching. CP 1077, 1031, 1033-1034.

Krug kept McNeil updated on the UFE's "ad hoc" committee's deliberations during the UFE's review of Doron's case and the UFE's decisions, however Krug did not provide the same updates and information to Doron. CP 1030-1031, 1077.

Krug did not convene the UFE committee to meet together to discuss Doron's case, instead, Krug consulted with committee members on an individual basis. CP 1016.

On January 12, 2011, Krug sent an email to Dorn, "UFE has been clear that the central document in your contract, your FAP, is deeply flawed. UFE has found nothing to grieve in your case with the exception of the FAP itself...." CP 1085. McNeil never expressed any concern to Krug regarding the UFE's opinion that Doron's FAP was not enforceable. CP 1023-1024.

McNeil's advice to Krug also included the UFE's duty of fair representation owed to Doron. CP 1014. McNeil never told Krug that UFE was taking the wrong approach in how it was handling Doron's case. CP 1016. McNeil never told Krug that the UFE's opinion was that Doron's FAP was "not a valid document" was

wrong. CP 1018. McNeil never advised Krug that Doron's FAP was a valid document if Doron and the EWU administration signed the FAP. CP 1018-1019.

UFE Refused To Grieve EWU's Withdrawal of Doron's Reappointment Based on WEA's Advice.

On February 8, 2011, EWU Provost Fuller emailed a letter dated February 7, 2011, to Doron providing notice that EWU was terminating Doron's reappointment to a third year. CP 1087, 853-854, 279-280. Provost Fuller's letter does not mention anything regarding "just cause" and the notice of disciplinary process in Article 13 of the CBA. CP 853-854. On February 9, 2011, Doron forwarded to Krug Fuller's email and attached letter terminating Doron's third year appointment. CP 1087. Doron writes in his email to Krug, "Gary: The university has terminated me effective June for not writing a new FAP. This is something the union will have to act on." CP 1087.

On February 9, 2011, Krug forwarded to McNeil Doron's email of the same date, along with the attached letter from Fuller withdrawing Doron's reappointment. CP 1087. Krug immediately recognized that the decision by EWU to withdraw Doron's reappointment was in violation of the CBA, as evidenced by what Krug wrote in his email to McNeil, "*Have the procedural, contractual steps been followed here? Is just cause for dismissal shown.[Sic] I'll look at this later tonight and tomorrow, but please share your thoughts in the meantime.*" CP 1087 (emphasis added).

On February 9, 2011, McNeil sent a reply email to Krug reaffirming the CBA's Article 13 requirements by writing, "The CBA covers both progressive discipline and just cause. Has this faculty person been disciplined before?" CP 1089.

On February 11, 2011, McNeil sent an email which advised Krug on the CBA Article 13 requirements, which included *inter alia*:

3. Termination is a serious discipline issue. Is refusing to participate in an improvement plan warrant termination? Where is the progressive discipline? Is Fuller suggesting insubordinate behavior warrants termination and not use of progressive discipline in CBA 13.2? Is this 'repeated' refusal to participate a 'nature of the offense call[ing] for immediate termination'?....

1. *Termination is a stretch. We could grieve progressive discipline.* The remedy would probably have to include an improvement plan....

3. *The union does not have to file a grievance.* We have to deliberate the case, not decide anything on personalities.

So we should talk about this one next week too.

CP 1092-1093 (emphasis added).

On March 11, 2011, McNeil sent an email to Krug forwarding advice from the WEA's staff attorney stating that the EWU administration had the authority under the CBA to terminate Doron's employment because Doron had refused to re-write his "flimsy" FAP. CP 1102. McNeil's email states, *inter alia*, "If Professor Doron wants to work at EWU, he will have to see the opportunity to work here by crafting a plan that re-writes the FAP." CP 1102.

On March 16, 2011, Doron met with McNeil and then drafted a "Counter-Improvement Plan," which was delivered by McNeil to EWU Provost Fuller. CP 856, 1107, 1113-1114. McNeil and Fuller discussed on the phone Doron's "Counter-Improvement Plan." CP 841-842. Now McNeil was "the lead" in the UFE's dealings with EWU on Doron's case. CP 1108. However, McNeil did not think there were grounds for a grievance in Doron's case. CP 1108.

As a result of WEA's interference with Doron's business expectations, Doron was deprived of the formal grievance process as provided in Article 12 of the CBA, which included an arbitration hearing. Without a grievance filed by his union, Doron was without any ability to protect his reappointment for a third academic year with his employer, EWU. WEA's actions interfered with Doron's business expectancies with his union and his employment with his employer.

D. EWU WRONGFULLY DISCHARGED DORON IN VIOLATION OF PUBLIC POLICY.

Doron's First Amended Complaint paragraph No. 127 alleges, "As a direct and proximate result of *his demands for protection and preservation of his rights guaranteed under the CBA and his previously approved FAP* put into place in accordance with RCW 41.76 *et seq.* EWU took retaliatory action against Doron which included termination of Doron's employment during the second year of his probationary period without just cause." CP 185-186 (emphasis added). Doron's wrongful discharge claim is NOT based upon Doron's "union activity" or "contact with the union." The evidence in the record undisputedly shows that UFE President Krug and the EWU administration were acting together, "trying to get Doron to move to a point of rewriting a FAP." CP 1034-1035.

Rather, Doron alleges that he was wrongfully terminated in violation of public policy in RCW 41.76 *et seq.* after Doron demanded that his CBA rights be preserved and protected by EWU, and enforced by UFE. Specifically, Doron alleges that EWU terminated Doron's reappointment in violation of the CBA when Doron demanded that his CBA right to have his FAP modified only with his consent be preserved and protected. CP 185-186. CBA §§ 5.3 and 7.3 guarantee

that the terms and conditions of a faculty member's employment with EWU for retention, tenure, and promotion will be set out in the faculty member's FAP. CP 242-243, 251-252. Specifically, CBA §5.3.1 states:

Such evaluations shall be based upon progress in meeting goals contained in the FAP. It is expected that the FAP will be in effect throughout the probationary period *unless modified by mutual agreement between the faculty members, chair, personnel committee, dean, and Chief Academic Officer.*

CP 242-243 (emphasis added).

As shown above, EWU terminated Doron's reappointment, in violation of public policy set forth in RCW 41.76 *et seq.*, because Doron refused to implement an improvement plan which required him to modify his FAP without his consent.

EWU's Straw Man Arguments Must Be Rejected.

Cases cited in EWU's Response Brief do not support the proposition that the tort of wrongful discharge is not available to a professor when the university/college terminates or withdraws a reappointment without following the disciplinary procedures in a CBA or handbook. EWU offers the argument that reappointment is not a right; this is a correct proposition but inapposite to Doron's claims. Doron argues that once bestowed, reappointment vests rights that cannot be abridged without the process bargained for under the CBA. This is the gist of Doron case, not EWU's substituted straw man arguments.

In *Guild v. St. Martin's College*, the college did not renew the plaintiff-professor's probationary contract at the end of his third year. 64 Wn. App. 491, 493 (Div. 2), review denied 119 Wn.2d 1016 (1992). *Guild* is distinguished from Doron's case because *Doron was reappointed*. Later Doron's reappointment was wrongfully

terminated by EWU *without formal disciplinary procedures* in violation of public policy when Doron refused to implement an improvement plan which required Doron to modify his FAP without his consent. Moreover, in *Guild* the professor was unable to show a mandate of a clear legislatively or judicially recognized public policy which was violated by the college's decision to not renew his probationary contract. *Id.* at 496. In Doron's First Amended Complaint he alleged that the terms and conditions of his employment guaranteed by a CBA executed pursuant to RCW 41.76 *et seq.* was violated. *Guild* does not help Defendants.

Likewise, in *Lovelace v. Southern Massachusetts University* the college sent the plaintiff-professor written notice that his probationary contract would NOT be renewed. 793 F.2d 419, 422 (1st Cir. 1986). Professor Lovelace was forced to argue that absent "just cause" or "justification" he was entitled to reappointment. *Id.* at 421. But in Doron's case, EWU sent him a formal notice of reappointment. CP 793. *Doron does not assert that he was entitled to reappointment.* Instead, Doron asserts that *once he was reappointed, his reappointment could not be terminated or withdrawn absent "just cause" or "justification" as required Article 13 of the CBA.* *Lovelace* does not help Defendants.

In *Alberti v. University of Puerto Rico*, the plaintiff challenged her dismissal as program director and as non-tenured associate professor in the school of nursing. 818 F. Supp.2d 452, 457 (D. P.R. 2011). The plaintiff's amended complaint alleged several constitutional and civil rights violations. *Id.* at 457-458. However, in *Alberti* the plaintiff did not allege a tort claim for wrongful termination in violation of public

policy. *Id.* Therefore, the analysis in *Alberti* is inapplicable to Doron’s claim of wrongful discharge in violation of public policy.

Furthermore, the *Alberti* Court held that the university’s regulations provided that the program director position was a “position of trust” and could be terminated at will, and as such, the plaintiff had no property interest in the program director position. *Id.* at 461-466. In Doron’s case, his employment at EWU after his reappointment—with an improvement plan—was controlled by the “just cause” provision of Article 13 of the CBA.

Next, the *Alberti* Court further held that under the university regulations the plaintiff did not complete the minimum five (5) years of probationary appointment for tenure, and as such did not have a property interest in her teaching position. *Id.* at 466-469. *Alberti* claimed she possessed a due process right to a pre-termination hearing. *Id.* at 467. However, the *Alberti* Court held that the plaintiff did not provide any supporting evidence, notwithstanding her probationary contract, that she was entitled to a constitutionally protected due process right. *Id.* In Doron’s case, he was reappointed to another year as a probationary faculty member. After his reappointment, Doron’s reappointment was terminated without following the formal disciplinary procedures in Article 13 of the CBA. Doron was contractually protected under the CBA and statutorily protected pursuant to RCW 41.76 *et seq.* to formal disciplinary proceedings and an arbitration hearing before terminating his reappointment. *Alberti* does not help Defendants.

Discharge discussions by universities are not “immune” from claims of wrongful discharge in violation of public policy. In *Maas v. Corporation of*

Gonzaga University, the plaintiff was a law student who brought an action against the school alleging the school negligently failed to warn her of probable failure. 27 Wn. App. 397, 398 (1980), *review denied* 95 Wn.2d 1002 (1981). The claims in *Maas* were not claims brought by a faulty member alleging wrongful discharge in violation of public policy. *Maas* does not help Defendants.

In *Kumar v. Board of Trustees*, the plaintiff-professor challenged a decision by the university denying tenure as discriminatory based upon race in violation of Title VII. 774 F.2d 1, 1 (1st Cir. 1985), *cert. denied* 475 U.S. 1097 (1986). The claims in *Kumar* did not include a challenge to a discharge decision. *Id.* The *Kumar* Court did not recognize an “absolute immunity” for discharge decisions by universities and its legal analysis is inapplicable to Doron’s claims of wrongful discharge in violation of public policy. *Kumar* does not help Defendants.

In *Board of Regents v. Roth*, the plaintiff-professor was informed that he would not be rehired after he completed the fixed one-year term for which he was hired. 408 U.S. 564, 566 (1972). In *Roth*, the plaintiff did not bring a tort claim of wrongful discharge in violation of public policy claim, instead he challenged the decision not to rehire him infringed upon his Fourteenth Amendment rights. *Id.* at 568. The *Roth* Court held that the terms of the plaintiff-professor’s employment secured no interest in re-employment. *Id.* at 578. In Doron’s case, he was notified in writing that he was reappointed for another academic year. CP 793. Moreover, Doron’s interest in re-employment was secured by the “just cause” protections in Article 13 of the CBA. *Board of Regents v. Roth* does not help Defendants.

In *Sweeney v. Board of Trustees*, the plaintiff-professor did not file a tort wrongful discharge in violation of public policy claim; rather she challenged a decision by the university to delay her promotion as discriminatory based upon sex. 604 F.2d 106, 108 (1st Cir. 1979), *cert. denied* 444 U.S. 1045 (1980). Again, the analysis in *Sweeney* has no bearing whatsoever on Doron case—because Doron is not challenging an “academic decision” by EWU. Rather, Doron is challenging the decision to terminate his reappointment *without following the formal disciplinary procedure* in Article 13 of the CBA was in violation of public policy. *Sweeney* does not help Defendants.

In *Board of Curators v. Horowitz*, the suit was filed by a medical student under 42 U.S.C. §1983 alleging that the university’s academic decision to dismiss her during her final year of study was a violation of her due process rights under the Fourteenth Amendment. 435 U.S. 78, 79 (1978). The legal analysis is inapplicable to Doron’s claim. *Board of Curators v. Horowitz* does not help Defendants.

Washington courts have recognized that employees may bring claims of wrongful discharge in violation of public policy against public employers. “[T]he tort of wrongful discharge seeks to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy.” *Smith v. Bates Technical College*, 139 Wn.2d 793 (2000). Bates is vocational-technical institution operated by the State of Washington, or other governmental entity. *Id.* at 796. See also *Piel v. City of Federal Way*, 177 Wn.2d 604 (2013); *Hubbard v. Spokane County*, 146 Wn.2d 699 (2002).

“[I]n establishing the prima facie case, the employee need not attempt to prove the employer's *sole motivation* was retaliation” *Wilmont v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 70 (1991) (emphasis added). In wrongful discharge cases, the plaintiff’s ultimate burden of proof is a preponderance of the evidence that retaliation was a “substantial” or “important” factor motivating the discharge. *Id.* at 71-73. Further, proximity in time between the protected activity and the adverse employment action is a factor that suggests retaliation. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 482 (Div. 3), *review denied* 166 Wn.2d 1038 (2009). A plaintiff is not required to exhaust administrative or contractual remedies to bring a claim for wrongful discharge in violation of public policy. *Bates*, 139 Wn.2d at 809-811.

EWU’s straw man arguments should be rejected.

The record shows that Doron’s *demands for protection and preservation of his rights guaranteed under the CBA and his previously approved FAP* put into place in accordance with RCW 41.76 *et seq.* were a *substantial factor* in the decision by EWU to terminate his reappointment *without following the formal disciplinary procedures in the CBA Article 13.*

E. EWU BREACHED A PROMISSORY ESTOPPEL PROMISE TO DORON.

During Doron’s interview process in February 2009 prior to being hired by EWU in March 2009, Fuller (who was Dean of the College of Business at the time) met with Doron and orally promised that Doron could meet any academic research requirements and be successful at EWU by allowing Doron to coauthor papers with Djatej. CP 1423-1424, 1436-1437, 1456-1457, 1458.

As evidenced by the email from the hiring committee member Professor Joe Dowd to Djatej, “Mike Doron agreed to come to [EWU] mostly to work with you....” CP 1465. Doron turned down a job offer at another university in reliance upon EWU’s promise that Doron could meet EWU’s research expectations by coauthoring papers with Djatej. CP 1456-1457.

When Djatej left EWU Doron told Fuller that Doron was concerned that Djatej would no longer be interested in coauthoring papers with Doron. CP 1426, 1454. Fuller promised Doron that Djatej would be available via the internet to help Doron meet research expectations. CP 1426. However, when Doron emailed Djatej a paper drafted by Doron and asked for Djatej’s input, Djatej never followed-up with Doron. CP 1440-1442, 1457, 1467.

However, when Djatej returned to EWU at the beginning of Doron’s second year at EWU, in the Fall of 2010, Murff and Djatej told Doron that his academic research as set forth in Doron’s FAP “isn’t working.” CP 394-398, 732, 745, 750, 1439.

In *Flower v. T.R.A. Industries, Inc.*, the employer made an oral promise to the plaintiff during the interview process that the plaintiff would not be terminated without just cause or anything short of serious misconduct. 127 Wn. App. 13, 23 (Div. 3, 2005), *review denied* 156 Wn.2d 1030 (2006). In *Flower*, the plaintiff accepted the position in Spokane and moved his family from Alabama. *Id.* Later, upon the employer’s demands, the plaintiff signed an acknowledgment form containing a boilerplate clause indicating that plaintiff was employed “at will.” *Id.* The *Flower* Court held that, “A boilerplate clause stating that the contract is not

modified or affected by other verbal or written agreements of the parties... will not be given effect where it appears that the provision was factually false.” *Id.* at 30 (quotation omitted). “When there is material parol evidence [to show] that outside agreements were relied upon[,] . . . those parol agreements should be given effect rather than permit boilerplate to vitiate the manifest understanding of the parties.” *Id.* at 30-31 (internal quotations omitted). The *Flower* Court further held that the promisee acted as expected by the promisor, and the promisee changed his position, thus injustice can be avoided only by enforcing the oral promise made by the promisor. *Id.* at 31. “Mr. Flower has, at a minimum, raised an issue of fact as to the alternative theory of promissory estoppel.” *Id.*⁸ If there is no valid contract between the parties based upon their negotiations, “[t]he doctrine of promissory estoppel can be used as a ‘sword’ in a cause of action for damages.” *Id.* at 31 (citation omitted).

The same legal analysis and reasoning applies to Doron’s claim of promissory estoppel. Injustice can be avoided only by enforcing the promise made by EWU Fuller when he was Dean of the EWU College of Business; specifically that Doron would be meet EWU’s research expectations and be successful at EWU with Djatej’ s help if Doron coauthored papers with Djatej. *See also Klinke v. Famous Recipe Fried Chicken, Inc.* 94 Wn.2d 255 (1980) (promissory estoppel was a basis for a cause of action for damages where injustice could be avoided only by

⁸ There are five recognized elements of a promissory estoppel claim: "(1) a promise, (2) that promisor should reasonably expect to cause the promisee to change his position, and (3) actually causes the promisee to change his position, (4) justifiably relying on the promise, (5) in such a manner that injustice can be avoided only by enforcement of the promise." *Flower*, 127 Wn.2d at 31.

enforcement of the oral promise by a franchisor to execute a franchise agreement after the plaintiff relocated to proposed franchise location).

Injustice can be avoided only by enforcing the oral promise made by EWU to that Doron could meet all academic research expectations and “be successful at EWU” by coauthoring papers with Djatej.

F. DORON IS ENTITLED TO HIS ATTORNEYS’ FEES AND COSTS PURSUANT TO RCW 49.48.030 AND RAP 18.1.

“RCW 49.48.030 provides reasonable attorney fees *in any action* in which a person is successful in recovering judgment for wages or salary owed.” *Flower*, 127 Wn. App. at 34-35 (emphasis in original) (internal quotations and citations omitted). “[I]f the employee gets the money on account of having been employed, then the money is wages in the sense of compensation by the reason of employment.” *McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 284 (Div. 3), *review denied* 166 Wn.2d 1022 (2009) (quotations and citations omitted).

“Attorney fees are recoverable under for breach of an employment contract *Gaglidari v. Denny’s Rests., Inc.*, 117 Wn.2d 426, 450 (1991); *Kohn v. Ga.-Pac. Corp.*, 69 Wn.App. 709, 727 (Div. 1), *review denied* 122 Wn.2d 1010 (1993) and more specifically, for breach of a labor contract *Naches Valley Sch. Dist. No. Jt3 v. Cruzen*, 54 Wn. App. 388, 399 (Div. 3, 1989).” *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35 (2002).

Attorney fees are recoverable under RCW 49.48.030 to plaintiff awarded back pay and front pay damages based on a tort claim for wrongful discharge. *Herring v. DSHS*, 81 Wn. App. 1, 36 (Div. 2, 1996) (citing *Hayes v. Trulock*, 51 Wn. App. 795, 806-807 (Div. 1), *review denied* 111 Wn.2d 1015 (1988)).

Attorney fees are recoverable under RCW 49.48.030 to plaintiff awarded damages based on a promissory estoppel claim against former employer because plaintiff's situation was analogous to a wrongful termination. *Fraser v. Edmond Cmty. Coll.*, 136 Wn. App. 51, 58 (Div.1, 2006).

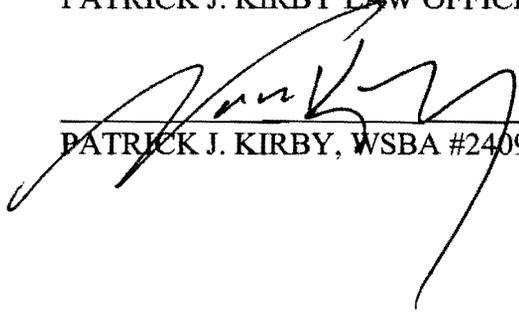
The record undisputedly shows that EWU terminated Doron's reappointment without following the disciplinary procedures in Article 13 of the CBA. As such, Doron's attorneys' fees are recoverable *as matter of law* under RCW 49.48.030 for any compensation recovered from EWU "by reason of employment." *Flower*, 127 Wn. App. at 35.

II. CONCLUSION

For the reasons set forth above, Michael E. Doron, Ph.D., respectfully asks this Court to reverse the trial court's judgment in favor of Respondents EWU, UFE, and WEA and grant summary judgment in favor of appellant, Dr. Doron.

DATED THIS 13th day of December, 2013.

PATRICK J. KIRBY LAW OFFICE, PLLC



PATRICK J. KIRBY, WSBA #24097

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of December, 2013, I
Caused to be served a true and correct copy of the foregoing document to
the following:

- HAND DELIVERY
- U.S. MAIL
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