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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 316360-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

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.

STATE RESPONDENT'S RESPONSE BRIEF

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ORIGINAL

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I. INTRODUCTION

Appellant Doron appeals the summary judgment dismissal of his claims for breach of contract, promissory estoppel and wrongful termination for engaging in union activity. Dr. Doron was employed by Eastern Washington University (EWU) on a year-to-year probationary contract. The written employment contract provided that whether he would be offered a renewed probationary term contract for the following academic year was dependent upon him having acceptable performance reviews. Under the contract, EWU had the discretion to not renew a probationary contract for the next year or require an Improvement Plan in the renewal process. It is undisputed in the record on appeal that Dr. Doron's performance fell below acceptable standards, and consistent with the plain and unambiguous terms of his contract, he was offered another annual probationary term contingent upon adopting "an Improvement Plan." Dr. Doron refused to adopt an Improvement Plan and rejected the terms of EWU's offer of continued employment. Despite his sworn testimony to the contrary, all of Dr. Doron's claims erroneously assert that the conclusion of his employment was a disciplinary termination by EWU instead of the result of failed negotiations for a new contract.

Consistent with clearly established law and the undisputed facts, the trial court held that 1) Dr. Doron's employment came to a conclusion at the end of that academic year when his existing contract expired because he refused to accept the offer of continued employment; 2) EWU's action in offering a renewed probationary contract with an Improvement Plan was consistent with the plain and unambiguous language of the contract; 3) the existence of a written employment contract and the conspicuous disclaimers of any reliance on oral promises prevent the promissory estoppel claim as a matter of law; but in any event, there was no evidence in the record that any oral promise to Dr. Doron was ever breached; and 4) the requirement to enter into an Improvement Plan was recommended before Dr. Doron contacted his union and the proposed Improvement Plan therefore could not have been motivated by any contact with the union. In addition, the trial court found EWU had legitimate reasons for requiring an Improvement Plan, and Dr. Doron admitted in his own testimony that he could not identify any evidence of a wrongful motive by anyone at EWU. Therefore, the trial court correctly dismissed Dr. Doron's claims on summary judgment, and EWU respectfully requests this Court affirm the dismissal.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the trial court correctly found that EWU did not violate any provision of the contract because the offer of a renewed contract with an Improvement Plan was consistent with the plain and unambiguous language of the contract.

2. Whether the trial court correctly dismissed Dr. Doron's claims for promissory estoppel because 1) Dr. Doron's employment was limited to the terms of his written contract, which conspicuously disclaimed any reliance on oral promises, and 2) there was no evidence that any oral promise was ever breached.

3. Whether the trial court correctly dismissed Dr. Doron's claim for wrongful termination because Dr. Doron was not terminated and because there was no evidence that his employment came to a conclusion based upon any protected union activity.

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

1. Michael Doron Was A Probationary Employee On A Year-To-Year Contract Subject To Non-Renewal

Michael Doron was hired as a probationary faculty member in the Accounting Department at EWU for a nine-month academic year, to start in the fall of 2009. CP 228-31. Dr. Doron was advised in writing that the terms of his employment with EWU would be "subject to the Collective

Bargaining Agreement (CBA),” the contract negotiated between EWU and the faculty union, the United Faculty of Eastern Washington University (UFE). CP 230-31. The offer of employment clearly stated that “If you believe you have been promised anything that is not included in this letter, do not sign and return the letter” CP 231. In addition, the contract states that the entire CBA agreement “supersedes any prior written or oral agreements” and:

Only those terms of employment that are made in writing to the appointees shall be binding upon the University.

CP 238, 286 (CBA §§ 3.3, 19.2).

Dr. Doron understood that the CBA governed his employment, and he admits that there was never any promise that his probationary employment would be renewed. CP 2752, 1666, 2756. Dr. Doron testified that he understood he had no entitlement to continued employment with EWU at the end of each probationary academic year, and any potential offer to renew his contract would be based upon his annual probationary evaluation. CP 1657-58, 2756:1-7.

The CBA required probationary employees to receive an annual evaluation to assess their performance in order to make recommendations regarding whether a renewed annual contract would be offered for the next academic year. CP 238-42 (CBA §§ 3.9, 4.1.2, 5.3). The evaluation

process required three faculty members, elected to serve as the Department Personnel Committee (Committee), and the Department Chair to provide a written discretionary evaluation and recommendation regarding contract renewal and address any areas of performance that needed improvement. CP 238-42 (CBA §§ 5.1, 5.3). Under the terms of the contract, EWU reserves the right to general supervision of employees, including “final authority” over the “evaluation of performance” and “final authority regarding faculty criteria for hiring and promotion.” CP 242-44, 285. EWU had the discretionary right to “manage, direct, and supervise all work performed.” CP 285 (CBA §§ 17.2.1, 17.2.2(f)). The CBA explicitly provided that EWU had the discretionary ability to renew the probationary contract, to not renew the contract, or to condition renewal on a required Improvement Plan. CP 242-44 (CBA § 5.3(c)). The CBA specifically states that when shortcomings in performance are identified, EWU “shall” require an Improvement Plan. CP 243-44 (CBA § 5.3.1(b)).

2. In October 2010, Significant Concerns Were Identified In Dr. Doron’s Performance Evaluation, Resulting In The Requirement That Dr. Doron Adopt An Improvement Plan

Consistent with the terms of the CBA, the Committee and Dr. Elizabeth (Murff) Tipton, the Department Chair, conducted

evaluations of Dr. Doron's performance and made recommendations on whether he should be offered continued probationary employment. CP 394-404. EWU's performance goals for Dr. Doron, as set out in his Faculty Activity Plan (FAP), required him to demonstrate 1) "acceptable levels of quality in teaching effectiveness, curriculum development, and student advising;" 2) "an acceptable level of research ... determined under the AIS Department Plan;"¹ and 3) "Professional Development and Interaction." CP 314-16, 1697-1704, 1664:7-13. In order for probationary employees to be retained, the College and Department Policies and Procedures require that faculty maintain teaching excellence and superior or significant scholarly contributions and comply with the Association to Advance Collegiate Schools of Business ("AACSB") standards. CP 350, 2567-2605.

Dr. Doron started his employment with EWU in September 2009. Four months into his employment, in January 2010, EWU evaluated his performance, with very limited information, and offered him a renewed annual contract for the next academic year starting fall of 2010 and ending June 15, 2011, which Dr. Doron accepted. CP 1697-1704, 2015-23. After this first renewal, however, EWU received a number of complaints from

¹ It was undisputed that EWU must comply with standards set nationwide by the AACSB for accreditation, as set out in the Department and College Policies and Procedures, and Dr. Doron's failure to meet these standards would jeopardize EWU's accreditation. CP 1697-1704, 2567-2605, 1752-53.

students, the MBA Director, and fellow faculty about Dr. Doron's performance. CP 2015-23; CP 1697-1704. By his second evaluation in October 2010, shortcomings were identified in several areas of Dr. Doron's performance, including but not limited to the following:

- 1) his teaching effectiveness and course development were unsatisfactory;
- 2) his research was not keeping him current in his teaching field; and
- 3) his collegiality and ability to accept mentoring as needed from colleagues was lacking. CP 394-404.

With regard to his teaching performance, Dr. Doron testified, based upon his own self-evaluation, that his performance was "not good," that he was not getting the job done, that his students were not happy, and that his teaching needed improvement. CP 1659, 1668-69, 1672-73. With regard to his research, Dr. Doron testified that it made "perfect sense" for EWU to want him to expand his research outside of accounting history, as addressed in his October 2010 evaluation, to enable him to stay current in his teaching field and meet AACSB standards. CP 1657, 1903. Dr. Doron knew that his research needed to comply with the University Policies and Procedures and AACSB accreditation standards, both of which required his research to be current and relevant in the area in which he was teaching. CP 321-48, 1645-46, 1697-1704, 1885-86, 2400-03, 2440-41, 2443, 2567-2605, 2747, 2754. This need for Dr. Doron to produce

publications outside of the area of accounting history had been addressed with him during his hiring process, since EWU did not offer any courses in accounting history. CP 165-166 ¶21, 1645-50, 1670, 1752-53, 1885-86, 2000.

In Dr. Doron's 2009 communications with Dr. Djatej, Dr. Doron was looking for ways to move his research from his previous accounting history work into a more current and relevant area. CP 1885-86. Dr. Doron admits that there was no promise that his research requirement could be satisfied by projects exclusively in the area of accounting history. CP 2767.

With regard to his professional interactions, Dr. Doron does not dispute that other EWU faculty reported non-collegial conduct by Dr. Doron to his evaluators, and he admits that it was appropriate for EWU to evaluate him based upon how he treated his colleagues. CP 1747-50. Dr. Doron did not dispute that EWU had legitimate concerns that his overall performance was unsatisfactory. CP 1757, 1659, 1908.

In October 2010, based upon their evaluation of Dr. Doron's performance, the Committee and Department Chair recommended that EWU renew Dr. Doron's probationary employment for the following year only if an Improvement Plan was established to correct the performance deficiencies. CP 394-404. Since the Committee and the Chair have the

most direct information on the faculty's performance and the department standards, it is standard procedure for the Dean and Provost to follow those recommendations, and they did so in Dr. Doron's case. CP 394-404, 406, 409, 2365-67.

The CBA, specifically provides that:

If performance shortcomings are identified through the evaluation process, the probationary faculty member **shall be provided a plan to correct the performance shortcomings which include timelines for improvement.** The plan will be created by the chair and the affected probationary faculty member....

CP 243-44 (CBA § 5.3.1 (b), (c)(ii)). [emphasis added].

All six evaluators unanimously recommended option (ii) under the CBA § 5.3(c): that Dr. Doron be offered continued employment on probation only "with an Improvement Plan" for the upcoming academic year (2011/2012).² CP 394-406, 409. The Dean advised that "As part of this recommendation to retain Dr. Doron, I am requiring the development of an Improvement Plan in accord with CBA Article 5, Section 5.3.1(c)." CP 406. On December 1, 2010, Dr. Doron received a letter from the Provost advising him that he was following the recommendations of the Committee, the Department Chair, and the College Dean, and that

² Doron's review committee gave serious consideration to simply recommending non-renewal, but after careful analysis, they recommended an offer of renewal subject to an Improvement Plan to allow Doron an opportunity to address the areas of deficiency. CP 2015-23, 394-404.

Dr. Doron was “**required** to develop an Improvement plan by no later than the end of the first week of Winter Quarter 2011 [January 7, 2011], pursuant to Section 5.3.1(b) of the *Collective Bargaining Agreement*” to be reappointed. CP 409 [emphasis added].

3. Dr. Doron Understood Continued Probationary Employment Was Conditioned Upon Adopting An Improvement Plan

Dr. Doron admitted that it was appropriate under the terms of the CBA for EWU to seek an Improvement Plan:

Q. Do you have an understanding that an Improvement Plan is something that the University is allowed to enact with regard to faculty members when their evaluation indicates there is a problem?

A. When I read the collective bargaining agreement, it seemed clear to me an Improvement Plan is when you are not meeting the goals in your FAP.

CP 1651:15-23.

Q. Do you understand that, as a probationary employee, that the college, in evaluating you, has the option to not renew your contract [interrupted with objection] to renew your contract with an improvement plan or to simply renew your contract with you remaining on the probationary status?

A. I believe that’s what – [interrupted with objection] my understanding, that is what the CBA says.

CP 1675:18-1676:4. Dr. Doron’s union reviewed the matter and agreed with EWU’s position that an Improvement Plan was the appropriate

course of action pursuant to the terms of the CBA. CP 1667:3-12, 2065 ¶20.

Dr. Doron clearly understood that after his October 2010 evaluation, a condition of his probationary reappointment was “to be involved in developing an Improvement Plan.” CP 1654:23-1655:2, 1661:16-1662:2. Dr. Doron expected that his employment with EWU would come to an end if he did not enter into an Improvement Plan because EWU made it clear that “if [he] did not participate in developing an improvement plan, that [he] would not be renewed for the following year.” CP 1677:21-1678:1.

4. Dr. Doron Rejected The Offer For A Renewed Contract With An Improvement Plan, Causing His Current Contract To End

If a faculty member intends to not accept the offered reappointment for the following year, the CBA provides that the probationary faculty member shall provide notice “not later than 15 days” after receipt of the letter relating to the offered appointment.³ CP 250 (CBA §5.6.3). After receiving the December 1, 2010, offer of reappointment letter, Dr. Doron expressed in writing on January 5, 2011, that he was refusing to participate in an Improvement Plan process.

³ Contrary to the language in the contract, Dr. Doron argues without any cite to the record that he is not required to accept the offer from EWU for a renewed contract. Opening Brief p. 31.

CP 411 He testified that by January 5th, he had decided to reject the contract offer made by EWU. CP 1675-76. Dr. Doron refused to draft an Improvement Plan and refused to meet with EWU administration to even discuss a written Improvement Plan. CP 1678-79, 1681. On January 20, 2011, despite not meeting the deadline of January 7, 2011, EWU gave Dr. Doron “one last” opportunity to agree to participate in an Improvement Plan process:

Though the previously set deadline (1/7/11) for completing a meaningful improvement plan that leads to tenure [CBA 5.3.1(b)] has now passed we would like to extend one last opportunity to develop an improvement plan This process must begin by February 1, 2011 with a completion date of February 18, 2011.

CP 413-14.

Dr. Doron was given until January 28, 2011, to respond in writing and indicate whether he would “agree to participate in the development of the Improvement Plan” within the new timeline. CP 414. On February 2, 2011, Dr. Doron again responded in writing stating that “I will not participate in this process.” CP 425. Dr. Doron failed to accept or meet the second deadline to begin developing an Improvement Plan by February 1, 2011, and he admits in his deposition that he “never accepted the conditional offer of employment” or agreed to an Improvement Plan. CP 1652:25-1653:18, 1661-63. On February 7, 2011, Provost Fuller acknowledged that EWU was accepting Dr. Doron’s rejection of the offer:

The purpose of this letter is to inform you of my conclusion that you have rejected the conditions of your reappointment for the 2011-2012 academic year. My conclusion is based upon your repeated refusal to participate in the development of a performance improvement plan, which is a required term of your reappointment. By these responses, you have rejected your reappointment for the 2011-2012 academic year. Accordingly, your employment at the University will terminate at the end of your current term of appointment, June 15, 2011.

CP 427-28. Dr. Doron testified that it was reasonable that EWU took his responses as a refusal of EWU's offer for a renewed contract. CP 1758:16-25, 1675-78.

Dr. Doron described his position as, "I refuse to do an Improvement Plan ... You want to not reappointment me because of that, then do that." CP 1662:8-12. According to Dr. Doron's own testimony, because he would "not participate in writing an Improvement Plan," EWU "went ahead and didn't reappoint me on that basis." CP 1661, 1671. Dr. Doron could not identify any basis for his non-renewal other than his refusal to participate in an Improvement Plan. CP 1662-63, 1671, 1676-77, 1686:21-22, 2474.

5. Dr. Doron Was Paid In Full Under The Existing Employment Contract

Despite the contract requiring Dr. Doron to teach full time, he refused to teach one of his two assigned classes in spring 2011, which caused him to have less than a full-time schedule. CP 2673-74, 2528-34.

Dr. Doron asserted that teaching a morning class would interfere with the “rhythms of his life;” however, he never told anyone at EWU that he objected to having a morning class. CP 2291-92, 2673-74, 2528-34. Dr. Doron admits that serious discipline or termination could have been imposed for his refusal to teach his assigned course. CP 2428-33. Instead, he was paid commensurate with his reduced workload, as required by state law, which Dr. Doron did not refute. CP 2233-36, 2340-42, 2433, 2564-65, 2673-74. Dr. Doron does not raise any facts or issue relating to unpaid wages in his Opening Brief. The trial court correctly held that Dr. Doron was paid in full, consistent with the contract and State law.

6. Dr. Doron Chose To Accept Alternative Employment In California And Admits He Was Not Terminated By EWU

In December 2010, Dr. Doron applied for a position at California Southern University at Northridge (CSUN). CP 2434, 2465. On April 16, 2011, after rejecting the offered reappointment contract at EWU, Dr. Doron accepted a contract for a faculty position at CSUN. CP 2434, 2465. Dr. Doron chose to reject EWU’s offer of continued employment, accept the offer in California and leave EWU at the end of his current contract term. CP 1758-59, 2434, 2465. By Dr. Doron’s own testimony, Dr. Doron’s current 2010/2011 academic year contract came to a conclusion on June 15, 2011, because he chose to reject the offered

Improvement Plan and instead accept employment with CSUN. CP 1758-59, 1661-63, 2434, 1676-78. Dr. Doron admitted in his deposition that “I had not been terminated,” and he in fact completed his contract term with EWU. CP 1686-87, 2434:19-25, 2673-74, 2233-36.

7. Dr. Doron’s Theory For Breach of Contract

Dr. Doron’s sole assertion in support of his breach of contract claim on appeal is that EWU’s offer for a new contract requiring an Improvement Plan should be treated as a disciplinary termination, requiring the application of progressive discipline and a “just cause” analysis.⁴ Opening Brief pp. 29-36. The CBA provides that “the University shall apply where appropriate the principles of progressive discipline” and sets out possible disciplinary steps. CP 279 (CBA § 13.2). Progressive discipline is not applicable to probationary evaluations or negotiations for renewed contracts. CP 2159, 2161-62, 2140-46. Even in his own testimony, Dr. Doron acknowledged that he did not consider the non-renewal of his contract to be disciplinary:

Q. Were you terminated for disciplinary reasons?

Q. (By Ms. Clemmons) In your opinion?

⁴In the underlying summary judgment, Dr. Doron’s primary argument for breach of contract was that EWU modified his existing Faculty Activity Plan (FAP), which he asserted violated the CBA. CP 210-12. Contrary to Dr. Doron’s argument, it was undisputed in the record that EWU never modified Dr. Doron’s FAP. CP 1690, 1697-1704, 1751, 1753, 1680, 1682:14-18, 1684. EWU nevertheless had the authority under the contract to modify an existing FAP. CP 252, (CBA, § 7.3.5), 1690, 2064 ¶ 20.

- A. Explicitly, I don't think that was the basis. It was not writing an Improvement Plan, if that qualifies as disciplinary. I guess I didn't think it did.

CP 2434:19-25. [objections omitted]

8. No Grievance Or Request For Administrative Review Was Ever Filed

The CBA provides that a grievance and/or arbitration process is the “exclusive means of resolving ... a dispute between the University and the UFE, on its own behalf or on behalf of an employee ... over an alleged violation, misinterpretation or misapplication of an express term or provision of this Agreement.” CP 276-79 (CBA §§ .1, 12.2). The CBA also provides an internal appeal process for Dr. Doron to challenge or seek review of his annual evaluations or any negative recommendation for renewal of a probationary contract. CP 1697-1704, 247-48 (CBA §§ 5.5.1, 5.5.2). Dr. Doron never filed any internal request to review his negative performance evaluation, and the union could not find any grounds to file a grievance. *Id.*, CP 2066-67, 2159, 2146, 2162, 501 ¶4.

9. Facts Related To Dr. Doron's Promissory Estoppel Claim

Dr. Doron understood prior to being hired that his research needed to comply with EWU's Policies and Procedures and AACSB accreditation standards, both of which required his research to be current and relevant in the area in which he was teaching. CP 1645-46, 1885-86, 2400-06, 1649-

50, 1657, 1670, 2440-41, 2000, 2567-2605. Since EWU did not offer courses in accounting history, Dr. Doron's preferred area of research, the need for him to publish outside the area of accounting history in order to remain current in his teaching field was discussed with him throughout his hiring process. CP 1645-46, 1885. In accepting employment with EWU, Dr. Doron testified that he relied upon: 1) the two written letters he received in March 2009 that advised him not to consider any oral promises, and 2) his general understanding that he could co-author research papers with a colleague, Dr. Djatej, in order to meet the research requirements at EWU. CP 228-31, 1456 at p. 264. In the hiring process, Dr. Doron discussed the potential of co-authoring publications with Dr. Djatej, but he admitted that he and Dr. Djatej did not agree to anything specific.⁵ CP 2739-41, 2762-63, 2766:11-16, 2767:22-23. Dr. Doron testified that "it was never identified specifically what "each person would do in the co-authoring process," and "we never set explicit terms." CP 1459.

According to Dr. Doron, Dr. Djatej told him that "you can work with me, I do that for other people." CP 2437:9-10. Dr. Doron was not

⁵ Dr. Djatej talked to Dr. Doron by phone and indicated that the "general idea" was that he could help train and mentor Dr. Doron in transitioning his research from "qualitative research to more quantitative, empirical type of research." CP 1436-37.

even sure this qualified as a promise, testifying that “I guess” this general understanding qualified as a promise. CP 2435:16.⁶

Although Dr. Doron initially planned on possibly co-authoring publications with Dr. Djatej, Dr. Doron testified that his plan changed when he had some individual success publishing papers. CP 2438:11-17. He testified he was “feeling more confident” that “I can do enough publications on my own”; “[s]o there is nothing preventing me from meeting the research requirement.” CP 2438:11-17. “I thought what I was doing on my own was fine. I didn’t need more projects working with Arsen [Dr. Djatej].” CP 1458 at p. 272:23-24. Dr. Doron testified that since he felt he was capable of meeting the publication requirements alone, he chose to continue with his sole-authored projects instead of pursuing co-authored projects. CP 2739-41, 2762-63.

Dr. Doron refused offers from Dr. Djatej to co-author publications together, and Dr. Djatej remained available to co-author publications with Dr. Doron. CP 1426, 2204-06, 2159.

Q. So was there ever an explicit promise made by Arsen [Dr. Djatej] that he didn’t fulfill?

A. ... That’s not something that I can say yes or no.

CP 1458, pp. 271:22- 272:1.

⁶ Dr. Doron met Dr. Djatej at a conference, and Dr. Djatej was acting as somewhat of a mentor to Dr. Doron before he even applied to work at EWU. CP 1456-57, 2436, 731.

Dr. Doron argues that Dr. Djatej “ignored” one e-mail in 2009 where Dr. Doron was asking for feedback on a paper. Opening Brief p. 8. However, the e-mail exchange is in the record and demonstrates that Dr. Djatej did respond and provide feedback. CP 1457, 1346. Dr. Doron admitted that Dr. Djatej never refused to co-author publications with him.

Q. Did Arsen [Dr. Djatej] ever indicate to you that he would not help you or co-author publications with you?

A. No, he never said that.

CP 1457 at p. 267:22-24.

Q. Was there anything you asked him [Dr. Djatej] to do specifically that he didn't do?

A. No.

CP 1457 at p. 268:19-21.

Q. Is there anyone at Eastern Washington University that you contend didn't do something they were required to do that would enable you to co-author any publication?

A. No.

CP 1458 at pp. 270:16, 271:3. [objections omitted]

Q. At any point in time did he [Dr. Djatej] refuse to co-author papers with you?

A. As I said, there was no explicit rejection of that. That didn't happen, no.

CP 1458 at p. 271:18-21.

10. There Is No Evidence Dr. Doron Was Terminated Related To Union Activity

The record is undisputed that the recommendations for Dr. Doron's contract renewal to be contingent upon an Improvement Plan occurred before Dr. Doron contacted his union. CP 394-404, 1666, 2060. Dr. Doron testified that he could not identify any facts that any action by EWU correlated to any union activity. CP 1760-61, 2421-23, 2427, 2445. According to the union, EWU administration welcomed the union's involvement. CP 2150. Dr. Doron testified that he could not identify any improper motive for the decisions made by EWU administrators related to his employment. CP 2472-73, 2480:5-6, 2490-91.

Dr. Doron further admits that Provost Fuller recommended that Dr. Doron contact the union, and that he had a good working relationship with Provost Fuller, who he described as being fair minded. CP 2413-14. Dr. Doron admits that he cannot identify any ill motive by Provost Fuller. CP 2451-57, 2490-91. Dean Zimmerman also recommended the Improvement Plan, and Dr. Doron could not say that Dean Zimmerman reacted inappropriately to him contacting the union. CP 406, 2424. Dr. Doron admitted he could not identify any facts that would indicate

anyone at EWU took any negative action because he contacted the union. CP 1666, 2421-23, 2427, 2445.⁷

B. Procedural Background

The EWU Defendants moved for and were granted summary judgment on all of Dr. Doron's claims.⁸ CP 1638-40, 1714-42, 1776-83, 2034-53, 2078-94, 2318-44. With respect to the breach of contract claim, the trial court ruled that interpretation of an unambiguous contract is a matter of law and found that the contract "clearly and unambiguously provides the employer, Eastern Washington University, has the right to make an offer of renewal contingent upon an Improvement Plan." CP 1358. The trial court dismissed the breach of contract claim as a matter of law. CP 1356-59.

With respect to the wrongful termination claim, the trial court found:

[Dr. Doron] refused to participate in the required Improvement Plan process, and therefore he rejected EWU's offer of employment. Dr. Doron's employment concluded at the end of the term of his current contract because he did not accept the offer for a renewed contract.

⁷ He could not identify anyone at EWU doing anything in bad faith—only that he disagreed with their discretionary evaluation of his employment. CP 1760-61.

⁸ EWU, the three Committee members, Dr. Tipton, the Dept. Chair, Neil Zimmerman, the College Dean, and Provost Rex Fuller were all named as Defendants in the litigation. CP 162.

CP 1359. The trial court noted that the ability to offer renewal with an Improvement Plan was “spelled out as [an] appropriate course of action in the Collective Bargaining Agreement and occurred for legitimate employment reasons,” and Dr. Doron’s “own testimony indicates that he had not been terminated.” CP 1372, 1566-67. The trial court noted that there was no evidence in the record that any negative action was motivated by labor relations activity. CP 1372-73, 1567:18-19.

With regard to the promissory estoppel claim, the trial court found:

It seems to me that Dr. Doron understood that there were some expectations that he would be required to do research in areas other than his area of expertise. I think there was some reliance on the conversations and promises that were given by Dr. Djatej. But I – I couldn’t find anything in the record that indicated that Dr. Djatej ever broke that promise.... But again, we come back to the actual facts and the sequence of events here. And Dr. Doron’s employment didn’t end because of any kind of broken promises by Dr. Djatej. It was based upon Dr. Doron’s decision and refusal to engage in development of the improvement plan. So I can’t find any evidence that there was any reliance on a promise that was actually then subsequently broken.

CP 1569-70. The trial court also found that EWU provided a conspicuous written disclaimer advising Dr. Doron not to rely on any oral promises. CP 1569, 1373. Therefore, the trial court dismissed the promissory estoppel claim as a matter of law.

IV. ARGUMENT

In his Opening Brief, the only issues Dr. Doron raised with respect to the EWU respondents relate to his claims for breach of contract, promissory estoppel and wrongful termination for engaging in union activity.⁹

A. Standard On Review.

When reviewing a trial court's ruling on a motion for summary judgment, this court reviews the record *de novo*. *Babcock v. Mason County Fire Dist. No. 6*, 101 Wn. App. 677, 5 P.3d 750 (2000). Plaintiff must come forward with more than speculation and argument to meet his burden of proof to avoid summary judgment. *Seven Gables Corp. v. MGM/UA Entm't. Col.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Dr. Doron cannot create an issue of fact or avoid summary judgment by contradicting his own sworn testimony. "When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation,

⁹ Although Dr. Doron initially filed a notice of appeal on all the summary judgment rulings, he has not raised or argued any issue in his Opening Brief with regard to the dismissal of his claims for disability discrimination, defamation, or wrongful withholding of wages and acknowledges that he has waived any appeal on these claims. *Emmerson v. Weilep*, 126 Wn. App. 930, 110 P.3d 214 (2005), *review denied* 155 Wn.2d 1026, 126 P.3d 820. Moreover, Dr. Doron admitted there is no basis to think that Provost Fuller perceived him as disabled to support a disability discrimination claim. CP 2482-83, 2488-91; 2495.

previously given clear testimony.” *Marthaller v. King County Hosp. Dist.* No. 2, 94 Wn. App. 911, 918, 973 P.2d 1098 (1999).

B. Contract Principles Require Summary Judgment Dismissal Of Dr. Doron’s Breach of Contract Claim As A Matter of Law

The interpretation of a public employment collective bargaining agreement is governed by contract law. *Keeton v. Dep’t of Soc. & Health Servs.*, 34 Wn. App. 353, 360, 661 P.2d 982, *review denied*, 99 Wn.2d 1022 (1983). In Washington, courts look to the plain language and intent of the parties to interpret a contract. *Berg v. Hudesman*, 115 Wn.2d 657, 664, 801 P.2d 222 (1990). Each provision must be interpreted as part of the whole contract, using the language, context, and other indicia of intent that is consistent with federal labor policy. *Maurer v. Joy Tech., Inc.*, 212 F.3d 907, 915-917 (6th Cir. 2000); *Int’l Union v. Yard-Man, Inc.*, 716 F.2d 1476, 1479-80 (6th Cir.1983).

1. The CBA Unambiguously Gave EWU The Ability To Offer Renewal Of A Probationary Contract Contingent Upon An Improvement Plan

When a contract is unambiguous, summary judgment is appropriate. *In re Estates of Wahl*, 99 Wn.2d 828, 831, 664 P.2d 1250 (1983); *Anderson Hay & Grain Co. v. United Dominion Indus.*, 119 Wn. App. 249, 255, 76 P.3d 1205 (2003). Washington courts do not read ambiguity into a contract that is otherwise unambiguous. *BP Land & Cattle LLC v. Balcom & Moe, Inc.*, 121 Wn. App. 251, 254, 86 P.3d 788

(2004). The plain language of the contract and the reasonableness of the parties' respective interpretations should be taken into account. *Berg*, 115 Wn.2d at 668 (1990). "A provision" is not considered "ambiguous merely because the parties suggest opposing meanings." *Sales Creators, Inc. v. Little Loan Shoppe, LLC*, 150 Wn. App. 527, 531, 208 P.3d 1133 (2009).

As the trial court correctly ruled, the plain language of the contract requires an Improvement Plan when performance shortcomings are identified. The CBA uses the term "shall" in Section 5.3.1(b) in relation to the requirement to create an Improvement Plan. Under the plain, unambiguous language of the contract, EWU has the option at its discretion to choose to continue the employee "on probationary status with an improvement plan." CP 243 (CBA § 5.3.1. (c) (ii)). This conclusion is consistent with the intent of both parties to the contract, EWU and the union. CP 239-48, 2130, 2142. Moreover, Dr. Doron testified that he understood the contract enabled EWU to require an Improvement Plan and that he had no contractual promise to continued employment. CP 1651, 1675-76, 1657-58, 2756:1-7.

It is undisputed in the record that Dr. Doron never accepted the offer of a contract renewal with an Improvement Plan. Therefore, as correctly found by the trial court, there was no evidence of a violation of

the contract by EWU, and Dr. Doron's employment came to a conclusion at the end of his current contract term because he refused the proposed offer for renewal. CP 1358-59, 1565-67.

2. Non-Renewal Of A Probationary Contract Cannot Be Considered Disciplinary Action As A Matter Of Law

An employer's ability to maintain the discretion not to renew probationary employees is consistent with both Washington and federal law. Washington law provides that "[t]he employer may separate any probationary employee who fails to meet **the employer's** standards." WAC 357-19-095; *Ross v. Wash. State Dep't of Soc. & Health Servs.*, 23 Wn. App. 265, 269, 594 P.2d 1386 (1979) [emphasis added]. In addressing similar state law, the U.S. Supreme Court found that the "law clearly leaves the decision whether to rehire a non-tenured teacher for another year to the unfettered discretion of the university officials." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 567 (1972). An employee serving a probationary period has no constitutionally protected property interest in continued employment. *Swartout v. Civil Service Comm'n of Spokane*, 25 Wn. App. 174, 182, 605 P.2d 796, review denied, 93 Wn.2d 1021, cert. denied, 449 U.S. 992 (1980). Therefore, a probationary appointment can be terminated "without cause" at the conclusion of a probationary term. *Causey v. Bd. Of Trustees of Cmty.*

College Dist., 30 Wn. App. 649, 638 P.2d 98 (1982); *See also Bullo v. City of Fife*, 50 Wn. App. 602, 607, 749 P.2d 749 (1988); *Samuels v. City of Lake Stevens*, 50 Wn. App. 475, 480, 749 P.2d 187 (1988). Dr. Doron's argument that non-renewal of a probationary term requires a just-cause disciplinary process is not supported by any legal authority.

Furthermore, the probationary contract renewal process cannot be interpreted as disciplinary in nature under the plain language of the contract. A contract interpretation is not reasonable if it renders some of the contract language meaningless or ineffective. *Better Fin. Solutions, Inc. v. Transtech Electric, Inc.*, 112 Wn. App. 697, 711, 51 P.3d 108 (2002). Addressing similar breach of contract claims by faculty members, federal courts have held that the conclusion of a probationary contract term does not entitle a plaintiff to a pre-termination disciplinary hearing. *Alberti v. University of Puerto Rico*, 818 F. Supp. 2d 452, 467-68 (D. Puerto Rico 2011); *Lovelace v. Southeastern Massachusetts Univ.*, 793 F.2d 419 (1st Cir. 1986). In both *Alberti* and *Lovelace*, the court found that a university can end or terminate a contract during the probationary period without going through the disciplinary process that would apply to tenured faculty. *Id.* Otherwise the language in the contract that allows the university to end a probationary term based upon a discretionary evaluation would have no meaning. *Id.*

With similar facts, the analyses in *Alberti* and *Lovelace* are directly on point in this case. Dr. Doron's argument asserts that the non-renewal of a probationary contract should be treated as a disciplinary termination and therefore require a "just cause" disciplinary hearing process. This argument is completely without merit and ignores the language in the CBA under the applicable section § 5.3 entitled "Retention of Probationary Faculty."

Both EWU and the union clearly understood that § 5.3 applied to the process of renewal of a probationary contract and that the contract renewal process could not reasonably be considered disciplinary action under the CBA. CP 2140-45, 2161, 2233-36. Even Dr. Doron understood that EWU had the right to offer him a renewed contract contingent upon an Improvement Plan, and he did not consider that process to be discipline. CP 1651, 1675, 2434. Dr. Doron admitted that his employment came to an end because he rejected the Improvement Plan offer, not because he was disciplined or terminated. CP 1661, 1671, 1686-87, 2434. Dr. Doron's attempt to misconstrue a renewal of a probationary term as a form of disciplinary action would render the entire section of the contract on the probationary renewal process completely meaningless, and his claim is contrary to the law, contrary to the plain language of the contract,

and contrary to his own testimony in this case. The trial court correctly dismissed Dr. Doron's claim for breach of contract as a matter of law.

3. Dr. Doron Is Bound By His Voluntary Rejection Of The Offer For Renewal Which Cannot Support A Breach Of Contract Claim

When a plaintiff is not terminated, but instead voluntarily decides to leave, the argument for breach of employment contract is without merit. *Travis v. Tacoma Public Sch. Dist.*, 120 Wn. App. 542, 551, 85 P. 3d 959 (2004). In the *Travis* case, a school district faculty member resigned and then tried to withdraw his resignation after the resignation had been accepted by the Board. Similarly, in this case, Dr. Doron rejected EWU's offer of a renewed contract for the 2011/2012 academic year, and EWU accepted his rejection. As admitted by Dr. Doron, he had no contract for the 2011/2012 academic year, and he had no entitlement to one. He voluntarily chose to reject the offer for a contract for 2011/2012, and after EWU accepted his rejection of this offer, there is no requirement for additional negotiations.

Furthermore, Dr. Doron should be equitably estopped from claiming that EWU prevented him from completing the probationary tenure term, when admittedly it was only his own actions and decisions in rejecting the required Improvement Plan that resulted in the non-renewal. The elements of equitable estoppel are "(1) an admission, statement, or act

inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.” *Peterson v. Groves*, 111 Wn. App. 306, 310–11, 44 P.3d 984 (2002). Dr. Doron testified that he understood that the December 1, 2010, offer was contingent upon his agreeing to an Improvement Plan. He also testified that he intended to reject the offer for a renewed contract in both his January 1, 2011, and February 2, 2011, communications to EWU. Dr. Doron further admits that it was reasonable for EWU to take his responses as a rejection of the contract renewal offer. Despite this testimony, Dr. Doron now attempts to argue without any support in the record that he was not aware that the December 1, 2010, offer for renewal required an Improvement Plan, and he claims EWU’s February 7, 2011, letter accepting his rejection of the offer is not reasonable and constitutes a disciplinary termination. Opening Brief pp. 19, 24. These arguments are contrary to Dr. Doron’s own sworn testimony.¹⁰ Equitable estoppel is intended to prevent parties from taking these types of contradictory positions. Dr. Doron conceded EWU

¹⁰ Dr. Doron testified that by January 5th he had decided to reject the contract offer made by EWU, and he admits that he “never accepted the conditional offer of employment.” CP 411, 1652:25-1653:18, 1661-63, 1675-76. Contrary to this testimony, Dr. Doron argues in his Opening Brief without any cite that “At no point did Professor Doron state he refused or rejected the notice of reappointment.” Opening Brief p. 28.

reasonably relied upon his written rejection of the proposed contract renewal. Therefore, Dr. Doron should be equitably estopped from now claiming that he did not reject the offer.

C. Dr. Doron's Breach of Contract Claim Must Also Fail As A Matter of Law Because He Failed To Exhaust His Administrative Remedies

Disputes arising out of a collective bargaining agreement must be arbitrated if the disputes relate to a subject that is within the scope of the agreement's arbitration clause. *Chelan County v. Chelan County Deputy Sheriff's Ass'n*, 162 Wn. App. 176, 252 P.3d 421 (2011).¹¹ "The collective bargaining agreement states the rights and duties of the parties [and] . . . covers the whole employment relationship." *Inlandboatmens Union of Pacific v. Dutra Group*, 279 F.3d 1075, 1079 (9th Cir.2002) (quoting *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578-80, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)).

In general, an employee must exhaust grievance procedures under a CBA before resorting to judicial remedies for a claimed breach of contract under state law. *Lew v. Seattle Sch. Dist. No. 1*, 47 Wn. App. 575, 577, 736 P.2d 690 (1987). Dr. Doron admittedly failed to file any

¹¹ "[A]ll questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication." *Council of County & City Emps. v. Spokane County*, 32 Wn. App. 422, 425, 647 P.2d 1058 (1982). There is a strong presumption by the courts that a controversy between parties to a Collective Bargaining Agreement is covered by their arbitration agreement. *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 413-14, 924 P.2d 13 (1996).

grievance or request for arbitration, or seek the available administrative review under the contract. An exception to this general rule of exhaustion is if the plaintiff can first prove a breach of the duty of fair representation by the union. *Swinford v. Russ Dunmire Oldsmobile, Inc.*, 82 Wn. App. 401, 411-412, 918 P.2d 186 (1996), *review denied* 130 Wn.2d 1024, 930 P.2d 1231 (1997). A union only breaches its duty of fair representation when its conduct is discriminatory, arbitrary, or in bad faith. *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 374, 670 P.2d 246 (1983); *Lindsey v. Mun. of Metro. Seattle*, 49 Wn. App. 145, 148, 741 P.2d 575 (1987). Washington law provides that a union "may screen its members' grievances and process only those it determines have merit The law requires no more." *Muir v. Council 2 Wash. State Council of County & City*, 154 Wn. App. 528, 531-32, 536, 225 P.3d 1024 (2009).

In this case, the union made a rational decision that based upon its good faith interpretation of the collective bargaining agreement; there was no valid basis to pursue a grievance. Dr. Doron's disagreement with the union's decision cannot support a claim for violation of the union's duty of fair representation. *Muir*, 154 Wn. App. at 531-32; *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 370, 670 P.2d 246 (1983).¹² The

¹² The courts require the union's decisions be given considerable deference, and it is only behavior that is "outside a wide range of reasonableness" and taken with intentional or egregious disregard that would support a claim for breach of the duty of

trial court ruled on EWU's motion that there was no breach of the plain language of the contract before addressing the union's motion that there was no evidence of any alleged breach of the duty of fair representation. CP 1356-59, 1523-27. However, the trial court correctly recognized that there was no bad faith by the union in failing to file a grievance and there was no evidence to support the claim of discrimination by the union. CP 1566-67. Even had the trial court not separately rejected Dr. Doran's breach of contract claim, his failure to prove a violation of the duty of fair representation by the union is also dispositive on the breach of contract claim because Dr. Doran cannot avoid the exhaustion requirement. *Muir*, 154 Wn. App. at 536.

D. The Facts In This Case Cannot Support A Claim for Promissory Estoppel As A Matter Of Law

The trial court ruled as a matter of law there was no promissory estoppel. There are five elements of a promissory estoppel claim: (1) a promise (2) that the promisor should reasonably expect to cause the promisee to change his position and (3) that actually causes the promisee to change position, (4) justifiably relying on the promise, (5) in such a manner that injustice can be avoided only by enforcement of the promise. *McCormick v. Lalee Wash. School District*, 99 Wn. App. 107, 117, 992

fair representation. *Cavanaugh v. Southern Cal. Permanente Medical Group, Inc.*, 583 F. Supp. 2d 1109, 1128-29 (C.D. Cal. 2008); *Lindsey*, 49 Wn. App. at 149.

P.2d 511 (2000). “If the promisee’s performance was requested at the time the promisor made his promise and that performance was bargained for, the doctrine is inapplicable.” 25 DeWolf & Allen, *Contract Law & Practice, Washington Practice*, § 6.1 (1998); *Hatfield v. Columbia Fed. Savings Bank*, 57 Wn. App. 876, 885, 790 P.2d 1258 (1990). Since Dr. Doron’s employment contract was bargained for and resulted in a written contract, the doctrine of promissory estoppel is inapplicable. However, even if a promissory estoppel claim could be asserted, the facts in this case cannot meet the legal requirements of a promissory estoppel claim for the following reasons.

1. Dr. Djatej Had No Authority To Make Any Binding Promises

Any person making a promise must have authority for the promise to be enforceable. *Codd v. Stevens Pass, Inc.*, 45 Wn. App. 393, 404, 725 P.2d 1008 (1986), *review denied*, 107 Wn.2d 1020 (1987); *Restatement (Second) of Agency* § 288 cmt. c (1958). If the agent makes a statement outside the scope of that agent’s authority to speak, the employer will not be bound by those statements. *Id*; *Arbogast v. Town of Westport*, 18 Wn. App. 4, 567 P.2d 244 (1977), *review denied*, 89 Wn.2d 1017 (1978). By law, Dr. Djatej did not have the authority to enter into any agreement regarding the renewal of a probationary faculty. CP 2365-67;

WAC 357-19-095; see e.g., *Chemical Bank v. Wash. Pub. Power Supply System*, 102 Wn.2d 874, 911, 691 P.2d 524 (1984) (*Chemical Bank II*), *cert. denied*, 471 U.S. 1065 (1985) (In order to bind a governmental entity, public agents must have statutory authority to enter into contractual agreements).

In this case, Dr. Doron understood the discussions he had with Dr. Djatej were general discussions as colleagues. Dr. Djatej had no authority to make any promises on behalf of EWU or alter the terms of the written employment contract between Dr. Doron and EWU.

2. Promissory Estoppel Does Not Apply When A Written Employment Contract Exists

Contract language that is clear and unambiguous cannot be refuted by alleged verbal promises to the contrary. Washington law provides that “the doctrine of promissory estoppel does not apply where a contract governs.” *Spectrum Glass Co., Inc. v. Public Utility Dist. No. 1 of Snohomish County*, 129 Wn. App. 303, 317, 119 P.3d 854 (2005); *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 857 P.2d 1053 (1993); *Accord Barnhart v. New York Life Ins. Co.*, 141 F.3d 1310 (9th Cir.1998). When a contract has been reduced to writing, a party does not have the right to rely on oral representations concerning the written terms of the contract. *Alexander Myers & Co., Inc. v. Hopke*, 88 Wn.2d 449, 455-56,

565 P.2d 80 (1977); *Glendale Realty, Inc. v. Johnson*, 6 Wn. App. 752, 756, 495 P.2d 1375 (1972). Extrinsic evidence is inadmissible to add, subtract, or modify the terms of a written contract when that contract was intended to be the complete expression of the intent of the parties. *DePhillips v. Zolt Constr. Co., Inc.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998).

In this case, the employment contract specifically provided that “[o]nly those terms of employment that are made in writing to the appointees shall be binding upon the University.” CP 238, 286. The CBA also states that “[t]his Agreement constitutes the entire agreement between the Parties, and it supersedes any prior written or oral agreements between the parties.” CP 286 (CBA § 19.2). The general discussions with Dr. Djatej cannot add to or modify the terms of Dr. Doron’s written employment contract which specifically prohibited any oral promises from governing the employment relationship. *Id.*

3. Dr. Doron’s Claim For Promissory Estoppel Is Defeated By EWU’s Conspicuous Disclaimer Of Any Liability For Oral Promises

The law allows an employer to avoid liability for asserted oral promises not contained in writing by utilizing a conspicuous disclaimer. *Payne v. Sunnyside Comty. Hosp.*, 78 Wn. App. 34, 39, 894 P.2d 1379 (1995); *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 527, 826 P.2d 664

(1992). Justifiable reliance, a necessary element of promissory estoppel, cannot exist when such a disclaimer is used. *Id.*

In this case, it was undisputed that 1) the written letters offering Dr. Doron employment at EWU had a conspicuous disclaimer advising Dr. Doron to “not rely on any promises” not set out in writing and 2) the contract itself indicated that it was the exclusive bargaining agreement, and that the contract “supersedes any prior written or oral agreements.” CP 228-31, 286. The trial court correctly found that a conspicuous disclaimer prevented any justifiable reliance by Dr. Doron in this case.

4. The Facts Do Not Support A Claimed Breach Of Any Promise

Dr. Doron’s promissory estoppel claim fails as a matter of law as set out above. However, the trial court additionally found that Dr. Doron failed to identify any facts that any oral promise was ever breached. Dr. Doron was well aware in negotiating a probationary tenure position that his publications would be judged by national AACSB standards and the written policies and procedures at EWU, both of which required publications to be in his field of teaching. EWU did not teach accounting history. The need for Dr. Doron to transition from accounting history research to more empirical data, encompassing current accounting practices, was understood by Dr. Doron in the hiring process. CP 1645-46,

1885-86, 2400-06, 1649-50, 1657, 1670, 2440-41, 2000, 2567-2605.¹³

Dr. Doron conceded that it made “perfect sense” that EWU wanted Dr. Doron to expand his research into the areas in which he was teaching, current accounting and auditing practices. CP 1657, 1670, 2443. Dr. Doron was aware that regardless of his FAP, his research would have to meet national accreditation standards which required him to publish outside of accounting history. CP 1645-46, 2404-05. Dr. Doron knew the CBA was the document that controlled the terms of his employment, not his FAP. CP 1665-66. Expectation is at the core of a promissory estoppel claim, and Dr. Doron testified that if any accreditation issue arose, he expected EWU to address it with him, regardless of the content of his FAP. CP 2404-05. Ultimately, Dr. Doron expected that his employment would not be continued if he did not agree to an Improvement Plan. CP 1951, 2404-05.

¹³ Dr. Doron argued below that his Faculty Activity Plan (FAP) constituted a promise that he did not have to publish outside of accounting history. This argument does not appear to be raised in his Opening Brief. However, this argument is faulty for a number of reasons: 1) the FAP was drafted after Dr. Doron started his employment, and could not have been relied upon in his accepting employment with EWU; 2) Washington law prevents written materials, such as faculty activity plans, from becoming a part of the collective bargaining agreement, because they are not part of the union bargaining process. *Swinford*, 82 Wn. App. at 407 (1996); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 801, 225 P.3d 213 (2009); 3) the CBA states that it is the predominant controlling document and supersedes all other written documents. Faculty activity plans are written by the employee, and they are not incorporated into the CBA. In fact, the CBA provides that the FAP is subject to revision at any time at either the faculty member or Department Chair's request. CP 252 (CBA §§ 7.3.2-7.3.3(b)), CP 2149-50, 2160, 2229-32, 2238-42; and 4) Dr. Doron admits his FAP did not indicate it would lead to tenure or a continued probationary appointment. CP 1664:4-13. Dr. Doron's FAP cannot support a claim for promissory estoppel.

Although, Dr. Doron claims that he relied upon his ability to make the transition to non-accounting history research by collaborating with a colleague to co-author publications, Dr. Doron admits that he could not identify any promise breached that prevented him from fulfilling his publication requirements at EWU. CP 1458, 2438-41, 2755-56. Dr. Djatej remained willing to co-author and help Dr. Doron with publications. CP 2204-05, 2159, 2206. By Dr. Doron's own testimony, the only thing preventing him from exercising the option to co-author publications was his decision to pursue his own projects. Dr. Doron admitted that there was never any promise that he would get a renewed contract.¹⁴ The trial court correctly found:

I couldn't find anything in the record that indicated that Dr. Djatej ever broke that promise. . . . And Dr. Doron's employment didn't end because of any kind of broken promises by Dr. Djatej. It was based upon Dr. Doron's decision and refusal to engage in the development of the improvement plan.

CP 1569-70. Therefore, the trial court properly granted summary judgment on Dr. Doron's promissory estoppel claim.

¹⁴ Q. Was there ever a contractual promise that you would be renewed?

A. A contractual promise that I would be renewed for a third year? No, no one ever made that.

CP 2756:1-7.

E. The Trial Court Correctly Held That Dr. Doron's Wrongful Discharge Claim Must Fail As a Matter of Law

To establish a claim of wrongful discharge in violation of public policy, an employee must prove 1) the existence of a clear public policy (the clarity element); 2) that discouraging the conduct he engaged in would jeopardize that public policy (the jeopardy element); 3) that the (employee's public policy related) conduct caused the discharge (the causation element); and 4) if the employer presents evidence that its conduct was justified, that the justification was invalid or pretextual (absence of justification element). *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002). Wrongful discharge is a narrow exception to the doctrine of at-will employment. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). Accordingly, wrongful discharge is more difficult to prove than retaliation because plaintiffs must prove actual violations of law, policy, or regulation to sustain a claim of wrongful termination or discharge in violation of public policy. *Ellis v. Seattle*, 142 Wn.2d 450, 460-61, 13 P.3d 1065 (2000).

A wrongful termination action must fail "if the employer acted within the law." *Bott v. Rockwell Int'l*, 80 Wn. App. 326, 336, 908 P.2d 909 (1996). Both Washington and Federal law provide that the tort of wrongful discharge is not available to a college employee whose

employer does not renew a periodically renewable contract. *Guild v. St. Martin's College*, 64 Wn. App. 491, 496, 827 P.2d 286, review denied, 119 Wn.2d 1016, 833 P.2d 1390 (1992); *Lovelace*, 793 F.2d 419 (1st Cir. 1986); *Alberti*, 818 F. Supp. 2d at 467-68 (2011). “The tort of wrongful discharge in violation of public policy clearly applies only in a situation where an employee has been discharged.” *Roberts v. Dudley*, 140 Wn.2d 58, 76, 993 P.2d 901 (2000).

Federal courts have recognized the need for the courts not to interfere with discretionary academic decisions by universities, finding that a tenure decision of a university “is entitled to stand even if it appears to have been misguided” unless there is an unlawful motive for the action. *Sweeney v. Board of Trustees of Keene State College*, 604 F.2d 106, 112 (1st Cir.1979), cert. denied, 444 U.S. 1045 (1980); Cf. *Board of Curators v. Horowitz*, 435 U.S. 78, 87-91 (1978).

[C]ourts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge on subjective judgments regarding the applicant's academic excellence, teaching ability, creativity, contributions to the university community, rapport with students and colleagues, and other factors that are not susceptible of quantitative measurement. Absent discrimination, a university must be given a free hand in making such tenure decisions ... a federal court should not substitute its judgment for that of the university.

Kumar v. Board of Trustees, 774 F.2d 1, 12 (1st Cir.1985) (Campbell, C.J., concurring), *cert. denied*, 475 U.S. 1097, 106 S. Ct. 1496, 89 L. Ed. 2d 896 (1986); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 566-567, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Washington courts have abided by this same policy. *Maas v. Corp. of Gonzaga Univ.*, 27 Wn. App. 397, 403, 618 P.2d 106 (1980). Washington further provides statutory absolute immunity to University employees for conducting discretionary performance reviews:

(1) Employees, agents, or students of institutions of higher education serving on peer review committees which recommend or decide on appointment, reappointment, tenure, promotion, merit raises, dismissal, or other disciplinary measures for employees of the institution, are immune from civil actions for damages arising from the good faith performance of their duties as members of the committees. Individuals who provide written or oral statements in support of or against a person reviewed are also immune from civil actions if their statements are made in good faith.

RCW 28B.10.648. The legislature, in enacting this statute, intended to protect the discretionary process which is necessary in academia. RCW 28B.10.648.

Dr. Doron fails to establish an actual violation of law, policy, or regulation to sustain his claim of wrongful termination. Dr. Doron argues in his Complaint that he was “terminated without just cause.” Opening Brief p. 24. However, as correctly determined by the trial court, the

record is undisputed that Dr. Doron was not terminated and that he was in fact offered a renewed contract, which he rejected. CP 1565-67. By his own testimony, Dr. Doron made the voluntary decision to reject that offer and admitted he “was not terminated.” *Id.*, CP 1661, 1671, 1686-87, 2434.

Dr. Doron admitted that Provost Fuller’s conclusion that he had rejected EWU’s offer for a contract renewal was reasonable.

Q. Would it be reasonable, certainly, for Eastern Washington University to interpret your January 5th, 2011, e-mail as a refusal to engage in an Improvement Plan process?

A. I believe that's a reasonable conclusion for them, yes.

Q. (By Ms. Clemmons) And that’s what you intended to convey in this e-mail, is that correct?

A. Yes.

CP 1758:16-1759:3 [objections omitted]. The union also concluded Dr. Doron had rejected EWU’s offer of reappointment. CP 1087. Dr. Doron testified that he could not identify any action relating to his employment that was premised upon an improper or ill motive, or directed at him because he contacted his union. CP 2472-73, 2480, 2490-91. In addition, the record is undisputed that the recommendation to require an Improvement Plan occurred on October 18-25, 2010, and Dr. Doron did not contact the union until October 30, 2010, after the recommendation for an Improvement Plan was made. CP 394-404, 2060. The trial court correctly found that Dr. Doron did not establish any of the required

elements of a wrongful termination claim, and summary judgment on this claim was warranted.

F. Dr. Doron Has No Valid Claim For Attorney's Fees and Costs

Dr. Doron asserts that he is entitled to an award of attorney's fees and costs on the basis that he has a claim for lost wages. An employer's obligation to pay wages must arise from statute, ordinance or contract. *Allstot v. Edwards*, 114 Wn. App. 625, 633, 60 P.3d 601 (2002); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1203 (9th Cir. 2002). Dr. Doron had no right to a renewed contract in the future after his existing contract expired. Dr. Doron admits that he was paid in full for all work performed under the annual contract he had with EWU for the 2010/2011 academic year. His decision to reject the pending offer by EWU for the 2011/2012 academic year and accept alternative employment with CSUN does not allow a claim for lost wages against EWU. There is no contractual provision allowing Dr. Doron a claim for lost wages or attorney's fees in this case. Therefore, his claim for fees is without merit.

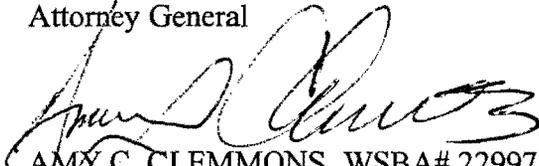
V. CONCLUSION

Based on the undisputed facts, summary judgment was appropriate as a matter of law. Appellant Doron's written contract clearly and unambiguously allowed EWU the option to require an Improvement Plan for the renewal of a probationary term. EWU acted consistent with the

plain terms of the contract, and Dr. Doron's employment ended because he rejected the proposed offer of renewal. Dr. Doron's claims for breach of contract, promissory estoppel and wrongful termination are without merit. Respondents respectfully submit that this Court should affirm the trial court's summary judgment dismissal.

RESPECTFULLY SUBMITTED this 13TH day of November, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding, State Respondent's Response Brief, was hand delivered and filed at the following addresses:

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