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No. 335283

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

KIM MIKKELSEN,
Plaintiff,

v.

PUBLIC UTILITY DISTRICT #1 of KITTITAS COUNTY, JOHN
HANSON, PAUL ROGERS, ROGER SPARKS, and CHARLES WARD,
Defendants.

**RESPONSE BRIEF OF PUBLIC UTILITY DISTRICT #1 OF
KITTITAS COUNTY, JOHN HANSON, PAUL ROGERS AND
ROGER SPARKS**

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TABLE OF CONTENTS

I. Introduction.....1

II. Statement of Facts.....2

III. Argument10

 A. Mikkelsen’s prima facie case fails because there is no showing of discriminatory intent.10

 B. Mikkelsen was fired for a non-discriminatory reason: “it just wasn’t working out.”17

 C. The reason for Mikkelsen’s termination was not pretextual.19

 D. Mikkelsen’s termination was proper under the District’s Corrective Action Policy.20

 1. Mikkelsen is not entitled to specific treatment under the Corrective Action Policy as a matter of law.22

 2. There is no justifiable reliance upon specific treatment.26

 E. There is no evidence to support the assertion that Mr. Ward was negligently hired, retained or supervised.27

 F. Ms. Mikkelsen’s claim of emotional distress is duplicative.....30

IV. Conclusion33

TABLE OF AUTHORITIES

Washington Cases

<i>Anica v. Wal-Mart Stores, Inc.</i> , 120 Wn. App. 481, 84 P.3d 1231 (2004).....	15
<i>Birge v. Fred Meyer, Inc.</i> , 73 Wn. App. 895, 872 P.2d 49, <i>review denied</i> , 124 Wn.2d 1020, 881 P.2d 253 (1994)	21
<i>Briggs v. Nova Servs.</i> , 135 Wn. App. 955, 147 P.3d 616 (2006), <i>aff'd</i> , 166 Wn.2d 794, 213 P.3d 910 (2009)	28
<i>Bulman v. Safeway, Inc.</i> , 144 Wn.2d 335, 27 P.3d 1172 (2001).....	21
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 864 P.2d 937 (1994).....	21
<i>Callahan v. Walla Walla Housing Authority</i> , 126 Wn. App. 812, 110 P.3d 782 (2005).....	14, 15
<i>Carle v. McChord Credit Union</i> , 65 Wn.App. 93, 827 P.2d 1070 (1992).....	17
<i>Chea v. Men's Wearhouse, Inc.</i> , 85 Wn. App. 405, 932 P.2d 1261, 971 P.2d 520 (1997), <i>review denied</i> , 134 Wn.2d 1002 (1998)	31
<i>Cluff v. CMX Corp., Inc.</i> , 84 Wn. App. 634, 929 P.2d 1136 (1997).....	13
<i>Dean v. Mun. of Metro. Seattle-Metro</i> , 104 Wn.2d 627, 708 P.2d 393 (1985).....	13
<i>Domingo v. Boeing Emps. Credit Union</i> , 124 Wn. App. 71, 98 P.3d 1222 (2004).....	12
<i>Drobny v. Boeing Co.</i> , 80 Wn. App. 97, 907 P.2d 299 (1995).....	26
<i>Duncan v. Alaska USA Fed. Credit Union, Inc.</i> , 148 Wn. App. 52, 199 P.3d 991 (2008).....	22
<i>Francom v. Costco Wholesale Corp.</i> , 98 Wn. App. 845, 991 P.2d 1182, <i>review denied</i> , 141 Wn.2d 1017 (2000).....	31

<i>Grimsby v. Samson</i> , 85 Wn.2d 52, 530 P.2d 291, 77 A.L.R.3d 436 (1975).....	31, 32, 33
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	12, 13
<i>Hatfield v. Columbia Fed. Sav. Bank</i> , 57 Wn. App. 876, 790 P.2d 1258 (1990), <i>review denied</i> , 121 Wn.2d 1030 (1993).....	14
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wn.2d 340, 172 P.3d 688 (2007).....	11
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 23 P.3d 440 (2001), <i>overruled on other grounds</i> 11, 17, 18	
<i>Hines v. Todd Pac. Shipyards Corp.</i> , 127 Wn. App. 356, 112 P.3d 522 (2005).....	19
<i>Kastanis v. Educ. Emps. Credit Union</i> , 122 Wn.2d 483, 859 P.2d 26, 865 P.2d 507 (1993)	11
<i>Kloepfel v. Bokor</i> , 149 Wn.2d 192, 66 P.3d 630 (2003).....	31, 32, 33
<i>Korslund v. DynCorp Tri-Cities Services, Inc.</i> , 156 Wn.2d 168, 125 P.3d 119 (2005).....	22
<i>Kuest v. Regent Assisted Living, Inc.</i> , 111 Wn. App. 36, 43 P.3d 23 (2002), <i>review denied</i> , 149 Wn.2d 1023 (2003).....	12
<i>LaPlant v. Snohomish Cnty.</i> , 162 Wn. App. 476, 271 P.3d 254 (2011).....	28
<i>Lawter v. Emp. Sec. Dep't</i> , 73 Wn. App. 327, 869 P.2d 102, <i>review denied</i> , 124 Wn.2d 1019 (1994).....	20
<i>McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006).....	11
<i>McClintick v. Timber Prods. Mfrs., Inc.</i> , 105 Wn. App. 914, 21 P.3d 328 (2001).....	24
<i>Parsons v. St. Joseph's Hosp. & Health Care Ctr.</i> , 70 Wn. App. 804, 856 P.2d 702 (1993).....	13

<i>Payne v. Sunnyside Cmty. Hosp.</i> , 78 Wn. App. 34, 894 P.2d 1379, <i>review denied</i> , 128 Wn.2d 1002 (1995).....	24
<i>Peck v. Siau</i> , 65 Wn. App. 285, 827 P.2d 1108 (1992).....	28
<i>Reid v. Pierce Cnty</i> , 136 Wn.2d 195, 961 P.2d 333 (1998).....	31
<i>Scrivener v. Clark College</i> , 181 Wn.2d 439, 334 P.3d 541 (2014).....	16, 19
<i>Sellsted v. Wash. Mut. Sav. Bank</i> , 69 Wn. App. 852, 851 P.2d 716, <i>review denied</i> , 122 Wn.2d 1018 (1993).....	13
<i>Snyder v. Med. Serv. Corp. of E. Wash.</i> , 145 Wn.2d 233, 35 P.3d 1158 (2001).....	31
<i>State v. Rice</i> , 120 Wn.2d 549, 844 P.2d 416 (1993).....	32
<i>Stewart v. Chevron Chem. Co.</i> , 111 Wn.2d 609, 762 P.2d 1143 (1988).....	21, 24
<i>Swanson v. Liquid Air Corp.</i> , 118 Wn.2d 512, 826 P.2d 664 (1992).....	22, 23, 26, 27
<i>Terry v. Emp. Sec. Dep't</i> , 82 Wn. App. 745, 919 P.2d 111 (1996).....	20
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	22
<i>Trimble v. Wash. State Univ.</i> , 140 Wn.2d 88, 993 P.2d 259 (2000).....	21, 25, 26
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	10
Federal Cases	
<i>Byers v. Dallas Morning News, Inc.</i> , 209 F.3d 419 (5th Cir. 2000)	15
<i>Carson v. Bethlehem Steel Corp.</i> , 82 F.3d 157 (7th Cir. 1996)	15

<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).....	10
<i>Cumpiano v. Banco Santander Puerto Rico</i> , 902 F.2d 148 (1st Cir. 1990).....	16
<i>Furnco Constr. Corp. v. Waters</i> , 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978).....	12, 13
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).....	11, 12, 17
<i>McKey v. Occidental Chem. Corp.</i> , 956 F. Supp. 1313 (S.D. Tex. 1997).....	19
<i>Nieto v. L&H Packing Co.</i> , 108 F.3d 621 (5th Cir. 1997).....	16
<i>O'Connor v. Consol. Coin Caterers Corp.</i> , 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996).....	15
<i>Pivirotto v. Innovative Systems, Inc.</i> , 191 F.3d 344 (3d Cir. 1999).....	15
<i>Texas Dep't of Cmty. Affairs v. Burdine</i> , 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).....	13
Statutes	
RCW 42.30	33
RCW 49.60.030(1).....	11
RCW 50.01.010	20
RCW 54.04.020	33
RCW 54.16.100	9
Rules	
CR 56(c).....	10
ER 802	32
ER 805	32
Additional Authorities	
Restatement (Second) of Torts § 46 (1965).....	31, 32

I. INTRODUCTION

Kim Mikkelsen was terminated from her employment with the Public Utility District #1 of Kittitas County (“the District”) because “it just wasn’t working out.” Mikkelsen and her supervisor, Charles Ward, had differing communication and management styles. After a complete and mutual communication breakdown, they lost trust in one another and it became clear that they could no longer work together. Relationships are complicated. Neither oil nor water is to blame; they just do not mix. Similarly, often neither party is at fault when “it’s just [not] working out.” Such was the case between Mikkelsen and Ward.

However, one final incident irrevocably undercut their working relationship and led to Mikkelsen’s termination. While Ward was on vacation and without his knowledge or input, Mikkelsen suggested to one of the District’s Commissioners that the Board send out an employee survey to evaluate, among other things, Ward’s performance as a manager. Ward was in the middle of union negotiations and his approval rating was “at an all-time low.” Ward believed that Mikkelsen’s suggestion of a survey was an attempt to get him fired. Ward fired Mikkelsen.

Mikkelsen further asserts that such an unceremonious end to a 27 year was unfair. She asserts that she should have received a lesser reprimand under the District’s Corrective Action Policy. However, the

policy, which was implemented by Mikkelsen herself, is expressly discretionary and promises no particular level of discipline.

There are no issues of fact regarding the circumstances which lead to Mikkelsen's termination. Mikkelsen was not fired because she was a woman or because she was over 40 years old. She was fired because it she had a personality conflict with her boss. Her termination was proper. The trial court correctly granted summary judgment on her claims.

II. STATEMENT OF FACTS

The Kittitas PUD is a municipal corporation that provides electrical service to Kittitas County and a small section of Yakima County. CP 64. It has approximately fifteen employees who together maintain more than 500 miles of line. CP 65. It provides power to more than 4,400 customers on a daily basis. *Id.*

The District is administered by a three-member Board of Commissioners. CP 65. The Commissioners set policy, approve plans, budgets and expenditures and review the District's operations. CP 65. The day-to-day operations, including hiring and firing of subordinate employees, are the responsibility of the General Manager. *Id.*

Kim Mikkelsen worked at the Kittitas PUD from 1984 until 2011. CP 75 -76. She was the Manager of Accounting and Finance until approximately July of 2009. Beginning in August 2009, Mikkelsen served

as the PUD's interim General Manager. CP 42. The Board encouraged her to apply for the position on a full-time basis and she had the support of at least one Commissioner. CP 43. However, Mikkelsen indicated that she was not interested in the General Manager position on a permanent basis. *Id.*

In the fall of 2009 the PUD began a nationwide search for a General Manager. In order to assist in a search of this scope and importance, the Board decided to hire an executive search consultant. CP 43. They reviewed proposals from five highly qualified executive search firms in order to determine who should assist them. CP 43. Each of the search firms had expertise in recruiting for public sector utilities. *Id.*

The Board ultimately hired Langley & Associates, Inc. Executive Search Consultants to assist them in their search to find appropriate candidates for the General Manager position. CP 43. Among the services that Langley & Associates offered was to "perform credential verification and thorough reference checks" on the finalists as well as "complete background checks." *Id.*

Langley & Associates selected nearly 30 highly qualified candidates. CP 43, 55. Langley & Associates and the Board reviewed the candidates' applications and submissions in detail. *Id.* From those top

candidates, seven were selected for personal interviews. CP 43. Charles Ward was selected as one of the final candidates. *Id.* Mikkelsen participated in the interview and selection process. CP 43, 57-58, 105.

Ward was the Manager of Engineering and Operations for High Plains Power in Riverton, Wyoming. CP 43. He had 29 years of experience in the power industry. *Id.* High Plains Power gave him a good recommendation. CP 126-127. He was offered the position of General Manager on or about May 14, 2010. CP 44. His official start date was July 5, 2010. *Id.*

When Ward began his employment with the Kittitas PUD, Mikkelsen resumed her job as finance manager. Ward began examining the organization for work force efficiency and legal compliance. CP 143. He re-negotiated a union contract. CP 145-146. And he also began an examination of the District's accounting and office practices. CP 143. Although they had gotten along well initially, Ward and Mikkelsen had different management and communication styles. Mikkelsen described her style as the interim manager as a collaborative "team leader." CP 125. She characterized Ward's management style as follows:

Chuck's management style is such that he has to have someone—he calls it accountability. I call it blame because he doesn't want anything to come back on him. So he has to have somewhere to structure his blame.

CP 110.

Mikkelsen admittedly is a “tell-it-like-it-is person.” CP 131. Ward allegedly characterized his communication style as “southern.” CP 115. It did not take long for the differences between Ward’s and Mikkelsen’s communication styles began to become apparent and affect their working relationship.

Mikkelsen also characterized Ward’s management style as “flash management”: “[h]e’d get a thought and he’d go do it.” CP 113.

Mikkelsen thought that Ward should have “stud[ied] things prior to making decisions that would impact [her].” CP 114. And to compound the problem, Mikkelsen did not work at the PUD full-time; she also ran a consulting business and would take frequent trips out of town. CP 76-77, 113. A point of friction between Ward and Mikkelsen is that Mikkelsen “want[ed] to be involved in the changes,” but she believed that Ward would hold meetings and change processes in her absence. CP 111-112. Ward asserted due to Ms. Mikkelsen’s flexible schedule, he never knew when Mikkelsen was going to be in the office. CP 144-148.

Mikkelsen testified that by June or July her relationship with Mr. Ward had “disintegrated substantially.” CP 123. Mikkelsen and Ward were not communicating and any trust that existed between the two of them was gone. CP 117. Mikkelsen asserts that Ward thought that

“everything’s a conspiracy” (CP 97), but also conceded some “paranoia on [her] part” as well. CP 123.

Mikkelsen indicated that she found some of Ward’s comments and behaviors offensive. He referred to the all-female office staff as “ladies” or “the girls.” CP 135. He once said that he would not mind wearing a uniform to work “as long as it wasn’t pink.” CP 86. In addition, Mikkelsen claims that every time Ward would sit down in her office, he would put his hand in his pocket and “rearrange his genitals.” CP 88. However, Mikkelsen never told Ward she found these comments or conduct offensive. CP 134-135.

Mikkelsen characterizes her conflict with Ward as a “guy-girl” thing. However, she also acknowledged that Ward’s management style, which included oversight over men and women, “obviously isn’t working.” CP 110. Mikkelsen asserted that Ward’s “management style was termination and insubordination.” CP 109. She asserted that “the verbs ‘insubordination’ and ‘termination’ [were] used more frequently in the past 12 months [of Mr. Ward’s tenure] than ever in my 27 years with the District and 33 in the industry.” CP 137. The use of the words insubordination and termination were used with reference to both men and women. CP 109, 137. Ward’s management style, according to Mikkelsen, “dissolve[d]” the morale of the District. CP 137. As a result,

Mikkelsen asserted that “several employees were seeking employment elsewhere,” referring to both men and women. CP 132-133. Ward’s approach to management was different than what the employees of the PUD were used to; however, neither his management style nor its effects were gender specific.

Mikkelsen also acknowledged a mutual and “general communication breakdown” between her and Ward. CP 114. They avoided one another. CP 229. Mikkelsen testified that she believed that Ward was working to destroy her “credibility” with the Board. CP 116, 152. She no longer trusted him. CP 123.

Mikkelsen brought complaints against a prior manager whom she also thought had “compromised” her “credibility” with the Board. CP 118-122. The prior manager left the District’s employ shortly after the complaints were lodged. CP 122. Ward began to believe that Mikkelsen was similarly attempting to orchestrate his departure from the PUD. CP 148. He believed his suspicion was confirmed in August 2011 when he learned that Mikkelsen sent Board Commissioners a survey to circulate among the employees regarding employee morale and Ward’s performance. CP 148-152.

Mikkelsen now attempts to minimize her involvement in the survey by asserting that she was only doing what Commissioner Hanson

asked her to do. Brief of Appellant, p. 30. However, Mikkelsen admitted that Commissioner Hanson asked for the survey only after she suggested the survey to him and told him that she had one in her files. CP 84 (“[W]hat I would suggest is a survey . . . I had one in my files.”)

Ward found the timing and circumstances of the proposed survey particularly troublesome. First, Ward had been in prolonged contract negotiations with the union. The negotiations had taken a toll on everyone and employee morale, along with Ward’s approval rating, was, as Mikkelsen testified, at an “all time low.” CP 124. Second, Ward was on vacation when Mikkelsen sent the proposed survey to the Board Commissioners. CP 95. And third, contrary to her assertion that she “never withheld information,” Mikkelsen did nothing to inform Ward of the survey. CP 82, 93-94. She sent the proposed survey to two of the Board Commissioners, but did not copy Ward on the e-mail. CP 93-96; see also CP 97.

During Mikkelsen’s tenure as the interim manager, she implemented a corrective discipline policy. The policy was still in effect during Ward’s tenure as general manager. It is prefaced with the following language:

[T]his is only a guideline. The District does not promise employees a specific formula of corrective action will be followed in every instance. Different circumstances

warrant different responses . . . the District may take the corrective action it decides is appropriate under the circumstance, which may involve any one or combination of the steps identified below, **up to and including immediate discharge without prior corrective action or notice.**

CP 346.

When Ward learned of the proposed survey, it “was the last straw.”

CP 152. He believed that Mikkelsen was under-cutting his authority and was going behind his back. *Id.*

Ward’s duties as General Manager of the Kittitas PUD are set forth by statute, among them are the duty to “hire and discharge employees under his . . . direction.” RCW 54.16.100. He believed that Mikkelsen was trying to get him fired. CP 150-151. He fired her first. On August 22, 2011, Ward fired Ms. Mikkelsen. CP 98. The reason for her termination was that “it just wasn’t working out.” CP 66.

Shortly after Mikkelsen was fired, the Kittitas PUD began using the services of a Certified Public Accountant, Genine Pratt. CP 65. Pratt was ultimately offered Mikkelsen’s former job, of Manager of Accounting and Finance. Pratt, a woman, was 51 years old at the time. CP 65.

At no time did Mikkelsen tell the Board that she thought she was being discriminated against on the basis of gender or age. Mikkelsen testified that she “mentioned to [Commissioner Hanson] that he [Ward]

was treating me differently” (CP 129) and told him of the “difficult times” she was having with Ward and their communication issues. CP 83.

However, Mikkelsen admits that she did not let any of the Commissioners know that she thought Ward was discriminating against her on the basis of gender or on the basis of age. CP 129. She testified that even though she could have raised these issues, she did not want to complain to the Commissioners because the last time she brought an issue to the Commissioners (a whistleblower action), it took “too much of a toll on me.” CP 129-130. The first that the Board heard about these claims was when Mikkelsen filed her claim against the Kittitas PUD. CP 129.

III. ARGUMENT

A. Mikkelsen’s prima facie case fails because there is no showing of discriminatory intent.

A trial court's order granting summary judgment is proper when the pleadings and affidavits before the court show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). “ ‘[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.’” *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

Mikkelsen's age and discrimination claims require her to establish discriminatory intent. *See* RCW 49.60.030(1). A plaintiff may establish a prima facie case of discrimination by either offering direct evidence of an employer's discriminatory intent, or by satisfying the *McDonnell Douglas*¹ burden-shifting test that gives rise to an inference of discrimination. *Kastanis v. Educ. Emps. Credit Union*, 122 Wn.2d 483, 491, 859 P.2d 26, 865 P.2d 507 (1993). A discrimination claimant will likely not have direct or "smoking gun" evidence of intent; the *McDonnell Douglas* test typically used for evaluating motions for summary dismissal and judgment as a matter of law in employment discrimination cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), *overruled on other grounds*, *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 354, 172 P.3d 688 (2007).

Under the *McDonnell Douglas* burden shifting test, Mikkelsen must first establish a prima facie case of discrimination. *Hegwine*, 162 Wn.2d at 354 (citing *Hill*, 144 Wn.2d at 180). To establish a prima facie case of age discrimination, Mikkelsen must show: (1) she was within the statutorily protected age group, (2) was discharged, (3) was doing

¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

satisfactory work, and (4) was replaced by a younger person. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 362, 753 P.2d 517 (1988) (citing *McDonnell Douglas*, 411 U.S. at 804). Similarly, to establish a prima facie case of gender discrimination, Mikkelsen must show: (1) she is a member of a protected class; (2) was discharged; (3) was doing satisfactory work; and (4) was replaced by a person of the opposite sex or otherwise outside the protected group. *Domingo v. Boeing Emps. Credit Union*, 124 Wn. App. 71, 80, 98 P.3d 1222 (2004) (citing *Kuest v. Regent Assisted Living, Inc.*, 111 Wn. App. 36, 43–44, 43 P.3d 23 (2002), *review denied*, 149 Wn.2d 1023 (2003)). Mikkelsen was not replaced by a person outside of either of the protected classes— she was replaced by a woman over 40. Because she cannot meet the requirements of the prima facie case, Mikkelsen asks the Court to omit the fourth step, the step that addresses discriminatory intent.

The prima facie case is merely a substitute for other kinds of evidence. “A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because [the courts] presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.’ ” *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 862, 851 P.2d 716 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978)), *review*

denied, 122 Wn.2d 1018 (1993). The factors considered in the *McDonnell Douglas* analysis “may vary depending on the individual case.” *Dean v. Mun. of Metro. Seattle–Metro*, 104 Wn.2d 627, 637, 708 P.2d 393 (1985) (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 257, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). Courts have been flexible in adapting the *McDonnell Douglas* test to address the facts in different cases. *See Burdine*, 450 U.S. at 253-55; *Grimwood*, 110 Wn.2d at 363 (*McDonnell Douglas* test to be used flexibly). The *McDonnell Douglas* test is not required if it makes the analysis needlessly complex, or if the employee chooses some other method to meet the burden of producing evidence. *See, e.g., Parsons v. St. Joseph’s Hosp. & Health Care Ctr.*, 70 Wn. App. 804, 809, 856 P.2d 702 (1993).

However, the use of the *McDonnell Douglas* and courts’ departure from the test are based in experience and logic. *See Grimwood*, 110 Wn.2d at 363 (citing *Furnco*, 438 U.S. at 577). There must be a reason to depart from the usual requirements. For example, because there is no replacement when termination occurs as a result of a reduction in force, the fourth part of the *McDonnell Douglas* test has been dispensed within reduction-in-force cases. *Cluff v. CMX Corp., Inc.*, 84 Wn. App. 634, 638, 929 P.2d 1136 (1997); *Hatfield v. Columbia Fed. Sav. Bank*, 57 Wn. App. 876, 790 P.2d 1258 (1990) (*overruled on other grounds by Burnside v.*

Simpson Paper Co., 123 Wn.2d 93, 864 P.2d 937 (1994)), *review denied*, 121 Wn.2d 1030 (1993). Regardless of the framework used and whether the claimant presents direct evidence of discriminatory intent or satisfies a modified *McDonnell Douglas* test, no court has simply done away with the claimant's burden of producing evidence of discriminatory intent.

Cases cited by Mikkelsen dispensing with the fourth/ replacement element of the prima facie do not relieve employees from the burden of producing sufficient evidence of discriminatory intent. In *Hatfield v. Columbia Federal Savings Bank*, the employee was terminated in a reduction in force; he was not replaced and therefore he could not show that he was replaced from someone outside the protected class. 57 Wn. App. at 881-83. The court did not require that Hatfield show replacement, but still required a showing discriminatory intent. The court in *Hatfield* posed the following question: "Has [claimant] come forward with evidence sufficient to create an inference that [employer] was motivated by discriminatory intent when it terminated him?" *Id* at 882.

In *Callahan v. Walla Walla Housing Authority*, the employee alleged that she was fired due to disability discrimination. 126 Wn. App. 812, 81-820, 110 P.3d 782 (2005). The *Callahan* court did not simply do away with the fourth element, but rather held that in order to satisfy the fourth element the employee must show that she was "discharged under

circumstances that raise a reasonable inference of unlawful discrimination.” *Id.* (citing *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 491, 84 P.3d 1231 (2004)). Similarly, the Third Circuit in *Pivrotto v. Innovative Systems, Inc.*, required “evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion.” 191 F.3d 344, 353 (3d Cir. 1999) (quoting *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996)) (internal quotation, brackets, and emphasis omitted).

In *Carson v. Bethlehem Steel Corp.*, the Seventh Circuit noted that an employee “may be able to show that his race or another characteristic that the law places off limits tipped the scales against him, without regard to the demographic characteristics of his replacement.” 82 F.3d 157, 158-59 (7th Cir. 1996). However, the court found that the claimant had not made such a demonstration. The reason the employee was terminated, he “was a mediocre employee who could not get along with co-workers and was let go to restore harmony within the department . . . is unrelated to race.” See also *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426-27 (5th Cir. 2000) (holding that replacement with member of same protected class is outcome-determinative if plaintiff does not present other evidence of discriminatory intent).

Nieto v. L&H Packing Co., 108 F.3d 621 (5th Cir. 1997), is cited by Mikkelesen for the proposition that “[w]hile . . . ‘one’s replacement is of another national origin ‘may help to raise an inference of discrimination, it is neither a sufficient or necessary condition.’” Brief of Appellant, p. 25 fn1. The *Nieto* court nonetheless found that “[n]ot only did Nieto fail to provide evidence that would allow a fact finder to infer that [the] decision was motivated by his national origin, but the record evidence provides substantial support to the contrary.” 108 F.3d at 623. Among the evidence to the contrary was the fact that Nieto was replaced by a member of the protected class. The court noted that “[w]hile not outcome determinative, this fact is certainly material to the question of discriminatory intent.” *Id.* at 624 (citing *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990)).

Mikkelsen asserts that she does not have to show that she was replaced by someone outside the class, but like *Nieto*, fails to provide evidence that would allow a fact finder to infer that Ward’s decision was motivated by gender. The burden at the prima facie case stage is merely a burden of production, but Mikkelsen has not presented any evidence to support an inference of discriminatory intent. *Scrivener v. Clark College*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014).

In fact, the evidence shows an absence of discriminatory intent. Mikkelsen's replacement was similar - a woman over 40. The difference? Her replacement did not have a "mutual" and "general communication breakdown" with the general manager. CP 114. Mikkelsen testified that she and Ward were unable to communicate and did not trust one another, but these difficulties were not confined to women. Ward had difficulties with employees at the District regardless of gender, leading to poor morale and several employees looking for other employment. CP 137. There is no evidence of discriminatory intent. Mikkelsen's case fails as a matter of law. See *Hill*, 144 Wn.2d at 181, 23 P.3d 440.

B. Mikkelsen was fired for a non-discriminatory reason: "it just wasn't working out."

Even if Ms. Mikkelsen has established a "prima facie case," it does not make this case sufficient for submission to a jury. *Carle v. McChord Credit Union*, 65 Wn.App. 93, 99, 827 P.2d 1070 (1992) (citations omitted). Rather, a prima facie case only creates a rebuttable presumption of discrimination sufficient to require that the employer come forward with evidence of a legitimate, nondiscriminatory reason for the discharge. *Id.* If the employer meets this burden of production, the plaintiff must then produce evidence of pretext. *McDonnell Douglas Corp.*, 411 U.S. at

804. If the plaintiff fails to make this showing, the defendant is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 182.

Ward had a legitimate, nondiscriminatory reason for discharging Ms. Mikkelsen: “it wasn’t working out.” This is undisputed. Mikkelsen testified that there was a “mutual” and “general communication breakdown” with her general manager. CP 114. Mikkelsen testified that there was a mutual lack of trust coupled with a thought that “everything’s a conspiracy” by Ward (CP 97) and “paranoia on [Ms. Mikkelsen’s part].” CP 123. Mikkelsen testified that Ward’s management style impacted not just her, and not just women, but “dissolve[d]” the morale of District employees, both men and women. *Id.* She claimed that as a result of Mr. Ward’s management style, “several employees were seeking employment elsewhere,” referring to both men and women. CP 137. 132-133. Ward believed that Mikkelsen sought to highlight his supposed managerial short-comings to the Board of Commissioners through an employee survey.² CP 150-151. Mikkelsen did not tell Ward of the proposed survey. CP 82, 93-94. Lack of communication, lack of trust, and self-preservation are all legitimate non-discriminatory reasons for Mikkelsen’s termination. The District has met its burden.

² The survey addressed a variety of employment issues under eight different headings. CP 249-267. The bulk of the questions, 33%, fall under the heading “General Manager.” *Id.*

C. The reason for Mikkelsen’s termination was not pretextual.

Mikkelsen must then show pretext. There are five ways for a plaintiff to demonstrate pretext. *Scrivener*, 181 Wn.2d at 447. She can demonstrate pretext by showing the District’s allegedly legitimate reason for the employment action (1) had no basis in fact, (2) was not really the motivating factor for the decision, (3) was not temporally connected to the adverse employment action, (4) was not a motivating factor in employment decisions for similarly situated employees, or that (5) discrimination was a substantially motivating factor in the employment action. *Id.* at 447–48.

“Speculation and belief are insufficient to create a fact issue as to pretext. Nor can pretext be established by mere conclusory statements. . .” *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 372, 112 P.3d 522 (2005) (quoting *McKey v. Occidental Chem. Corp.*, 956 F. Supp. 1313, 1319 (S.D. Tex. 1997)). One co-worker’s observation that the conflict was a “guy-girl thing” (CP 223) is hearsay and a conclusory statement. It does not establish pretext.

Similarly, the District’s response to Mikkelsen’s unemployment application, that she was terminated “without cause” (CP 402) does not show pretext. Mikkelsen asserts that “without cause” means “without

reason” and asserts that this supposed inconsistency demonstrates pretext. Brief of Appellant, p. 32.

Mikkelsen was fired for a reason: “it just wasn’t working out.” The District correctly characterized Mikkelsen’s termination as a termination “without cause.” “The Employment Security Act provides unemployment benefits to help those who have become unemployed through **no fault of their own.**” *Terry v. Emp. Sec. Dep’t*, 82 Wn. App. 745, 749, 919 P.2d 111 (1996) (citing RCW 50.01.010) (emphasis added); *Lawter v. Emp. Sec. Dep’t*, 73 Wn. App. 327, 331, 869 P.2d 102, *review denied*, 124 Wn.2d 1019 (1994)). The fact that it “just wasn’t working out” was “mutual.” It was not Mikkelsen’s fault. It was not Ward’s fault. They simply could not work together.

The reason given for her termination is based in undisputed fact, is consistent with the reason given at the time of her termination, and is supported by Mikkelsen’s own testimony. It is not pretext, “it just wasn’t working out.”

D. Mikkelsen’s termination was proper under the District’s Corrective Action Policy.

The District’s Corrective Action Policy provided Ward sufficient flexibility to terminate Mikkelsen’s employment. Washington courts regularly resolve employee handbook cases on summary judgment. *E.g.*,

Trimble v. Wash. State Univ., 140 Wn.2d 88, 94–95, 993 P.2d 259 (2000) (employee handbook language was discretionary and not a promise for specific treatment as a matter of law); *Birge v. Fred Meyer, Inc.*, 73 Wn. App. 895, 900, 872 P.2d 49 (employee handbook did not create promise for specific treatment in situations outside defined reasons for immediate discharge as a matter of law), *review denied*, 124 Wn.2d 1020, 881 P.2d 253 (1994); *see also Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613–14, 762 P.2d 1143 (1988) (employer's layoff policy was discretionary and did not create a binding promise as a matter of law).

To establish an equitable reliance claim, the employee must prove (1) that a statement in an employee manual or handbook or similar document amounts to a promise of specific treatment in specific situations, (2) that the employee justifiably relied on the promise, and (3) that the promise was breached. *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340–41, 27 P.3d 1172 (2001). Whether or not an employer has made a promise specific enough to create an obligation and to justify an employee's reliance thereon is a question of fact. *See Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 104–05, 864 P.2d 937 (1994). However, “if reasonable minds cannot differ as to whether language sufficiently constitutes an offer or a promise of specific treatment in specific circumstances, as a matter of

law the claimed promise cannot be part of the employment relationship.”

Swanson v. Liquid Air Corp., 118 Wn.2d 512, 522, 826 P.2d 664 (1992).

1. Mikkelsen is not entitled to specific treatment under the Corrective Action Policy as a matter of law.

A specific treatment claim is not a species of express or implied contract, but instead is based on a justifiable reliance theory. *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005). She must show “(1) a promise of specific treatment in a specific situation; (2) justifiable reliance on the promise by the employee; and (3) a breach of the promise by the employer.” *Id.*

Mere “general statements of company policy” that do not “amount to promises of specific treatment” are not binding. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984). “Courts have found a question of fact as to the existence of a promise for specific treatment where the language of an employee manual could be construed to **require** the employer to utilize a certain process or procedure.” *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 62, 199 P.3d 991 (2008) (citing *Thompson*, 102 Wn.2d at 233 and *Swanson v. Liquid Air Corp.*, 118 Wn.2d at 525) (emphasis added).

For example, in *Thompson v. St. Regis Paper Co.*, an employee who was forced to resign for “stepp[ing] on somebody's toes” relied on a

handbook providing that terminations “ **will** be processed in a manner which will at all times be fair, reasonable, and just.” *Thompson*, 102 Wn.2d at 221–22 (emphasis added). The court also paraphrased an internal memoranda quoted by the employee as “stating termination of controllers **will** be discussed before the fact between the corporate controller and divisional operations managers.” *Id.* at 222 (emphasis added). The court concluded that it was “unable to determine the effect of the manual in relation to the employment relationship” and “whether any statements therein amounted to promises of specific treatment in specific situations.” *Id.* at 233. It went to trial.

Similarly, in *Swanson v. Liquid Air Corp.*, a memorandum of working conditions contained an **exclusive** list of five types of conduct sufficient for discharge without prior notice. 118 Wn.2d at 516 (emphasis added). The memorandum also provided: “[i]n all other instances of misconduct, at least one warning, **shall** be given.” *Id.* (emphasis added). Given these mandatory provisions, the court held that material issues of fact remained as to whether the employer promised specific treatment in that situation. *Id.* at 525.

In *Payne v. Sunnyside Cmty. Hosp.*, the employer's policy manual disclaimed any intent to change the at-will employment status of its employees but nevertheless set forth **mandatory** progressive discipline

procedures. 78 Wn. App. 34, 35-37, 894 P.2d 1379, *review denied*, 128 Wn.2d 1002 (1995). The court held these inconsistencies, coupled with the employer's oral statements that progressive discipline was a mandatory policy, created a genuine factual question to defeat a motion for summary judgment. *Id.* at 42-43.

Contrary to the cases relied upon by Mikkelsen, *Thompson*, *Swanson* and *Payne*, the District's Corrective Action Policy contains no terms such as "shall," "will," or "must" to indicate the disciplinary procedures were mandatory. *See McClintick v. Timber Prods. Mfrs., Inc.*, 105 Wn. App. 914, 21 P.3d 328 (2001) (citing *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613-14, 762 P.2d 1143 (1988)).

Mikkelsen asserts the Corrective Action Policy's progressive discipline is mandatory because the policy states that it "**must** be administered with due consideration . . . of employee rights" including those that derive from contract such as the union contract. Appellant's Brief, p. 40-41 (citing CP 344). "Due consideration" simply required Ward to think before he acted. The requirement of "due consideration" in no way limited Ward's choice as to the appropriate course of action after consideration. As to what level of discipline is the appropriate level after due consideration the policy is replete with terms such as "should," "typically," "generally" and "may" indicating that the procedures are set

forth are advisory and leave substantial room for discretionary application.

CP 344-348. For example, the policy provides:

Verbal warning . . . is **generally** used in cases of minor offenses. CP 346

Written warning . . . is **generally** used for intermediate offenses. *Id.*

Probation . . . **may** be imposed . . . [but] does not guarantee later employment or limit our discretion with respect to later corrective action of discharge. CP 347.

Discharge is **generally** used in cases of major offenses. . . *Id.*

In addition, the policy contains numerous references to it being discretionary or a “guideline.” CP 343, 344, 346. It is prefaced with the following language:

[T]his is only a guideline. The District does not promise employees a specific formula of corrective action will be followed in every instance. Different circumstances warrant different responses . . . the District may take the corrective action it decides is appropriate under the circumstance, which may involve any one or combination of the steps identified below, **up to and including immediate discharge without prior corrective action or notice.**

CP 346.

Courts have found similar language to be discretionary and not a promise of specific treatment as a matter of law. For example, in *Trimble v. Washington State University*, a professor who had been denied tenure claimed that the university breached a faculty manual that described the

tenure review process as follows: “The tenured members of the unit are expected to establish how the evaluation is to be accomplished (for example, in an open meeting, in written evaluations submitted directly to the department chair, or by other appropriate means).” 140 Wn.2d 88, 95, 993 P.2d 259 (2000). The court held that this language was discretionary and not a promise for specific treatment as a matter of law. *Id.*

Similarly, in *Drobny v. Boeing Co.*, 80 Wn. App. 97, 907 P.2d 299 (1995), the court held that an employee was as a matter of law not entitled to progressive discipline procedures outlined in an employee handbook where a subsequent provision provided: “It is not always necessary ... that the discipline process ... include every step. Some acts ... warrant more severe discipline on the first or subsequent offense.” *Id.* at 102.

The District’s Corrective Action Policy did not make any promises as a matter of law.

2. There is no justifiable reliance upon specific treatment.

“It is generally recognized that an employer can disclaim what might otherwise appear to be enforceable promises in handbooks or manuals or similar documents.” *Swanson*, 118 Wn.2d at 526. A disclaimer “must be effectively communicated to an employee in order to be effective.” *Id.* at 519. This case is unique in that the policy was drafted (or selected) by the claimant. CP 317. Mikkelsen, had she wanted or

intended the policy to be mandatory, and not merely a guideline, was uniquely situated to choose the language of the policy. Rather, while the interim general manager she chose a flexible policy because “as the general manager . . . I wanted some protection.” CP 417. The policy she chose and submitted to the Board for implementation is not mandatory and does not promise specific treatment, but rather allows “immediate discharge without prior corrective action or notice.” CP 346. Mikkelsen as the proponent of the policy, had reasonable notice of the disclaimer.

A disclaimer may be negated by later, inconsistent representations by the employer. *Swanson*, 118 Wn.2d at 532. But the fact that Mikkelsen herself once used progressive discipline with a lineman, a non-managerial employee under union contract (CP 419), and Ward also once used progressive discipline with a lineman, a non-managerial employee under a union contract (CP 317), does not give rise to justifiable reliance of similar mandatory treatment for management personnel under different circumstances. The trial court appropriately dismissed Mikkelsen’s claims under the Corrective Action Policy.

E. There is no evidence to support the assertion that Mr. Ward was negligently hired, retained or supervised.

Mikkelsen also claims that the District, and the Commissioners themselves, were negligent in hiring, supervising and retaining Ward. “A

negligent supervision claim requires showing: (1) an employee acted outside the scope of his or her employment; (2) the employee presented a risk of harm to other employees; (3) the employer knew, or should have known in the exercise of reasonable care, that the employee posed a risk to others; and (4) that the employer's failure to supervise was the proximate cause of injuries to other employees.” *Briggs v. Nova Servs.*, 135 Wn. App. 955, 966–67, 147 P.3d 616 (2006), *aff'd*, 166 Wn.2d 794, 213 P.3d 910 (2009).

Negligent hiring and negligent retention and supervision claims share the same elements; the only difference is the timing of the employer's alleged negligence. *Peck v. Siau*, 65 Wn. App. 285, 288-89, 827 P.2d 1108 (1992). With negligent hiring, the negligence occurs at the time of hiring; with negligent retention and supervision, the negligence occurs during the course of employment. *Id.*

The claim for negligent supervision is redundant against the District because if Mikkelsen proves Ward discriminated against her on the basis of gender and age, the District will also be liable. If Mikkelsen fails to prove discrimination, defendants are not liable, even if their hiring, retention and supervision was negligent. *See LaPlant v. Snohomish Cnty.*, 162 Wn. App. 476, 480-81, 271 P.3d 254 (2011).

More importantly, the facts do not support a finding of negligent hiring, retention or supervision. The District used the services of a recruiter to find candidates for the general manager position. Ward had the requisite experience, was properly vetted, and received positive recommendations. When asked what else the Board could have done when hiring Mr. Ward, Ms. Mikkelsen stated that she would have liked to have seen a more thorough investigation of Ward's prior employers, but stated that "I don't think this is the board's fault. I think it's the headhunter." CP 127-128. Mikkelsen admits that Ward's references were checked, but those references did not tell the truth. CP 126-127. Relying upon the services of a professional recruiter and relying upon the veracity of references is reasonable. The District did not negligently hire Mr. Ward and no reasonable jury could conclude otherwise.

The facts bear out similarly with respect to the negligent retention and negligent supervision claims. At its core, the claim requires that Mikkelsen show that the District knew or had reason to know that Ward posed a risk of harm to others. Mikkelsen on appeal claims to "[do] everything within her power to bring issues to the Board both before and after defendant Ward's hiring." Brief of Appellant p. 49.

Mikkelsen asserts without specificity or citation to the record that there were "concerns" prior to Ward's hire and that the Board recognized

the “deficiencies” by placing a bonus component to his compensation. Brief of Appellant, p. 49. The only concern identified by Mikkelsen was his short tenure at prior jobs. CP 556. Because the recruiting process is time consuming and expensive the District offered a bonus to incentivize a longer tenure with the District. However, the bonus component in no way acknowledges or implies knowledge that Ward posed a risk of harm to others. Furthermore, Mikkelsen acknowledged that the District and its Commissioners had no reason to know of Mikkelsen’s alleged difficulties with Ward. CP 128-130. At no time did Mikkelsen tell the Board that she thought she was being discriminated against on the basis of gender or age, even though she acknowledged that she could have done so. *Id.* There is no evidence that at any time the District or the Commissioners knew or should have known about Ward’s purported unfitness.

Mikkelsen’s claims of negligent hiring, supervision and retention must be dismissed because they are duplicative of the underlying discrimination claims and there is insufficient facts to support the claims.

F. Ms. Mikkelsen’s claim of emotional distress is duplicative.

Mikkelsen also asserts that her termination “without investigation” and subsequent remarks about her termination made on the internet and reported by the local newspaper support a claim of outrage. CP 101-103.

To prevail on a claim for the tort of intentional infliction of emotional distress, also known as outrage,³ Mikkelsen must prove that (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actually resulting in severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195–96, 66 P.3d 630 (2003) (citing *Reid v. Pierce Cnty*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998)). Our Supreme Court adopted these elements from the Restatement (Second) of Torts § 46 (1965). *Kloepfel*, 149 Wn.2d at 196 (citing *Grimsby v. Samson*, 85 Wn.2d 52, 59–60, 530 P.2d 291, 77 A.L.R.3d 436 (1975)).

Mikkelsen relies upon the same facts to support her outrage claim as she does to support her discrimination claims. A plaintiff may not maintain a separate and duplicative claim for emotional distress based on the same facts that support a claim under the law against discrimination. *See Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 864–65, 991 P.2d 1182, *review denied*, 141 Wn.2d 1017 (2000). In *Chea v. Men's Wearhouse, Inc.*, the Court found that separate claims for discrimination and emotional distress were proper because the two did not overlap. 85 Wn. App. 405, 413–14, 932 P.2d 1261, 971 P.2d 520 (1997); *review*

³“Outrage” and “intentional infliction of emotional distress” are synonyms for the same tort. *Kloepfel v. Bokor*, 149 Wn.2d 192, 193 n. 1, 66 P.3d 630 (2003) (citing *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 250, 35 P.3d 1158 (2001) (applying elements of outrage to claim for intentional infliction of emotional distress)).

denied, 134 Wn.2d 1002 (1998). In *Chea*, the claimant alleged that he was grabbed by the lapels and cursed at in *addition*, to being discriminated against on the basis of his race.

Mikkelsen does not present evidence of additional conduct that would serve as the basis of her emotional distress claim. She asserts that after she was fired comments were made about her termination. Her outrage claims overlap her discrimination claims.

Even if the dissemination of information regarding her termination is sufficient to support an independent cause of action, there is no evidence of record that information regarding her termination was actually disseminated. The alleged newspaper articles and board minutes are not in the record. To the extent Mikkelsen asserts written minutes or an article quoted a Commissioner, it is hearsay.⁴

Furthermore, any dissemination regarding news of her termination would not be behavior “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Kloepfel*, 149 Wn.2d at 196 (quoting *Grimmsby*, 85 Wn.2d at 59, and Restatement (Second) of Torts § 46, cmt. d) (emphasis omitted). The tort “does not

⁴ Hearsay is not admissible unless it fits under a recognized exception to the hearsay rule. ER 802. In instances of multiple hearsay, each level of hearsay must be independently admissible. ER 805; *State v. Rice*, 120 Wn.2d 549, 564, 844 P.2d 416 (1993).

extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’ In this area [,] plaintiffs must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration.” *Kloepfel*, 149 Wn.2d at 196 (quoting *Grimsby*, 85 Wn.2d at 59).

The District is a municipal corporation established under RCW 54.04.020. As such it is subject to the Open Public Meetings Act, chapter 42.30 RCW, and the press is often present. Mikkelsen’s termination was news. CP 44. Mikkelsen’s suit against the District and her claims against the defendants in this action was also news. *Id.* The fact that her termination was “news” is insufficient to support a separate common law claim of outrage.

IV. CONCLUSION

Mikkelsen is a woman and was over 40 years old when she was fired, but the reasons for her termination were unrelated to gender or age. The District’s actions did not violate its expressly discretionary Corrective Action Policy nor did it violate the duty of reasonable care. The District respectfully requests that the Court affirm the order of the trial court.

DATED this 26th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 26th day of October, 2015, I caused a true and correct copy of the foregoing document, "Response Brief of Public Utility District #1 of Kittitas County, John Hanson, Paul Rogers and Roger Sparks," to be mailed by U.S. Mail, postage prepaid, to the following counsel of record:

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