

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Apr 02, 2013, 3:09 pm
BY RONALD R. CARPENTER
CLERK

No. 88323-8

E *CPB*
RECEIVED BY E-MAIL

SUPREME COURT
OF THE STATE OF WASHINGTON

DUANE STORTI, and a class of faculty members,

Petitioners,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

**AMICUS MEMORANDUM OF AMERICAN ASS'N OF
UNIVERSITY PROFESSORS IN SUPPORT OF
PETITION FOR REVIEW**

Mary Danford Forsgaard
WSBA No. 12640
Young deNormandie, P.C.
1191 Second Avenue, Suite 1901
Seattle, Washington 98101
(206) 224-9818
Attorneys for Amicus AAUP/UW, WSU

 ORIGINAL

TABLE OF CONTENTS

INTEREST OF AMICI..... 1

REASONS FOR GRANTING REVIEW 2

1. The UW’s Faculty Salary Policy Was Not An Unenforceable
“Illusory Promise.”2

2. The Faculty Had a Right to Rely on the UW’s Express
Commitment That the Salary Policy Was a “Guarantee” and a
“Commitment.”7

CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

<i>Alder v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004).....	8
<i>Caritas v. DSHS</i> , 123 Wn.2d 391, 869 P.2d 28 (1994).....	6, 7
<i>Carlstrom v. State</i> , 103 Wn.2d 391, 694 P.2d 1 (1985).....	5, 7
<i>Goodpaster v. Pfizer, Inc.</i> , 35 Wn.App. 199, 665 P.2d 414 (1983).....	4
<i>Hearst Communications, Inc.</i> , 154 Wn.2d 493, 115 P.2d 262 (2005).....	8
<i>Kennewick Irrig. Dist. v. U.S.</i> , 880 F.2d 1018 (9 th Cir. 1989).....	6
<i>Multicare Med. Center v. DSHS</i> , 114 Wn.2d 572, 780 P.2d 124 (1990).....	1
<i>Navlet v. Port of Seattle</i> , 164 Wn.2d 818, 194 P.3d 221 (2008).....	3
<i>Nostrand v. Little</i> , 58 Wn.2d 111, 361 P.2d 551 (1961).....	1
<i>Powell v. Republic Creosoting Co.</i> , 172 Wash 155, 19 P.2d 919 (1933).....	3, 5
<i>Roberts v. King County</i> , 107 Wn.App 806, 27 P.3d 1267 (2001), <i>review denied</i> , 145 Wn.2d 1024 (2002).....	1
<i>Scott v. J.F. Duthie</i> , 125 Wash., 470, 216 Pac. 853 (1923).....	5
<i>Simon v. Riblet Tramway Co.</i> , 8 Wn.App 289, 505 P.2d 1291 (1973).....	5
<i>Spooner v. Reserve Life Ins. Co.</i> , 47 Wn.2d 454, 287 P.2d 735 (1955).....	4
<i>Swanson v. Liquid Air Corp.</i> , 118 Wn.2d 522, 826 P.2d 664 (1992).....	8
<i>Taylor v. Shigaki</i> , 84 Wn.App. 723, 930 P.2d 340 (1997).....	6
<i>Tobin v. DLI</i> , 145 Wn.App. 607, 187 P.3d 780 (2008).....	8

Other Authorities

1 *Corbin on Contracts*
 § 53.16 at 388..... 3

2 *Corbin on Contracts*
 § 56.2 at 217..... 3

Rules

RAP 13.4 (b)(2) 10

RAP 13.4(b)(4) 10

INTEREST OF AMICI

Amicus American Association of University Professors,
Washington State University and the University of Washington chapters (AAUP), along with affiliates, represent thousands of faculty members at colleges and universities across the country. AAUP strongly believes in the importance of the system of shared governance in colleges and universities. In this system, the faculty and administration jointly participate in institutional governance, including faculty members at colleges and universities working together to adapt institutional regulations concerning the faculty.¹ Here, in 1999, the University of Washington Faculty Senate and the UW Administration adopted a Faculty Salary Policy and accompanying regulations to solve a long-term problem with faculty salaries.² The issue was that limited funds for salary raises were being spent on raises for AAUP recruitment (new hires) and retention (retaining “stars”), allowing no raises for rank-and-file faculty.

Accordingly, under the UW’s shared governance system (which is, in part, a special form of rulemaking process), the Faculty Senate and Administration agreed to change salary priorities. All faculty would first receive a minimum 2% “merit” raise (still less than a cost-of-living raise

¹ *E.g., Nostrand v. Little*, 58 Wn.2d 111, 132, 361 P.2d 551 (1961).

² The Faculty Salary Policy is enforced both as a regulation and as a contract. *Multicare Med. Center v. DSHS*, 114 Wn.2d 572, 591, 780 P.2d 124 (1990); *Roberts v. King County*, 107 Wn.App 806, 815, 27 P.3d 1267 (2001), *review denied*, 145 Wn.2d 1024 (2002).

would typically be) and the remaining funds would be used for retention and recruitment raises. As a condition of these “merit” raises, the Faculty Senate agreed to a new system of merit reviews applicable to all faculty, including tenured faculty.

When the Faculty Salary Policy was suspended in 2002, the Faculty Senate voted 99-1 against the suspension, but the Administration nevertheless refused to provide the 2% merit raise until it was ordered by the Superior Court, which held the Policy’s requirement of merit raises was a unilateral contract. A few years later (in 2009), however, the UW again unilaterally suspended the Policy, even before the Faculty Senate could vote. The court of appeals majority held in this second case that the Faculty Salary Policy was unenforceable, an illusory promise.

The court of appeals majority’s logic would lead to the destruction of shared governance, since an administration could always disregard promises made through the shared rulemaking process. This means the only Washington universities providing regular faculty raises would be those with collective bargaining such as Western Washington.

REASONS FOR GRANTING REVIEW

1. The UW’s Faculty Salary Policy Was Not An Unenforceable “Illusory Promise.”

Here, the UW purported to revoke the promise of a 2% merit raise after substantial work had been performed. Revoking a unilateral contract

that has been accepted by substantial performance is indisputably a breach of contract. *Navlet v. Port of Seattle*, 164 Wn.2d 818, 848, 194 P.3d 221 (2008) (“a unilateral contract becomes enforceable and irrevocable when performance has occurred in response to a promise”); 1 *Corbin on Contracts* § 53.16 at 388; 2 *Corbin on Contracts* § 56.2 at 217; *Powell v. Republic Creosoting Co.*, 172 Wash 155, 159-60, 19 P.2d 919 (1933). The UW’s only way out of the breach, therefore, was to argue that the promise was illusory in the first place; it was an *illusory* promise. The court of appeals majority agreed, holding that the promise was illusory. Pet. Rev. p. A-8-9, 11.

Although the majority could only point to language in the Policy making the 2% merit raises mandatory, Pet. Rev., p. A-8, n. 6, it argued that three things cumulatively turned the mandatory promise into an optional one. The majority said the reevaluation provision, coupled with the Regents’ authority to change a regulation, made the Policy’s “shall be awarded” language an illusory promise, Pet. Rev. p. A-11, and that the promise concerned a raise, not a bonus. *Id.*, pp. A-11 -12.

The court of appeals specifically relies on the illusory promise cases, Pet. Rev., p. A-11, under which an offer of compensation to employees is made optional or discretionary (*i.e.*, an illusory promise) *only* when the employer *explicitly* stated the “promise” was optional or

discretionary. In *Spooner v. Reserve Life Ins. Co.*, 47 Wn.2d 454, 457-59, 287 P.2d 735 (1955), for example, the company expressly told the employees, in the same bulletin announcing a bonus, that it was “voluntary” and could be “withheld . . . by the employer with or without notice.” 47 Wn.2d at 457. This Court explained that the “ordinary meaning of ‘withhold’ is ‘to refrain from paying that which is due’” and the employer told the employees “in plain English that the company could withhold or decrease the bonus with or without notice.” *Id.* at 459.

In *Goodpaster*, similarly, the employer “*expressly* stated that the bonus payment was *discretionary*.” *Goodpaster v. Pfizer, Inc.*, 35 Wn.App. 199, 200-03, 665 P.2d 414 (1983) (emphasis added). There was “no material evidence that the promise to pay the bonus was definite and certain” and the promise was therefore unenforceable because it contained provisions “which make its performance optional or entirely discretionary by the promisor.” *Id.* at 203, *citing Spooner*, 47 Wn.2d at 458.

The court of appeals majority failed to notice that the Faculty Salary Policy’s “reevaluation” provision language is very far removed from the provision in *Spooner* expressly allowing the employer to withhold a bonus, with or without notice, and very far from the language in *Goodpaster* that expressly said the bonus was discretionary. As the court of appeals majority recognized, the reevaluation clause did not say

“retroactively revoke.” The court of appeals distinguish the unilateral contract cases — *Powell*, 172 Wash. at 159-60, *Scott v. J.F. Duthie*, 125 Wash., 470, 471, 216 Pac. 853 (1923); and *Simon v. Riblet Tramway Co.*, 8 Wn.App 289, 292-94, 505 P.2d 1291 (1973) — by saying those cases involved bonuses, not raises. Pet. Rev. p. A-12.

But doubting its illusory promise logic, the court of appeals majority also said the promised raises here are somehow different from promised bonuses in those cases because the Regents could amend a regulation on 60 days’ notice, before the raise was to begin. Pet. Rev., p. A-9; Resp. Br., pp. 2-18. This is directly contrary to this Court’s decision in *Carlstrom v. State*, 103 Wn.2d 391, 394-95, 694 P.2d 1 (1985), where a collective bargaining agreement made *future percentage pay raises* between the community college faculty and the State generally subject to present and future acts of the Legislature, but did not expressly make the contractual salary increase contingent on legislative funding.

In the absence of language *explicitly* making a promised salary increase contingent on legislative appropriations, this Court in *Carlstrom* declined to allow the State to escape its promise of future raises, ruling the State unconstitutionally impaired the contract when it enacted legislation abrogating the future percentage raises. 103 Wn.2d at 394-95. The Court also specifically rejected the State’s economic argument, saying

“[f]inancial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts.” *Id.* at 396.

Moreover, because construing a contract to be an illusory promise renders the “contract” meaningless, such a construction is highly disfavored in contract law. A “court will not give effect to interpretations that would render contract obligations illusory.” *Taylor v. Shigaki*, 84 Wn.App. 723, 730, 930 P.2d 340 (1997) citing *Kennewick Irrig. Dist. v. U.S.*, 880 F.2d 1018, 1032 (9th Cir. 1989) (“[p]reference must be given to reasonable interpretations as opposed to those that are unreasonable, or that would make the contract illusory”). The court of appeals majority disregarded this principle.

Furthermore, the court of appeals majority said that the UW Regents and President have general authority to change provisions in the Faculty Code on 60 days’ notice, and the revocation thus occurred before the raise went into effect. Pet. Rev., p. A 9; Resp. Br. 2-18. So it held the enactment could be retroactive, applicable to the faculty’s performance that had already occurred.

This Court has rejected precisely this precise argument. In *Caritas v. DSHS*, 123 Wn.2d 391, 869 P.2d 28 (1994), DSHS argued — just as the University argues here — that it could retroactively modify an existing contract because the contract said the parties’ rights and obligations were

subject to the laws of Washington “as now existing or hereafter adopted or amended[.]” 123 Wn.2d at 404, 406. DSHS argued that this clause in its contracts with health care providers meant that “any contractual rights were subject to future alteration by the State Legislature.” *Id.* at 406. DSHS also argued that a “statutory reservation of powers clause” allowing DSHS to adopt rules also authorized it to modify the contract to change the payment amounts for work performed. *Id.* at 406 and n. 8. And see *Carlstrom, supra*, pp. 5-6.

Caritas explained that “states or agencies may put potential contractors explicitly on notice that the terms of a public contract are subject to retroactive adjustment as the whims or the budgetary necessities of the state may dictate.” *Id.* at 406 n. 9. But “our case law requires such reservation clauses to be made *explicitly* contingent on future acts of the Legislature with retroactive effect.” *Id.* at 406 (emphasis by this Court), *citing Carlstrom*, 103 Wn.2d at 393-95, 398-99. And “[b]ecause neither the contract nor the statute explicitly mentions future retroactive modification of pre-existing or already performed contracts, we hold they are insufficient to reserve the power to retroactively modify the contracts between DSHS and [the health care providers].” *Caritas*, at 407.

2. The Faculty Had a Right to Rely on the UW’s Express Commitment That the Salary Policy Was a “Guarantee” and a “Commitment.”

Additionally, because the Faculty Salary Policy requiring 2%

minimum raises is part of the Faculty Handbook, this Court's decision on the requirements of an effective disclaimer in an employee handbook apply here. This Court, in *Swanson v. Liquid Air Corp.*, 118 Wn.2d 522, 526-35, 826 P.2d 664 (1992), held that a disclaimer of otherwise contractual promises in an employment handbook must be conspicuous, unequivocal and express. *Id.* The reevaluation provision is definitely not such an express and unequivocal disclaimer.

Contemporaneous statements made during the course of contract formation are important in determining the parties' intent. *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 352-53, 103 P.3d 773 (2004); *Hearst Communications, Inc.*, 154 Wn.2d 493, 502-04, 115 P.2d 262 (2005). The same consideration is given to legislative history of regulations, to which the UW correctly compares the Faculty Code (Resp. Br. 25). *Tobin v. DLI*, 145 Wn.App. 607, 616 n. 7, 187 P.3d 780 (2008). The court of appeals majority erred by completely ignoring the many contemporaneous statements by the UW administration about the mandatory effect of the "shall" language in the Policy.

The UW faculty had a right to rely on the administration's representations as to the meaning of the promise in the Faculty Salary Policy to negate the effect of a disclaimer (if there actually were one). *Swanson, supra*, 118 Wn.2d at 532-33, 534 (a disclaimer may be negated

by employer representations). The UW gave the faculty very strong contemporaneous assurances that the language stating meritorious faculty “shall be awarded a regular 2% merit salary increase” was intended to be mandatory. UW President McCormick and Provost Huntsman repeatedly told the faculty that the Faculty Salary Policy “guarantees” meritorious faculty a “minimum” 2% annual salary increase:

- In March 1999 Provost Huntsman told the Faculty Senate Executive Committee that a “major emphasis in the salary policy will guarantee minimum awards for career progression.” CP 272.
- In March 1999 President McCormick told the Faculty Senate that “[r]ecent discussions have been focused on articulating a new faculty salary policy founded on the principle that meritorious faculty shall be ensured regular merit increases.” CP 279.
- In September 1999 President McCormick told the Board of Regents that the new faculty salary policy “provide[s] for minimum annual salary increases for meritorious faculty.” CP 296.
- In October 1999 Provost Lee Huntsman told the UW’s Deans, Directors, and Chairs that under the new salary policy in the Faculty Code “all faculty members who are judged by their colleagues to have performed meritoriously will receive at least some merit pay increase each year” and “this regular annual merit increase will be 2 percent.” CP 300.
- In January 2000, when President McCormick signed EO 64, he said that it “is in this Executive Order that I make the commitment to a 2% salary adjustment every year for faculty who are deemed meritorious.” CP 303(emphasis added).

These statements by President McCormick and Provost Huntsman all show that, consistent with Faculty Salary Policy’s mandatory language (“shall be awarded”), the Policy “guarantees” a “minimum” 2% annual

salary increase. The court of appeals majority erred in disregarding the UW's very strong contemporaneous assurances that it was making an actual promise, not an illusory promise.

CONCLUSION

The unilateral contract issues here are extremely important to the system of shared governance at colleges and universities. Absent these contract principles, the administration can unilaterally and retroactively revoke the express promises it negotiates with its faculty. Review should be granted under RAP 13.4(b)(4) and (b)(2).

RESPECTFULLY SUBMITTED this 2nd day of April, 2013.

YOUNG DENORMANDIE, P.C.

By:



Mary Danford Forsgaard,

WSBA No. 12640

Attorneys for Amicus AAUP/UW, WSU

CERTIFICATE OF SERVICE

I, Judy Williamson declare under penalty of perjury that I am over the age of 18 and competent to testify and that the following parties were served as follows:

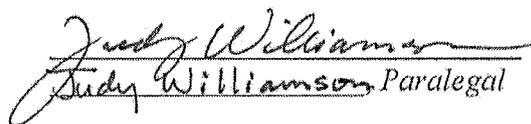
On Tuesday, April 2, 2013, I served via email and USPS regular mail a copy of the Amicus Memorandum of American Ass'n Of University Professors in Support of Petition for Review to:

Louis Peterson/Mary Crego/Michael Ewart
Hillis Clark Martin & Peterson
1221 Second Avenue, Ste 500
Seattle, WA 98101
ldp@hcmp.com
mec@hcmp.com
mje@hcmp.com
Attorneys for Respondent

Philip A. Talmadge
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
phil@tal-fitzlaw.com

Stephen K. Strong
Bendich Stobaugh & Strong PC
701 Fifth Ave, Ste 6550
Seattle WA 98104
skstrong@bs-s.com
Attorneys for Appellants

DATED: April 2, 2013, at Seattle, Washington.


Judy Williamson Paralegal

OFFICE RECEPTIONIST, CLERK

To: Judy Williamson
Cc: Mary Forsgaard
Subject: RE: Electronic Filing: Storti v. UW Case No. 88323-8

Rec'd 4-2-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Judy Williamson [<mailto:jwilliamson@ydnlaw.com>]
Sent: Tuesday, April 02, 2013 3:04 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Mary Forsgaard
Subject: Electronic Filing: Storti v. UW Case No. 88323-8

Greetings:

Please find the following pleading for filing today:

- Amicus Memorandum of American Ass'n of University Professors in Support of Petition for Review.

Case Name: Duane Storti v. University of Washington
Case No. 88323-8

Filed by:
Mary D. Forsgaard
WSBA No. 126040
Young deNormandie, P.C.
206-805-2707
mforsgaard@ydnlaw.com

Thank you.

Best Regards,
Judy Williamson
Paralegal
Young deNormandie, P.C.
1191 2nd Avenue, Suite 1901
Seattle, WA 98101
206-805-2709
jwilliamson@ydnlaw.com

CONFIDENTIALITY NOTE: This e-mail contains information belonging to the law firm of Young deNormandie, P.C., which may be privileged, confidential and/or protected from disclosure. The information is intended only for the use of the individual entity named above. If you think that you have received this message in error, please e-mail the sender. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited.