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COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

2009 AUG -5 PM 3:05 *E*

No. 63251-5-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

ROZANNA CAROSELLA, NATALIE PRET, et al.

Appellants,

v.

UNIVERSITY OF WASHINGTON,

Respondent

RESPONDENT'S BRIEF

Michael Madden
WSBA #8747
Bennett Bigelow & Leedom, P.S.
1700 7th Avenue, Suite 1900
Seattle, WA 98101
(206) 622-5511
Attorneys for Respondent

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I. INTRODUCTION

In 2002, the legislature did not appropriate any funds for state employee pay raises.¹ In the absence of state funding, the University of Washington's Board of Regents decided not to provide pay raises for University faculty and staff out of internal funds. Several years later, two class actions were filed, one on behalf of certain faculty in academic departments and the second on behalf of part-time lecturers in academic departments, alleging that provisions in the University's Handbook, termed the Faculty Salary Policy ("FSP"), obligated the University to provide pay raises in academic year 2002-03 to all "faculty" who had undergone a successful merit review during academic year 2001-02. Both of these cases were settled.

The issue presented by this appeal, which was not presented or decided in the earlier cases, is whether Extension Lecturers employed in the University's Educational Outreach ("EO") program to teach English as a Second Language courses are members of the "faculty" for purposes of the FSP. The Handbook defines "faculty" as those who hold one of 12 specifically enumerated titles. Extension Lecturer is not one of the listed positions. CP 638. In another section, however, the Handbook references "persons giving instruction in extension classes" and states that when such

¹ Ch. 371, Secs. 601(2)(a), (c) and (f) L. 2002.

persons teach courses for academic credit, they must have “qualifications equivalent to those required for the teaching of regular University classes.” CP 674. Thus, even when teaching courses for academic credit, Extension Lecturers do not hold “faculty” positions. Instead, their qualifications to teach credit courses are reviewed by the relevant academic department.

In addition to these clear and unambiguous Handbook provisions, the record shows that appellants have repeatedly admitted that Extension Lecturers are not “faculty.” They have asked the University’s Faculty Senate to initiate amendments to the Handbook that would confer faculty status. When that effort failed, they petitioned the Public Employment Relations Commission for permission to organize as a non-faculty bargaining unit. When that petition was denied, they sought legislative authorization to organize as a non-faculty bargaining unit. And, finally, appellants have conceded that they were unaware of the terms of the FSP in 2001 and 2002 and that the FSP did not induce them to stay on the job.

These factors led the superior court to dismiss their claims on summary judgment. CP 973-75. Thirty-five pages into their brief, appellants finally, but obliquely, address these points. They say that, although Extension Lecturers do not fit within the “explicit” definition of faculty set forth in the Handbook, they fit an “implicit definition,” which

they posit as functional equivalence between their positions and some of the positions enumerated in the Handbook's list of faculty positions.²

This argument misses the mark because the legal theory under which appellants are proceeding requires proof of a promise of specific treatment in specific circumstances. *Trimble v. Washington State University*, 140 Wn.2d 88, 94-95, 993 P.2d 259 (2000). Thus, even if it were shown that the job of an Extension Lecturer teaching basic English to non-English speakers is functionally equivalent to that of a Lecturer teaching courses for credit in law, mathematics or engineering, the undisputed fact remains that the salary policy extends only to persons holding enumerated titles, of which Extension Lecturer is not one. Accordingly, the trial court should be affirmed.

II. STATEMENT OF CASE

A. Procedure

Plaintiff/Appellants Rozanna Carosella and Natalie Pret represent a class consisting of:

All persons whom the University employed during both the 2001-2002 and 2002-2003 academic years as an Extension Lecturer, whether Full- or Part-Time, on an annual or quarterly appointment, and who were not deemed unmeritorious during the 2001-2002 academic year, and whose rate of compensation the University did not augment by a two percent merit increase for the 2002-2003 academic year.

² Appellants' Brf. at 36.

CP 123-26.

In their complaint (filed April 24, 2008), they alleged that the University violated the FSP when, due to budget constraints, it did not provide them with a two percent salary increase for the 2002-2003 academic year raise. CP 1-9. They sought relief in the form of a monetary award representing two percent of their 2001-2002 salaries and, for those subsequently employed, an adjustment of current salary and benefits to make-up for the “missed” raise in 2002-2003. *Id.*

After discovery, the case was decided on cross-motions for summary judgment. CP 527, 549. Neither side contended that there were genuine issues of material fact for trial. *Id.* After hearing argument, the superior court entered an order on March 6, 2009 denying appellants’ motion and granting the University’s. CP 123-26. Appellants timely appealed.

B. Facts

1. The University Handbook

The University of Washington operates on a “shared governance” model, whereby much of the responsibility for operations has been delegated from the Board of Regents to the president and faculty.³ As a

³ See RCW 28B.20.200 (“[t]he faculty of the University of Washington shall consist of the president of the university and the professors and the said faculty shall have charge of the immediate government of the institution under such rules as may be prescribed by the board of regents”).

part of shared governance, a “Faculty Code” has been adopted, which is found in Chapters 21-29 of the University Handbook.⁴ Originally implemented during the 1950s, the Faculty Code sets forth University policies and procedures concerning hiring, promotion, removal, and compensation of the faculty members who are subject to its terms. The Code, which has been jointly developed by the faculty and administration, subjected to a faculty vote, and approved by the president of the University, defines, in part, the terms and conditions of the faculty’s employment. *See Nostrand v. Little*, 58 Wn.2d 111, 131, 361 P.2d 551 (1961) (tenured faculty subject to termination for refusing to sign loyalty oath contractually entitled to hearing under UW Handbook, “which form[s] a part of their contracts of employment”).

The FSP came about as a result of amendments to the Faculty Code and a presidential Executive Order, which were adopted in 1999 and 2000. As amended, Handbook § 24-70 (CP 692) specifies that all “faculty” who have successful merit reviews and who return to the University in the following year shall receive “initial minimum equal-percentage” salary increases. Executive Order (“EO 64”), which was

⁴ Appellants refer interchangeably to the University Handbook, which has broad application to the entire University community, and the Faculty Code, which was adopted by the faculty and applies only to faculty as defined therein. But, their complaint alleges claims based solely on the Faculty Code, which comprises only Part II of Volume 2 of the Handbook. Handbook Vol. 2, Introduction, Organization of Materials. CP 637. The entire Faculty Code is included in the record at CP 638-73.

promulgated by the President of the University and incorporated into the Code following approval of FSP by the faculty, specifies a two percent minimum annual raise for faculty who undergo a successful merit review. CP 690-92. EO 64 also contains a “Funding Caution” which states in part: “Without the influx of new money or in the event of decreased State support, a reevaluation of this Faculty Salary Policy may prove necessary.”⁵ CP 692.

The FSP sets forth specific requirements for the merit review process. It also states that faculty members not deemed meritorious shall receive no raise and, after two successive non-meritorious ratings, shall be subject to further review and a performance improvement plan. CP 683-85. Altogether, the FSP represents a trade-off, whereby faculty (including tenured faculty) subjected themselves to detailed annual reviews of their performance, and the risk of not receiving a meritorious rating, in return for a qualified offer of an annual minimum salary increase for those who perform meritoriously.

2. *Appellant’s Employment*

Rozanna Carosella and Natalie Pret are representatives of a class of approximately 75 persons who were employed as Extension Lecturers in

⁵ Because of the current economic crisis, by order of the University’s President and Board of Regents’ resolution, the provisions for minimum merit increases have been suspended for the 2009-011 fiscal biennium. Handbook § 24-57, n. 3 (Partial Suspension of Executive Order 64) and n. 4 (Board of Regents resolution), available at <http://www.washington.edu/faculty/facsenate/handbook/Volume2.html>.

the English Language Program (“ELP”), which is sub-unit of EO, on a quarterly or annual basis during the 2001-2002 and 2002-2003 academic years to teach ESL courses. The majority of the teaching duties of the ELP Extension Lecturers consisted of noncredit classes offered to nonmatriculated students that do not form part of the approved curriculum of the University. They also taught remedial, college-preparatory credit classes in English, which did not count toward graduation. CP 127-28. They have never held an appointment in any academic department, school or college at the University.⁶ CP 129; CP 7; CP 622.

For the relevant years, the employment relationship between the University and the class was governed by individual appointment letters, which each class member received on a quarterly or annual basis, and by the ELP’s “Operations Manual.” CP 128. The Operations Manual was developed by the ELP’s Director and staff. CP 128. It is not part of the University Handbook. CP 853. Neither the appointment letters nor the Operations Manual made any promise of a minimum annual raise or incorporated the FSP. CP 853-54; 367; 423; 615; 633.

⁶ The academic organization of the University’s Seattle campus consists of 18 schools and colleges, each headed by a dean; e.g., Arts & Sciences, Engineering, Medicine, Law, etc. In most schools and colleges, there are a number of academic departments, headed by a chair. Others, like Law, are not divided into departments and are termed “undepartmentalized.” CP 127-28.

3. *Application of the Faculty Salary Policy*

Appellants claim that the FSP's reference to "all faculty" includes Extension Lecturers. The plain language of the definitional sections and context of the FSP require that this contention be rejected.

- a. The Handbook's definition of 'Faculty' excludes Extension Lecturers.

Handbook § 21-31 states that "[t]he University faculty consists of" persons who hold 12 enumerated academic and administrative titles, including "lecturers," "senior lecturers" and "principal lecturers." Handbook § 24-34 states the qualifications for appointment to faculty positions, and also describes a long list of modifiers, such as "acting," "affiliate," "adjunct," "clinical," "emeritus," "joint," and "visiting." Neither the list of primary faculty titles nor the list of modifiers includes "Extension Lecturers" or "Extension."

Handbook § 24-36 (adopted in 1956 as an original part of the Faculty Code) separately references "[p]ersons giving instruction in extension classes," and states that when such persons teach classes offered for academic credit, they shall have "scholarly and professional qualifications equivalent to those required for the teaching of regular University classes." Thus, the Handbook specifically categorizes "persons giving instruction in extension classes" (*i.e.*, the appellants) as other than "faculty" for purposes of the Handbook and states that, when teaching

courses for academic credit, “qualifications equivalent” to regular faculty re required, but not an actual appointment to the faculty.⁷

Appellants largely ignore these provisions of the Faculty Code, and instead look outside of the Code to the University’s administrative classification of “affiliate faculty” as “Academic Personnel.”⁸ They contend that inclusion of Extension Lecturers as “affiliate faculty” signifies that they are “faculty” for purposes of the FSP. Appellants’ Brf. at 22-23. Appellants fail to disclose, however, that the University’s grouping of “academic personnel” includes multiple titles that are clearly not included within the Faculty Code’s definition of “faculty;” *e.g.*, librarians, graduate teaching and research assistants, medical school interns and residents, and post-doctoral fellows, and that, in categorizing academic personnel, the University counts EO personnel separately from “faculty.” CP 855. 858-59.

⁷ Without any citation to the record, appellants’ assert that “the English Department has exercised approval over ELP’s course offerings [and] those who teach ELP’s courses.” App’s Brf. at 8. Under Handbook § 24-36, the English department must approve the course content and the qualifications of persons who teach ESL courses for academic credit. This is not the equivalent of appointing an Extension Lecturer to the English department’s faculty. CP 129. See also, CP610 (Ms. Carosella states that English department “has become newly involved in our programs. . . but I don’t really know what’s going on. . .” None of the appellants held appointments in the English department. *Id.*

⁸ This classification is found in V. 4, Part IV, Ch. 1, § 1 of the University Handbook, which is not a part of the Faculty Code. It has no bearing on the meaning of the terms used in the Faculty Code.

b. Review procedures under the FSP do not apply to Extension Lecturers.

Faculty status alone is not sufficient to render a person eligible for a merit raise under the FSP. In addition to holding an eligible faculty position, the FSP prescribes specific procedures that must be followed in order to be eligible for a merit increase:

- Handbook §24-70.B.1, entitled “Faculty Salary System: Policy and Principles,” states: “A salary increase ... shall be granted to provide an initial equal-percentage salary increase to all faculty following a successful merit review (conducted in accordance with the procedures of Section 24-55).”
- EO 64 states: “The University’s Salary Policy is founded upon the principle that individual salary decisions must be based on merit as assessed by a performance review conducted by faculty and administrative colleagues. ... The University commits to support salary adjustments based on performance evaluations for those faculty deemed meritorious after a systematic review by faculty colleagues, department or unit head, Dean, and Provost.”
- Handbook §24-55 specifies that annual reviews of merit and salary must be conducted at four distinct levels: (a) by the faculty of the academic department, school or college who are superior in rank; (b) by the chair of the department; (c) by the dean of the school or college; and (d) by the President of the University. Handbook § 24-57 details the scope of the review, and requires written documentation of the process, which requires consideration of “the faculty member's cumulative record, including contributions to research/scholarship, teaching, and service, and their impact on the department, school/college, university, and appropriate regional, national, and international communities.”

The record shows that, in 2001, the procedures for reviewing and adjusting the salaries of Extension Lecturers were entirely different. Per the ELP Operations Manual, Extension Lecturers were evaluated solely by the program director, who was not himself an Extension Lecturer or a member of the faculty of any academic department. CP 367-75, 853. Further, the procedures under the Operations Manual did not require peer review or input from higher level administrators, nor was there any process for addressing those not performing meritoriously, other than by non-renewal. *Id.*

Both class representatives admitted that they had never been subjected to the type of review process that the FSP requires:

Q. This is an excerpt of the University handbook, parts of Chapter 24 governing the appointment and promotion of faculty members. And we've included Section 24-55 which is the procedure for salary increases based upon merit, Section 24-57 procedural safeguards, and finally Section 24-70 which is faculty salary system policy and principles. And the question, ... is, you're aware now, are you not, that the merit review process that has been employed by the ELP does not involve annual review of performance by your peers, the fellow faculty members?

A. Yes.

CP 616.

Q. And do you know whether other extension lecturers or any group of them were called upon to conduct a

review of your performance as a part of this merit review process as described in the manual?

A. I don't think so.

CP 869.

Q. Have you ever gone through a merit review by your colleagues, other extension lecturers?

A. No, I have not.

CP 628.

Despite these admissions, in their reply brief in support of summary judgment, appellants suggested that the ELP's process for reviewing Extension Lecturers was somehow modified in 1999 (before the FSP was finalized) to meet the new Faculty Code requirements. CP 957. Appellants submitted an artfully crafted declaration from Bill Harshbarger, former ELP director, with their reply brief in support of their motion for summary judgment. In the declaration, Mr. Harshbarger related that, in 1999, changes to the faculty "salary system" did away with a former "step" system for raising salaries in favor of a merit raise policy and that he was directed by Vice Provost Szatmary to follow the new merit system. CP 947-49. Mr. Harshbarger went on to state that he told one of the class members, Alison Stevens, who was serving as a representative of her fellow Extension Lecturers, that he would no longer be the sole reviewer for merit evaluations and that a committee needed to be formed for that purpose. CP 948-49. Pointedly, however, Mr.

Harshbarger never indicated that any kind of peer review system was actually put in place, and Ms. Stevens disclaimed any knowledge about how the review process may have been reconstituted as a result of these alleged discussions. *Id.*; CP 502. Ms. Carosella then chimed in, stating that “since 2003,” a review committee consisting of the Senior Director and various program directors conducted merit reviews for Extension Lecturers. CP 508-09. Ms. Carosella further asserted that all but one of these reviewers “at one time or another,” carried the instructional title Extension Lecturer. *Id.* In fact, however, none of these individuals were Extension Lecturers at the time when they were involved in conducting reviews. And, more importantly, there is no evidence that any kind of peer review process was in place in 2001-02. CP 853.

Appellants now assert that this record establishes “mapping” between the review process for Extension Lecturers and the FSP’s requirements.⁹ Whether this term is intended to suggest functional equivalence or something else, the record is undisputed that Extension Lecturers were never subjected to merit review by fellow Extension Lecturers, deans or the University’s president. Further, no one has disputed the assertion, confirmed by Vice Provost Szatmary, that decisions on individual salary increases for ELP Extension Lecturers in 2001 were

⁹ Appellants’ Brf. at 12.

made by Mr. Harshbarger, rather than as a result of a vote by Extension Lecturers.

Therefore, even if there was some effort to broaden the process for reviewing Extension Lecturers in the ELP, the undisputed evidence shows that the FSP's essential requirements of a vote by faculty peers on individual merit, and a separate review by a chair, dean or the president, all of which are required to qualify for a merit raise under the FSP, were lacking.

c. Other critical aspects of the faculty personnel system are inapplicable to Extension Lecturers.

Other key pieces of the faculty personnel system, set forth in the Handbook and described below, are also inapplicable to Extension Lecturers. These provisions are closely related to the processes required by the FSP. The fact that they do not apply to Extension Lecturers further demonstrates why plaintiffs are not treated as "faculty" under the Handbook.

i. Appointments.

Handbook § 25-51 sets forth a multi-step process for hiring faculty, which entails "[f]ull and discriminating consideration by [the] faculty of the scholarly and professional character and qualifications of a proposed appointee." *Id.* When a need is identified within an academic department

1. A committee of faculty conducts a search for suitable candidates, determines their qualifications, and evaluates all data related to the appointment.
2. When the committee finds an appropriate candidate, its recommendation is transmitted to the chair of the department.
3. The chair then forwards all information about the candidate to the voting members of the department. Handbook § 24-52.
4. If a majority of the voting faculty vote in favor of the candidate, their recommendation is forwarded to the appropriate dean, along with the chair's recommendation.
5. The dean then makes a decision and transmits his/her recommendation to the President.
6. The President makes a recommendation to the Board of Regents. *Id.* at §§ 24-51 and 24-52.
7. The Regents approve the appointment. Handbook V. 1, Part III, Ch. 1.3.

In contrast to this multi-step, peer-driven process for hiring faculty, candidates for Extension Lecturer positions are recruited and evaluated by the ELP program director and final decisions are made by the Vice Provost for Educational Outreach, who may extend an offer, which is reflected in a simple appointment letter. CP 362.

ii. Renewals.

Handbook § 24-41.C specifies that full-time lecturers, senior lecturers and principal lecturers may be appointed for periods of up to five years, while part-time lecturers may be appointed for up to one year.

Under Handbook § 24-53, renewal of any lecturer by an academic department, school or college requires the voting members of a department to decide whether to recommend renewal or termination of an appointment, based on a thorough review of the faculty member's applicable record of teaching, scholarship and service. Then, the chair of the department forwards the recommendation to the dean, along with the chair's independent recommendation. The dean makes the final decision on renewal and informs the faculty member about the decision. *Id.* The procedures for renewing Extension Lecturers are entirely different. The ELP Director alone made the decision, based on four factors: evaluation of teaching performance; teaching-related duties; participation in program operations; and professional relationships. CP 367.

4. Appellants Have Acknowledged That They Are Not Faculty.

During the 2006-2007 academic year, appellants and other Extension Lecturers approached the University's Faculty Senate, the elected body that represents the faculty, to discuss amending the University Handbook to grant faculty status to Extension Lecturers. CP 629. Ms. Carosella and Ms. Pret attended meetings of the Faculty Council on Educational Outreach ("FCEO"), which is an arm of the Faculty Senate, to support that effort. CP 130. The minutes of those meetings show that they attended as "guests," not as "faculty." CP 425-458. In May

2007, both Ms. Carosella and Ms. Pret attended a meeting in which the Vice Provost for Educational Outreach David Szatmary explained that ELP personnel are not UW faculty and are not covered by the Faculty Code. CP 425-430. At subsequent meetings, other Extension Lecturers complained about not having faculty status. CP 431-458. Ms. Carosella and Ms. Pret participated in those meetings and expressed similar views. *Id.*

In November 2007, Ms. Carosella again attended a meeting of the FCEO. CP 130-131. Her comments at the meeting, which are reflected in the minutes, indicate that she understood that ELP Lecturers are not faculty, but she expressed the view that the Faculty Code should be amended to change their status:

Our dilemma or ongoing plight is that we are neither fish nor fowl in the university. Our primary function is teaching and we teach a wide range of courses and students.... The perception is that we mainly teach ABCs or grammar.... Our goal is to become fully enfranchised members of the community.... We would like to be in a position where we can work directly with the faculty as faculty ourselves.

CP 451.

The Chair of the FCEO explained that, in order for Extension Lecturers to be subject to the Faculty Code, their titles would have to be changed from Extension Lecturers to one of the regular faculty titles, or the Faculty Code would have to be amended to include Extension

Lecturers as faculty. *Id.* No action was taken by the Senate to grant faculty status to Extension Lecturers, however. CP 131.

Frustrated by these events, in the spring of 2008, some Extension Lecturers, including appellants, sought to organize themselves into a separate, non-faculty bargaining unit. CP 612; 630-31. In a letter to the University dated May 2008, the American Federation of Teachers on behalf of the Extension Lecturers acknowledged that Extension Lecturers are not faculty under Ch. 41.76 RCW, and requested that the University recognize them as a separate class for purposes of collective bargaining:

Our understanding is that the University of Washington has repeatedly maintained to its Extension Lecturers that they are not considered faculty, and we take the university at its word that these workers are not faculty that fall under chapter 41.76 RCW in public 4-year institutions of higher education. We request that the University voluntarily recognize the UW Extension lecturers as a separate class for purposes of collective bargaining.

CP 631; 635.

When their petition was denied, and while this case was pending before the superior court, appellants testified before the Legislature in support of a bill that would have permitted Extension Lecturers to organize as a non-faculty bargaining unit under Chapter 41.56. CP 929-930. Consistent with plaintiffs' earlier statements, the Senate Bill Report

indicates that its supporters agree that Extension Lecturers “are not faculty.” *Id.* The bill subsequently failed to pass.¹⁰

5. *Appellants were not Induced to Remain on the Job by the Promise of Pay Raise.*

As discussed below, in order to prevail on their promise of specific treatment claim, appellants must establish justifiable reliance, which requires them to show that the alleged promise “induced them to remain on the job and not seek other employment.” *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 230, 685 P.2d 1081 (1984). The appellants in this case admitted that they were completely unaware of the terms of the revised FSP, and specifically unaware of the provision for a two percent annual merit raise, until years after the fact. CP 611, 627. Thus, as Ms. Carosella candidly admitted during her deposition, they could not have been induced to remain on the job in 2002-03 by the promise of a pay raise that they did not know about. CP 613.

C. Other Litigation

Appellants devote the largest portion of their brief to discussion of two other cases involving the FSP and the purported impact of settlements in those cases on their claims. Neither case has any bearing on the issues presented. The *Storti* litigation, which was brought in 2004 by a tenured professor in the College of Engineering, did not address whether

¹⁰ See <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5986&year=2009>.

Extension Lecturers fall under the FSP or whether the justifiable reliance element could be established. The only question upon which a ruling was issued involved the application of the “Funding Caution” contained in EO 64. CP 779-784.

The *Help* litigation, which was brought in 2006, arose because part-time lecturers in academic departments were omitted from the *Storti* class. The omission was based on the belief of *Storti* class counsel and the University administration that, although part-time lecturers holding academic appointments are defined as “faculty” in Handbook § 21-31, they had not been subject to the FSP’s merit review process and therefore could not qualify for merit raises under the FSP. CP 565-66, 855-56.¹¹ After the *Help* litigation was filed, however, it was discovered that some schools, colleges and departments followed inconsistent practices with respect to merit reviews and raises for part-time lecturers. Accordingly, the case was settled on a compromise basis. CP 855-56. No rulings were issued by the court on the application of the FSP to Extension Lecturers.

¹¹ Contrary to appellants’ assertion at pp. 21 and 35 of their brief, the University did not take the position in *Storti* that part-time academic lecturers were not faculty under the Handbook definition. As its pleadings from the *Storti* case clearly show, the exclusion of part-time lecturers from the *Storti* class was based on the lack of annual merit reviews. CP 829. The University has consistently insisted that, in order to be eligible for a merit raise under the FSP, a person must both hold one of the “faculty” positions enumerated in Handbook § 21-31 and also undergo a successful merit review according to the processes specified in the FSP.

III. ARGUMENT

A. Summary of Argument

As repackaged for this appeal, appellants' primary contention appears to be that highly experienced class counsel in the *Storti* case and their own counsel, who represented the class in *Help*, neglected to include Extension Lecturers in the class definition, and that this Court simply ought to correct those alleged oversights and allow them the benefits of the FSP. The record demonstrates, however, that the earlier litigation did not decide whether Extension Lecturers are covered by the FSP. Moreover, examination of the relevant Handbook sections demonstrates quite clearly why Extension Lecturers were excluded from the classes in the earlier cases. Accordingly, appellants' claim must stand on its own merits.

In that regard, appellants have conceded that their claim is governed by the standard set forth in *Korlund v. Dynacorp*, 156 Wn.2d 168, 125 P.3d 119 (2005) and *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 993 P.2d 259 (2000).¹² Under that standard, plaintiffs must establish the following propositions: (1) a statement in the Handbook amounting to a promise of specific treatment in a specific situation; (2) justifiable reliance on that promise; and (3) breach of that promise.

¹² Appellants' Brf. at 42-43.

Korslund, 156 Wn.2d at 184, citing *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340-41, 27 P.3d 1172 (2001). Summary judgment is appropriate in such cases when reasonable minds could not differ as to the existence of any element of the claim. *Id.* at 184-85.

None of these elements has been established. The “specific promise” upon which plaintiffs’ claim is based is allegedly contained in the FSP, which is a part of the University’s Faculty Code and published in the University Handbook. CP 5; 527. Appellants’ theory is that the FSP guarantees all meritorious “faculty” an annual minimum merit raise of two percent and that Extension Lecturers are “faculty,” as that term is used in the Faculty Code. As discussed earlier, the Faculty Code contains an extensive set of definitions of various faculty ranks and titles. Extension Lecturers are not included in those definitions. To the contrary, Handbook § 24-36 specifically indicates that persons who teach in the extension program are not “faculty” for purposes of the Code.

With respect to the second element of their claim, appellants must show that they reasonably relied on the alleged promise contained in the FSP and were “induced thereby to remain on the job and not seek other employment.” *Thompson v. St. Regis Paper Co.*, 102 Wn. 219, 230, 685 P.2d 1081 (1984). Appellants were completely unaware of the revisions to the FSP generally, and specifically unaware of the alleged promise of a

two percent annual merit raise contained in EO 64, until years after the fact. Thus, as Ms. Carosella candidly admitted during her deposition, she could not have been induced to remain on the job in 2002-03 by the promise of a pay raise that she did not know about. CP 613.

Finally, appellants did not submit any evidence to show that the University breached the alleged promise. Instead, they assert that the question of whether the Funding Caution contained in EO 64 permitted the University to forego faculty pay raises generally was determined in the *Storti* litigation. CP 544. They are mistaken. The ruling in *Storti* was an interlocutory order on partial summary judgment. It has no binding effect in this matter. *See Lutheran Day Care v. Snohomish Cty.*, 119 Wn.2d 91, 115, 829 P.2d 746 (1992) (collateral estoppel requires final judgment in first action). In the end, however, it is not necessary to reach the breach question because the definitional language of the Code undisputedly excludes Extension Lecturers and because appellants cannot establish reliance.

B. Legal Standards Applicable to Plaintiffs' Claims

1. Class Action Standards

The claims of the class stand or fall based on the claims of the class representatives, Ms. Carosella and Ms. Pret. *O'Shea v. Littleton*, 414 U.S. 488 (1974). In this case and as explained below, while appellants

submitted declarations from some class members, those declarations did not add anything to the claims presented by the named plaintiffs.

2. Interpretation of the University Handbook

Appellants' complaint contains a single claim for breach of contract, based on the alleged failure to comply with the FSP. CP 8. Under *Trimble v. Washington State University*, faculty members' claims based on handbook provisions are analyzed under the rubric of a promise of specific treatment in specific circumstances. 140 Wn.2d at 93-94. Summary judgment is appropriate in such cases where reasonable minds could not differ as to the existence of any element of the claim. *Korslund*, 156 Wn.2d at 184-85; *Trimble*, 140 Wn.2d at 95.

In *Thompson v. St. Regis Paper Co.*, 102 Wn.2d at 230, the court cited the Restatement (Second) of Contracts ¶ § 2 (1981) to emphasize the specific nature of an enforceable promise: "a promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding a commitment has been made." Whether the statements contained in an employee manual are sufficiently specific to be enforceable is a question of law. *Magula v. Benton Franklin Title Ins. Co.*, 79 Wn. App. 1, 6, 901 P.2d 313 (1995). Statements of general employer policy, including general assurances regarding reasonable treatment, are not sufficiently specific. *Id.* Claims may not be

based on language that confers discretion on the employer. *Trimble*, 140 Wn.2d at 93.

In *Trimble*, an assistant professor was unable to show that the University breached specific promises to him when it denied him tenure. The plaintiff asserted that the faculty manual required that evaluations by tenured faculty members be in writing. The court held that the manual gave discretion to the tenured faculty as to the manner of the evaluation and therefore, the manual did not contain enforceable promises of specific treatment. 140 Wn.2d at 95. Similarly, in *Stewart v. Chevron Chemical Co.*, 111 Wn.2d 609, 613-14, 762 P.2d 1143 (1988), the court held that a termination policy stating that management “should” consider certain factors in layoff decisions was too indefinite to create an obligation.

Interpretation of employee handbook provisions is also guided by general rule that “[e]mployment contracts are governed by the same rules as other contracts.” *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 298, 890 P.2d 480 (1995). In this regard, Washington courts employ an objective theory of contract interpretation, attempting to ascertain the intent of the parties from the ordinary meaning of the words they used. *Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994) (courts “impute an intention corresponding to the reasonable

meaning of the words used”); *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502, 115 P.3d 262 (2005).

In addition to the contractual terms, if relevant for determining mutual intent, Washington courts consider extrinsic evidence, which includes: (1) the subject matter and objective of the contract; (2) all the circumstances surrounding the making of the contract; (3) the subsequent acts and conduct of the parties; and (4) the reasonableness of respective interpretations urged by the parties. *Id.* at 502. The use of extrinsic evidence is limited, however. Surrounding circumstances and other extrinsic evidence are to be used “to determine the meaning of specific words and terms used,” and not to “show an intention independent of the instrument” or to “vary, contradict or modify the written word.” *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 694-96, 974 P.2d 836 (1999).

C. The Handbook’s Definition of ‘Faculty’ Excludes Extension Lecturers

An employee manual creates obligations on the part of the employer only if the language of the manual is specific. *Trimble*, 140 Wn.2d at 94, *citing Drobny v. Boeing Co.*, 80 Wn. App. 97, 101, 907 P.2d 299 (1995). Here, the Handbook §§ 21-31 identifies “faculty” in precise detail, including: lecturer, principal lecturer and senior lecturer. Handbook §§ 24-34 and 24-35 further defines these titles in various ways; *e.g.*, “acting,” “adjunct,” “affiliate,” “clinical,” “emeritus,” “joint,” “research,”

“full time,” “part time,” and “visiting.” Nowhere in this comprehensive set of definitions, including three separate categories of lecturers, is there any reference to “Extension Lecturers.”¹³ But the Handbook does deal separately, in § 24-36, with what it carefully describes as “[p]ersons giving instruction in extension classes.” When such persons teach classes “offered for academic credit,” they “shall have scholarly and professional qualifications equivalent to those required” for “regular University classes.” *Id.* The intent to distinguish persons, like the plaintiffs, who teach in the extension program from “faculty” is clear, and reasonable minds could not disagree that the Handbook treats them differently.

Furthermore, the fact that the FSP’s mandatory provisions for peer-reviewed, multi-layered merit reviews of faculty members have not been applied (and cannot apply) to Extension Lecturers is probative of the proposition that the Faculty Salary Policy does not apply to Extension Lecturers. *See Puget Sound Fin. LLC v. Unisearch, Inc.*, 146 Wn.2d 428,

¹³ Appellants point out that the *Storti* settlement class included “principal lecturers,” a title was not added to the Handbook’s definition of “faculty” until after the settlement. On this basis, they argue that Handbook definition has not been rigidly applied. Appellant’s Brf at 23. As appellants acknowledge, however, the title of Principal Lecturer was in use by academic departments, schools and colleges at the time of the *Storti* settlement. *Id.* Furthermore, as indicated by the legend “RC” following § 21-31, the addition of the Principal Lecturer title was made by the Faculty Senate’s Rules Coordination Office without a faculty vote or Presidential approval, because it was “a simple housekeeping amendment[] to ... correct ... clarify language without changing its effect.” UW Handbook, V. 2, Introduction, Terminology and Abbreviations, available at <http://www.washington.edu/faculty/facsenate/handbook/Volume2.html>. In contrast, the Faculty Senate here indicated that a substantive amendment to the Faculty Code would be required in order to add Extension Lecturers to the “faculty.” CP 934.

434, 47 P.23d 940 (2002) (course of dealing is relevant to interpreting a contract and determining its terms).¹⁴

1. The ELP Operations Manual Did Not Incorporate the Faculty Salary Policy

Recognizing that the FSP does not apply according to its own terms, appellants argue that the ELP Operations Manual somehow obligated University to provide them with the same pay raises.¹⁵ No claim based on the Operations Manual was included in their complaint, however. CP 1. Therefore, this argument should be disregarded. *See Escude v. King Cty. Hosp. Dist. No. 2*, 117 Wn. App. 183, 192 n. 8, 69 P.3d 895 (2003) (theory not contained in complaint and not argued below will not be considered on appeal).

If it is to be considered, the record shows that the argument has no merit. The 2001 ELP Operations Manual, which is the relevant document, neither promises pay raises nor references the FSP. Instead, it states:

The state legislature occasionally awards merit raises to University faculty. Because UW Educational Outreach is a self-sustaining unit, it can make independent decisions regarding salary increases and merit pay as long they don't exceed those awarded by the University. The Vice-Provost normally follows the decisions for the entire University,

¹⁴ "A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Restatement Second of Contracts § 223(1) (1981). Ambiguity is not required before evidence of course of dealing can be used to ascertain the terms of a contract. *Id.* Comment B.

¹⁵ Appellants' Brf. at 46.

assuming revenue is available. ELP instructors have consequently received the same salary increases as other faculty.

CP 367.

Appellants apparently want the Court to hold that this language amounts to a promise to always give the ELP Extension Lecturers the same raises as are awarded to academic faculty. This assertion is contrary to any fair reading of the language used, which imparts the following relevant points:

(1) Pay raises for EO personnel are not dependent on legislative appropriations because EO is a self-sustaining unit. In contrast, the FSP's "Funding Caution" states the ability to provide annual merit raises is "based upon an underlying principle that new funds from legislative appropriations are required to keep the salary system in equilibrium" and that "[w]ithout the influx of new money or in the event of decreased State support, a reevaluation of this Faculty Salary Policy may prove necessary." EO 64.

(2) Stating that raises for EO personnel "normally" follow those for the University as a whole, "assuming the revenue is available,"¹⁶ does not mean that ELP Extension Lecturers are entitled to the same raises as academic faculty. First and foremost, per the dictionary, the word

¹⁶ This is the same practice that the University follows with respect to its Professional Staff. CP 854.

“normally” indicates “commonly” or “ordinarily,” not “always” or “inevitably.” Second, regardless of legislative action or the University’s general financial condition, there may not be sufficient money available from EO operations, in which case there is no expectation of a raise of any sort.¹⁷

(3) The phrase “ELP instructors have consequently received the same salary increases as other faculty,” is conspicuously framed in the past tense. It is a description of past events; not a promise that future pay raises will invariably track those awarded to academic faculty. It cannot be read, either standing alone or, especially in conjunction with the words that precede it (“normally follows” and “assuming that revenue is available”), as making an unqualified promise of future pay raises equal to the raises awarded to academic faculty. Furthermore, the course of performance most certainly illustrates that the Operations Manual did not create any sort of lockstep relationship with the FSP; *i.e.*, twice in the last six years, Extension Lecturers have received pay raises that exceeded those awarded to academic faculty.¹⁸

¹⁷ See CP 515 Carosella Decl., Ex. 2, stating, with respect to any pay raises, “we’ll have to pay for it ourselves.”

¹⁸ It has been suggested that one of these large raises, in 2007-08, was for reasons of “compression,” rather than merit. Appellants’ Brf. at 20. This suggestion is directly contrary to Ms. Carosella’s deposition testimony, where she stated that while there was some discussion of “compression” at the time, “that wasn’t our understanding” of the reasons why the raises were given. CP 865-66. Further, the testimony of Vice Provost Szatmary is clear that the raises were given to reflect individual contributions to the ELP program. CP 854.

D. Appellants Cannot Show Justifiable Reliance on a Policy That Had Never Been Applied to Them and of Which They Were Unaware

In addition to showing that the FSP contained a promise to Extension Lecturers that, if they performed meritoriously in a given academic year, a minimum two percent merit raise would be awarded for the following academic year, appellants must also show that this promise “induced [them] to remain on the job and not seek other employment.” *Thompson v. St. Regis Paper Co.*, 102 Wn. at 230. The absence of actual reliance dooms appellants’ claims as a matter of law. *Bulman v. Safeway*, 144 Wn.2d 335, 350, 27 P.3d 1172 (2001) (no enforceable promise where plaintiff did not rely on policies at issue); *Stewart v. Chevron Chemical Co.*, 111 Wn.2d 609, 614, 762 P.2d 1143 (1988) (layoff provision did not become part of plaintiff’s employment contract where there was no evidence that plaintiff was aware of or relied upon the provision); *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522, 826 P.2d 664 (1992) (“as a matter of law,” there is not an enforceable promise of specific treatment in specific circumstances “where the employee did not know about the ‘promise’ until after he was discharged”).

Here, the class representatives admitted that, in 2001-02 and until shortly before the lawsuit was filed, they were of the specifics of the FSP, including the provision for minimum annual merit raises to meritorious

faculty. CP 611, 627. Thus, as one of them testified, reliance cannot be established:

Q. [Y]ou would have had no expectation that those amendments would have applied to you because you didn't know about them?

A. Correct.

CP 613.

Bulman illustrates why this fact is fatal to appellants' claim. It holds that the plaintiff/employee must have been aware of the specific promise allegedly breached and that specific promise must have induced the employee to remain on the job and not seek other employment. *Bulman*, 144 Wn.2d at 343-44, 350. The court further stated: "there is not an enforceable promise of specific treatment in specific circumstances where the employee did not know about the 'promise'" *Id.* at 341.

Appellants attempted to avoid dismissal on reliance grounds by submitting declarations stating, without reference to any specific language of the University Handbook, that they "understood" that they were UW "faculty." *See, e.g.*, CP 467. This kind of subjective and general "understanding" that Extension Lecturers would be treated like faculty, even if undisputed, cannot suffice to show that, in 2001-02, they relied on a specific promise in the FSP to provide an annual minimum merit pay raise of two percent. Nor can it serve to establish that they were thereby

induced to stay on the job in the succeeding academic year. Such a claim turns on the words used by the employer in its manual or handbook, interpreted objectively in accordance with usual principles of contract interpretation, rather than subjective understandings. Furthermore, the law requires knowledge of the specific terms of the handbook provision in question, rather than reliance on the general atmosphere or understandings of employer policies. *Bulman* at 343-45. None of the other class members who have submitted declarations assert that they were aware of the specific terms of the FSP.

Finally, appellants cannot claim reliance on asserted “faculty” status while simultaneously stating before the Faculty Senate, Public Employment Relations Commission and the Legislature that they are not “faculty.”

E. Other Litigation Has No Bearing on This Matter

Appellants assert that a partial summary judgment ruling in the *Storti* case collaterally estops the University here. The *Storti* case was a class action brought on behalf of persons holding full-time faculty appointments in academic departments, challenging the University’s decision not to provide merit raises for the 2002-2003 academic year. The issue in the litigation was the meaning and significance of the “Funding Caution” included in Executive Order 64, which reserved the President’s

ability to “reevaluate” the Faculty Salary Policy if funds were not appropriated by the Legislature for pay raises. The superior court issued a partial summary judgment ruling, holding that the President’s 2002 decision not to grant raises to meritorious faculty did not constitute a “reevaluation” of the policy. CP 779-784. Nothing in the *Storti* case has any bearing on the question of whether Extension Lecturers are covered by the FSP.

For these reasons, appellants’ claim that collateral estoppel prevents the University from litigating the issues in this case is mistaken because collateral estoppel requires that the issues in the two actions must be identical. *Lutheran Day Care v. Snohomish Cty.*, 119 Wn.2d 91, 115, 829 P.2d 746 (1992); *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn. App. 378, 387, 166 P.3d 748 (2007). Furthermore, the trial court’s grant of the University’s summary judgment here meant that it never reached the issue of whether the *Storti* ruling precludes the University from litigating the meaning of the Funding Caution provision in the FSP.

In brief response to appellants’ arguments, however, the University notes that because there was no final judgment on the merits in *Storti*, collateral estoppel cannot apply. *George v. Farmers Ins. Co. of Washington*, 106 Wn. App. 430, 444, 23 P.3d 552 (2001). Appellant argues, nevertheless, that *Cunningham v. State*, 61 Wn. App. 562, 811

P.2d 225 (1991) permits preclusive effect to be given to a partial summary judgment order. *Cunningham* was a legal malpractice case where the plaintiff, the driver of a car involved in a collision on federal land, claimed that his former attorneys were negligent for failing to bring a timely claim against the federal government. In a parallel action in which *Cunningham* had been a defendant, a federal judge had ruled that the identical claim by *Cunningham*'s passenger was barred by governmental immunity. *Cunningham* had joined his passenger in opposing dismissal of the claim against the Government. *Id.* at 564-65. The ruling was final and conclusive as to the Government's liability, but not immediately appealable because there were other claims against other defendants in the case. When *Cunningham* later sued his former attorneys for failing to timely sue the Government on the identical claim, this Court held that the legal malpractice claim failed because *Cunningham* could not make out the "case within the case;" *i.e.*, the summary judgment ruling against the passenger was a complete defense to the malpractice case because it established that *Cunningham* could not have recovered, even if a timely action had been brought on his behalf.

Cunningham does not apply here because the ruling in *Storti* was not a final decision on the plaintiff's claims; it only addressed one issue in the case—whether the President of the University had engaged in a

sufficient re-evaluation of the FSP. The *Storti* ruling did not address whether the Regents had independent authority to modify the FSP or any of the University's other defenses. CP 779-784.

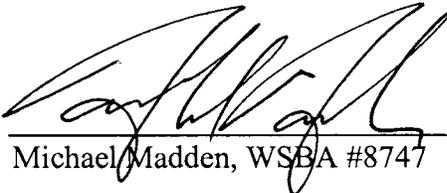
Furthermore, *Cunningham* has never been applied or extended beyond its unique facts. To the contrary, subsequent Washington cases have consistently stated that, in order for collateral estoppel to apply, "a final judgment on the merits" must have been entered in the initial action. *See Paradise Orchards Gen'l Partnership v. Fearing*, 122 Wn. App. 507, 515, 94 P.3d 372 (2004) (final judgment requirement not met where, after summary judgment ruling, case was settled before entry of a final order); *Channel v. Mills*, 61 Wn. App. 259, 265, 909 P.2d 935 (1996) (arbitration award not a final judgment). *also see e.g., City of Arlington v. Central Puget Sound Growth Mgt. Hrgs. Bd.*, 164 Wn.2d 768, 193 P.3d 1077, 1089 (2008); *Hadley v. Maxwell*, 144 Wn.2d 306, 312, 27 P.3d 600, 602 (2001); *Lutheran Day Care*, 119 Wn.2d at 115; *City of Walla Walla v. \$401,333.34*, 150 Wn. App. 360, 365, 208 P.3d 574 (2009); *Gold Star Resorts*, 140 Wn. App. at 387; *Eugster v. City of Spokane*, 139 Wn. App. 21, 29, 156 P.3d 912 (2007) (reiterating requirement for a final judgment on the merits).

IV. CONCLUSION

The clear and unambiguous language of the University Handbook compels the conclusion that Extension Lecturers are not “faculty” for purposes of the FSP. Appellants themselves recognize this fact and, accordingly, they did not rely—and could have justifiably have relied—on the FSP as an inducement to remain on the job after the 2000-2001 academic year. Accordingly, this Court should affirm the judgment.

Respectfully submitted this 5th day of August 2009

BENNETT BIGELOW & LEEDOM, P.S.

By: 
Michael Madden, WSBA #8747

Special Assistant Attorney General
Attorneys for Respondent University of
Washington

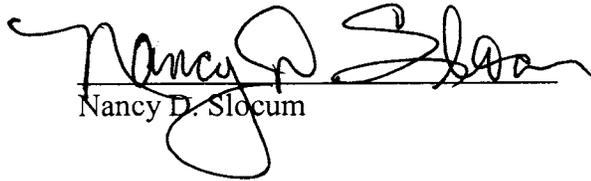
CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the foregoing **BRIEF OF RESPONDENT** to be delivered via legal messenger as follows:

Frederick H. Gautschi, III
George T. Hunter
Connell, Cordova, Hunter & Pauley, PLLC
1325 Fourth Avenue, Ste 1500
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 5th day of August 2009.


Nancy D. Slocum

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