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SUPREME COURT  
OF THE STATE OF WASHINGTON

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DUANE STORTI and a class of faculty members,

Appellants,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

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BRIEF OF APPELLANTS

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A. INTRODUCTION

This case presents issues relating to a unilateral contract in public employment and *res judicata*. The University of Washington's ("University") Faculty Salary Policy articulated in the Faculty Handbook and Executive Orders of its President provided that if the faculty performed meritorious service during an academic year, the faculty would receive a 2% salary increase in the following academic year.

In prior litigation between the University and virtually the identical class of faculty members in each instance with Professor Duane Storti as the lead plaintiff, the King County Superior Court ruled on the merits that the Faculty Salary Policy created a mandatory duty on the University's part. It made an offer to the faculty that the faculty accepted by performance—a unilateral contract. A provision in an Executive Order permitting the University to reevaluate the Policy in the event that the Legislature provided insufficient funding did not expressly allow the University to suspend or rescind the Policy where the faculty had substantially performed in the applicable academic year.<sup>1</sup>

Nevertheless, in April 2009, the University suspended the Faculty Salary Policy for a two-year period and, when Storti and the class filed suit for breach of the contract and their entitlement to a 2% increase in

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<sup>1</sup> The University's academic year runs from July 1 to June 30.

salary for academic year 2009-10, the University successfully argued to the trial court, a different King County Superior Court judge than in the first case, that the Faculty Salary Policy was not mandatory and that the reevaluation provision allowed it to summarily suspend the Policy although the faculty had substantially performed for academic year 2008-09.

The Faculty Salary Policy is mandatory. It is an offer made to the faculty that the faculty accepts by substantial performance their services for academic year 2008-09. The reevaluation provision was not an express reservation of the University's right to revoke the promised 2% raise after the faculty had substantially performed the work in the 2008-09 academic year. Instead, the "reevaluation" language notified the faculty that the promise of a 2% raise for meritorious work was not permanent and it could be changed in the future, but such a change could apply only prospectively.

In any event, the University is estopped under principles of res judicata from denying that the Faculty Salary Policy was mandatory or that the reevaluation provision entitled it to suspend or rescind its offer where those issues were litigated in prior litigation to a conclusion adverse to the University's present position.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in denying the class's motion for partial summary judgment.

2. The trial court erred in granting the University's motion for summary judgment.

3. The trial court erred in denying the class's motion for judgment on the pleadings.

(2) Issues Pertaining to Assignments of Error

1. Where the University's unilateral contract – set forth in the Faculty Handbook and the President's Executive Order 64 – was that any faculty member whose performance was deemed meritorious was entitled to a 2% merit salary increase in the upcoming academic year, and the work of class members like Professor Storti in year 2008-09 was found to be meritorious, did the University breach its contract with faculty members by suspending in April 2009 the merit salary increase for academic year 2009-10, after the faculty had substantially performed its obligations entitling them to the 2% merit increase? (Assignments of Error Numbers 1-2)

2. Where the University previously maintained in May, 2002 (after the academic year was nearly over) that it did not have to comply with the Faculty Salary Policy for work performed during 2001-02 and Storti and the plaintiff class (same class as here except the years are different) successfully litigated the same contract defenses raised by the University here (the 2% raise was discretionary and conditioned on legislative funding) and the court expressly rejected these defenses and determined that the faculty were owed the 2% raise for the 2002-03 academic year, which the University then paid, is the University barred by res judicata in this, the second *Storti* class action concerning the same unilateral contract? (Assignments of Error Numbers 1-3)

C. STATEMENT OF THE CASE

(1) The University's Faculty Salary Policy

In response to internal University faculty and administration discussions involving faculty salary issues, CP 564-67, 1067-70, 1159-73, the University adopted a policy<sup>2</sup> in its Faculty Handbook and by an Executive Order of its President mandating 2% annual salary increases for faculty whose service in the previous academic year was meritorious. CP 1241-43.

The Policy was originally conceived by an *ad hoc* Advisory Committee on Faculty Salaries that the University convened in February 1998 "to review the UW approach to faculty salaries." CP 1067, 1171. Provost Lee Huntsman convened the Committee and said the "charge to this committee" was to "undertake a critical evaluation of the merit review process" and "characterize an ideal salary system." CP 1067, 1171-72.

The Committee's July 1998 report concluded that "[f]aculty salary levels at the University of Washington present a severe and increasing problem." CP 1159. It also stated that "the University salary policy must

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<sup>2</sup> This policy was adopted to deal with major faculty pay problems—that money available for pay raises was being focused on "recruitment" (new hires) and "retention" (keeping "star" faculty) while the bulk of the faculty normally received *no* raises. The pre-1999 salary policy meant that (1) new faculty members recently out of graduate school could make as much or more than long-term faculty and (2) faculty members who threatened to leave or obtained offers from other institutions could obtain much larger salaries than other faculty members. CP 1159-70, 1302-03. Accordingly, the primary function of the policy was to establish small minimum raises for all meritorious faculty as a matter of first priority. CP 1242.

... provide opportunities for career advancement” and a “career advancement policy should allow every faculty member to be evaluated with the expectation that successful performance is rewarded with promotion and increases in salary commensurate with professional achievements without resorting to outside offers as a mechanism for gaining a salary raise.” CP 1166. The Committee therefore recommended that “[f]or major and regular reviews, there will be an associated salary change.” CP 1168.

A few months after the Committee issued its report in October 1998, the Board of Regents said a goal for the 1998-99 academic year was for the University to “discuss, revise (as needed), and enact the key recommendation in the recent reports on faculty responsibilities and rewards and faculty salaries” to effectuate the goal of recruiting and retaining faculty. CP 296. “[M]embers of the faculty and key administrators” then started “meeting, separately and together to respond to long-standing needs in terms of how faculty are reviewed and rewarded at th[e] University.” CP 1198. “The result of the year-long deliberations [was] a consensus among participants from both the faculty and administration” to a “strong commitment to tying faculty reviews to predictable salary increases for meritorious faculty,” and this consensus was “expressed in a proposal for new provisions in the Faculty Code, as

well as in an executive order, pertaining to faculty rewards, responsibilities and salary.” CP 1198.

Many Faculty Senate meetings in 1999 addressed the Policy. CP 268-93, 1113-30. In these meetings the University President, Provost, and faculty leaders repeatedly told the faculty that the proposal would “guarantee” the University’s “commitment” to pay meritorious faculty annual “2% merit salary increases.” CP 272, 279, 296, 300, 303, 1075-76. On June 3, 1999, Faculty Senate Chair Theodore Kaltsounis told the faculty before they voted on whether to recommend that the President adopt the Policy that under the Policy “[m]eritorious faculty are assured of a minimum annual increase in salary (initially 2 percent) throughout their career.” CP 1125. Faculty Secretary Lee Vaughan similarly told the faculty that same day that the proposed Policy “alters what may be considered the core of our ‘employment contract’ as faculty at UW,” CP 127, and “commits the University to awarding annual salary increases to all meritorious faculty .... The President is committed at present to a minimum 2% annual merit award.” CP 1129. Based on these assurances, the faculty voted in favor of the Policy, recommending it to the President.

The President, Provost, and faculty leaders repeatedly told the faculty that the proposed policy committing the University to annual 2% merit salary increases to meritorious faculty did not depend on receiving

additional funds from the Legislature for that raise.<sup>3</sup> CP 270, 271, 288-89, 290, 1118-19, 1195, 1305-06.

After receiving these assurances the faculty approved the policy, and the President then adopted Faculty Handbook §24-70.B, which requires that a “salary increase . . . *shall* be granted to provide an initial minimum equal-percentage salary increase to all faculty following a successful merit review” and §24-71.A.1, which requires that the President “*shall* each year make available funds to provide an initial minimum increase to all faculty deemed meritorious under Section 24-55.”

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<sup>3</sup> The University fully recognized the funding implications of this salary policy in times of economic weakness. Provost Lee Huntsman told the Faculty Senate Executive Committee on February 22, 1999:

[T]he real significance of the new policy is however, the priority position given to this sort of merit salary increase. We are saying that, independent of what Olympia does, independent of what the market does, we will make this a first priority from our own available resources. In an era with a budget cut from Olympia, we’re going to be downsizing new-faculty positions in order to fund this first priority. We’re saying than when real crunch times come, we’re no long going to balance the budget on the backs of the continuing faculty in favor of retaining “stars.” We’re going to fund a minimum level of “career progression.”

CP 270. Again, on March 1, 1999, the Provost pointed out the real significance of the policy would be in “lean” years:

[T]he essence of the proposed policy . . . will have almost no impact in normal years, when there is enough to fund everything, but it will have a profound impact in lean years, when it will mean that, despite the lack of additional funding from the Legislature, we will use the recapture money first to do this –even if we have to reduce the faculty count by cannibalizing vacancies. That’s where the power of this policy is.

CP 271.

(emphasis added).<sup>4</sup> CP 1069. After establishing this policy, the President reported to the Regents in September 1999 that “[a]ll the major recommendations regarding faculty... salaries” have been “approv[ed] by the President” and “the new policies ... provide for minimum annual salary increases for meritorious faculty.” CP 296.

In October 1999, President McCormick wrote to Faculty Senate Chair Gerry Phillipsen, that “[w]e continue to work cooperatively on implementing the recent revisions to the Faculty Code related to roles, responsibilities, and salaries.” CP 1147. The President “enclose[d] a draft of a proposed Executive Order [Executive Order 64] which will implement my [*i.e.*, the University President’s] *commitment* of a 2% *annual salary increase* for meritorious faculty.” *Id.* In response to the Faculty Senate’s review of the draft executive order, Professor Phillipsen wrote to President McCormick in December 1999 on behalf of the Faculty Senate and he asked President McCormick to have it “stated explicitly” that the Faculty Salary Policy is based on a commitment to “predictable and continuing salary progression for those continuing faculty members who are meritorious”:

One of the commitments that inspired the Chapter 24 additions and revisions, particularly the new Faculty Salary Policy, is to a predictable and continuing salary progression

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<sup>4</sup> President McCormick described the Policy to the Regents as “pretty much like an across-the-board increase for anybody who was living and breathing.” CP 329.

(2) Storti I Litigation

Duane Storti, an associate professor in the Department of Mechanical Engineering, filed an action in 2004 in the King County Superior Court (“*Storti I*”) on the effect of the Faculty Salary Policy when the University failed to provide the 2% increase to faculty whose work in the 2001-02 academic year was found to be meritorious. CP 355-71.<sup>5</sup> The court, the Honorable Mary Yu, certified the class of faculty members. CP 487-91.<sup>6</sup> The court also granted summary judgment for the *Storti I* class, CP 701-06, ruling that “the plain language [of the Faculty Salary Policy] creates a mandatory duty that requires the University to provide meritorious faculty an annual increase of at least 2%.” CP 704. The court rejected the University’s argument that it retained discretion to not fund a 2% merit raise or that such increase was conditioned upon legislative funding, stating “the court cannot find any language that makes the merit salary increase contingent on [legislative] funding.” *Id.* The court further found that the funding caution in the Faculty Salary Policy allowed the University to “reevaluate” the policy, but agreed with the class that the provision reserves the University’s right to change the policy at some

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<sup>5</sup> The University recognized the 2% increase for meritorious service in academic years 1999-2000, 2000-01, and 2002-03. CP 703 n.1.

<sup>6</sup> The *Storti I* class is the same as the *Storti II* class although the years at issue are different. CP 1485.

future date, going forward, not to revoke or repeal it after the work for the raise had been substantially performed. CP 705-06.

After losing on the merits in *Storti I*, the University agreed to provide back pay and it reset faculty salaries to reflect the omitted 2% raise. CP 707-35. The court approved the settlement, entering findings of fact and conclusions of law approving the settlement. CP 736-42.

(3) *Storti II* Litigation

At the beginning of the 2008-09 academic year, the Faculty Salary Policy remained in place, promising Storti and fellow faculty class members that they would receive a 2% raise for meritorious work performed in 2008-09. Because of budgetary fears, in April 2009, after the faculty's work was substantially performed for academic year 2008-09, the President and the Board of Regents voted to suspend the policy for a two-year period. CP 1226-27. Executive Order 29 was issued to implement that suspension policy. CP 1244-45.

In the meanwhile, Professor Storti's performance for academic year 2008-09 was specifically found in May 2009 to be meritorious in accordance with the review required by § 24-55 of the Faculty Handbook. CP 1105. He, like other faculty members, was denied a 2% increase for academic year 2009-10 because the University applied Executive Order 29 to work already meritoriously performed in 2008-09. CP 2, 6.

Professor Storti commenced the present action as a class action in the King County Superior Court in December, 2010 ("*Storti II*"). CP 1-8. The class contended that the University breached its unilateral contract with the faculty created by the Faculty Handbook and Executive Order 64 in applying the suspension of Executive Order 29 to work performed for 2008-09, and that the University was also precluded by principles of res judicata and/or collateral estoppel from relitigating the legal issues inherent on the Faculty Salary Policy resolved in *Storti I*. *Id.* The case was ultimately assigned to the Honorable Bruce Hilyer after the University filed an affidavit of prejudice against Judge Yu. Upon a class certification motion, CP 161-79, Judge Hilyer certified the same class of faculty members as in *Storti I*. CP 1483-86.

Both the class and the University moved for summary judgment. CP 1063-1103, 1200-21. The class also filed a motion for judgment on the pleadings. CP 743-76. The University opposed the class's motion and supported its own motion on the same grounds that it argued in *Storti I*, *i.e.*, that a reevaluation provision in Executive Order 64 made the 2% merit raise discretionary with the University and contingent on legislative funding. CP 1377-90. The reevaluation section of Executive Order 64, argued by the University, stated:

This Faculty Salary Policy is based upon an underlying

principle that new funds from legislative appropriations are required to keep the salary system in equilibrium. Career advancement can be rewarded and the current level of faculty positions sustained only if new funds are provided. Without the infusion of new money from the Legislature into the salary base, career advancement can only be rewarded at the expense of the size of the University faculty. Without the influx of new money or in the event of decreased State support, a reevaluation of this Faculty Salary Policy may prove necessary.

CP 1290. The University also denied that either *res judicata* or collateral estoppel applied. CP 1020-31, 1390-92.

The trial court granted the University's motion for summary judgment and denied the class's motion on liability, CP 1487-89, and denied the class's motion for judgment on the pleadings. CP 1040-41. The trial court said that it is "implicit in the promise [of a 2% raise] that it is changeable upon review[.]" RP 24; *see also*, RP 21 ("the promise is implicitly repealable on 60 days notice"). This timely appeal followed. CP 1490-96.

#### D. SUMMARY OF ARGUMENT

The University's Faculty Salary Policy set forth in Executive Order 64, once accepted by faculty members through substantial performance during academic year 2008-09 constituted a unilateral contract. That contract mandated 2% salary increases for the class in

academic year 2009-10 where their services for 2008-09 were determined to be meritorious.

The reevaluation provision of Executive Order 64 was not a clear reservation of the University's right to withdraw its offer after work had been performed if the Legislature failed to fund faculty salaries.

The decision in *Storti I* is res judicata as to the issues resolved in that case and the University is barred from relitigating in this action. The court in *Storti I* specifically rejected the University's argument on the effect of the reevaluation provision in Executive Order 64.

E. ARGUMENT<sup>8</sup>

(1) The University's Faculty Salary Policy Created A Unilateral Contract with Storti and the Class

The parties agreed below that the Faculty Salary Policy is a unilateral contract. CP 1210, 1389-90, 1478; RP 18-19.<sup>9</sup> Washington law generally follows the traditional common law principles associated with

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<sup>8</sup> The principles pertaining to the review of orders on summary judgment are well known to this Court. Summary judgment is appropriate only when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. CR 56(c). A court considers the facts, and inferences from those facts, in a light most favorable to the non-moving party, here, the class. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). This court reviews a trial court's summary judgment decision de novo. *Michael v. Mosquera - Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009).

<sup>9</sup> Such contracts are construed in accordance with traditional contract analysis principles. *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 468 P.2d 666 (1970) (rights and obligations under private pension plan are measured by terms of contract under ordinary rules of contractual construction).

the creation of a unilateral contract. This Court described a unilateral contract in *Cook v. Johnson*, 37 Wn.2d 19, 23, 221 P.2d 525 (1950) as follows:

A unilateral contract is a promise by one party-an offer by him to do a certain thing in the event the other party performs a certain act. The performance by the other party constitutes an acceptance of the offer and the contract then becomes executed.

As this Court has also noted, the critical difference between a unilateral and bilateral contract is in the nature of the acceptance; in the case of the former, the contract is created by the offeree's performance in response to the offeror's offer. *Id.*; *Higgins v. Egbert*, 28 Wn.2d 313, 317-18, 182 P.2d 58 (1947); *Multicare Medical Center v. Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 584, 790 P.2d 124 (1990).

Unilateral contracts are common in the employment setting. For example, an employer's offer of a bonus or a raise to an employee after work is performed is a "unilateral contract" binding upon the employer when the employee accepts the offer by performing the work. *Scott v. J. F. Duthie & Co.*, 125 Wash. 470, 471, 216 Pac. 853 (1923) (employer bound by promise to give employee bonus when employee accepts the offer by performing); *Powell v. Republic Creosoting Co.*, 172 Wash. 155, 159-60, 19 P.2d 919 (1933) (employer's practice of paying a year-end bonus created an implied contract for a bonus which the employee

accepted and earned by working); *Simon v. Riblet Tramway Co.*, 8 Wn. App. 289, 292-94, 505 P.2d 1291 (1973), *review denied*, 82 Wn.2d 1004 (1973), *cert. denied*, 414 U.S. 975 (1973).

More specifically, in the public employment context, a public employer's policies and rules constitute a part of the employees' employment contract, or, more precisely, part of the employer's offer to the employees. *See, e.g., Scannell v. City of Seattle*, 97 Wn.2d 701, 656 P.2d 1083 (1982) (city charter provision on employee vacations); *Roberts v. King County*, 107 Wn. App. 806, 27 P.3d 1267 (2001), *review denied*, 145 Wn.2d 1024 (2002) (county policy on equal pay for equal work). And in the university setting, a faculty handbook becomes part of a professor's contract. *Nostrand v. Little*, 58 Wn.2d 111, 123, 132, 361 P.2d 168 (1961), *appeal dismissed*, 368 U.S. 436 (1962); *Mega v. Whitworth College*, 138 Wn. App. 661, 158 P.3d 1211 (2007), *review denied*, 163 Wn.2d 1008 (2008); *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 908-09, 246 P.3d 1254 (2011).

The public employer's offer, based on the policies set forth in its policies and rules, becomes a unilateral contract upon the employee's acceptance of the offer by performance. This Court recently explained again that "[i]n the employment context, an employee who renders service in exchange for compensation has a vested right to receive such

compensation.” *Navlet v. Port of Seattle*, 164 Wn.2d 818, 828 n.5, 194 P.3d 221 (2008). Indeed, “a unilateral contract becomes enforceable and irrevocable ‘when performance has occurred in response to a promise.’” *Id.* at 848, quoting 25 *Washington Practice: Contract Law and Practice* § 1.4 at 8 (2007). This Court stated that “[a]n employer cannot expect to accept the benefit of continued service from its employees while reserving the right to not compensate those employees once it has received the full benefit of their service.” *Navlet, supra*, 164 Wn.2d at 848-49.

The University’s Faculty Salary Policy was unambiguously an offer accepted by Professor Storti and the class by their performance of meritorious services throughout the 2008-09 academic year. As previously noted, the Faculty Salary Policy was plainly intended to be *mandatory* even in the event the Legislature failed to fully fund the 2% increase. The history of the Policy referenced *supra* attests to its mandatory status.<sup>10</sup>

There was no equivocation in the language of the Policy. The Policy itself states that the University “shall” pay the 2% raise, and the word shall creates a mandatory duty.<sup>11</sup> And the faculty and the

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<sup>10</sup> The Court may consider the context to the contract’s development in construing its terms. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.2d 262 (2005).

<sup>11</sup> See, e.g., *Scannell*, 97 Wn.2d at 707; *Roberts*, 107 Wn. App. at 815.

administration believed it to be *mandatory*. The administration understood that if the Legislature failed to fund the 2% increase, it would likely need to reprioritize to find the money, perhaps even leaving faculty positions vacant. CP 270-71. The intent to make the Policy mandatory could not be any more clear.

The class members here substantially performed their obligations in response to the University's offer. Where the 2008-09 academic year commenced on July 1, 2008, Professor Storti, for example, provided services for 6 months of 2008 and for several months in 2009 until the Faculty Salary Policy was suspended. The University had the benefit of those services, deemed meritorious in May, 2009, for the bulk of the 2008-09 academic year. The class substantially performed in response to the University's offer.

Substantial performance is sufficient. Washington recognizes the doctrine of substantial performance in unilateral contract law. The *Navlet* court cited 1 *Corbin on Contracts* § 3.16 at 388 (1993) with approval, *id.* at 848, which states:

[A]n employer's promise is usually made on condition that the employees remain in service for a stated period. In such cases ... it [is] unnecessary for the employee to give any notice of assent. It is sufficient that the employee continues in the employment as expressly or impliedly

requested....A unilateral contract exists when the period of service is substantially completed. Prior to that time the offer becomes irrevocable.

2 *Corbin on Contracts* § 6.2 at 217 (2005) similarly explains that “although the bonus is not fully earned until the service had continued for the full time, after a substantial part of the service has been rendered the offer of the bonus cannot be withdrawn without a breach of contract.”<sup>12</sup> See also, *Barr v. Day*, 124 Wn.2d 318, 329, 879 P.2d 912 (1994); *Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340, review denied, 132 Wn.2d 1009 (1997) (client may not avoid paying contingent fee by terminating lawyer once that lawyer has substantially performed contract).

The University argued below that these principles of contract law do not apply here because “the cases cited by Plaintiff involve earned bonuses or retirement benefits that have nothing to do with a future potential raise.” CP 1215. The University maintains that “[t]here is a significant difference between a bonus paid for past services and a raise to be implemented in the future[.]” RP 16.

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<sup>12</sup> The *Restatement of Contracts* § 45 states:

If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.

But a bonus is “money or equivalent given in addition to the usual compensation” (Webster’s Third International Dictionary at 252 (1976 ed.)), and a “raise” is “an increase in wages or salary.” *Id.* at 1877. Thus, a bonus and a raise are both additional compensation that an employee earns. The difference is that a bonus is added on top of an employee’s base pay, while a raise increases an employee’s base pay. *See Bates v. City of Richland*, 112 Wn. App. 919, 936, 51 P.3d 816 (2002). A bonus and raise are thus both items of compensation that increase the employee’s pay after satisfactory performance. *Id.*

The University’s argument that a promise to provide a 2% or 10% lump-sum bonus is enforceable after substantial performance, but a promise to provide the same or lesser amount in a 2% raise is not enforceable after substantial performance, is illogical because they are both promises to pay additional compensation to reward continuing meritorious service. The University is unable to cite to any authority for its argument because there is none. In sum, the University made an offer to the class which it accepted by meritorious performance in academic year 2008-09. Here, the Faculty Salary Policy, as set forth in the Handbook and Executive Order 64, constituted a part of the University’s unilateral contract with the faculty. The class members performed, or substantially performed, by providing meritorious service in academic

year 2008-09, which was their necessary acceptance of and performance of the contract with the University. The University could not unilaterally withdraw the policy so as to deprive the faculty of the 2% merit increase for the 2009-2010 academic year. By that contract, the class was entitled to 2% salary increases in academic year 2009-10.

(2) The Reevaluation Clause in Executive Order 64 Was Not a Reservation of the University's Right to Revoke Salary Increases if the Legislature Failed to Provide Additional Resources

The University argued below that the reevaluation clause in Executive Order 64 (part of funding cautions) allowed it to unilaterally suspend or revoke the Faculty Salary Policy. CP 1210-11. In effect, the University argues that the reevaluation provision made its offer to the faculty contingent on legislative funding. This argument is contrary to Washington law because the reevaluation clause was not an *express* reservation of a funding contingency that altered the University's offer. It is also belied by the history of the Faculty Salary Policy itself.

In the public employment context, public employers may make employment contracts contingent on appropriations forthcoming from legislative bodies to fully fund *prospective* elements of the employment contract, but only where this contingency is *expressly* articulated in the contract. *Carlstrom v. State*, 103 Wn.2d 391, 394-95, 694 P.2d 1 (1985).

There, the collective bargaining agreement made future percentage pay raises between the community college faculty and the state generally subject to all present and future acts of the Legislature, but did not expressly make the contractual salary increase contingent on legislative appropriations to fund it.

In the absence of language explicitly making the salary increase contingent on legislative appropriations, the Court in *Carlstrom* declined to allow the State to escape its contractual obligation, ruling that the State unconstitutionally impaired the contract when it enacted legislation abrogating the future increases. 103 Wn.2d at 394-95. The Court also specifically rejected the State's argument that an economic downturn allowed it to suspend the contract, saying "[f]inancial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts." *Id.* at 396.

The Court's decision in *Carlstrom* is consistent with the general rule in employment law that to make a promise of additional pay revocable, the employer must *expressly* state that the pay may be withheld or is discretionary. *Spooner v. Reserve Life Ins. Co.*, 47 Wn.2d 454, 457-58, 287 P.2d 735 (1955); *Goodpaster v. Pfizer, Inc.*, 35 Wn. App. 199, 665 P.2d 414, *review denied*, 100 Wn.2d 1011 (1983). In *Spooner* the company told the employees, in a bulletin that announced a bonus policy,

that the employer's bonus was "voluntary" and could be "withheld . . . by the employer with or without notice." 47 Wn.2d at 457 (quoting employer's policy). The Court said that the "ordinary meaning of 'withhold' is 'to refrain from paying that which is due[.]'" The employer's bulletin thus told the employees "in plain English that the company could withhold or decrease the bonus with or without notice." 47 Wn.2d at 459.

Similarly, in *Goodpaster*, the employment manual "expressly stated that the bonus payment was *discretionary*." 35 Wn.App. at 200 (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.<sup>13</sup>

Here, the reevaluation clause said that "[w]ithout the influx of new money or in the event of decreased State support, a reevaluation of this

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<sup>13</sup> *Goodpaster* and *Spooner* are both "illusory promise" employee bonus cases, and the University relied on *Goodpaster* in the trial court. CP 1211-12, 1216. (The University relied on *Spooner* in *Storti I* -- CP 297.) Because an illusory promise renders a contract meaningless, such a construction is highly disfavored. A "court will not give effect to interpretations that would render contract obligations illusory." *Taylor, supra*, 84 Wn.App. at 730, 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.").

Faculty Salary Policy may prove necessary.”<sup>14</sup> CP 1290. This “reevaluation” provision is not even as specific a funding contingency as that in *Carlstrom*, where this Court disapproved the contingency as insufficiently express. 103 Wn.2d at 393, 395 (“subject to all present and future acts of the legislature.”). And the reevaluation language is very far from the provision in *Spooner* expressly allowing the employer to withhold a bonus with or without notice or the language in *Goodpaster* that expressly said the bonus was discretionary. Indeed, as Judge Yu found in *Storti I*, the word reevaluation does not mean the Policy will be “rescinded, cancelled, or repealed and this court cannot transpose such a meaning to the word ‘reevaluation.’” CP 1097.<sup>15</sup>

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<sup>14</sup> Thus, the 2% annual merit raise was not a career-long promise. The promised 2% raise could always be “reevaluated” and changed prospectively. Pension promises are different because the promise becomes vested at the time of hire for the entire period of employment. *Cf. Bakenhus v. Seattle*, 48 Wn.2d 695, 699-700 (1956) (in determining the extent of the contractual undertaking of the public authority that promised a pension, the obligation of the employer is based upon the “promise on which the employee relies . . . at the time he enters employment”).

<sup>15</sup> The University knew how to make a promise contingent on legislative funding because elsewhere in the handbook it promised faculty that “Resources permitting” it would pay “salaries commensurate with those of their peers elsewhere” (§24-70.A.2), which would “require a 20 percent increase in full professor salaries[.]” CP 1164. Because the resources permitting language for parity with peer institutions does not apply to the 2% annual raise, a different intent is evidenced. *In re Forfeiture of One 1970 Chev. Chevelle*, 166 Wn.2d 834, 842, 215 P.2d 166 (2009); *Carlstrom*, 103 Wn.2d at 394 (“the State was fully aware how to makes its contracts contingent on future acts of the Legislature” as evidenced by a contract with a different union that “made the salary schedule contingent on the availability of legislative appropriation.”).

There is no explicit language of discretion in the Faculty Salary Policy -- indeed, the explicit language in the Policy is that the 2% raise is mandatory: §24-70.B.1: a "salary increase ... *shall* be granted to provide an initial minimum equal-percentage salary increase to all faculty following a successful merit review;" §24-71.A.1, the University "*shall* each year make available funds to provide an initial minimum increase to all faculty deemed meritorious under Section 24-55;" and Executive Order 64: "[a]ll faculty *shall* be evaluated annually for merit.... A faculty member who is deemed to be meritorious in performance *shall* be awarded a regular 2% merit salary increase at the beginning of the following academic year." (emphasis added).

Accordingly, the reevaluation provision does not render the promise of the 2% raise meaningless, revocable, or illusory. The University was entitled to reevaluate the Policy *prospectively* under the terms of the reevaluation provision; it was just not entitled to unilaterally rescind or suspend its operation in an existing academic year where the faculty had substantially performed in response to its offer. The reevaluation language notified the faculty that the duty to provide the 2% raise was not permanent and it could be changed in the future. But as in any unilateral contract, the change operates prospectively only and the University cannot revoke an offer of the 2% raise after substantial work

performance has occurred. The offer of a 2% raise made at the beginning of the 2008-09 academic year therefore could not be suspended near the end of the year, in April 2009, because substantial work had already been performed. Rather, the two-year suspension of the Faculty Salary Policy applied only to subsequent work performed, in the 2009-10 and 2010-11 academic years.

The reevaluation provision therefore did not expressly make the Faculty Salary Policy contingent upon legislative appropriation to fund it. The trial court recognized this when it decided not that the Policy expressly reserved for the University the right to revoke the promise of the 2% raise after the faculty had substantially performed the work earning the raise, but that it is “implicit in the promise that it is changeable upon review[.]” RP 21. Similarly, the court stated: “the promise implicitly is repealable on 60 days notice” like any other Executive Order or Board of Regents’ action. RP 24.

The trial court erred because any such reservation of rights must be stated explicitly, not implied. *Carlstrom*, 103 Wn.2d at 394-95; *Spooner*, 47 Wn.2d at 459; *Goodpaster*, 35 Wn. App. at 200. And a contractual term will be implied only if it is necessary to *effectuate* a contract, *i.e.*, it is “legally necessary” to “save an otherwise invalid contract.” *Brown v. Safeway Stores*, 94 Wn.2d 359, 370-72, 617 P.2d 704 (1980); *Oliver v.*

*Flow Int'l Corp.*, 137 Wn. App. 655, 660-63, 155 P.3d 140 (2006) (implied covenants in contracts are disfavored). Here, the contract expressly stated that the University shall (not may) pay the 2% merit raise after the faculty perform meritorious service in an academic year. The trial court's decision that the Policy contains an implied term that the promise of a 2% raise is "changeable [retroactively] upon review" (RP 21, 24) was not legally necessary to effectuate the contract; instead, it would *destroy the contract* and make it illusory as were the contracts in *Goodpaster* and *Spooner*.

Courts in other states have also rejected fiscal arguments similar to that advanced here by the University and accepted by the trial court because a university's obligations "must be given effect and cannot be disregarded or thought of as advisory merely because funding problems have arisen." *Subryan v. Regents of the Univ. of Colo.*, 698 P.2d 1383, 1385 (Colo. App. 1985) (regents could not appoint professor for less than three years due to funding problems because University rules mandated that appointment of instructors shall be for three years).

The University cannot disregard its employment obligations in times of economic difficulty because, among other reasons, a university itself benefits when its faculty members know the university's obligations are binding and not subject to unilateral change at any time. In *Karr v. Bd.*

*of Trustees of Mich. State Univ.*, 325 N.W.2d 605, 608-09 (Mich. App. 1982), the Court explained:

A contractual agreement which remains binding on the university during times of economic difficulty insures that the employee need not fear being put out of a job. The benefits inherent in such an agreement extend not only to the employee, but also to the university. It insures that the university will be able to obtain qualified instructors whose decision whether to accept employment with the university will not be adversely affected by concern that the agreement they enter into in good faith at the time that they accept employment will be subject to unilateral change any time thereafter that the Legislature decides to cut appropriations. Therefore, in our opinion, the university's obligations as they relate to contracts of employment do not merit different treatment than do its other contractual obligations.

The University also included in the Faculty Salary Policy a rule of priorities for salaries, placing the regular merit raises above retention raises for the star faculty — “the first priority shall be to support regular merit . . . awards to current faculty.” CP 305. *See also*, CP 270 (“we’re no longer going to balance the budget on the backs of the continuing faculty in favor of returning ‘stars.’”). The University’s suspension of Executive Order 64 suspended these priorities, as well as the 2% merit raises, thereby diverting the University’s merit raise funds to the faculty stars. CP 1243. These funds should have been directed to the merit raises

because the continuing faculty had already substantially performed the work required for the raise.<sup>18</sup>

Moreover, the Faculty Salary Policy itself stated that if new money from the Legislature is not provided for faculty salaries, “career advancement can only be rewarded at the expense of the size of the University faculty.” CP 1290. In other words, without new money, the Policy could still be implemented by reducing the overall size of the faculty – laying off faculty or not filling positions. This is entirely consistent with then Provost Lee Huntsman’s February and May 1999 statements to the Executive Committee of the Faculty Senate referenced *supra*. The history of the contract thus also shows that the reevaluation language did not permit the University to revoke its promise of a 2% raise after substantial performance by the faculty.

(3) Principles of Res Judicata Bar Relitigation of the Court’s Decision in *Storti I*

Under principles of res judicata, the University is precluded from making the arguments it now advances on the Faculty Salary Policy. Under that claim preclusion doctrine, issues resolved in prior litigation carry preclusive effect in subsequent litigation. The policy of that doctrine

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<sup>18</sup> In addition to wrongly diverting funds from merit raises for continuing faculty to retention raises for “stars,” the Faculty Salary Policy also specifically provided that “funds from tuition increases” and “[f]unds centrally recaptured from faculty turnover” and “grant, contract and clinical funds” would support the merit increase. CP 304.

is a prudential one. It is designed to bar the relitigation of claims that either were, or should have been, litigated in a former action. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 859, 762 P.2d 1 (1986). Parties may not file two separate lawsuits on what amounts to the same event, thereby splitting their cause of action. *Landry v. Luscher*, 95 Wn. App. 779, 780, 976 P.2d 1274, review denied, 139 Wn.2d 1006 (1999). The purpose of the doctrine is to avoid wasting the courts,' and the parties' time and resources on what amounts to duplicative litigation. *Id.* at 859. "The doctrine puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings." *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982). Res judicata is an issue of law reviewed de novo by this Court. *Martin v. Wilbert*, 162 Wn. App. 90, 94, 253 P.3d 108 (2011).

Res judicata requires a concurrence of identity between the cases as to (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons or person for or against whom the claim is made. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011); *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009). See also, *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009), review denied, 168 Wn.2d 1028 (2010). A necessary

precondition to the application of res judicata is that the prior case must have been resolved by a valid and final judgment on the merits. *Id.*

(a) *Storti I Was Resolved by a Final Judgment on the Merits*

The class anticipates that the University will contend that because *Storti I* settled after entry of a summary judgment in the class's favor, the requisite final judgment was not present here. The University is wrong.

An unappealed summary judgment is a final judgment for purposes of res judicata. *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004); *Ensley*, 152 Wn. App. at 899-902. Similarly, an agreed order may be a final judgment, *Miles v. State*, 102 Wn. App. 142, 152, 6 P.3d 112 (2000), *review denied*, 142 Wn.2d 1021 (2001) (agreed order of dependency was basis for collateral estoppel), as may be a stipulation for voluntary dismissal of an action, *Thompson v. King County*, 163 Wn. App. 184, 190-92, 259 P.3d 1138 (2011), a judgment by confession, *Pederson v. Potter*, 103 Wn. App. 62, 11 P.3d 833 (2000), *review denied*, 143 Wn.2d 1006 (2001), or a dismissal with prejudice arising out of a settlement. *Schoeman*, 106 Wn.2d at 861.

Settlement agreements in litigation dismissing the cases are also final judgments for purposes of res judicata, *Dep't of Ecology v. Yakima*

*Reserv. Irr. Dist.*, 121 Wn.2d 257, 287-91, 850 P.2d 1306 (1993),<sup>19</sup> as are settlement agreements in class actions are also final judgments for this purpose. *Knuth v. Beneficial Wash. Inc.*, 107 Wn. App. 727, 731-33, 31 P.3d 694 (2001), *review denied*, 145 Wn.2d 1035 (2002). The settlement agreement is final judgment on the merits unless it voids the prior summary judgment orders. *Hartley v. Mentor Corp.*, 869 F.2d 1469, 1473 (Fed. Cir. 1989); *Ossman v. Diana Corp.*, 825 F.Supp. 870, 878 n.21 (D. Minn. 1993).

The settlement agreement entered into by the class and the University in *Storti I* did not purport to in any fashion modify or void Judge Yu's summary judgment order. CP 724, 730. Instead, the agreement *implemented* Judge Yu's order by providing the class back pay and resetting faculty salaries to reflect the omitted 2% raise. CP 707-35.

Thus, the summary judgment order in *Storti I*, after the dismissal of the action with prejudice and without vacation of that order, constitutes a final valid judgment.

(b) The Parties in *Storti I* and *Storti II* Were Identical

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<sup>19</sup> See also, *Cunningham v. State*, 61 Wn. App. 562, 565-70, 811 P.2d 225 (1991) (partial summary judgment order in prior litigation that was settled was a final judgment barring the subsequent litigation); *accord Bunce Rental, Inc. v. Clark Equipment Co.*, 42 Wn. App. 644, 648, 713 P.2d 128 (1986) (summary judgment order in prior case that settled was a final judgment barring the second lawsuit).

With respect to the third or fourth elements of the res judicata test, a party claiming the application of res judicata must demonstrate that the parties are identical. *Kuhlman v. Thomas*, 78 Wn. App. 115, 120, 897 P.2d 365 (1995). In *Knuth*, the Court of Appeals specifically addressed the identity of parties in two class action cases, concluding that the identity of parties elements were satisfied. 107 Wn. App. at 731-32. Indeed, in *Ensley*, the court held that a summary judgment in favor of a tavern in an earlier over-service action carried preclusive effect as to an action against the tavern's bartender because they were in privity. 152 Wn. App. at 902-03.

Here, the University never contended below that *Storti I* and *Storti II* involved different parties. CP 1020-31, 1390-92. By failing to argue below that the identity of parties element was not satisfied, the University cannot raise the issue for the first time on appeal, RAP 2.5(a); *Nelson v. McGoldrick*, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995) (issues not raised on summary judgment may not be raised for first time on appeal) effectively conceding that the third and fourth elements of the res judicata test are met. Even if it could now raise the issue, the third and fourth elements of the test for res judicata are met under the facts here as the parties are identical.

(c) The Claims in *Storti I* and *Storti II* Were Identical

The first and second elements of the res judicata test address the question of whether the subject matter and the parties' claims are identical. Our Supreme Court described the appropriate analysis for the identity of claims in *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983):

(1) Whether rights or interest established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of the facts.

*See also, Ensley*, 152 Wn. App. at 903-05. The issues in *Storti I* and *Storti II* are identical, the only difference being the academic year at issue.<sup>20</sup>

They arise out of the same transactional nucleus of facts relating to the

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<sup>20</sup> A series of cases litigated between property owners and a cement company for the nuisance effect of cement dust from the plant is instructive. In *Riblet v. Spokane-Portland Cement Co.*, 41 Wn.2d 249, 248 P.2d 380 (1952), the Supreme Court held that landowners stated a cause of action in nuisance for damages to their property from dust emanating from the defendant's plant but also held a two-year statute of limitations applied. After the plaintiffs secured a judgment against the company, the plaintiffs filed nuisance actions every two years against the company and its successor. In *Riblet v. Ideal Cement Co.*, 54 Wn.2d 779, 345 P.2d 173 (1959), the Supreme Court held that the judgments in the prior nuisance action carried preclusive effect.

Judgments in prior actions between the Riblets and appellant's privy determined the rights and liabilities of the parties and the law applicable thereto. In the absence of a major factual change, the prior judgment binds these parties.

*Id.* at 782. The University's continuing disregard of the Faculty Salary Policy here is no different.

effect of Executive Order 64, and the evidence presented on liability would have been the same in *Storti I* and *Storti II*.<sup>21</sup>

The class contended in *Storti I* that the Faculty Salary Policy expressed in the Faculty Handbook, including §§ 24-70 and 29-71 and Executive Order 64, which was incorporated into the Faculty Salary Policy, constituted a unilateral employment contract. CP 529-45. The Policy was an enforceable contract because it repeatedly used the word “shall” in describing the University’s responsibility to provide a 2% raise, the promise of a 2% raise was not an illusory promise, and the raise was not conditioned upon legislative funding for the raise. CP 572-73, 670-74. The University agreed that contract principles, including unilateral contract principles, governed the dispute, CP 592, 594, 610 and that applicable case law required that the policies in the Faculty Handbook be interpreted as a contract. CP 592, 594. The same basic contentions by both parties are offered in *Storti II*.

In *Storti I*, as in this case, the University contended that the Faculty Salary Policy created no enforceable rights because the 2% raise was discretionary and was also conditioned upon legislative funding for the

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<sup>21</sup> Even if the University failed to raise certain issues in *Storti I*, under res judicata principles, it is barred from relitigating issues actually litigated in the first action, but also those issues that *could have been litigated* in the first case, but were not. *Ensley*, 152 Wn. App. at 899. See generally, Karl B. Tegland, 14A *Wash. Practice: Civil Procedure* § 35.33 at 479.

raise. CP 648-53. The University maintained that in May 2002 it suspended the Faculty Salary Policy and therefore Professor Storti and the faculty were not owed a 2% raise for the work performed during the 2001-02 year because the contract allowed the University to suspend the promised raise at any time, even after the work had been substantially performed. CP 602-03, 641-42. The class asserted in *Storti I* that even if the suspension was proper, it could not affect the 2% raise earned for work performed in 2001-02 because by May 2002, when the University announced the suspension, the work had already been substantially performed. CP 585-86, 632-33, 674. This issue is present in *Storti II* as well. Judge Yu specifically rejected the University's position. (App. at 351-52).

The claims by the class here mirror those in *Storti I*. Similarly, the principal defenses advanced by the University are the same in *Storti I* and *Storti II*.

The present case qualifies on all of the res judicata grounds — a summary judgment was entered on liability, the case involves the same subject matter and virtually the same issues and defenses (only the year of the University's breach of its unilateral contract with the faculty is different), and it involves the very same parties. Accordingly, the same

claims and issues presented here were raised and decided in *Storti I*. *Storti I* carries preclusive effect.

(4) Effect of the Court of Appeals' Nye Decision

The class fully expects that the University will contend that the Court of Appeals decision in *Nye v. University of Washington*, \_\_\_ Wn. App. \_\_\_, 260 P.3d 1000 (2011) affects the issues in this case. It does not.

First, Nye's case was one brought by an individual professor. He is not a member of the certified class in *Storti II*. CP 1485. The class is not bound by Nye's result. *East Texas Motor Freight System Inc. v. Rodriguez*, 43 U.S. 395, 404-06, 97 S. Ct. 1891, 52 L.Ed.2d 453 (1977) (where plaintiffs were not proper class representatives, class action imposing class-wide liability upon defendants was improper). *Hansberry v. Lee*, 311 U.S. 32, 40-46, 61 S. Ct. 115, 85 L.Ed. 22 (1940); *3 Newberg on Class Actions*, § 7:15 at 52-54 (2002).

Second, and more critically, the issues presented in Professor Nye's individual action are materially different from those argued by the class here. The Court of Appeals did not have before it those different legal theories *Storti* raised such as that the University could not revoke its promise of a 2% raise after substantial performance by the faculty and the University's interpretation of the Policy would make it an illusory promise. Certainly, *res judicata* was not an issue in *Nye*.

Nye brought his action against the University after the Regents suspended the Faculty Salary Policy, claiming the University could not suspend the Policy without the faculty members' consent, or, alternatively, that it had failed to adequately suspend the Policy because faculty members were still required to undergo merit review. Nye quarreled with how the University reevaluated the Policy and whether that reevaluation was effective. Although Nye filed his claim as a putative class action, but he never moved to certify the class, *Nye*, 260 P.3d at 1003 n.4, and both Nye and the University filed motions for summary judgment. The trial court granted the University's motion for summary judgment, denying Nye's motion. Because a class was never certified, the University obtained a judgment only against Nye as an individual and not against any other faculty member. And, as stated above, Professor Nye is not a class member in *Storti II*. CP 1485.

The class's claim in *Storti II* is different from Nye's individual claim because the class did not, and does not, contend that the University cannot suspend the Faculty Salary Policy or that it was inadequately suspended. CP 5. The class agrees the University can reevaluate its Policy unilaterally, but only *prospectively*. The class claim in *Storti II* is that the University's reevaluation or suspension of the Policy in April 2009 could not *retroactively* revoke the offer of a 2% raise made at the

beginning of the 2008-09 academic year because the faculty had already substantially performed the work necessary for the raise when the Policy was suspended in April 2009. The class therefore claims the faculty were owed a merit raise at the beginning of the 2009-10 academic year (July 1, 2009) for their meritorious service in the 2008-09 academic year, and the two-year suspension may only operate *prospectively* so that the faculty working in the 2009-10 and 2010-11 academic years would be no longer promised a 2% raise if they perform meritorious work in those years. In contrast, Nye claimed that the Policy could only be changed bilaterally and therefore it “mandates the payment of two percent merit increases to continuing faculty for the 2009-10 and 2010-11 academic years.” *Nye*, 260 P.3d at 1005.

Nye further contended that the faculty earned the 2% raise in the 2008-09 and 2009-10 academic years by undergoing merit reviews and the University must pay wages that an employee has earned. His statement that the faculty earned the 2% merit raise in the 2008-09 and 2009-10 academic years rested not on a contract claim of substantial performance, as argued in *Storti I* and *Storti II*, but instead on a justifiable reliance theory. By contrast, the class assumes the University suspended the contractual provisions promising a 2% merit raise in *future* academic

years, regardless of whether the faculty were required to continue to undergo merit reviews.

Although Nye characterized his claim as a contract claim, his actual legal theory that the faculty members earned the 2% merit raise in the 2008-09 and 2009-10 academic years is based not on contract law, but instead on employee handbook justifiable reliance cases such as *Korlund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005); *Nye*, 260 P.3d at 1006. Indeed, in his reply brief on appeal, Nye even asserted the Faculty Salary Policy was *not* a unilateral contract: “Nor is the Code like the employer promulgated handbooks that the court regarded as forming the basis for unilateral contracts[.]” *Nye Reply Br.* at 10 (emphasis added).

In contrast, the class’s claim in *Storti I* and *Storti II* is based on unilateral contract principles. Specifically, the class’s claim, as noted *supra*, is that an employer’s offer of a raise to the faculty if certain work is performed constituted a binding unilateral contract when the faculty member accepts the offer by performing the work.

Further, much of Nye’s argument on appeal was devoted to defeating the University’s argument under the Administrative Procedure Act (“APA”), RCW 34.05, relating to whether Executive Order 29 was an agency action which required Nye to challenge it within 30 days. The

Court of Appeals did not reach this issue, having ruled in favor of the University on the merits. It is noteworthy that Judge Yu in *Storti I* ruled against the University on this specific APA issue. CP 647-48, 706.

Ultimately, a careful reading of the Court of Appeals opinion shows that it did not have the benefit of the decision in *Storti I*, nor the class's arguments on res judicata in *Storti II*. This is not surprising as that *Nye* court denied amicus status to the *Storti II* class in an order entered on March 28, 2011. Instead, the Court of Appeals appeared to largely analyze the *Nye* case as one involving a bilateral contract arising out of the Faculty Handbook, as argued by Professor Nye.<sup>22</sup> The court did not have before it the *Storti I* decision based on unilateral contract, res judicata, or the substantial performance of a unilateral contract argued by the class in *Storti II*.

In sum, the Court of Appeals decision in *Nye* as to the effect of the reevaluation provision of Executive Order 29 for 2009-10 arrived at the correct conclusion based on Professor's Nye's actual legal arguments. But the outcome would be different for this one particular academic year based on the substantial performance arguments made by the class in *Storti I* and

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<sup>22</sup> The Court of Appeals did recognize that Nye's was a contract case and made a passing reference, without analysis, to unilateral contracts.

*Storti II*.<sup>23</sup> Given the procedural posture of *Nye*, its lack of attention to the preclusive impact of the judgment in *Storti I*, and the different analysis of the Faculty Salary Policy by *Nye* and the class here, the *Nye* decision of the Court of Appeals does not rule on the issues at stake here. And it would simply be unfair to the *Storti II* class given these circumstances for the Court of Appeals decision in *Nye*'s individual case to have any effect on this review.<sup>24</sup>

(5) The Class Is Entitled to Fees at Trial and on Appeal

RAP 18.1(b) requires a party seeking fees to devote a separate section of its brief to its fee request. The class here would be entitled to an award of fees at trial and on appeal pursuant to RCW 49.48.030, a statute allowing fees where wages are withheld, and under the common fund equitable exception to the American Rule on attorney fees in civil litigation. *Covell v. City of Seattle*, 127 Wn.2d 874, 891-92, 905 P.2d 324 (1995); *Bowles v. Dep't of Retirement Sys.*, 121 Wn.2d 52, 70-71, 847 P.2d 440 (1993).

---

<sup>23</sup> Nowhere in the *Nye* briefs or the decision was substantial performance or any of the cases cited here mentioned.

<sup>24</sup> If Professor *Nye* had sought class certification in his case, *Duane Storti* would have objected and, if it were certified anyway, *Storti* would have had an opportunity to raise his arguments there. Because *Nye*'s action did not involve a certified class, its result implicates only *Nye* himself. *East Texas Motor Freight*, 431 U.S. at 404-06.

This Court should award the class its fees on appeal either under the statute or because the class, if successful, will have created an identifiable common fund.

F. CONCLUSION

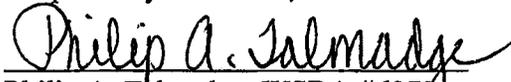
The University's Faculty Salary Policy constituted a unilateral contract. If a faculty member performed meritoriously in an academic year, that faculty member was entitled to a 2% salary increase in the next academic year. Duane Storti and the class members fulfilled their obligation by performing meritorious service for the University substantially throughout academic year 2008-09. The University could not retract its offer for that academic year after the faculty had substantially performed in response to the University's offer.

Moreover, under *res judicata* principles, after the court's decision in *Storti I*, the University is precluded from litigating the very same issues regarding the Faculty Salary Policy resolved in *Storti I*.

This Court should reverse the summary judgment in favor of the University and the denial of partial summary judgment in favor of the class, and remand the case to the trial court with directions to enter a partial summary judgment on liability in favor of the class. Costs on appeal, including reasonable attorney fees, should be awarded to the class.

DATED this 14<sup>th</sup> day of November, 2011.

Respectfully submitted,



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Attorneys for Appellants

# APPENDIX



- 1 • Stephen Festor's March 16, 2005 declaration and its attached exhibits;
- 2 • Stephen Festor's September 23, 2005 declaration and its attached exhibits;
- 3 • Excerpts from University Handbook;
- 4 • Brief of Plaintiff Class in Opposition to UW's Motion for Summary Judgment;
- 5 • Stephen Strong's October 10, 2005 declaration and its attached exhibits;
- 6 • Excerpts from University Handbook (Volume II);
- 7 • Plaintiffs' Reply Brief on Summary Judgment;
- 8 • Stephen Festor's October 17, 2005 declaration and its attached exhibits;
- 9 • Defendant's Motion for Partial Summary Judgment;
- 10 • Declaration of David B. Robbins and its attached exhibits;
- 11 • Declaration of Gerry Philipson;
- 12 • Declaration of Bradley Holt;
- 13 • Declaration of Sandra Silberstein and its attached exhibits;
- 14 • Declaration of Steven Olswang;
- 15 • Declaration of Michael Madden and its attached exhibits;
- 16 • Memorandum in Opposition to Plaintiff's Motion for Summary Judgment;
- 17 • Declaration of Richard L. McCormick;
- 18 • Second Declaration of David B. Robbins and its attached exhibits;
- 19 • Defendants' Reply Memorandum in Support of Motion for Summary Judgment;

20 and heard oral argument on October 21, 2005.

21 **Decision and Order**

22 After considering the pleadings and argument presented by the parties, the court finds  
23 that there are no material issues of fact and that the court can decide the issues presented as a  
24 matter of law. Summary judgment in a contract dispute is appropriate where the terms of a  
25 written contract are unambiguous or where reasonable minds could reach only one conclusion  
26 from all of the evidence presented. Therefore, for the following reasons,

27 IT IS HEREBY ORDERED that Plaintiff's Motion IS GRANTED and Defendant's  
28 Motion IS DENIED.

29 The University of Washington's ("the University's") Faculty Salary Policy is contained  
in the Faculty Handbook §§24-70 and 24-71, and Executive Order 64. Plaintiff claims that the  
Faculty Handbook constitutes the employment contract between the University and its faculty.

1 The University does not dispute this claim for summary judgment purposes and indeed argued  
2 that principles of contract interpretation should apply (*see* Memorandum in Opposition to  
3 Plaintiff's Motion for Summary Judgment at p.6).  
4

5 The Faculty Salary Policy outlines the University's policy on faculty salary pay raises.  
6 The Faculty Salary Policy was the result of extensive negotiations between the University  
7 Administration and the faculty represented by the Faculty Senate. The issue presented on  
8 summary judgment is whether the Faculty Salary Policy regarding merit salary increases  
9 constitutes a contractual obligation for the University in the year 2002-03.<sup>1</sup>  
10

11 A preliminary question is whether the court should consider extrinsic evidence in order to  
12 interpret the contract. Both parties offered such evidence to support their respective  
13 interpretations.<sup>2</sup> While the contemporaneous material submitted by Plaintiff supports the court  
14 finding that the parties intended to bind themselves to funding a 2% meritorious salary increase,  
15 the court concludes that it is not necessary to consider this extrinsic evidence since the intent of  
16 the parties is ascertainable by reading the plain language of the agreement. *Hearst*  
17 *Communications v. Seattle Time Co.*, 154 Wn.2d 493 (2005).  
18  
19

20 The Faculty Handbook outlines principles and procedures for implementing promotion,  
21 merit based salary, and tenure considerations. It also discusses the purpose of the Faculty Salary  
22 Policy which is to "recruit and retain the best faculty" by rewarding faculty based on  
23 performance. "This new policy is designed to provide for a predictable and continuing salary  
24

25  
26 <sup>1</sup> The University provided at least 2% salary increases to meritorious faculty in 2000-01, 2001-02, and 2003-04. The  
only year in question is 2002-03.

27 <sup>2</sup> The Plaintiff offered extensive contemporaneous material such as minutes, e-mails, and hard copy  
28 correspondence. The Defendant offered *post hoc* testimony of individuals who were directly involved in the  
development of the salary policy.  
29

1 progression for meritorious faculty.” §24-57, at p.10. The policy goes on to describe allocation  
2 categories and prioritizes the salary distribution plan. The first priority is to support regular  
3 merit and promotion awards to current faculty. *Id.*, at p. 11. It further states that all meritorious  
4 faculty shall receive a 2% merit salary increase:  
5

6 All faculty shall be evaluated annually for merit and for progress towards reappointment,  
7 promotion and/or tenure, as appropriate. A faculty member who is deemed to be  
8 meritorious in performance shall be awarded a regular 2% merit salary increase at the  
9 beginning of the following academic year. Higher levels of performance shall be  
10 recognized by higher levels of salary increases as permitted by available funding.

11 *Id.*, at p.11-12.

12 The Faculty Salary Policy states that a “salary increase . . . shall be granted to provide an  
13 initial minimum equal-percentage salary increase to all faculty following a successful merit  
14 review.” §24-70.B.1, at p. 13. Section 24-71.A.1 states that the University President “shall each  
15 year make available funds to provide an initial minimum equal percentage salary increase to all  
16 faculty deemed meritorious . . .” Executive Order 64, incorporated by reference into the Faculty  
17 Salary Policy, states an express commitment by the University to support a salary adjustment  
18 based on performance evaluations for those faculty deemed meritorious; that “[a] faculty  
19 member who is deemed to be meritorious in performance shall be awarded a regular 2% merit  
20 salary increase at the beginning of the following academic year.”  
21

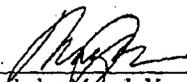
22 After reviewing all of the relevant portions of the Faculty Salary Policy, the court  
23 concludes that the plain language creates a mandatory duty that requires the University to  
24 provide meritorious faculty an annual merit increase of at least 2%. The court cannot find any  
25 language that makes the merit salary increase contingent on funding.  
26  
27



1 must mean that if funding became an issue, the parties would subject the Faculty Salary Policy to  
2 further evaluation or review. It does not say that the Faculty Salary Policy will be rescinded,  
3 cancelled, or repealed and this court cannot transpose such a meaning to the word  
4 "reevaluation." One might assume that reevaluation would require a re-opening of discussions  
5 with the Faculty Senate and resubmitting the Salary Policy for review and consideration by all of  
6 the stakeholders. However, the court need not reach the question of what process would have  
7 been utilized to repeal, evaluate, or modify the Faculty Salary Policy. The Faculty Salary  
8 Policy's plain language creates a mandatory duty that requires the University to provide  
9 meritorious faculty an annual 2% merit salary increase in the year 2002-03.  
10

11  
12 In regard to Defendant's Motion for Partial Summary Judgment, the court denies the  
13 Motion in its entirety. For the above stated reasons, the court denies Defendant's Motion to  
14 dismiss plaintiff's contract claims. The court also rejects Defendant's assertions that the court  
15 does not have jurisdiction to consider Plaintiff's claims. The court has original jurisdiction over  
16 this contract dispute in which the relief sought is monetary damages. Moreover, the University  
17 rejected Plaintiff's attempts to adjudicate the dispute on the basis that the adjudication process of  
18 the University was "not the proper forum" to review the faculty salary issue.  
19  
20

21 IT IS SO ORDERED this 25<sup>th</sup> day of October, 2005.  
22

23   
24 \_\_\_\_\_  
25 Judge Mary I. Yu  
26 KING COUNTY SUPERIOR COURT  
27  
28  
29

DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: Brief of Appellants Storti to the following:

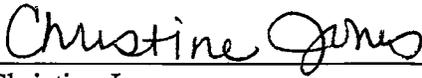
Louis Peterson  
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 14, 2011, at Tukwila, Washington.

  
\_\_\_\_\_  
Christine Jones  
Talmadge/Fitzpatrick

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Christine Jones  
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