NO. 335283

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

KIM MIKKELSEN

Plaintiff / Appellant

v.

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

Defendants / Respondents

BRIEF OF APPELLANT KIM MIKKELSEN

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I. INTRODUCTION

Kim Mikkelsen was a 27 year female employee over the age of 40 employed at the Kittitas County PUD who was fired from her job by Defendant Charles Ward. Mikkelsen had a spotless record at the PUD. In fact she was the acting interim General Manager prior to Defendant Ward being hired. There were no complaints nor adverse documentation in Mikkelsen's employee file.

The Mikkelsen firing was wrongful for several reasons. First, she was discriminated in the firing on the basis of sex and age. Mikkelsen made a sufficient prima facie showing as to both claims and has satisfied her burdens to allow these claims to be presented to a jury. These claims involve multiple issues of fact and it was error for the trial court to dismiss these claims as a matter of law.

In addition, defendants failed to follow the Corrective Action policy that was in place. Mikkelsen was entitled to enforce this policy and the failure to do so by defendants was actionable by Mikkelsen. Multiple issues of fact are presented in this claim and the trial court erred in dismissing the claim as a matter of law.

Finally, it was error for the Court to dismiss Mikkelsen's claims for outrage and negligent hiring and supervision. Again, multiple issues of fact were presented making the Court's dismissal inappropriate. There was no

valid reason for Mikkelsen's firing. Such action violated both Washington public policy and the PUD's Corrective Action policy. Multiple issues of fact were presented and it was error for the trial court to grant the defendants' motions for summary judgment.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in its granting of the Defendants' Motions for Summary Judgment and dismissing the plaintiff's case.

Issues Related to Assignment of Error No. 1:

1. Did Mikkelsen present a prima facie case of discrimination?
2. Is the fact that Mikkelsen was not replaced by someone outside the protected class fatal, as a matter of law, to her discrimination claim?
3. Are multiple issues of fact presented by Mikkelsen as to her prima facie case and the issue of pretext thus making summary judgment inappropriate?
4. Were issues of fact presented as to the Mikkelsen's ability to enforce the PUD Corrective Action policy thus making summary judgment inappropriate?
5. Were issues of fact presented as to the application of the doctrine of Outrage thus making summary judgment inappropriate?

6. Were issues of fact presented as to the application of the negligence claims thus making summary judgment inappropriate?

III. STATEMENT OF THE CASE

Kim Mikkelsen (hereinafter "Mikkelsen) was born in 1954 in a small Montana town. She obtained a college degree and after graduation from college in 1976 she went to work for Fergus Electric Cooperative in 1978. Mikkelsen worked at Fergus until 1984 when she was hired by the Kittitas County Public Utility District (PUD). This move started her 27 year career with the Kittitas County PUD. Mikkelsen was hired as the finance manager. She worked "part time" and was paid by the hour. (CP 315). Mikkelsen and the PUD entered into an employment contract which set forth 36 specific duties that she, as Manager of Accounting and Finance, would be required to perform. (CP 391-93)(APP-1-APP-3).

At the same time, in 1984, Mikkelsen started her consulting business. The primary focus of the business was on financing, administration and accounting issues and training in the utility businesses. (CP 214). There was no secret about her consulting business. In fact, the consulting business was the primary reason that she was a part time employee.

The Kittitas County PUD has a three member Board of Commissioners (hereinafter "Board") that oversee operations and it employs a General Manager to oversee operations. The first General Manager Mikkelsen worked with was Budd Weir. She worked with him from her initial employment in 1984 until Weir's retirement in 1988. Mikkelsen worked well with Weir and had no issues or problems. (CP 316).

Upon Weir's retirement in 1988, George Harmon was hired as the new General Manager at the PUD. He remained General Manager until his retirement in 2001. During these 14 years Mikkelsen worked with Harmon and that work was both rewarding and enjoyable. There were many accomplishments at the PUD during this time and, again, Mikkelsen had no issues or problems under Harmon's tenure as General Manager. (CP 316).

After Harmon retired, the Board hired Mark Kjelland as the new General Manager. While Mikkelsen had no issues with Mr. Kjelland, personally, she, along with three other employees became concerned with certain of his actions late in his employment as General Manager. These concerns culminated with a letter in August 2009 that Mikkelsen, together with three other employees sent to the Board under the "whistleblower" policy provision at the PUD outlining the concerns that these four PUD employees had with respect to Mr. Kjelland. (CP 316; CP 326-28)

As a result of this whistleblower action, Mr. Kjelland resigned his position as the General Manager at the PUD. This left a void at the General Manager position. Mikkelsen was asked by the Board to assume the duties of the interim General Manager of the PUD. She agreed to do so. (CP 317) She was the interim manager from October 2009 through July 2010. (CP 416) All three Commissioners asked Mikkelsen on numerous occasions to be the permanent General Manager of the PUD but Mikkelsen did not desire the position and declined the kind offers. Among other duties, Mikkelsen then organized the search for a new General Manager for the PUD. Mikkelsen found three manager search firms and the Board selected one to work with. The selected firm vetted about 50-60 applicants. (CP 317).

This search process resulted in the Board hiring defendant Charles Ward (hereinafter "Ward") as the next General Manager of the PUD. His tenure ran from July 1, 2010 through December 31, 2011 (18 months) at which time his employment was terminated by the Board. (CP 395 & 404).

A. Adoption Of The "Corrective Action Policy"

During her time as interim General Manager at the PUD, Mikkelsen spearheaded several initiatives. The one relevant to this discussion was the development of a "Corrective Action Policy" to be followed by the PUD in the discipline of PUD employees. No such written PUD policy existed at the time that Mikkelsen assumed the role of interim manager. (CP 317)

This Corrective Action policy was adopted for the protection of both the employees of the PUD as well as the PUD itself. The intent was to have "guidelines" in place so that everybody knew what the rules were. (CP 417-18)

Prior to becoming interim manager, Mikkelsen was required to discipline one of the PUD employees. There were no procedures in place at the time so that both Mikkelsen and the person being disciplined had nothing to follow. Mikkelsen did not desire to be in that position again. (CP 418-19).

Accordingly, once interim general manager, Mikkelsen made several inquiries as to what other PUDs were using as corrective action policies and was provided a policy from the Chelan County PUD. While not taken verbatim, the Chelan policy was largely adopted by the PUD Board. The Corrective Action Policy adopted by the Board applies to both the PUD union and non-union employees. The final policy was the subject of several meetings and discussion at the Board level. The Corrective Action Policy was eventually adopted in November 2009 by the Board. (CP 317; CP 343-348; APP 4- APP 9).

After the adoption of the Corrective Action Policy and during Mikkelsen's time as the interim General Manager, she utilized the Corrective Action Policy on one occasion. As the acting General Manager,

Mikkelsen did not view the Corrective Action Policy as "optional". Mikkelsen was faced with a situation with a union lineworker and utilized the Correction Action Policy adopted by the Board. Mikkelsen used and followed the Corrective Action policy and the progressive discipline alternatives set forth therein. In accordance with the progressive discipline model set forth therein, a verbal warning was given to the worker at issue and the warning successfully remedied the situation. (CP 317; 419).

The same Corrective Action Policy was utilized by the defendant Ward as well once he became the General Manager of the PUD. Once Ward became the General Manager, he used the Corrective Action Policy to issue a verbal warning to a PUD lineworker. Mikkelsen was involved in the process because she was the "witness," under the policy, for the verbal warning that was issued. During the process, defendant Ward had discussions with Mikkelsen with respect to the use of the Corrective Action policy. Defendant Ward never took the position that the policy was somehow "optional." Defendant Ward and Mikkelsen discussed the appropriate level of discipline under the Corrective Action policy and the Policy was followed. Defendant Ward was faced with the discipline issue as General Manager and the Corrective Action Policy was used as it was designed. (CP 317; 556).

Prior to Mikkelsen's termination in August 2011, The PUD Corrective Action policy was in effect for nearly two years. The Corrective Action policy was invoked and utilized by the PUD on two occasions during that time frame. There is no evidence in the record, up until Mikkelsen's termination, that the Corrective Action policy was not followed.

B. The Rein Of Defendant Ward As General Manager

Mikkelsen was involved in the process for the search for a new General Manager for the PUD after Mr. Kjelland. Mikkelsen reviewed defendant Ward's materials. Mikkelsen had concerns and she expressed those concerns to the search consultant and the Board. One of the main concerns was the fact that Mr. Ward seemed to have multiple, short term positions, one of which he admitted being fired from. These issues concerned Mikkelsen and she expressed them. In response, the Commissioners inserted a bonus payment to Mr. Ward if he stayed for at least five years. Mr. Ward was eventually offered the position of General Manager and his first day was in July, 2010. (CP 556; CP 395-96).

Once defendant Ward was hired as the General Manager in July 2010, Mikkelsen resumed her position as the Finance Manager. There were three PUD employees on the "management team" in addition to defendant Ward: Mikkelsen, Brian Vosburgh and Matt Boast. The management team

group met on a regular basis. Mikkelsen had initiated such regular meetings during her tenure as the interim General Manager of the PUD. (CP 556).

While Mikkelsen's relationship with Mr. Ward was initially unremarkable, it did not take long for certain issues to arise. In about December 2010, Mikkelsen began to notice a distinctly different treatment from defendant Ward. Mikkelsen noticed that defendant Ward was "passing me over" on e-mail communications while including both of her male management team members in those e-mails. Both Brian Vosburgh and Matt Boast even mentioned this fact to Mikkelsen. It was at this point that Mikkelsen noticed that defendant Ward was beginning to work with the male management team members to the exclusion of her. When the management team would have meetings, defendant Ward would cut Mikkelsen off and ignore her and did not do the same to the male team members, Matt and Brian. (CP 318-19; CP 434-37).

There were several occasions where Mikkelsen would suggest something at management meetings and the suggestion would be ignored by defendant Ward. However, if Mikkelsen told that exact same thing to Matt or Brian and they suggested it to defendant Ward, he not only listened but adopted the suggestion. When defendant Ward first started work, Mikkelsen was the "acting manager" at the PUD when defendant Ward was gone. Subsequently, Ward excluded Mikkelsen from this position. Ward's

gender bias became more overt as time passed. Ward began making remarks separating employees by gender rather than by job. On numerous occasions, he would refer to the "girls", "gals" or "ladies" in clerical positions of the office, yet when referring to the male line crew, he avoided the use of "guys" or "men" or "boys." (CP 318-19; CP 434-37).

The relationship between Mikkelsen and defendant Ward continued to deteriorate. In March, 2011 (9 months after Ward becomes General Manager), Mikkelsen initiated a meeting with Ward on March 30, 2011. Among other topics of discussion, Mikkelsen specifically addressed gender discrimination issues with defendant Ward as they pertained to Mikkelsen. While defendant Ward said he would attempt to do better, that did not happen. In fact, Ward's actions toward Mikkelsen became more derisive, dismissive and the relationship deteriorated even further. (CP 318).

The atmosphere did not improve on the gender front from defendant Ward toward Mikkelsen. This became more overt during the union negotiations when Mikkelsen attempted to make the contract gender neutral. During negotiations regarding fire-retardant clothing, Mr. Ward said he would wear any uniform paid for by the PUD, just so long as it wasn't "pink". Mikkelsen was also told that it was simply one of those "guy/girl" things with defendant Ward. Even more troubling, Ward would

rearrange his genitals when he sat across from Mikkelsen, a behavior she never witnessed toward Ward's male staff members. (CP 318).

In July 2011, the President of the PUD Board, Commissioner Hanson, called Mikkelsen to ask how things were going at the PUD. She told Commissioner Hanson that she would only discuss those issues if he acknowledged that he had called her. Since it was the truth, he agreed. Mikkelsen told President Hansen many of the items addressed above. He asked Mikkelsen what she would suggest the Board do. She suggested an independent consultant would likely suggest that an employee survey be conducted so that it was not just one person's perception. On August 9, 2011, President Hanson called Mikkelsen to ask her to send him a proposed survey. Mikkelsen did as requested and sent President Hansen a copy of a survey. President Hanson also asked Mikkelsen to forward a copy of the survey to the other two commissioners and she complied with that request as well. (CP 318-19).

The policy of Sexual Harassment enacted by the PUD in 1991 said, "Any question regarding either this policy or a specific situation should be addressed to the General Manager or the President of the Board of Commissioners. Prompt action shall be taken when a question or situation is brought to the attention of the appropriate person." When President Hanson called Mikkelsen on the 24th of July, 2011, she specifically told him

of Ward's different treatment of her than that of her male contemporaries. There was no response by the Board after Mikkelsen informed President Hanson. (CP 318-19).

C. The Termination Of Mikkelsen's 27 Year Career

Mikkelsen was gone the next week in August 2011 on her consulting business. She returned to the PUD on Monday, August 23, 2011. At 3:48 p.m. that day, defendant Ward met with Mikkelsen. Matt attended the meeting. At the meeting, defendant Ward read from a written script as he fired Mikkelsen. (CP 398-99) Those was no hearing. There was no debate. There was no discussion. Defendant Ward read from his written script and fired Mikkelsen from her 27 year position at the PUD. The only thing that the written script allowed defendant Ward to say was that "it's not working out." When Mikkelsen asked what "it" was, defendant Ward would not answer. Defendant Ward noted that, "Kim said she needed specifics and I [defendant Ward] told her we were not going to have that discussion." (CP 398-99) Defendant Ward did allow Mikkelsen to retrieve her personal belongings but he warned her, "now don't you make a scene." Mikkelsen viewed this as another offensive, gender based comment, yet again alluding to her gender being overly emotional. **In the 13 months of supervision under Ward, not one document was placed in Mikkelsen's personnel file, nor was any verbal discipline rendered.** (CP 319).

Mikkelsen specifically asked for, and was provided, a copy of her personnel file. **There are absolutely no adverse items in her file. Mikkelsen had never been reprimanded, admonished or disciplined in any manner in the 27 years she was employed by the PUD.** (CP 319)

After Mikkelsen was fired, Defendant Ward allegedly presented some form of a list of the purported reasons for Mikkelsen's termination to the PUD Board, after the fact. This list was created after the termination and has no basis in fact. In fact, there is no evidence that it was ever actually given to the Board. Mr. Ward never came to Mikkelsen to address any concern or to discuss any issue with respect to items in the memorandum. As stated above, there was nothing in the Mikkelsen personnel file from defendant Ward stating any problems. (CP 319-20).

When Mikkelsen was unceremoniously fired from a job she loved and had invested the majority of her career in, it was difficult both emotionally and financially. She had curtailed her independent consulting jobs to take on the position of interim GM, so income from that source was limited and being re-built. As a two-time cancer survivor, health insurance was paramount. As a long-term employee, Mikkelsen was invested in the PERS 3 retirement system. The requirement of 30 years of service was severely diminished by the early termination at 27 years. A 401k plan that replaced social security further impacted her retirement income. (CP 320)

The early retirement penalty, lost medical coverage, 401K contributions, and future wage loss will affect Mikkelsen for the rest of her life. The worry and concerns from this financial loss are constant. Mikkelsen did not create consulting websites until two years had passed hoping to minimize the chance clients would read of her alleged incompetence. Commissioner Sparks commented in published board minutes, on line, the issues were "long term and pervasive" as well as in the local newspaper the PUD had "found a number of things that needed correction". Comments were disclosed not just in an open public meeting, but also after a board meeting to a local reporter by Commissioner Sparks. Mikkelsen is still concerned her future consulting income potential may be impacted by statements made by Board members and Ward. (CP 320).

Mikkelsen was fired by defendant Ward on August 23, 2011. Defendant Ward's employment with the PUD was terminated by the Board in November 2011. The resolution to terminate Defendant Ward's employment as the General Manager of the PUD was first introduced to the Board of Commissioners on November 29, 2011, about three months after Ms. Mikkelsen's termination. (CP 404) This lawsuit was initially filed in September 2011. (CP 320).

After being terminated by the PUD, Ms. Mikkelsen filed for unemployment benefits. In response to her application, the PUD stated,

when asked whether the discharge was based on "cause" replied, "Ms. Mikkelsen was an "at will" employee and was terminated without cause." (CP 402) The defendants represented to the state of Washington that the PUD fired Mikkelsen, "because it could."

IV. ARGUMENT

The framework for the analysis herein will focus on two broad areas, although other areas will be addressed. As will be set forth in detail below, the theme of this appeal is that there are multiple issues of fact existing that precluded the granting of summary judgment.

However, the starting point for the analysis is that Washington is an "at will" employment state. As a general rule, when an employee is employed for an indefinite period they may be terminated from that employment for any or no reason. *See Swanson v. Liquid Air Corp.,* 118 Wn.2d 512, 520, 826 P.2d 664 (1992). However, Washington also recognizes exceptions to this general rule that are applicable to this case.

In *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984), the Court first clarified and set forth the extent of these various exceptions to the "at will" employment doctrine. Such an employment contract is only terminable for cause in the event that (1) there is an express or implied agreement to that effect; or (2) where there is evidence of promises of specific treatment in specific situations found in an employee

manual or handbook issued by an employer to its employees, the employer will be compelled to honor those promises; (3) the employer can be held liable in tort for discharging an employee for a reason that contravenes a clear mandate of public policy. *See Thompson*, 102 Wn.2d at 233.

After Mikkelsen's firing, she filed this suit. She alleges that her termination of employment by the defendants violated public policy since it was discriminatory on the basis of both sex and age. In addition, Mikkelsen alleges that the termination of her employment by the defendants was in violation of and did not adhere to the PUD Correction Action policy. Mikkelsen also alleged that her dismissal caused emotional distress (Outrage) and that the PUD was negligent in its hiring of defendant Ward as well as its supervision of him. On motions for summary judgment, the trial court dismissed Mikkelsen's claims and this appeal follows.

A. Overview Of The Discrimination Analysis

The Mikkelsen discrimination claims that her termination was in violation of public policy are premised on a violation of RCW 49.60.180(2) ("WLAD") which provides: "It is an unfair practice for any employer: To discharge or bar any person from employment because of age, sex . . ." RCW 49.60.180(2). Mikkelsen was discharged from employment with the PUD because of her age and/or sex.

The WLAD sets forth no criteria nor elements for the prosecution of any claim brought under the statute. *See Grimwood v. University of Puget Sound, Inc.,* 110 Wn.2d 355, 361, 753 P.2d 517 (1988). However, the WLAD shall be construed liberally for the accomplishment of the purposes expressed in the Act. *See Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993).

Courts have developed a unique approach in analyzing these types of discrimination cases. This is because courts have recognized that a plaintiff will rarely have direct, "smoking gun" evidence of discriminatory motive by the employer. *See Hill v. BCTI Income Fund-I,* 144 Wn.2d 172, 179, 23 P.3d 440 (2001). Such evidence is not required. In announcing the standards that will apply, courts have recognized that "employers infrequently announce their bad motives orally or in writing." *deLisle v. FMC Corp.,*57 Wn. App. 79, 83, 786 P.2d 839 (1990). Thus, it would not be appropriate to require a plaintiff to provide such direct evidence to successfully maintain a claim. *See Hill*, 144 Wn.2d at 179.

> Courts have thus repeatedly stressed that "[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden. *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 860, 851 P.2d 716, *review denied,* 122 Wn.2d 1018, 863 P.2d 1352 (1993). "Indeed, in discrimination cases it will seldom be otherwise. . ." *deLisle*, 57 Wn. App. At 83, 786 P.2d 839.

Hill, 144 Wn.2d at 179-80.

The discrimination claims are "disparate treatment claims" based upon the presentation of circumstantial evidence. A disparate treatment claim is one of the most easily understood claim since it means that the employer simply treats some people less favorable due to their sex or age *See Hegwine v. Longview Fibre* 162 Wn.2d 340, 354 & n. 7, 172 P.3d 688 (2007). Mikkelsen has made a sufficient showing to satisfy the "Burden Shifting" test as set forth below. Accordingly the trial court erred in granting summary judgment dismissing Mikkelsen's claims.

B. Circumstantial Evidence "Burden Shifting" Test

In making this WLAD discrimination determination under a "circumstantial evidence" situation, Washington Courts utilize a three-pronged, "burden shifting" analysis. *See Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 667, 880 P.2d 988 (1994). This analysis is patterned after the analysis first developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973)(hereinafter the "McDonnell Douglas analysis").

Under the first prong of the *McDonnell Douglas* analysis, the plaintiff bears the initial burden of establishing a "prima facie case" of discrimination. *See Scrivener v. Clark College*, 181 Wn.2d 439, 446, 334 P.3d 541 (2014). All discrimination cases, whether they be race, sex, age, etc. . . have different proof elements. However, with respect to the sex

discrimination and age discrimination, the first three elements of a prima facie case are substantively similar: (1) plaintiff was in the protected class (a woman or over 40); (2) plaintiff was discharged; (3) the plaintiff was doing satisfactory work. *See Rice v. Offshore Systems, Inc.,* 167 Wn. App. 77, 88, 272 P.3d 865 (2012). A potential additional element will be discussed below.

This analysis deals with the "burden of production" of evidence and is unique in application. As a burden of production issue, it is a legal issue to decide and the Judge must view the evidence and reasonable inferences therefrom in a light most favorable to the plaintiff. *See Carle v. McChord Credit Union*, 65 Wn. App. 93, 98, 827 P.2d 1070 (1992).

If the plaintiff meets her initial burden as set forth above, she is entitled to a "rebuttable presumption" of discrimination mandating that the defendant come forward with evidence of a legitimate, nondiscriminatory reason for the discharge. *See Grimwood*, 110 Wn.2d at 364. This is the first "burden shift" involved in this test.

There is no question that the Mikkelsen can establish these first three elements of her prima facie case. As to her sex discrimination claim, she is a woman and was discharged. As to her age discrimination claim, she was over the age of 40 and was discharged. *See Griffith v. Schnitzer Steel Indus.*, 128 Wn. App. 438, 447, 115 P.3d 1065 (2005).

The third element asks whether the plaintiff was performing her job in a satisfactory manner. The evidence establishes that there were no complaints as to Mikkelsen's job performance. She was appointed the interim manager of the PUD and the Commissioners wanted her to be the permanent General Manager. All of the commissioners had no reason as to why she should be terminated. There were never any complaints registered under past PUD General Managers as to Ms. Mikkelsen's performance. Defendant Ward never brought any issues of Ms. Mikkelsen's performance to the Board. In fact, Commissioner Hanson specifically told defendant Ward that Ms. Mikkelsen should not be fired. (CP 450-51, 456)

There is no evidence in the record that Mikkelsen was doing anything but a "good job." In response to her unemployment request, defendants represented that Mikkelsen was not terminated "for cause." While defendants may now attempt to set up some "reasons" for the termination, those go to the "pretext" issue which will be discussed below. Given the standard that all inferences must be viewed in the light most favorable to the plaintiff, there are, at least, issues of fact presented. Mikkelsen has met her burden on this first prong of a prima facie case.

It is also important to remember the incredible burden that the defendants must overcome in a WLAD discrimination summary judgment motion; a burden they cannot meet. Summary judgement should rarely be

granted to an employer in a WLAD case because of the inherent difficulty of being able to prove discriminatory motive. *See Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 144 94 P.3d 930 (2004).

That, then, brings us to the perceived fourth element within Mikkelsen's alleged "prima facie" case under the *McDonnell Douglas* test and the one that both defendants claim plaintiff cannot meet. This would be a showing that, after she was fired, Mikkelsen was replaced by someone who was a man (for sex discrimination) or someone "significantly younger" (for age discrimination). As explained below, neither of these arguments are sufficient to grant the defendants' summary judgment in this case since neither should be a determinative factor in making her prima facie case.

The starting point for this examination is the pronouncement from the *Grimwood* court at the time this *McDonnell Douglas* analysis was first set forth by our Washington court. The Court noted that these factors listed within the prima facie analysis were not "absolutes." *Grimwood*, 110 Wn.2d at 362-63. In fact, it has been specifically noted that these four elements of a "prima facie" case should not be used as a "rigid, mechanized, or ritualistic or exclusive method for proving the claim. *See Hatfield v. Columbia Federal Sav. Bank,* 57 Wn. App. 876, 881-82, 790 P.2d 1258 (1990). Yet that is exactly what the defendants seek to do in their motions

and what the trial court actually did in its ruling. The trial judge made a mechanical application of this fourth factor and doing so was error.

Washington courts have done away with this fourth factor in the context of age discrimination cases. In *Hatfield*, the court held that the fourth element as it related to the replacement of a discharged employee by a younger person was not applicable. It went on to analyze the case in accordance with the other functions. *Hatfield*, 57 Wn. App. at 881-82. In fact, in *Grimwood, supra,* the Court in discussing the prima facie case as it related to an age discrimination case specifically noted:

> In *Loeb*, the court also points out that the element of replacement by a younger person or a person outside the protected age group is not absolute; rather, the proof required is that the employer "sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills." *Loeb,* at 1013.

Grimwood, 110 Wn.2d at 363.

The PUD hired someone to fill the position previously held by Mikkelsen. She started work on August 23, 2011 the same day Mikkelsen was fired. (CP 272, 383).

Washington courts have also done away with a similar "fourth element" in the context of a "failure to hire" discrimination claim, and noted the flexible standard that was set forth the *McDonnell Douglas* analysis and

the Court then eliminated a previous "factor" that the person had to have applied for the job considered:

> As the United States Supreme Court has specifically cautioned, and our state Supreme Court has agreed, **"The prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic' " or the exclusive means of proving a discrimination claim.** Because the facts in employment discrimination cases vary, the *McDonnell Douglas* model for proving a plaintiff's prima facie case "is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas,* 411 U.S. at 802 n. 13, 93 S.Ct. 1817. **Instead, the *McDonnell Douglas* prima facie elements should be used "flexibly to address the facts in different cases" and should not be " 'viewed as providing a format into which all cases of discrimination must somehow fit.' "** *Grimwood,* 110 Wash.2d at 363, 753 P.2d 517 (quoting *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1016–17 (1st Cir.1979); *Johnson v. Dep't of Soc. & Health Servs.,* 80 Wash.App. 212, 227 n. 21, 907 P.2d 1223 (1996)).

Fulton v. State, Dep't of Soc. & Health Servs., 169 Wn. App. 137, 152, 279 P.3d 500 (2012)(footnoted omitted)(emphasis added).

Similarly, this fourth "replacement" prong of the prima facie case has also been eliminated in a disability discrimination claim under the WPLA. *See Callahan v. Walla Walla housing Authority*, 126 Wn. App. 812, 820, 110 P.3d 782 (2005). The same has been held in a handicap discrimination claim. *See Cluff v. CMX Corp. Inc.,* 84 Wn. App. 634, 638-39, 929 P.2d 1136 (1997). Washington Courts have followed the "flexible" "non-rigid" approach and have held that this fourth prong is not a fatal showing in a discrimination case. This Court should so hold as well.

Federal courts have likewise eliminated this fourth prong and have done so in gender discrimination claims. Federal decisions, while not binding on this court are persuasive authority and provide a "source of guidance." *See Grimwood*, 110 Wn.2d at 361-62.

In a sex discrimination case, the Court in *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 347 (3d Cir. 1999) specifically analyzed this issue and held that the fourth prong of showing that a male had been hired in the female's place was not a necessary showing so as to prove a discrimination claim and make a "prima facie" showing . *Pivirotto,* 191 F.3d at 347

In *Pivirotto*, the plaintiff, a female, could not meet the fourth element to show that her replacement who was hired after she was terminated was a male. *Pivirotto*, 191 F.3d at 349. The *Pivirotto* Court reasoned that it made absolutely no sense to have such a requirement since it added nothing to the discrimination analysis:

> **By contrast, a plaintiff's inability to prove that she was replaced by someone outside of her class is not necessarily inconsistent with her demonstrating that the employer treated her "less favorably than others because of [her] race, color, religion, sex, or national origin.**" *Id.* (internal quotation omitted). Even if the plaintiff was replaced by someone within her own class, this simply demonstrates that the employer is willing to hire people from this class—which in the present context is presumably true of all but the most misogynistic employers—and does not establish that the employer did not fire the plaintiff on the basis of her protected status.

> **As we find this issue quite straightforward, we are not surprised to find that seven of the eight federal courts of appeals to have addressed it have held that a plaintiff need not prove, as part of her prima facie case, that she was replaced by someone outside of the relevant class.**

Pivirotto, 191 F.3d at 353 (emphasis added).

Even given that a man was hired to fill her position, she still could have been discriminated against:

> In other words, even if a woman is fired and replaced by another woman, she may have been treated differently from similarly situated male employees. This seems to us to be self-evident.

Pivirotto, 191 F.3d at 353-54.

The seven other circuits in the country, in addition to the 3d Circuit, have held that the fourth "replacement" prong is not a necessary showing in order to make out a prima facie case. [1]

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[1] *Carson v. Bethlehem Steel Corp.* 82 F.3d 157 (7th Cir. 1996)(replacement by someone in the same protected class did not prevent the showing of a prima facie case); *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148 (1st Cir. 1990)(replacement by someone in the same protected class did not prevent showing of prima facie case); *Meiri v. Dacon,* 759 F.2d 989, 995–96 (2d Cir.1985) ("[Requiring] an employee, in making out a *prima facie* case, to demonstrate that she was replaced by a person outside the protected class ... is inappropriate and at odds with the policies underlying Title VII."); *Nieto v. L & H Packing Co.,* 108 F.3d 621, 624 & n. 7 (5th Cir.1997) ("While the fact that one's replacement is of another national origin 'may help to raise an inference of discrimination, it is neither a sufficient nor a necessary condition.' " (quoting *Carson*)); *Jackson v. Richards Med. Co.,* 961 F.2d 575, 587 n. 12 (6th Cir.1992) ("We wish to make clear ... that the fact that an employer replaces a Title VII plaintiff with a person from within the same protected class as the plaintiff is not, by itself, *sufficient* grounds for dismissing a Title VII claim."); *Walker v. St. Anthony's Med. Ctr.,* 881 F.2d 554, 558 (8th Cir.1989) ("[T]he sex of [plaintiff's] replacement, although a relevant consideration, is not necessarily a determinative factor in answer to either the initial inquiry of whether she established a prima facie case or the ultimate inquiry of whether she was the victim of discrimination."); *Howard v. Roadway Express, Inc.,* 726 F.2d 1529, 1534 (11th Cir.1984) (holding that a district court misstated the law when it concluded that "there can be no racial discrimination against a black person who

The *Pivirotto* and related other federal circuit case authority are not only relevant but extraordinarily persuasive to the issue presented herein. Washington recognizes the "flexibility" of the *McDonnell Douglas* factors and specifically recognizes that they are not to be considered some form of ridged or mechanically applied test. Defendants want it to be a "hard and fast" rule and the trial court applied it as such. This was error. Washington courts have already, in other discrimination areas and including within an age discrimination setting, not required the "replacement" showing to be made. This concept should be affirmed and summary judgment should be reversed since Mikkelsen has set forth a prima facie case and the burden should now shift to the defendants to set forth a legitimate, nondiscriminatory reason for discharge. It was error for the trial court to dismiss the claim on this basis.

Once the plaintiff successfully presents a prima facie case the burden then shifts to the defendants come forward with evidence of a legitimate, nondiscriminatory reason for the discharge. *See Grimwood*, 110 Wn.2d at 364. In support of his motion for summary judgment, in order to fulfill his shifted burden of proof, defendants attempt to set forth such

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is not selected for a job when the person who is selected for the job is black" (internal quotation omitted)). *See Pivirotto*, 191 F.3d at 354 & n. 6.

reasons. Mikkelsen respectfully submits that such attempts are woefully inadequate and, in and of itself, requires reversal of the trial court order.

First, recall that Mikkelsen specifically asked defendant Ward for reasons for her termination at the time Ward fired her. She was told nothing other than, "it wasn't working out." It is undisputed that defendants represented to the State of Washington in response to the unemployment application that Mikkelsen was not terminated "for cause."

Any alleged deficiencies in Mikkelsen's work were not documented at the time of her termination. It is undisputed that no adverse employment documents were in plaintiff's employee file nor was there any adverse document in her personnel file. Defendants have not met their burden to show a nondiscriminatory reason for her termination and accordingly, it was error for the trial court to grant summary judgment.

Even if the defendants could meet their shifting burden of proof to show a nondiscriminatory reason for termination of employment, the burden of would then shift back to the Mikkelsen under the *McDonnell Douglas* burden shifting test to show that the alleged reasons were just a pretext ("pretext prong"). Mikkelsen would have to then create issues of fact as to:

> An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual or (2) that

> although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer.

Scrivener, 181 Wash. 2d at 446-447.

It is important to note that, in order to meet this burden, the plaintiff could do **nothing** with respect to presenting additional evidence.

> The employee resisting summary judgment then must produce evidence that raises a genuine issue of material fact on whether the reasons given by the employer for discharging the employee are unworthy of belief or are mere pretext for what is in fact a discriminatory purpose. *Sellsted,* 69 Wash.App. at 859, 851 P.2d 716. **The employee is not required to produce evidence beyond that offered to establish the prima facie case, nor introduce direct or "smoking gun" evidence.** *Sellsted,* 69 Wash.App. at 860, 851 P.2d 716. Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff's burden. *Sellsted,* 69 Wash.App. at 861, 851 P.2d 716. He must meet his burden of production to create an issue of fact but is not required to resolve that issue on summary judgment. "For these reasons, summary judgment in favor of employers is often inappropriate in employment discrimination cases." *Sellsted,* 69 Wash.App. at 861, 851 P.2d 716.

Rice, 167 Wn. App. at 89 (emphasis added).

The plaintiff need not disprove each of the defendants' articulated reasons in order to satisfy this third "shifting" burden of proof. *Scrivener*, 181 Wn.2d at 447. In fact as identified above, plaintiff need do nothing. However, the Court has identified four factors, as examples, that a plaintiff could establish as to the "pretext" factor by demonstrating that the facts

demonstrated that the discriminatory trait was a substantial factor in the discharge:

> In the earlier *Kuyper* case, the Court of Appeals listed these factors as examples of how to show the defendant's articulated reasons were pretextual: "a plaintiff must show, ***for example***, that the reason has no basis in fact, it was not really a motivating factor for the decision, it lacks a temporal connection to the decision or was not a motivating factor in employment decisions for other employees in the same circumstances." *Kuyper v. Dep't of Wildlife,* 79 Wash.App. 732, 738–39, 904 P.2d 793 (1995) (emphasis added). In the *Fulton* case, the Court of Appeals repeated these four factors, omitting that they were only examples. *Fulton v. Dep't of Soc. & Health Servs.,* 169 Wash.App. 137, 161, 279 P.3d 500 (2012). Now in this case, the Court of Appeals repeated the *Fulton* error, overlooking that a plaintiff may also establish pretext by proving that discrimination was a substantially motivating factor in the employment decision. This was error. A plaintiff may satisfy the pretext prong **using one of the four factors** listed by the Court of Appeals, **but the plaintiff may also** satisfy the pretext prong by presenting sufficient evidence that discrimination nevertheless was a substantial factor motivating the employer.

Scrivener, 181 Wn. 2d at 447-48 (emphasis added).

This showing can be made directly or indirectly by showing that the defendants' proffered explanation is unworthy of credence. *See Carle*, 65 Wn. App. at 101. In this case, the plaintiff has met this shifting third "pretext" burden by showing that the alleged reasons are false, not temporally connected with her termination nor the actual reasons for her termination. At the very least, issues of fact exist as to these issues which

would preclude the entry of summary judgment and the trial court erred in dismissing Mikkelsen's discrimination claim.

The alleged rationale that the defendant Ward sets forth for Ms. Mikkelsen's termination is classic pretext. It is found in a memorandum that is dated the day prior to her termination (August 22, 2011). It is a memorandum addressed to the Board. (CP 242-46). It is undisputed that defendant Ward never communicated any of those facts to Mikkelsen. It is undisputed that this memorandum was not in Mikkelsen's employee file. It is undisputed that Mikkelsen specifically asked defendant Ward for the reasons for her termination and was given none. There is no evidence that this memorandum was actually given to the Board members.

Even assuming that the memorandum sets forth the actual reasons for Mikkelsen's firing, the reasons given are simply not true or disputed. Defendant Ward first raises an issue of a survey that Mikkelsen sent to Commissioner Hanson. It is undisputed that Commissioner Hanson asked for the survey. Mikkelsen did not initiate the contact. She did what she was asked. She did not request a special meeting of the Board. That was Commissioner Hanson's request. (CP 407-13; 452-55).

Next, Defendant Ward and Mikkelsen may have had differences as to the "line policy" to be developed at the PUD, it was finalized and presented to the Board. Everything was presented to the Board and no

information was withheld. (CP 424-26). The work in process survey that Defendant Ward wanted was likewise done. It was an inconvenience for staff, but was done and Mikkelsen did not argue otherwise. (CP 427-28).

Ms. Mikkelsen never told defendant Ward that he could not talk to staff outside her presence or that he could not talk, "to her people." (CP 422-23; 441). The alleged "billing error" was not a "billing error." Defendant Ward was told this. The PUD billing computer software showed a significant decline and Ms. Mikkelsen asked "why". She was told that the customer had made efficiency improvements. It ultimately was a metering issue and Ms. Mikkelsen never said to anyone to withhold information from the Board on the issue. (436-39; 442).

Ms. Mikkelsen never said that she was having a "come to Jesus meeting" with Defendant Ward. (CP 439-40). Mikkelsen did have a meeting in March 2011 with defendant Ward and he was late for that meeting. They discussed many issues, one of which was the gender discrimination that was occurring. (CP 430-36). Ms. Mikkelsen never withheld information from defendant Ward. (CP 443). There was no personal benefit from PUD resources for Ms. Mikkelsen's consulting business that she did not compensate the PUD for. (CP 444-45).

It was Ms. Mikkelsen who did all the research for the internet changes at the PUD. Defendant Ward chose a less expensive option, but it

was Ms. Mikkelsen who presented that information to him. (CP 414, 429-30). Ms. Mikkelsen did not stop attending union negotiation meetings. Defendant Ward chose to not invite her. (CP 415).

There simply isn't a single "reason" put forth by defendants for Mikkelsen's termination that has any basis in fact. The only person he ever communicated any such alleged reason was to himself and he certainly never said anything to Mikkelsen nor documented her employee file.

At the very least issues of fact exist as to both the sex and age discrimination claims made in this case. If the cases and pronouncements truly mean what they say, the elements set forth for a showing of the initial prima facie case are not "absolutes" and should not be applied in a ritualistic or mechanical manner. Plaintiff need not show that she was replaced by someone outside the protected class involved in order to make the claim or satisfy her first burden of proof under the *McDonnell Douglas* analysis. The other elements of her discrimination claim have been satisfied. Defendants have failed to set forth a straight-faced rationale for plaintiff's termination that would not be discriminatory. Even if they did so, Mikkelsen has presented sufficient evidence to satisfy her burden to at least create issues of fact as to the "pretext" of this alleged rationale so as to make summary judgment inappropriate and take this case to trial. The defendants' motions

for summary judgment should be denied, the trial court reversed, and these discrimination claims should be allowed to be presented to a jury.

C. The Failure Of Defendants To Follow The Corrective Action Policy Also Provides A Basis For Liability

Since this issue is, as well as the previous issue, are presented in motions for summary judgment, it is appropriate to briefly discuss the standards applicable thereto. The moving party has the burden of demonstrating that there are no genuine issues as to any material fact. *See Fitzpatrick v. Okanogan County,* 169 Wn.2d 598, 605, 238 P.3d 1129 (2010). In considering the motion, the Court must take all facts and inferences in the light most favorable to the nonmoving party. *See Spradlin Rock v. Pub. Util. Dist.*, 164 Wn. App. 641, 654, 266 P.3d 229 (2011). A material fact is one that affects the outcome of the case. *See Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

As is particularly applicable to this section of the argument, when interpreting a contract, summary judgment is not appropriate if the parties objective manifestations, has two or more reasonable but reasonable meanings. *See Ledaura, LLC v. Gould*, 155 Wn. App. 786, 798, 237 P.3d 914 (2010). When a question of fact is presented for determination in a summary judgment motion, the Court may only decide the issue, and rule as a matter of law, only if reasonable minds could reach but one conclusion

from them. *See Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995).

As set forth in the previous section of this brief, Washington courts have recognized several exceptions to the "at will" employment doctrine. The "public policy" exception related to discrimination claims was discussed above. Plaintiff will now address the exception recognized that relates to enforcing provisions of employee manuals or related policy statements. The trial judge dismissed these claims and her dismissal was in error since, at the very least, issues of fact existed on these issues.

There are two recognized paths to enforce the terms of company policy statements (usually employee manuals). First, the employee and employer can modify their relationship and thus be subject to statements contained in employee policy manuals or handbooks issued by the employer. *See Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 228, 685 P.2d 1081 (1984). This presents an issue of fact for the trier of fact to determine. *See Swanson v. Liquid Air Corp.,* 118 Wn.2d 512, 522, 826 P.2d 664 (1992). This is termed the "implied contract" theory. *See Gaglidari v. Denny's Restaurants, Inc.,* 117 Wn.2d 426, 433, 815 P.2d 1362 (1991).

The second pathway is distinct and independent of the first. The second pathway asks whether the employer has created an atmosphere of job security and fair treatment with promises of specific treatment in

specific situations and the employee is induced thereby to remain on the job and not actively seek other employment. *See Thompson*, 102 Wn.2d at 228-29. This inquiry also presents issues of fact to be decided by the trier of fact. *See Swanson*, 118 Wn.2d at 525. This is often referred to as the "specific treatment" theory. *See Bulman v. Safeway, Inc.,* 144 Wn.2d 335, 27 P.3d 1172 (2001). These are two different theories with two different proof elements. At the very least, issues of fact exist as to each that would preclude the granting of summary judgment.

From a factual standpoint the "Corrective Action" policy adopted by the PUD and which will form the basis of the discussion to follow is found at CP 443-48; APP 4-9. The policy contains a "progressive discipline" model which identifies "reasons" for corrective action as "minor", "intermediate" and "major". (CP 344-46, APP-5, 6, 7). From there, the "corrective action" alternatives range progressively from "verbal warning," to "written warning," to "probation," to "suspension" and finally, to "discharge." (CP 346-47, APP-7, 8).

The policy was not followed with respect to the firing of Mikkelsen in this case. Her employment file contained absolutely no disciplinary notes. There had never been any "corrective action" taken. Mikkelsen was simply summoned by Defendant Ward on August 23, 2011 and fired from her job of 27 years. No explanation was given. As is outlined below, at the

very least, issues of fact are presented as to the enforcement of this Corrective Action policy.

1. Issues of Fact Exist on the "Implied Contract" Theory

Under the first "pathway" a plaintiff may establish that the employer policy sought to be enforced was a contract modification to the "at will" employment relationship. *See Thompson,* 102 Wn. 2d at 228. In undertaking this analysis, the Court should focus on the traditional elements of contract formation: offer, acceptance and consideration which establish that the policy would become part of the employment contract. *See Swanson*, 118 Wn.2d at 523.

In addition, in undertaking this inquiry, the Court must consider the framework for analysis set forth in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) when interpreting this prospective "new" contractual agreement. *Berg* not only allows for, but mandates, that in the interpretation of contracts, "extrinsic evidence," if it exists, must be viewed by the Court to aid the Court in determining the intent of the parties and thus interpret the contract. *Berg*, 115 Wn.2d at 667. This analysis is consistent with the rationale set forth in *Thompson, supra*, that, "the idea that **whether the parties intended policies in an employment document to be part of their employment contract involves issues of fact.**" *Swanson*, 118 Wn.2d at

523 (emphasis added). Thus, yet again, issues of fact exist as to appropriateness of the trial court's granting of summary judgment below.

These progressive disciplinary provisions contained in the Corrective Action policy are specific enough to be enforced as contract terms if the trier of fact determines that they are part of the employment contract. The extrinsic evidence existing shows that the Corrective Action policy was adopted when Mikkelsen was the interim manager at the PUD in 2009. She took a large part of the policy from the Chelan County PUD. Others assisted in the work up of the document. The union steward and the union representative as well as her fellow managers Matt and Brian also reviewed and worked on it prior to the presentation to and adoption by the PUD Board. (CP 416, 421).

The primary purpose for developing the Corrective Action policy and presenting it to the Board was that Mikkelsen wanted some guidelines, approved by the Board, to be followed in the discipline process. This was especially important with the union employees that existed. (CP 417-18). Once the policy was adopted in 2009, it has been followed on two instances, both of which involved the issuance of a verbal warning. Once, while Mikkelsen was interim general manager (CP 419-20) and once while Mr. Ward was the General Manager. (CP 317; 556). There was never any discussion nor dispute as to the use of the policy. There is no evidence that

the policy was "not" used until Mikkelsen was terminated by Defendant Ward.

Ms. Mikkelsen was clear that this policy procedure for disciplinary action was being done for the protection of both the employee and the employer. Her intent was to have "guidelines" in place so that everyone knew what the rules were. (CP 417-18). Mikkelsen had, in the past, had to discipline someone at the PUD prior to the policy being enacted. It was not a pleasant experience in that there were no guidelines in place so that all involved knew the parameters of the discipline process. Her proposal to the Board sought to change this fact.

As set forth above, there are issues of fact presented in the interpretation of what happened in this case. There is significant extrinsic evidence presented that the trier of fact needs to consider in interpreting whether the policy at issue formed part of the employment contract in this case. Issues of fact that cannot be established as a matter of law are presented and, accordingly it was error for the trial court to grant defendants' motions for summary judgment. It cannot be said that, as a matter of law, the Corrective Action policy should not have been followed.

2. Issues of Fact Exist as to the "Specific Treatment" Claim Presented

The second pathway in this analysis presents a "Specific Treatment" claim that the Corrective Action policy is enforceable because it promises specific processes in certain situations. Under this claim, the plaintiff has the burden of establishing: (1) the terms of the policy amounted to promises of specific treatment in specific situations and (2) if so, whether the employee justifiably relied on any of these promises. *See Bulman*, 144 Wn.2d at 339.

It is clear that the issues of whether the policy issued contains a promise of specific treatment in specific situations; whether the employee justifiably relied on the promise and whether the promise was breach **all involve questions of fact** that are not appropriate for resolution on summary judgment. *See Burnside*, 123 Wn.2d at 105. The trial court erred when it granted summary judgment on these issues.

Under paragraph 1.0 of the Policy (CP 344, APP-5), it states:

1.0 General Principles

1.1 Corrective Action

> Corrective action should be fair. This means, while the District retains the discretion to determine what action is appropriate in any particular situation, the corrective action should be equal with the misconduct or performance deficiency at issue, and

> whenever possible, performance issues typically should be addressed, at least initially, with an eye to improvement. Before administering corrective action, consideration should be given to all relevant facts, such as:
>
> How much trouble or damage did the misconduct cause?
>
> How, if at all, did it affect others or District operations?
>
> Are there potential future consequences?
>
> Has the employee committed other misconduct, including but not limited to similar acts?
>
> Has the employee already received a prior warning?
>
> Are there explanatory circumstances?

Under paragraph 1.3 of the Policy (CP 344, APP-5), it states, under a section entitled **Employee Rights** the following rights under the policy:

> Corrective action **must** be administered with due consideration of, and respect for, employee rights and expectations, whether those rights and expectations drive from employment policies, operation of law, or contract. As just one example: all union-represented employees are entitled to union representation during any meeting that may reasonably be expected to lead to disciplinary action.

(emphasis added).

"Must" is surely a "mandatory" word that defines the expectations of the parties in this case. This provision is included in the "Employee Rights" section of the Policy. This paragraph clearly contemplates that the corrective action will be followed and that consideration should be given to the employees' "rights and expectations." In fact, it is stated that such corrective action **must** be so done.

The primary, if not exclusive, reasons that employers even issue such employment policies is to create an atmosphere of fair treatment and job security for the people that work there. *See Parker v. United Airlines, Inc.,* 32 Wn. App. 722, 726-27, 649 P.2d 181 (1982). While an employer is clearly not required to establish such additional policies, once it does so, the employees clearly have the right to take those into consideration.

> While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly.... It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices ... [the policies] established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "*instinct with an obligation* ".
>
> (Italics ours.) *Toussaint v. Blue Cross & Blue Shield,* 408 Mich. 579, 613, 292 N.W.2d 880 (1980). **It would appear**

> **that employers expect, if not demand, that their employees abide by the policies expressed in such manuals. This may create an atmosphere where employees *justifiably rely* on the expressed policies and, thus, justifiably expect that the employers will do the same. Once an employer announces a specific policy or practice, especially in light of the fact that he expects employees to abide by the same, the employer may not treat its promises as illusory.**

Thompson, 102 Wn. 2d at 229-30 (emphasis added).

The issues presented herein are **issues of fact**. As the Court in *Swanson* stated:

> Moreover, the questions whether statements in employee manuals, handbooks, or other documents amount to promises of specific treatment in specific situations, whether plaintiff justifiably relied upon any such promises, and whether any such promise was beached present material issues of fact.

Swanson, 118 Wn.2d at 525.

As to the issue of justifiable reliance, most cases deciding this issue as a matter of law involved situations where the plaintiff was not aware of the policy in question. *See e.g. Bulman* 144 Wn.2d at 350. That is not the factual situation presented herein. Plaintiff not only knew about the policy, she helped draft it. It was important to her to have implemented. The record is also clear that Ms. Mikkelsen had other offers of employment (CP 446-47). She was comfortable where she was because of the policy that had been enacted. The Corrective Action policy had been used two times prior,

both of which Mikkelsen was involved with on the employer side, and the evidence is that the Corrective Action policy was never "not" utilized. At the very least, issues of fact exist on this "specific treatment" claim because Mikkelsen had a reasonable expectation that the policy would be follow and it was error for the trial court to grant summary judgment.

3. Any Alleged "Disclaimers" in the Policy are not Effective or Present Issues of Fact for the Trier of Fact

Finally, under either pathway identified above, defendants sought to argue that, even if, the policy could somehow be enforced, it should not be done since there was "disclaimer" or "discretion" language in the Corrective Action policy. Again, while there is some "discretionary" language in the policy, at the very least, issues of fact are presented as to the interpretation of this language.

An employer can attempt to disclaim, in a conspicuous manner, that nothing in a policy should effect the employment relationship. *See Swanson*, 118 Wn.2d at 526-27. However, there is no "disclaimer" involved in this PUD Corrective Action policy. The PUD Corrective Action policy does not have a provision such as was presented in *Swanson, supra,* or *Payne v. Sunnyside Community Hosp.*, 78 Wn. App. 34, 894 P.2d 1379 (1995) stating that the terms of the policy did not alter the "at will" relationship. Those provisions are not in the PUD Corrective Action policy.

Defendants' argument, and the trial court's ruling, seems to be that defendants are immune from liability, as a matter of law, because the PUD policy retains some form of "discretion" in implementing the Corrective Action Policy. However, even assuming so, at the very least, issues of fact are involved in this analysis as to the enforcement of the policy so as to preclude the dismissal of plaintiff's claims.

As this Court recently noted:

> [T]he effect of employer policies and disclaimers is normally a question of fact for the jury. *Swanson v. Liquid Air Corp.,* 118 Wn.2d 512, 534, 826 P.2d 664 (1992). Moreover, a disclaimer may be negated by inconsistent employer representations and practices. *Swanson,* 118 Wn.2d at 534, 826 P.2d 664.

Kries v. Wa-Spok Primary Care, LLC, ___ Wn. App. ___, ___ P.3d ___ 2015 WL 5286176 at ¶ 56, *11 (Div. III, 2015).

Those issues of fact are present in this case together with inconsistent practices from the PUD and, together with existing law as set forth below, mandate the reversal of the trial court's decision since, at the very least, issues of fact are presented.

For example, in *Payne, supra,* the defendant hospital had a progressive discipline policy. However, the policy had several provisions that stated the "discretionary" nature of the policy. The policy stated, "The policies and procedures described [here] are implemented at the sole

discretion of the hospital and are subject to change at any time without prior notice." *Payne*, 78 Wn. App. at 37.

The *Payne* policy provisions in its employee manual are very similar as to what is presented in the PUD policy herein. Because the PUD Corrective Action policy mentions that "discretion" could be used, defendants argue that they are immune from liability. Again, such is not the case. The first element of the *Swanson* analysis is irrelevant in that Mikkelsen knew of the language of the PUD policy since she helped to draft it. It is the second element of the test that creates issues of fact in this case.

Swanson, supra, recognized that even if a disclaimer was effectively communicated, it could still present issues of fact as to its enforceability if inconsistent representations and or contradictory employment practices operate to negate the disclaimer. *See Payne*, 78 Wn. App. at 40.

Swanson, supra, was faced with exclusionary language in the policy that, on its face, unambiguously established an "employment at will" scenario. *Swanson,* 118 Wn. 2d at 532. However, *Swanson* expressly rejected the premise put forth by defendants herein that, the disclaimer language could, as a matter of law, be the basis of a summary judgment motion. Rather, the Court noted: "We reject the premise that this disclaimer can, as a matter of law, effectively serve as an eternal escape hatch for an

employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make." *Swanson*, 118 Wn.2d at 532.

Instead, a disclaimer can be negated by either inconsistent employer representations or practices. **This is a question of fact for the trier of fact**. *See Swanson*, 118 Wn.2d at 534. Even in the face of a disclaimer, if the policy has been consistently used by the employer, a question of fact is presented as to the effectiveness of the disclaimer. *See Johnson v. Nasca*, 802 P.2d 1294, 1297 (OK App 1990)(cited with approval in *Swanson*, 118 Wn.2d at 535).

As the Court stated in *Payne*, "the crucial question is whether the employee has a reasonable expectation the employer will follow the discipline procedure, based upon the language used in stating the procedure and the pattern of practice in the workplace." *Payne*, 78 Wn. App. at 42. These are issues of fact. As outlined above, plaintiff has presented sufficient evidence to create issues of fact in this regard. The Corrective Action policy has always been used at the PUD since its adoption. It has never not been followed. It was established to set guidelines to be followed and that was done for the benefit of both the employee and the employer. Those guidelines have been followed. Mr. Ward followed those guidelines. Plaintiff participated in the process when he did so. Defendant Ward never said such Corrective Action policies were somehow "discretionary." At the

very least, issues of fact are presented in this regard making summary judgment inappropriate.

The ending comments made by the Court in *Swanson* are telling and applicable to this case:

> An employee handbook is only useful if the policies and procedures set forth in it are followed by the employer and its management personnel. **Instead of looking for new ways to avoid liability when handbook provisions are not followed, employers should concentrate on setting forth reasonable policies and ensuring compliance with those policies.**
>
> As the New Jersey court said in *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 491 A.2d 1257, 1269 (1985):
>
> > The solution is not deprivation of the employees' claim, but enforcement of the employer's agreement.... **If, however, the at-will employment status of the workforce was so important, the employer should not have circulated a document so likely to lead employees into believing they had job security.**

Swanson, 118 Wash. 2d 512, 540-41 (emphasis added)(citation omitted).

That's all that Mikkelsen seeks in this case. The Corrective Action policy was put in place for a reason. Defendants didn't follow the policy. Nothing that Mikkelsen is even alleged to have done would justify even a reprimand or verbal warning, let alone termination after a 27 year career. The practices of the PUD, the language of the policy and the actions taken consistent therewith, at the very least, create issues of fact in this cause of

action requiring a trial on the merits. The trial court erred when it granted the defendants' motion in this regard. That decision should be reversed and this case remanded to the trial court for a trial on the merits.

D. Issues of Fact Exist as to the Plaintiff's Claim of Negligent Hiring, Supervision and/or Retention.

The trial court dismissed Mikkelsen's claim for negligent hiring/supervision of defendant Ward. Such relief is inappropriate on summary judgment and the trial court erred. In order to prove the cause of action for negligent supervision a plaintiff must demonstrate:

> (1) an employee acted outside the scope of his or her employment; (2) the employee presented a risk of harm to other employees; (3) the employer knew or should have known in the exercise of reasonable care, that the employee posed a risk to others; and (4) that the employer's failure to supervise was the proximate cause of the injuries to other employees."

Briggs v. Nova Servs., 135 Wash.App. 955, 966-67, 147 P.3d 616 (2006), aff'd 166 Wash.2d 794, 213 P.3d 910 (2009).

To assert a claim for negligent hiring, a plaintiff must demonstrate:

> (1) the employer knew or, in the exercise of ordinary care, should have known of the employee's unfitness at the time of hiring and (2) the negligently hired employee proximately caused the plaintiff's injury.

Rucshner v. ADT Sec. Sys. Inc., 149 Wn. App. 665, 680, 204 P.3d 271 (2009).

While the two tests are similar, there are differences. The facts supporting this claim are outlined above. The Board was made aware of the

concerns of hiring defendant Ward prior to his hire. The Board even recognized those deficiencies by placing a bonus component to Ward's compensation. Unfortunately, that incentive was not successful. Mikkelsen went to President Hanson and complained about the treatment that she was undergoing from defendant Ward. The only response to this revelation was that Mikkelsen was fired about a month later. There is no question as to the proximate cause issue. At the very least, issues of fact are presented on this claim. Mikkelsen did everything within her power to bring issues to the Board both before and after defendant Ward's hiring. Those efforts went for naught. Accordingly, the trial court erred in dismissing these actions.

E. Plaintiff's Intentional Inflection of Emotional Distress (Outrage) Claim should Likewise Proceed since there are Issues of Fact Presented

In order to make out a claim for Outrage, a plaintiff must demonstrate:

> (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.

Kirby v. City of Tacoma, 124 Wn. App. 454, 473, 98 P.3d 827 (2004).

Whether the conduct alleged is sufficiently outrageous to satisfy the elements listed above is a **question of fact**. *See Kirby*, 124 Wn. App. at 473. The facts supporting this claim are set forth above. Not only do the discriminatory actions play into this claim but the actions as they relate to

Mikkelsen's termination also come into play. She feared for her consulting business because of the false information that had been disseminated. As a 27 year employee, the treatment she was subjected to was unacceptable. Mikkelsen suffered severe emotional distress and this incident took a significant toll on her life. This claim is more than just the alleged discrimination. Defendants also failed to follow existing policy as to discipline issues and caused Mikkelsen severe emotional distress. The loss of benefits, the loss of retirement and the treatment that Mikkelsen was subjected to all contribute to this distress. At the very least, issues of fact exist that should proceed to trial and the trial court erred in dismissing the claim.

V. CONCLUSION

For the reasons set forth above, the trial court's decision should be reversed and this case and this matter should be remanded back to the trial court for a trial on the merits.

DATED this 23 day of September, 2015.

HALVERSON | NORTHWEST Law Group P.C.
Attorneys for Appellant Mikkelsen

By: _____
J. Jay Carroll, WSBA No. 17424

CERTIFICATE OF SERVICE

I, JENNIFER FITZSIMMONS, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am the assistant to J. Jay Carroll, the attorney for Kim Mikkelsen and am competent to be a witness herein.

On September 23, 2015 I caused to be mailed by U.S. Mail, postage pre-paid, the original of the foregoing document to the following:

Court of Appeals Division III 500 N. Cedar Street Spokane, WA 99201	☒ First Class U.S. Mail

On September 23, 2015, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

James M. Kalamon Paine Hamblen LLP 717 West Sprague Avenue Suite 1200 Spokane WA 99201	☒ First Class U.S. Mail
Sarah L. Wixson Stokes Lawrence Velikanje Moore & Shore 120 N. Naches Avenue Yakima, WA 98901-2757	☒ First Class U.S. Mail

DATED at Yakima, Washington, this 23rd day of September, 2015.

Jennifer Fitzsimmons, Legal Assistant
HALVERSON | NORTHWEST Law Group P.C.

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KITTITAS COUNTY PUD # 1
Ellensburg, Washington 98926

Manager of Accounting and Finance
Position Description

I. Objectives

Each position with KITTITAS COUNTY PUD #1, has as its primary objectives, the promoting of energy conservation by taking every opportunity to acquaint the consumers with the advantageous and productive uses of electricity; obtaining increased consumer understanding of the PUD's objectives, plans and programs and rural electrification in general, and assuring maximum service to the members by satisfactory performance of the responsibilities and authorities assigned to it. Specific to this position:

A. Keeping the General Manager informed on the financial condition of the PUD to enable a determination of adequacy, effectiveness and conformity to established policies, objectives and budgets.

B. Provide custodianship of all financial records of the PUD and keep these records in accordance with the PUD's policies and procedures and REA guidelines.

II. Performs Personally the Following Activities Unique to this Position:

a. Prepares quarterly analysis and interpretation of actual expenditures compared to budgets.

b. Develops data for long and short range financial programs.

c. Develops data for use in establishing of guidelines in financial controls to be used by the General Manager and Commissioners.

d. Assembles and maintains data on long range financial forecast.

e. Recommends insurance coverage and reviews current insurance coverage to test for adequacy.

f. Keeps a complete and systematic set of records of business transactions, examining and recording transaction data in record books, ledgers and forms.

g. Balances books and compiles reports at regular intervals to show receipts, expenditures, accounts payable, tax data, margins and othat matters pertinent to fiscal operations.

h. Prepares the monthly operating report for General Manager and Commissioners.

i. Maintains depreciation ledger records of equipment and plant.

j. Keeps record of cash investments .

k. Reconciles and reimburses petty cash.

l. Reconciles Treasurer's Statement and supplies report on a monthly basis.

m. Maintains file of paid checks.

n. Analyzes, assembles and prepares records for various tax forms to be sent in from time to time.

o. After authorization, prepares and issues warrants.

p. Prepares and mails monthly other accounts receivable, and maintains a monthly reconciliation of other accounts receivable in an aging format.

q. Reconciles accounts receivable energy on a monthly basis.

r. Maintains and files pertinent business and fiscal matters and does other miscellaneous filing tasks as required.

s. Records daily time sheets, daily transportation mileage.

t. Prepares payroll checks on the 15th and 30th of each month.

u. Keeps record and reconciles vacation and sick leave accruals.

v. Posts all entries from monthly work order cap sheet to cost records, reconciles work orders to ledger balace and prepares monthly statns report of 107.2 and 108.8 for General Manager and Commissioners on a monthly basis.

w. Maintains and reconciles monthly stock status cards of 154 inventory of materials.

x. Prepares documents necessary for materials inventory and reconciles inventory to ledger on a yearly basis.

y. Maintains continuing property records.

z. Helps to relieve Billing Clerk when necessary and during peak billing periods.

aa. Prepares quarterly reports on federal, state and local taxes.

ab. Prepares and maintains outage information sufficient for year end 7A report to REA.

ac. Maintains and requisitions special equipment through REA processes.

ad. Maintains and continues to perpetuate records retention in accordance with State and REA guidelines.

ae. Assists in the preparation of rate studies with assistance of consulting engineer or other qualified personnel.

af. Prepares yearly budget for approval by Commission.

ag. Provides assistance to the State Auditor as required in the timely and effective preparation of a yearly audit of the PUD.

ah. Periodically reviews employee benefits to test adequacy and shop for perhaps better benefits.

ai. Prepares regularily employee cost analysis for the information the general manager and Commission in establishment of wage.

aj. Assists in the preparation of Commission and PUD policies in areas of finance and personnel.

III. Compensation:

Compensation will be at a rate of $180.00 per day for each 8 hour day completed. This is the equivalency of $22.50 per hour for all increments greater than 8 hours per day. Non-working paid days will include:

130 days minimum
- 7 vacation days
- 6 holidays
- 7 sick leave days

Also included contributions by employer to benefits package will include:

- 6.7% of gross pay in Deferred Compensation
- 7.31% of gross pay in Public Employee Retirement System
- 60% Industrial Insurance
- 73% Medical Insurance
- 73% Life Insurance
- 73% Long Term Disability Insurance
- 73% Short Term Disability Insurance

Compensation will be reviewed from time to time to determine adequacy.

Manager 8-1-84

Kim Weinheimer 8-1-84

33528 3-000000393

PUD - 000531

APPENDIX - A3

Kittitas PUD #1
Policy: Corrective Action
Adopted: November, 2009

Corrective Action Policy

Policy

The District expects employees will not fail to act professionally and in the District's best interests at all times. The District believes in the ability of its employees to do so through the exercise of sound judgment and common sense.

1.0 General Principles

1.1 Corrective Action

Corrective action should be fair. This means, while the District retains the discretion to determine what action is appropriate in any particular situation, the corrective action should be equal with the misconduct or performance deficiency at issue, and whenever possible, performance issues typically should be addressed, at least initially, with an eye to improvement. Before administering corrective action, consideration should be given to all relevant factors, such as:

- How much trouble or damage did the misconduct cause?
- How, if at all, did it affect others or District operations?
- Are there potential future consequences?
- Has the employee committed other misconduct, including but not limited to similar acts?
- Has the employee already received a prior warning?
- Are there explanatory circumstances?

1.2 Communication

Effective communication is critical to the successful resolution of performance-related issues. Consequently, the District strongly encourages supervisors and managers to document performance issues and related corrective action. This includes documenting verbal warnings. Such documentation should be discussed with the employee at issue and given to him or her to sign. The employee's signature acknowledges receipt and explanation of the document, not necessarily agreement with its content. An employee may refuse even to sign a document for this limited purpose. If that occurs, the supervisor/manager should simply record the employee's refusal to sign on the document. The goal of the documentation is to enhance understanding between management and staff through written confirmation of the major points of discussion. Employees may prepare responses or rebuttals if they so desire.

1.3 Employee Rights

Corrective action must be administered with due consideration of, and respect for, employee rights and expectations, whether those rights and expectations derive from employment policies, operation of law, or contract. As just one example: all union-represented employees are entitled to union representation during any meeting that may reasonably be expected to lead to disciplinary action.

1.4 Resources

Supervisors will not fail first to review disciplinary actions on difficult issues with the General Manager, particularly when especially severe corrective action, such as suspension and/or discharge, is under consideration.

2.0 Reasons for Corrective Action

Violations of the District's standards of conduct and/or the failure or refusal to meet work performance requirements are unacceptable and may result in corrective action. The acceptability of certain conduct often turns on the specific facts and circumstances involved. No organization can accurately anticipate and list every type of conduct or work performance that is unacceptable. The District does not try to do so here. Instead, the District provides some examples, which are intended to illustrate broadly, without limiting, the types of conduct and work performance it may consider unacceptable, and to what degree. These are only guidelines. To be able to respond appropriately to whatever particular circumstances may arise in the future, the District must, reserve the right to determine the categorization of, and response to, any conduct or performance concern, regardless of where it falls within the broad parameters set forth below.

2.1 Minor

Minor offenses and performance-related concerns are actions typically considered correctable by training, counseling, and guidance, and not necessarily serious enough for formal corrective action unless repeated. Examples of minor offenses are first instances of:

- Tardiness and/or absenteeism.
- Using work time for personal activities.
- Performance that does not meet requirements.

2.2 Intermediate

Intermediate offenses and performance-related concerns are actions typically considered severe enough to call for formal corrective action, usually short of discharge, for the first violation. Examples of intermediate offenses are:

- Repetition of a minor offense.
- Gambling on District property.
- Obscene or foul language.
- Unexcused absence.
- Unauthorized distribution of literature or advertising material.
- Unauthorized tampering with and removal or alteration of notices and signs.
- Solicitation of employees during work time or in work areas.

2.3 Major

Major offenses and performance-related concerns are actions typically considered severe enough to call for prompt and severe corrective action up to and including immediate discharge without prior warning or counseling. Examples of major offenses include, but are not limited to:

- Repetition of an intermediate offense.
- Unauthorized use or release of confidential information.
- Insubordination or deliberate failure or refusal to carry out instructions.
- Misusing, destroying, or purposely damaging District property or property of an employee.
- Unauthorized use or removal of District property.
- Falsifying records, including employment applications or time sheets.
- Unlawful harassment, discrimination, or retaliation.
- Threatening, abusive, intimidating and/or violent conduct.
- Violation of the District's drug and alcohol policy.

- Unauthorized possession of firearms and/or other weapons on District property or time.

- Disregard or failure to follow safety and/or security regulations, practices and/or procedures.

This policy is not intended to be a complete list of all circumstances that may result in corrective action or discharge. The rules set out here are intended only as guidelines, and do not give any employee a right to continued employment or any particular level of corrective action.

3.0 Corrective Action

The general goal of the District's corrective action policy is to correct unsatisfactory behavior or performance. To that end, where appropriate in its judgment, the District will apply less severe corrective action initially, and more severe measures if the problem persists. However, this is only a guideline. The District does not promise employees a specific formula of corrective action will be followed in every instance. Different circumstances warrant different responses. Unless otherwise prohibited by law, when the District concludes an employee has not adhered to its standards or performance otherwise is unsatisfactory, the District may take the corrective action it decides is appropriate under the circumstances, which may involve any one or combination of the steps identified below, up to and including immediate discharge without prior corrective action or notice.

3.1 Verbal warning

This is generally used in cases of minor offenses. Its purpose is to inform and train the employee regarding correct behavior and performance. The supervisor and employee should reach an understanding of the specific sources of dissatisfaction and the corrective actions required. The supervisor must document the warning and related understanding, present it to the employee for signature, and place a copy in the employee's personnel file. If after six (6) months, the employee has had no other related issues, the documentation, by request of the employee, shall be expunged from his/her file.

3.2 Written warning

This is generally used for intermediate offenses, repetition of or failure to correct a minor offense, commission of another type of minor offense within a reasonable time, or persistent performance deficiencies. A written warning typically will be issued after the employee has received one or more verbal warnings for misconduct, whether of the same nature or not. The written warning should identify the problem and any improvement

required, refer to any previous warnings or actions taken, and explain the consequences of repeated infractions or failure to correct performance. The employee should sign the warning and receive a copy. A copy must be placed in the employee's personnel file. If after one (1) year, the employee has had no other related issues, the documentation, by request of the employee, shall be expunged from his/her file.

3.3 Probation

A probationary period, which may be imposed before, after or in combination with any of the other corrective actions identified, does not guarantee the employee will remain employed to the end of the specified period. Further, successful completion of probationary status does not guarantee later employment or limit our discretion with respect to later corrective action or discharge.

3.4 Suspension

Suspension, which may be imposed before, after or in combination with any of the other corrective actions identified, may be used as a corrective measure, to permit an investigation, to allow the District time to determine what corrective action will be applied, or to remove an employee from the premises for a period of time. For exempt salaried employees (employees not eligible for overtime), a suspension will be unpaid only if the employee is suspended for an entire work week or for violation of a safety rule of major significance. If after two (2) years, the employee has had no other related issues, the documentation, by request of the employee, shall be expunged from his/her file.

3.5 Discharge

This is generally used in cases of major offenses, repeated or uncorrected minor or intermediate offenses after at least one written warning, continued performance deficiencies (previously identified in a written warning), or unacceptable responses to corrective action by the employee. In general, discharges are to be reviewed by the General Manager before being communicated to the employee. In some cases, however, this may not occur. If an employee is discharged before the decision is reviewed by the General Manager, the discharge will still be effective immediately but the District may, at its discretion, reverse the discharge after it is reviewed. The discharge decision should be documented by the employee's direct supervisor in a memorandum, which identifies the reason(s) for the termination, the previous attempts to correct the situation, if any, and the terms of the termination. The termination letter must be placed in the employee's personnel file.

Kittitas PUD #1
Policy: Corrective Action
Adopted: November, 2009

{Roger Sparks}
President

Attest:
{Paul Rogers}
Secretary

{ John Hanson}
Vice-President

Adopted: