

No. 63251-5-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

ROZANNA CAROSELLA, NATALIE PRET, et al.

Appellants,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

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BRIEF OF APPELLANTS

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ASSIGNMENT OF ERROR

The trial court erred in entering an order on March 6, 2009, granting the University's motion for summary judgment dismissal of the class's breach of contract claim under the University's Faculty Salary Policy.

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. What conclusion does the order on summary judgment in *Storti v. University of Washington*, KCSC No. 04-2-16973 SEA, in favor of the plaintiff's claim that the University breached a contractual obligation to pay meritorious faculty members two percent merit increases in the 2002-2003 academic year support in this case?
2. What conclusion does the evidence that Extension Lecturers perform the exact same function that other "lecturers" at the University of Washington support?
3. What conclusion does the evidence that all members of the class of Extension Lecturers underwent a successful merit review during the 2001-2002 academic year support?
4. What conclusion does the evidence that Extension Lecturers who underwent successful annual merit reviews subsequent to the advent of the University of Washington's Faculty Salary Policy in January 2000, with the exception of the 2002-2003 academic year, always received merit increases of at least two percent during the following academic year support?
5. What conclusion does the evidence that the unit of the University of Washington that has housed Extension Lecturers since before and throughout the period following the advent of the University's Faculty Salary Policy always followed University procedures for determining merit increases for Extension Lecturers support?
6. What conclusion does the evidence that members of the class of Extension Lecturers have been aware of provisions in their unit's operations manual that condition merit increases on successful merit reviews and commit the unit to paying the same merit raises that other University faculty receive support?
7. What conclusion does evidence that the head of Educational Outreach, under which Extension Lecturers are housed, directed that procedures for determining merit raises for Extension Lectures would have to follow the Faculty Salary Policy support?

STATEMENT OF THE CASE

Introduction

In 2004, Duane Storti (Prof. Storti), an associate professor in the College of Engineering at the University of Washington (University), commenced a class action lawsuit against the University for wages owed to the University's "faculty." KCSC No. 04-2-16973 SEA. The current case centers on the same claim as advanced by Extension Lecturers whom the University employed in the 2001-2002 and 2002-2003 academic years. In this appeal they seek a reversal of the trial court's order denying their motion for summary judgment as to liability and granting the University's motion dismissing their claim.

Facts and Procedural History

As the basis for his claim, Prof. Storti pointed to the University's Faculty Salary Policy (FSP) that is a footnote to Sec. 24-57 of the University's Faculty Code (Faculty Code). CP 690 -692. The Faculty Code comprises Chapters 21 - 29 of the University's Handbook (Handbook).¹ CP 638 – 671.

The FSP, which became effective in January 2000, is an adjunct to the Faculty Salary System set forth in Sections 24-70 and 24-71 of the Faculty Code. CP 692 – 694. As such the FSP constructs a process for

¹ The Handbook, which comprises six volumes, is available in its entirety at www.washington.edu/faculty/facsenate/handbook/handbook.html.

determining which of the University's "faculty" members will receive annual merit salary increases, at a minimum of two percent. Under the terms of the FSP, all University "faculty" must undergo an annual performance review for merit. The FSP does not define which University personnel come within the term "faculty" as it appears in the FSP. Regardless, all "faculty" who are not deemed unmeritorious must receive an increase in compensation of at least two percent during the academic year immediately following the required merit review. During the 2002-2003 academic year, the University paid no such merit increases to any of its "faculty." CP 781, n. 1.

The definitive issue in the *Storti* lawsuit was whether the University breached a contractual obligation in failing to pay the merit increases to meritorious "faculty" during the 2002-2003 academic year. CP 781, l. 7 – 10. In defending the lawsuit the University argued that "it retained discretion to fund or not fund the 2% meritorious raise and that such an increase was conditioned upon Legislative appropriations." CP 783, l. 1 – 2. In October of 2005, the Court rejected the University's argument and entered a partial summary judgment on the question of the University's contractual liability. CP 774 – 784. The University chose not to appeal that judgment; instead, it settled with Prof. Storti. CP 798 – 825.

Sec. 24-34 of the Faculty Code addresses the “scholarly” and “professional” qualifications that one must satisfy to be a “faculty” member at the University. CP 670 – 674. Those qualifications take two primary forms: teaching and research. Persons in the professorial ranks, i.e. professors, associate professors, and assistant professors, must demonstrate competence on those two dimensions. Sec. 24-34.A.2, A.3, and A.4. CP 670 – 671. In contrast, the titles “Lecturer,” “Senior Lecturer,” and “Principal Lecturer” include “faculty” whom the University employs solely for an instructional purpose. That is, those persons teach; the University does not require them to conduct research. Sec. 24-34.B.1, B.2, and B.3. CP 671. Under Sec. 21-31 of the Faculty Code “lecturers,” whether “serving part-time or full-time,” are members of the University “faculty.” CP 638.

The FSP does not specify separate processes for the annual merit reviews of “faculty” in the professorial ranks and “lecturers,” whose sole function is teaching. Instead, the FSP requires “a performance review conducted by faculty and administrative colleagues.” CP 690. Further, “merit/performance evaluations are unit-based and reward the faculty for their contributions to local units as well as to the University’s goals.” The University’s goals to which “faculty” contribute are to establish a record of excellence in teaching, research, and service. Sec. 24-57: Footnote:

Documentation for Recommendations for Promotions, Tenure, and Merit Increases. CP 688 – 689. Thus, for “faculty” in the professorial ranks the annual merit review involves an assessment of the faculty member’s performance on three dimensions: teaching, research, and service. In contrast, despite the FSP’s mandate that annual merit reviews include an assessment of the “faculty” member’s performance on the research and service dimensions, the reviews of “lecturers” can encompass no more than an assessment of the faculty member’s performance on the teaching dimension.

The covered class of “faculty” in the settlement agreement reached by Prof. Storti and the University included all persons who undergo annual merit reviews of their performance on the teaching, research, and service dimensions. In addition, the class included “lecturers” who served in a full-time capacity. The class did not include either “lecturers” who serve in a part-time capacity or “lecturers” whose title includes the prefix “Extension.” CP 596.

In May 2006, Susan Helf (Ms. Helf), a Lecturer, Part-Time, in the University’s Business School, commenced a class action lawsuit for wages owed against the University. Similar to Prof. Storti, Ms. Helf alleged that the University had breached a contractual obligation to pay its continuing Lecturers, Part-Time, who were not deemed unmeritorious, and who did

not come within the *Storti* class of “faculty,” two percent merit raises since the FSP went into effect in January 2000. CP 15, l. 1 – 8.

At the same time that she commenced her lawsuit, Ms. Helf filed a motion to intervene in the *Storti* litigation. In opposing Ms. Helf’s motion, the University argued that because Lecturers, Part-Time, are not “faculty” for purposes of the FSP, Ms. Helf lacked standing to intervene. CP 114, l. 4 – 13. After the Court denied her motion, Ms. Helf proceeded with her lawsuit. In 2007, she and the University settled the case. In June of that year, the Court gave final approval to the settlement between the University and the “Helf class.” CP 15, l. 9 – 13.

In April 2008, Rozanna Carosella (Ms. Carosella) and Natalie Pret (Ms. Pret), two Extension Lecturers, Full-Time, in the University’s English Language Programs (ELP), commenced a class action lawsuit against the University for back wages. CP 3 – 9. Similar to Ms. Helf, they claimed that the University breached a contractual obligation under the FSP to pay two percent merit increases to ELP’s meritorious Extension Lecturers during the 2002-2003 academic year. CP 8, l. 18 – 20.

ELP is a subunit within the University’s Educational Outreach (EO) unit. EO is not one of the University’s schools or colleges, almost all of which are headed by a dean. Instead, the head of EO is a University Vice Provost. But, as is true of the University’s deans, EO’s Vice Provost

reports to the University's chief academic officer, the Provost. CP 899. The Vice Provost for EO is responsible for the management of UW Extension, of which ELP is a part. Handbook Sec. 12-22.C.8.c. The Provost, on the other hand, has responsibility for, among other things, reviewing recommendations regarding faculty salary increases. Handbook Sec. 12-22.C.1. The Provost is "deputy to the President." Handbook Sec. 12-22.A. The President acts for the University's Board of Regents in approving salary increases for "faculty." Handbook Sec. 12 – 12.C.

ELP has had several "homes" during its various incarnations at the University. In 1947, before ELP existed as a subunit at the University, the University's English Department offered a course titled "English for Foreign Graduate Students." By the next decade that course had morphed into two courses taught in the English Department: Elementary English and Intermediate English. In 1962, the Linguistics Department assumed responsibility for the courses. Later that decade two University faculty members developed two "English" courses for foreign students in the sciences and engineering. By 1981, English as a Second Language (ESL) courses were well established at the University, although the "home" for those courses varied. Prior to that time the University had established an ESL Center. In 1981, the ESL Center became part of the English

Department. In 1984, ESL became part of UW Extension/Continuing Education. CP 182 – 184.

In 2000, ESL became ELP. Although ELP is not part of any school or college of the University, its mission involves “supporting the overall mission of the University of Washington and the communities it serves.” CP 137.

Throughout ELP’s existence, the English Department has exercised approval authority over ELP’s course offerings. Further, the English Department exercises approval authority over those who teach ELP’s courses. The administrative head of ELP is responsible for recommending persons for appointment to teaching positions in ELP. In addition, although the head of EO has authority as to those appointments in ELP, the appointments are subject to approval by the University’s Office of Academic Human Resources (Academic HR). Further, the administrative head of ELP, its Senior Director, has responsibility for recommending persons for appointment to teaching positions to EO’s Vice Provost. Academic HR is under the direct authority of the University’s Vice Provost for Academic Personnel. CP 870, l. 24 – 25; CP 871, l. 1 – 18. In contrast, the University’s Office of Human Resources administers appointments and policies pertaining to non-academic personnel. That office is directly under the University’s Executive Vice President rather

than a vice provost, or other academic officer of the University.

Handbook Sec. 12 – 21.C.6.e. The website of the University’s Office of Human Resources explains the reporting relationship.

www.washington.edu/admin/hr.

Teaching appointments in ELP carry the title Extension Lecturer. An appointment to the position of Extension Lecturer can be on an annual, quarterly or hourly basis. The “Carosella” class includes only persons who held annual or quarterly appointments during at least the 2001-2002 and 2002-2003 academic years. Those persons carry the titles Extension Lecturer, Full-Time, and Extension Lecturer, Part-Time. CP 362.

Qualifications for the position of Extension Lecturer include a Masters degree in teaching English as a Second Language and experience in teaching English to non-native speakers. CP 363. In contrast, Sec. 24-34 of the Faculty Code imposes no degree requirement for the holder of an appointment as a “lecturer” in any of the University’s schools or colleges. CP 671.

Throughout the period encompassed by the current lawsuit, ELP maintained an Operations Manual (OPMAN). The OPMAN, among other things, describes the various programs that ELP provides, sets forth course descriptions and prerequisites for those courses, and details a series of policies that pertain to ELP and its Extension Lecturers. CP 140 -147; CP

189 – 294. Thus, ELP determines its programs and, with the approval of, for example, the English Department, the content of the courses that it offers. Similarly, Sec. 23-43 of the Handbook authorizes the “faculty” of the University’s various colleges and schools to, for example, “determine [the college’s or school’s] curriculum and its academic programs. CP 661.

In addition, the OPMAN includes a description of ELP’s Performance Appraisal System (PAS). The OPMAN notes that “[t]he [PAS] has been established to assist the Director in making contract renewal and merit raise decisions for contracted lecturers.” CP 367; CP 789. The PAS mandates an annual performance, i.e. merit, review for ELP’s Extension Lecturers. Mandated annual merit reviews of Extension Lecturers have been in effect since at least 1993. Further, as a prerequisite to receiving a merit raise an Extension Lecturer has had to undergo a successful merit review that focuses on three dimensions: teaching, professional contributions, and contributions to ELP’s programs. CP 367 – 368; CP 789 – 790.

Until sometime during the 2000-2001 academic year, the Director of ESL had sole responsibility for performing the annual merit reviews of Extension Lecturers. The Director would determine a “merit number” for each Extension Lecturer and use the set of “merit” numbers to establish a rank ordering of the entire group of Extension Lecturers. The “merit”

numbers then would translate into the merit raise that Extension Lecturers would receive. Prior to the 2000-2001 academic year, the University compensated its faculty according to placement on a “step ladder.” The “step ladder” applied to Extension Lecturers as well as to “faculty” in the University’s schools and colleges. CP 947, l. 8 – 25; CP 948, l. 1 – 14; CP 508, l. 4 – 25; CP 508, l. 3 – 12.

As an adjunct to the PAS, ELP has had a Professional Development System (PDS). The function of the PDS is to “encourage and provide on-going support for the professional development of [Extension Lecturers].” CP 373. Under the PDS Extension Lecturers submit an “Annual Review.” The Annual Review is a written document in which the Extension Lecturer, using a form set forth in the OPMAN, provides information to the Senior Director regarding, for example, the courses taught during the year, course evaluations, and a summary of professional activities. Those Annual Reviews become part of the basis for determining merit raises for Extension Lecturers. CP 373.

The written Annual Review submitted by Extension Lecturers maps the “Yearly Activity Report” that Sec. 24-57.B. of the Faculty Code mandates for “faculty” in the University’s departments in its schools and colleges:

Each department (or undepartmentalized college) shall adopt a suggested format by which each faculty member will have the opportunity to provide information on professional activities carried out during the prior year. These reports shall be prepared in writing by each faculty member and submitted to the chair (or dean) . . . and shall be used as a source of information for consideration of . . . merit salary

CP 686.

Mapping between the PAS and Sec. 24-57 of the Faculty Code involves administrative feedback regarding the performance and career development of the “faculty” member in ELP and the “faculty” member in the University’s schools and colleges. Specifically, the PAS mandates an annual “performance appraisal meeting,” during the Autumn Quarter, between ELP’s Senior Director and each Extension Lecturer. Sec. 24-57 of the Faculty Code requires a “[r]egular [c]onference with [f]aculty:”

Each year the chair, or where appropriate the dean or his/her designee, shall confer individually with all *lecturers* and assistant professors. . . . The purpose of the regular conference is to help individual faculty members plan and document their career goals. While the documentation of those goals will be part of the faculty member’s record for subsequent determinations of merit, the regular conference should be distinct from the merit review pursuant to Section 24-55 (emphasis added).

CP 684.

The required merit review under Sec. 24-55 of the Faculty Code is multi-faceted:

Such reviews shall consider the faculty member's cumulative record, including contributions to research/scholarship, teaching, and service, and their impact on the department, school/college, university, and appropriate regional, national, and international communities.

CP 684.

The required annual merit review for Extension Lecturers focuses on three dimensions: teaching, as evidenced by data from teaching evaluation forms completed by students and optional classroom observations conducted by the Senior Director; professional contributions; and contributions to ELP, in the form of, for example, committee work and help to other Extension Lecturers. CP 363 - 368. Thus, apart from the "research/scholarship" dimension, annual merit reviews of Extension Lecturers focus on the required data that finds expression in Sec. 24-55.

Despite Sec. 24-55's mandate that merit reviews for all faculty in the University's schools and colleges must include an assessment of the faculty member's research/scholarship, teaching and service, the merit reviews for "lecturers" in the University's schools and colleges focus only on teaching, the first of those three dimensions. The schools and colleges determine for themselves the process that they will use in conducting the annual merit reviews of 'faculty.' In contrast, for all faculty in the professorial ranks in any school or college, that review must and can

involve an assessment of the faculty member's research/scholarship, teaching, and service. Faculty Code Sec. 24-70; CP 692.

In July 1999, changes to the Faculty Code, specifically Sec. 24-70: Faculty Salary System: Policy and Principles, and Sec. 24-71: Procedure for Allocating Salary Increases, became effective. CP 693 – 694.

Accordingly, the “step” system for determining faculty compensation disappeared. Thus, changes in compensation for “faculty” in the University's schools and colleges and for Extension Lecturers derived from annual performance reviews. As of the 2000-2001 academic year, the University began to pay annual two percent merit increases to its meritorious “faculty,” including Extension Lecturers.

In 1995, the position of Faculty Representative (Faculty Rep) in ESL came into being. CP 184; CP 506, l. 4 – 6. During the Summer and Fall Quarters of 1999 and the Winter Quarter of 2000, Extension Lecturer Alison Stevens (Ms. Stevens) held that position. CP 506, l. 17 – 18. As the Faculty Rep Ms. Stevens served as a liaison for ESL's Extension Lecturers and Staff with ESL's Director, Bill Harshbarger (Mr. Harshbarger). In that capacity, Ms. Stevens met at least weekly with Mr. Harshbarger. Afterwards, in ESL's weekly “Monday Memo” she reported on the contents of those meetings to ESL's faculty, i.e. Extension Lecturers, and staff. CP 500, l. 21 – 26.

On several occasions during the Winter Quarter of 2000, after the FSP went into effect, Mr. Harshbarger informed Ms. Stevens that “ESL would have to comply with the merit review requirements set forth in the [FSP].” When Ms. Stevens questioned the need to do so, Mr. Harshbarger “explained that ESL had always followed procedures for determining merit raises in other units of the University, which [Ms. Stevens] had always understood to be true.” CP 501, l. 16 – 25; CP 502, l. 1.

Further, he insisted that he was following the explicit directive of David Szatmary, Vice Provost of Educational Outreach, that ESL comply with the requirements of the Faculty Salary Policy.

CP 502, l. 1 – 4.

According to Mr. Harshbarger, EO’s Vice Provost, David Szatmary (Mr. Szatmary), “directed me to follow the new Faculty Salary Policy in determining annual merit raises for Extension Lecturers.” CP 948, l. 11 – 14. Mr. Szatmary denies that he directed Mr. Harshbarger to follow the FSP. CP 853, l. 10 – 11. Regardless, well before the FSP went into effect, Mr. Harshbarger informed Ms. Stevens that ESL would have to develop a “committee” system for effecting annual merit reviews. In the October 11, 1999, Monday Memo Ms. Stevens explained what that requirement would mean:

In June, Bill [Harshbarger] was told that for future merit decisions, there should be a committee (of more than one)

to make recommendations. This committee could come from inside or outside of ESL, and Bill was asked to see that such a committee was in place before the merit decisions of the year 2000.

CP 508, l. 4 – 8.

By sometime in 2000, the committee was in place and has made the required recommendations regarding merit for Extension Lecturers ever since. CP 508, l. 15 – 25; CP 509, l. 1 – 2; CP 949, l. 1 – 3. Thus, according to Mr. Harshbarger, except for 2002-2003, from the 2000-2001 academic year through 2004, when he retired, “meritorious Extension Lecturers received annual merit raises in accordance with the Faculty Salary Policy.” CP 949, l. 4 – 8.

Mr. Harshbarger, who had been ESL’s Director since 1988, became the Senior Director of the unit in 2003 when ESL became ELP. At the same time several other “director” positions came into being for ELP’s various programs. Those directors reported to Mr. Harshbarger, who in turn reported to Mr. Szatmary. CP 947, l. 21 – 25; CP 148 – 149. Mr. Szatmary reported to the Provost, who has responsibility for EO. Management responsibility for EO, including UW Extension, is in the hands of that unit’s Vice Provost. Handbook, Sec. 12 – 22.C, Sec. 12 - 22.C.8.

According to the OPMAN, the Senior Director performs several functions. For example, he is directly responsible for formulating policy for ELP. CP 149. In accordance with Mr. Szatmary's directive that ESL/ELP would have to follow the FSP in determining annual merit raises for Extension Lecturers, Mr. Harshbarger, as ESL's/ELP's policy maker, established merit-review-by-committee in ESL. Since 2003, the committee has comprised ELP's Senior Director and its various program directors. Throughout the period encompassing the current lawsuit, ESL's/ELP's Director/Senior Director always had final authority as to the merit increases for each Extension Lecturer. CP 159. Mr. Szatmary, in his role of managing EO, had approval authority as to the aggregate percentage merit increases for the population of meritorious Extension Lecturers. CP 853, l. 15 – 17; CP 129, l. 20 – 22. Again as noted above, however, ultimate responsibility for Educational Outreach, including salary increases, lay in the Office of the Provost.

Pursuant to Sec. 24-55 of the Faculty Code, each of the University's schools and colleges follows a procedure for determining merit increases for "faculty" similar to that described above. Specifically, for example, in an undepartmentalized school or college faculty senior in rank to the faculty member under review make merit recommendations to the dean. The dean then makes his or her own recommendation and

forwards that on to the President of the University, who has final approval authority. Of course, prior to reaching the President, the dean's recommendation undergoes review by the Provost, who makes recommendations to the President. CP 684; Handbook Sec. 12 – 22.C.1.

During the 2001-2002 academic year, each of the members of the current class underwent a successful annual merit review by the multi-member reviewing committee in ESL. Despite having been deemed meritorious, none of those class members received a merit increase during the 2002-2003 academic year. Nor has the University ever paid those merit raises to members of the Carosella class. Further, members of the class underwent successful annual merit reviews during the period of academic years from 1999-2000 through 2006-2007. With the exception of 2002-2003, in each of the academic years following a successful merit review members of the class received merit raises of at least two percent. CP 467 – 510.

As part of the OPMAN's section on the PAS, is a subsection on merit raises that ties those raises to legislative appropriations and merit raises that the University awards to its "other faculty:"

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

follows the decisions made for the entire University, assuming revenue is available. ELP instructors [i.e. Extension Lecturers] have consequently received the same salary increases as other faculty (emphasis added).

CP 367.

Seventeen members of the class submitted declarations stating, among other things, that throughout their employment in ESL/ELP, they were familiar with the OPMAN's provision set forth above. Further, based on that provision, they understood that if they underwent a successful merit review they would receive the same merit raise that the University's "other faculty" received. CP 467 – 510.

As to the merit raises that "other faculty" receive, the FSP mandates a minimum of two percent. "Higher levels of performance shall be recognized by higher levels of salary increases as permitted by available funding." CP 691. Pursuant to Sec. 24 – 71 of the Faculty Code, during any given academic year, the University's President determines the allocation of funds that are available for salary increases for "faculty." The first step in the resulting process is an across-the-board two percent increase for the University's meritorious "faculty." Afterwards, allocations include, for example, increases for "faculty" in the professorial ranks who have been promoted. Further, if funds are available, the President can use them to correct "market gaps" for

particular units. In such an allocation, then, the average raise in the affected unit would exceed the averages in other units at the University. CP 693 -694.

Subsequent to abandoning the “step” system for faculty salaries, the University established “salary floors” for faculty. Ultimately, EO applied the salary floor for lecturers in the University’s schools and colleges to Extension Lecturers in ELP. That meant, for example, that Ms. Carosella, whose salary was already above the salary floor, experienced compression in the gap between her salary and that of the lowest paid Extension Lecturer. CP 509, l. 13 – 21.

Prior to the beginning of the 2007-2008 academic year, Richard Moore (Mr. Moore), ELP’s Faculty Rep at the time, learned from the unit’s Senior Director that raises for Extension Lecturers for the coming academic year would exceed eight percent. According to Mr. Moore, those raises would comprise three components: an across the board raise of two percent for “merit;” some percentage to correct for salary compression of the type that Ms. Carosella experienced; and some percentage for additional merit. CP 903, l. 1 – 25; CP 904, l. 1 – 13.

In addition to its mandated two percent merit increase for all meritorious “faculty,” the FSP authorizes several other categories for allocating funds for increases in faculty salaries. Two particularly

germane categories are “additional merit to all faculty,” and “differential distributions by unit to correct salary gaps [i.e. salary compression].”

FSP: Allocation Categories. CP 691. Thus, the three-part increase in salaries for Extension Lecturers in the 2007-2008 academic year was an application of the mechanism authorized under the FSP’s Allocation Categories provisions.

The FSP’s references to “all faculty” do not detail which persons who teach at the University are included in “all faculty.” When Ms. Helf sought to intervene in *Storti*, the University took the position that Lecturers who hold part-time appointments are not within the FSP’s references to “all faculty.” Regardless, as noted above, the University ultimately settled with the *Helf* class by, among other things, paying a \$500,000 lump sum to members of the class as compensation owed in the form of merit raises. CP 843, 1. 2 – 4.

Despite the University’s contention in opposing Ms. Helf’s effort to intervene in *Storti*, Sec. 21-31 of the Faculty Code defines “lecturers” who hold part-time appointments as being part of the “University faculty.” On the current list of twelve titles that constitute the University faculty the prefix “Extension” does not appear. That section of the Faculty Code is not, however, the only section of the Handbook that addresses the employment classification of Extension Lecturers.

In fact, according to its own taxonomy, the University employs five types of personnel: academic personnel, professional staff, classified staff, temporary staff, and student employees. Handbook, Vol. 4, Part IV, Ch. 1; CP 736. Extension Lecturers are neither professional staff, classified staff, temporary staff, nor student employees. Thus, they fall within the “academic personnel” classification. This reality is consistent with the Factbook, a self-reporting document that the University maintains on its website at www.washington.edu/admin/factbook. Table F2 of the Factbook details a “headcount” of the University’s Academic Personnel. As of the date of the determination of the motions for summary judgment in this case, Table F2 was available on the University’s website for the period from Autumn 2002 through Autumn 2007. The number of persons who held full-time and part-time appointments in EO, i.e. Extension Lecturers, Full- and Part-Time, appear in the Educational Outreach subcategory under Academic Personnel.

Within “academic personnel” are four subcategories of University employees: teaching, research, clinical, and affiliate *faculty*; graduate student appointees and post-doctoral fellows; professional librarians; and medical residents (emphasis supplied). Handbook, Vol. 4, Part IV, Ch.1, Sec. 1.A; CP 736.

Extension Lecturers are neither graduate students, post-doctoral fellows, professional librarians, nor medical residents. Thus, according to the Handbook's taxonomy, Extension Lecturers are either teaching, research, clinical or affiliate *faculty*.

Again, Sec. 21-31 of the Faculty Code lists twelve titles of academic personnel who comprise the "University faculty." The term "lecturer" appears three times on that list: principal lecturer, senior lecturer, and lecturer. Prior to 2007, the University provided for the employment of persons as Principal Lecturers. CP 671. Yet prior to 2007, Sec. 21-31 of the Faculty Code did not include the title Principal Lecturer on the list of titles that comprise the "University faculty." CP 889. Regardless, the court-approved *Storti* settlement agreement included all Principal Lecturers, whom the University employed in a full-time capacity during the period covered by the lawsuit. On the other hand, Extension Lecturers, who fall within the "faculty" classification under Vol. 4, Part IV, Ch. 1, Sec. 1.A., and whom the University employed on a full-time basis during the period encompassed by the *Storti* lawsuit, were not part of the class in that lawsuit. CP 821.

On April 24, 2008, Ms. Carosella and Ms. Pret initiated a class action lawsuit on behalf of the University's "meritorious" Extension Lecturers whom the University employed during the 2001-2002 and 2002-

2003 academic years and who were not part of the *Storti* class. In that lawsuit Ms. Carosella and Ms. Pret alleged that the University breached a contractual obligation under the FSP to pay to them two percent merit increases during the 2002 - 2003 academic year. CP 3 – 9.

In late September 2008, Ms. Carosella and Ms. Pret moved for class certification. CP 10 – 22. The University opposed the motion. CP 100 -109. In an order entered on October 6, 2008, the Court granted class certification and certified Ms. Carosella and Ms. Pret as the class representatives. CP 123 – 126.

In February 2009, Ms. Carosella and Ms. Pret filed a motion for partial summary judgment as to liability on their breach of contract claim. CP 527 – 548. Concurrently, the University moved for summary judgment dismissal of that claim. The basis for the University’s motion was its contention that Extension Lecturers are not University “faculty.” Thus, the FSP does not apply to them. CP 549 – 564. On March 6, 2009, after hearing oral argument on the opposing motions, the Court entered a summary judgment dismissal, without findings or conclusions, of the class’s claim. CP 973 – 975. On May 6, 2009, Ms. Carosella and Ms. Pret filed a Notice of Appeal of the Court’s order granting summary judgment dismissal.

ARGUMENT

Standard of Review

On review of a summary judgment order, [the appellate court] engages in the same inquiry as the trial court. *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). All facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed de novo. *Berger v. Sonneland*, 144 Wn. 2d 91, 102-03, 26 P.3d 257 (2001). Summary judgment is appropriate only when there are no disputed issues of material fact and the prevailing party is entitled to judgment as a matter of law. CR 56(c).

Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, 165 Wn.2d 679, 686, 202 P.3d 924 (2009).

Application of this standard requires focusing on the same two questions that were before the trial court on the parties' competing motions for summary judgment: Does the FSP's mandate that the University must pay all continuing meritorious "faculty" a minimum two percent merit increase apply to Extension Lecturers, who hold either full- or part-time appointments? If the FSP does apply to those Extension Lecturers, did the University breach a contractual obligation to pay to them two percent merit increases during the 2002-2003 academic year? The answers to the two questions require an explication of what the Court's ruling in *Storti* established for the current case. Accordingly, we address that question first.

***Storti* Established that Barring Amendment, the FSP Obligates the University to Pay Annual Merit Increases to All Meritorious Faculty Regardless of Whether the Legislature Has Appropriated Funds for Merit Salary Increases**

In its motion for summary judgment in this case the University asserted that the *Storti* and *Helf* cases have no bearing on the current matter. In particular, the trial court's order granting summary judgment to the plaintiff class in *Storti* is an interlocutory order that was never reduced to a final judgment because the parties settled. In fact, the court-approved settlement agreement includes a statement that several issues remained for trial in the case. For example, which "faculty" titles come within the use of that term in the FSP had yet to be resolved. Thus, according to the University, the *Storti* court's determination on summary judgment that the University had breached a contractual obligation to pay two percent merit increases to continuing meritorious "faculty" in the 2002-2003 academic year has no preclusive effect in any subsequent litigation that focuses on the issue.

Law in the federal courts and in the courts of this state is clear that, with but few exceptions, only final judgments are appealable. The question not addressed by the University in its argument set forth above is

whether “offensive” collateral estoppel requires a final judgment.

Collateral estoppel comprises four elements:

(1) the previously decided issue is identical with the one presented in the action in question; (2) there was a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the prior adjudication; and (4) application of the doctrine does not work an injustice on the party against whom the doctrine will be applied. [citations omitted]

Cunningham v. State, 61 Wn. App. 562, 566, 811 P.2d 225 (1991).

In *Cunningham*, the Court revisited the question whether because it is not “final” for purposes of the right to appeal, a partial summary judgment is not a “final judgment” as that term appears in the second of the doctrine of collateral estoppel’s four elements. The Court noted that it had decided the issue in a previous case:

Cunningham argues that the trial court erred in finding collateral estoppel because the summary judgment was not a final judgment. He contends that finality for collateral estoppel purposes is the same for determining appealability under CR 54. We recently rejected a similar argument on the ground that such a rigorous finality requirement does not implement the purposes of collateral estoppel: to protect prevailing parties from relitigating issues already decided in their favor, and to promote judicial economy. *Chau*, 60 Wn. App. at 120 – 121.

Cunningham, 61 Wn. App. at 566.

In reaffirming its ruling in *Chau*, the Court cited to *Carpenter v. Young*, 773 P.2d 564 (Colo. 1989), a case in which the Colorado Supreme

Court addressed the same issue and came to the conclusion that “final” under Colorado’s CR 54 analogue did not necessarily equate to “final” for collateral estoppel purposes. *Cunningham*, 61 Wn. App. at 568. The antecedent for the ruling in both *Cunningham* and *Carpenter* is *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962). In *Lummus*, Judge Friendly, writing for the Court stated as follows:

Whether a judgment, not “final” in the sense of 28 U.S.C. § 1291, ought nevertheless be considered “final” in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e. that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. “Finality” in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.

Id. at 89.

The *Cunningham* Court then looked to the Restatement (Second) of Judgments for the test that maps the “Friendly” approach:

[F]or purposes of issue preclusion, a final judgment “includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded preclusive effect.” Restatement § 13. Factors for a court to consider in determining whether the requisite firmness is present include whether the prior decision was adequately deliberated, whether it was firm rather than tentative, whether the parties were fully heard, whether the court supported its decision with a reasoned opinion, and

whether the decision was subject to appeal or in fact was reviewed on appeal. Restatement § 13, comment g.

Cunningham, 61 Wn. App. at 567.

Cunningham involved a motor vehicle incident in which Cunningham drove into a concrete bollard near the entrance to the U.S. Navy's Bangor Submarine Base. Cunningham, who was intoxicated at the time, and his passenger were injured. The passenger, McBride, sued Cunningham, the United States, and various entities that allegedly played roles in the "negligent design of the road and gate." *Id.* at 564. Because his attorneys missed the applicable statute of limitations, Cunningham had no claim against the United States. As to McBride's claims against it, the United States contended that the "discretionary function" exception to the Federal Tort Claims Act served as a shield against those claims. Subsequently, after agreeing with the United States as to some of those claims, the court entered a partial summary judgment regarding several design issues. In addition to opposition to the motion from McBride, the Court received a lengthy brief in opposition from Cunningham's attorneys. After the grant of summary judgment, McBride settled his remaining claims against the United States. *Cunningham*, 61 Wn. App. at 564 – 565.

Cunningham sued his attorneys for malpractice because they missed the statute of limitations for filing a claim against the United

States. By agreement of the parties, that meant that the attorneys occupied the same position as the United States. After McBride settled, Cunningham's attorneys sought summary judgment dismissal of his claim through the application of collateral estoppel. *Cunningham*, 61 Wn. App. at 565. Subsequent to looking to *Carpenter* and two other cases, one a federal case from California, another a state case from Texas, that applied the multi-factor test above, the Court ruled that the partial summary judgment had preclusive effect:

Cunningham fully and vigorously litigated the discretionary function issue in the first proceeding.[fn. omitted] The federal judge considered the question and issued a written opinion outlining her reasons for finding the discretionary function exception applicable. The judge was firm in her decision; she denied both Cunningham's and McBride's motions for reconsideration. . . . Accordingly, we affirm the trial court's conclusion that the federal court's partial summary judgment was sufficiently firm to satisfy the requirements of collateral estoppel.

Cunningham, 61 Wn. App. at 569 – 570.

Lummas, *Carpenter*, and *Cunningham* all involved the “defensive” use of collateral estoppel. Thus, in *Carpenter* and *Cunningham*, appellate courts gave collateral estoppel effect to a summary judgment ruling that dismissed claims against a defendant in a prior action. Case law in this state makes clear, however, that entry of partial summary judgment

against a defendant in a prior action can preclude litigation of the same issue in a subsequent action against the same defendant.

In *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001), a case that involved an attempt by husband and wife plaintiffs to use collateral estoppel as a “sword,” the Court made no distinction between that form of use and the defensive use of the doctrine. Instead, the Court looked to the fourth element in the test for whether issue preclusion was appropriate. In examining whether the application of collateral estoppel would “work an injustice” on the defendant, the Court adverted to “respected authorities” Lewis Orland and Karl Teglund and “consider[ed] whether ‘the party against whom the estoppel is asserted [had] interests at stake that would call for a full litigational effort.’ 14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: TRIAL PRACTICE, CIVIL § 373, at 763 (5th Ed. 1996). . . .” *Hadley*, 144 Wn.2d at 312.

The plaintiffs in the personal injury suit against Ms. Maxwell attempted to use her having been cited for an illegal lane change as determinative of her driving negligently when her vehicle collided with the vehicle that Mr. Hadley was driving. The Court concluded that Ms. Hadley’s “incentive to litigate [regarding the citation] was low – Maxwell was at risk \$95.” Thus, the application of collateral estoppel would work an injustice on Ms. Maxwell. *Id.* at 312, 315.

Application of the teaching of *Cunningham* and *Hadley* supports the application of collateral estoppel here. Under the four part test, only elements (2) and (4) can be at issue. That is, the predicate issue in this case is whether the University breached a contractual obligation to pay meritorious “faculty” during the 2002-2003 academic year. In its order granting summary judgment in favor of the *Storti* class the Court ruled that the University did breach that contractual obligation. Thus, elements (1) and (3) are satisfied.

As to the second element, under *Cunningham* the relevant inquiry centers on the following questions: whether the University fully and vigorously litigated the issue in *Storti*; whether the Court considered the question and issued a written opinion that outlined the reasons for determining that the University has breached a contractual obligation; and whether the Court was firm in its decision. In *Storti* both the University and Mr. Storti moved for summary judgment and filed responsive briefs with the Court. Both motions centered on the breach of contract question. Further, the Court did issue a written opinion in which it detailed the reasons for denying the University’s motion and granting Mr. Storti’s. Nothing in that written opinion suggests that the Court was anything but firm in the decision.

In its motion for summary judgment here, the University attached significance to the fact that in *Storti* it chose to settle rather than proceed to trial on, for example, the question of which “faculty” titles come within the ambit of the FSP. Further, the University would not have been able to appeal the summary judgment until after it became a final judgment, presumably at the conclusion of trial on the remaining issues. Thus, according to the University, collateral estoppel cannot apply here. In *Cunningham*, this court cited with approval to the Colorado Supreme Court’s rejection of a similar argument in *Carpenter*:

The court found it significant that the granting of the motion “was in no way tentative”, that the plaintiff against whom estoppel was asserted had ample opportunity to be heard, and that although the summary judgment would ultimately been subject to review, plaintiffs had waived the right to review when they entered into a settlement agreement. *Carpenter*, 773 P.2d at 568.

Cunningham, 61 Wn. App. at 568 – 569. Similarly, by settling with Mr. Storti after the Court had entered an order and issued an opinion that “was in no way tentative,” the University waived its right to appeal the issue whether it had breached a contractual obligation under the FSP during the 2002-2003 academic year.

Finally, as to *Hadley*’s teaching, *Storti* was far from a “low risk” case, as terms of the settlement agreement make clear. Recall that in

Hadley, the maximum price that Ms. Maxwell might have had to pay for making an illegal lane change was \$95. In contrast, in *Storti* the University agreed to pay \$17,450,000 to settle the breach of contract claims of members of the class. That payment “represent[ed] a compromise of claims for back pay and interest.” CP 811, l. 16 – 17; CP 813, l. 11 – 12. Further, “when the value of the adjustment to current salary and the accompanying retirement contributions by the University are considered,” the total value of the settlement exceeded \$50,000,000. CP 814, l. 11 – 13.

The money at risk in *Storti* by itself compels the conclusion that the University had a powerful incentive to litigate the breach of contract issue fully. The immediate potential liability for millions of dollars in back pay, particularly when translated into salary adjustments that would go forward, was not the only significant issue that the University faced. Specifically, the Court ruled that as long as the FSP remained unchanged, irrespective of any financial difficulties in which it might find itself, including the absence of any legislative appropriations for salary increases, the University would have to pay two percent merit increases to continuing meritorious “faculty.” Despite these two risks, the University chose to settle rather than go to trial and then appeal the liability determination. For this and the other reasons set forth above, the summary

judgment entered in *Storti* means that the question of the University's having breached a contractual obligation under the FSP in 2002-2003 is settled.

The FSP Applies to Extension Lecturers

In its motion for summary judgment, the University claimed that the FSP does not apply to Extension Lecturers. The basis for this claim is twofold: First, EO, which includes ELP, is not an academic unit of the University. "Faculty" only reside within the University's academic units. Thus, Extension Lecturers cannot be "faculty." Second, Sec. 21-31 of the Faculty Code lists a series of titles that constitute the University "faculty." "Extension Lecturer" does not appear on the list. The Faculty Code pertains exclusively to persons holding the titles on the list in Sec. 21 – 31. The FSP is in the Faculty Code. Thus, it applies exclusively to persons holding titles on the list in Sec. 21 – 31. Because Extension Lecturer does not appear on the list, the FSP does not apply to them.

This line of argumentation represents a shift from what the University argued in opposing Ms. Helf's motion to intervene in *Storti*. There the University contended that the Faculty Code's definition of "faculty" as comprising the titles in Sec. 21 – 31 is not coextensive with the term "all faculty" in the FSP. Thus, Lecturer, Part-Time, is a title that the FSP does not encompass. As support for this line of argument the

University pointed to no specific language in the Faculty Code or any other provision in the Handbook. Now, apparently, the University takes the position that the term “all faculty” as it appears in the FSP does include Lecturers, Part-Time. That position is, of course, consistent with the University’s decision to pay back wages to the *Help* class rather than vigorously litigate that case.

A second anomaly that arises in the University’s reasoning derives from the inclusion of Principal Lecturers, Full-Time, in the *Storti* class. The Court gave final approval to the settlement in that case in May 2006. As of that time “Principal Lecturer” did not appear on the list of titles in Sec. 21 – 31 of the Faculty Code. Thus, according to the University’s reasoning here, persons holding that title were not “faculty.” Thus, they could not be part of the *Storti* class.

All of this leaves open the question that the parties in *Storti* agreed was left for determination at trial: Which titles are included in the word “faculty” as that word appears in the FSP?

Ms. Carosella and Ms. Pret argued before the trial court that despite any explicit definition of “faculty” in the FSP, there is ample reason to conclude that Extension Lecturers fit any implicit definition. To begin, “Extension” modifies the title “Lecturer” just as do “Principal” and “Senior.” Every variation on the title “Lecturer” includes persons whom

the University employs to perform a single function for the institution: they teach. In the University's schools and colleges Lecturers, "Senior" Lecturers, and "Principal" Lecturers teach matriculated students. In ELP "Extension" Lecturers teach both matriculated and non-matriculated students of the University. What seems to be implicit in the University's contention that Extension Lecturers are not "faculty" is that the courses they teach are not really University courses. Otherwise, the University's schools and colleges would offer the courses and "real" faculty would teach them. As the history of ELP set forth above makes clear, however, for many years ESL's "home" was in one or more of the University's academic departments. Further, English as a Second Language courses were offerings of those departments. Even today, courses that Extension Lecturers teach, as well as those persons who teach them, are subject to approval by academic departments.

Further, the FSP's required annual merit reviews for Lecturers, "Senior" Lecturers, and "Principal" Lecturers of necessity involve an assessment of nothing more than the teaching performance of those persons. Under the Faculty Code individual departments, or undepartmentalized schools and colleges, have authority to determine what the review process will involve in their units. Similarly, "Extension" Lecturers have always undergone merit reviews that focus primarily on

teaching performance. Just as in the University's academic units, ESL/ELP developed and implemented a system for conducting those reviews.

What the above comparison makes clear is that the only distinction between the three categories of "Lecturer" and Extension Lecturer is twofold: First, the University employs the three categories in its "academic units" and its Extension Lecturers in EO. Second, the two groups have different titles. Otherwise, all "Lecturers," irrespective of any prefix that might attach, perform exactly the same function, undergo annual reviews of their job performance on the exact same single dimension, teaching, and with the exception of the 2002 – 2003 academic year, have received merit increases if the performance review deemed them to be meritorious.

What employees do, that is what their job functions or activities encompass, often has greater significance than their job titles in several areas of the law. For example, under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207, *et seq.*, courts have focused on an employee's job functions as opposed to job title to determine whether that employee is exempt from the FLSA's coverage as to overtime. *Dalheim v. KDFW-TV*, 706 F. Supp. 493, 504 (N.D. Tex. 1988); *Freeman v. National Broadcasting Co.*, 846 F. Supp. 1109, 1120 (S.D. N.Y. 1993), *rev'd on*

other grounds, *Freeman v. NBC*, 80 F.3d 78 (2d Cir. 1996); and *Nordquist v. McGraw-Hill Broadcasting Co.*, 32 Cal. App. 4th 555, 565 (1995). A similar inquiry attends cases in which a plaintiff did not receive equal pay for equal work in violation of the Equal Pay Act, 29 U.S.C. § 206 (d) (1). For example, in *Gunter v. County of Washington*, 623 F.2d 1303, 1309 (9th Cir. 1979), the Court noted that “actual job performance and context and not job titles, classifications or descriptions is determinative. . . . [T]he overall job must form the basis for comparison.”

In cases of alleged discrimination in employment brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e – 2000e-17, plaintiffs must establish that they were treated differently from “comparators.” Typically, as in the Ninth Circuit, a “comparator” is someone who is “similarly situated” to the plaintiff “in all material respects.” *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006). In *Boumehdi v. Plastag Holdings, Inc., LLC*, 489 F.3d 781, 791 (7th Cir. 2007), the Court explained that the inquiry into “material aspects” focused on four factors: whether the plaintiff and alleged comparator “had the same job description; were subject to the same standards; [had] the same supervisor; and had comparable experience, education, and other qualifications.” Thus, identical job titles do not mean that the plaintiff and the alleged comparator are “nearly identical,” as the Court ruled in a

recent case in Ohio. *Thompson v. OhioHealth Corp.*, No. 2: 07-CV-00110, 2008 U.S. Dist. LEXIS 100093, at 24* (S.D. Oh., Dec. 11, 2008): “The same job title does not necessarily equate to ‘similarly situated.’ Persons can have the same job title but perform different job functions.”

Finally, when courts face the decision whether to certify a class the question of the composition of that class is an issue. *Hnot v. Willis Group Holdings Ltd.*, 228 F.R.D. 476 (S.D. N.Y. 2005), a sex discrimination case, provides a useful example. There the two named female plaintiffs, who were high level employees of the defendant, sought to define the class to include “females of officer rank, and officer-level equivalents.” *Id.* at 480. The Court focused first on, “ascertainability,” an implicit requirement of Rule 23(a) of the Federal Rules of Civil Procedure. That is, the plaintiffs had to be able to “readily identify” persons who fit within the two categories that would constitute the class. The Court noted that “[a] class is ascertainable when defined by objective criteria that are administratively feasible, without subjective determination. [citations omitted].” *Id.* at 481.

In *Storti* the Court certified the class quite broadly:

All University of Washington faculty who worked in the 2001-2002 academic year and the 2002-2003 academic year, and who were not found unmeritorious for their service in the 2001-2002 academic year.

The class excluded several administrators as part of the certification order and two subsequent stipulated orders. CP 800, l. 24 – 26; CP 801, l. 1 – 2.

The University sought discretionary review of the certification order, without success. As a consequence, the precise composition of the class never obtained through litigation. Instead, absent the Court’s determining its scope, but with the Court’s approval, the parties ultimately agreed to exclude certain titles from the rubric “faculty who worked in the 2001-2002 academic year and the 2002-2003 academic year and who were not found unmeritorious in the 2001-2002 academic year.” CP 821.

Subsequently, by settling in *Help*, the University agreed to a retroactive inclusion of in excess of 750 persons, Lecturers with part-time appointments, who had worked during at least two successive academic years during the 2001-2002 through 2005-2006 period, who had not been found unmeritorious during that period, and whom the University had failed to pay at least one merit raise during the period. CP 834, l. 16 – 26.

The teachings from cases involving alleged violations of the FLSA, the Equal Pay Act, Title VII, and ascertainability in the context of a motion for class certification point in one direction: An employee’s title is not determinative as to whether she is “nearly identical” for employment purposes to someone who has a different title. Instead, courts examine

what employees do. Extension Lecturers' sole function is teaching. That is the exact same sole function of Lecturers, Senior Lecturers, and Principal Lecturers. The sole qualification for appointment to each of those four positions is competence in teaching. Further, persons occupying each of those positions are subject to a performance review for merit each academic year, under processes adopted by the unit of the University in which the "lecturer" holds an appointment. In short, in "all material aspects" Extension Lecturers and Lecturers, Senior Lecturers, and Principal Lecturers are identical. Thus, Extension Lecturers should have been part of the *Storti* class of "faculty" to which the FSP applies.

**Under *Trimble v. WSU*, the University Breached a Contractual
Obligation to Pay Merit Increases to the Class of Extension Lecturers
in the 2002-2003 Academic Year**

Before the trial court the parties agreed that *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 993 P.2d 259 (2000), controls as to whether the University breached a contractual obligation under the FSP to pay two percent merit increases to continuing meritorious Extension Lecturers during the 2002 - 2003 academic year. The *Trimble* "test" derives from *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), where the Court established that promises made by an employer in a "handbook," even if not bargained for, can be binding on the employer:

Therefore, we hold that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of *specific treatment in specific situations* and an employee is induced thereby to remain on the job and not seek other employment, these promises are enforceable components of the employment relationship. We believe that by his or her unilateral objective manifestation of intent, the employer creates an expectation, and thus an obligation of treatment in accord with these written promises.

Id. at 230.

Trimble applied the promise of specific treatment in specific circumstances to a faculty member's claim of breach of contract against a public university. In *Korslund v. DynCorp Tri-Cities Servs.*, 156 Wn.2d 168, 125 P.3d 119 (2005), the Court explained that to prevail on such a claim, the employee must satisfy a three-part test:

- (1) that a statement (or statements) in an employee manual or handbook or similar document amounts to a promise of specific treatment in specific situations, that
- (2) the employee justifiably relied on the promise and
- that (3) the promise was breached.

Korslund, 156 Wn.2d at 168.

In the proceedings before the trial court in this case, the University argued that the plaintiff class could not satisfy the test above. The argument rested on two propositions. First, because Extension Lecturers are not "faculty," the University did not promise specific treatment to them in the form of the FSP's merit raises to meritorious "faculty." Thus,

Extension Lecturers could not have justifiably relied on the promise. Second, Ms. Carosella admitted during her deposition that she was not aware of the FSP until sometime after the 2002-2003 academic year. Consequently, even if Extension Lecturers come within the ambit of “faculty” in the FSP, Ms. Carosella could not have justifiably relied on a promise that she did not know existed. As a result under either proposition, the University did not breach a promise of specific treatment in the form of paying two percent merit raises to Extension Lecturers in the 2002-2003 academic year.

What the University overlooks, but does not deny, in its argument is the inconvenient fact that during the 2002-2003 academic year, every member of the class underwent a successful merit review via a process that, according to Mr. Harshbarger, ESL’s Director and primary policy maker, comported with the FSP’s mandated merit review process, as Mr. Harshbarger’s direct report, Mr. Szatmary had decreed. Further, with the exception of 2002-2003, during every academic year following the advent of the FSP meritorious Extension Lecturers received merit increases of at least two percent. That is, except for the 2002-2003 academic year, the University paid merit raises that Extension Lecturers earned.

Further, the University has not denied that members of the class justifiably relied on provisions in the OPMAN that detailed the PAS, particularly the section dealing with merit raises. Those class members have always known that they had to undergo a successful merit review in order to receive a merit raise. Again, following the adoption of the FSP, with the exception of the 2002-2003 academic year, when they underwent a successful review, the University did pay a merit raise of at least two percent during the immediately succeeding academic year.

In addition, members of the class knew that the merit raise section of the OPMAN stated that any merit raises that they could receive would be the same that the University's "other faculty" received. Because that had always been true, they had reason to believe that unless the OPMAN were modified, the practice would continue.

By implication under the University's line of argument, the only relevant "handbook," manual," or "similar document" in this case is the Faculty Code, which contains the FSP. Thus, the OPMAN's promise of specific treatment in the specific circumstance of merit raises is of no consequence. There can be no argument, however, that the OPMAN contains a range of promises of specific treatment that under *Thompson* are enforceable components of the employment relationship between Extension Lecturers and the University. Without authorization by ELP's

Senior Director, acting under authority delegated to him by the Vice Provost of EO, in turn acting under authority delegated to him by the University's chief academic officer, the Provost, to whom the President acting for the Board of Regents delegated authority, the OPMAN, with its various promises to Extension Lecturers of specific treatment in specific circumstances, could not exist.

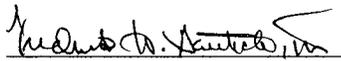
Although the OPMAN exists apart from the Faculty Code, it should be clear, as described in the Statement of the Case above, that the OPMAN tracks portions of the Faculty Code. Particularly germane are the requirements for a systematic annual merit review tailored to particular units and specific titles of persons who perform a solely instructional role at the University. Thus, we submit that members of the class can satisfy *Korlund's* three-part test:

First, the OPMAN, a University "manual" or other "similar document" that incorporates in practice the FSP and attendant portions of the Faculty Salary System, promises annual merit raises to meritorious Extension Lecturers. Second, Extension Lecturers justifiably relied on that promise. Finally, by not paying merit raises in 2002-2003 that Extension Lecturers had earned in 2001-2002, the University breached the promise of specific treatment to pay those raises.

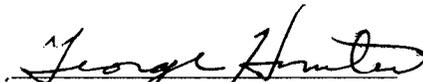
CONCLUSION

In 2006, the University succeeded in narrowing the class of “faculty” whom it would compensate for failing to pay merit raises in the 2002-2003 academic year. In 2007, as the result of a second class action lawsuit against it for the same failure to pay, the University agreed to a retroactive inclusion of in excess of 750 part-time “lecturers” whom it did not pay earned merit increases in 2002-2003 and other academic years. Regardless, the University has steadfastly refused to recognize the right to the 2002-2003 merit raises that another group of instructional “faculty” earned for that year. For the reasons set forth in this brief, those “faculty” submit that the trial court erred in granting the University’s motion dismissing their breach of contract claim and denying their competing motion as to the University’s liability on that claim. Accordingly, they request that this Court reverse the trial court and enter judgment for them as to liability.

Respectfully submitted this 6th day of July, 2009.



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