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No. 69890-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
2013 JUL 29 PM 4:07

CAPTAIN BRUCE NELSON,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE
BOARD OF PILOTAGE COMMISSIONERS,

Defendants/Respondents.

REPLY BRIEF OF APPELLANT CAPTAIN BRUCE NELSON

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ORIGINAL

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ARGUMENT IN REPLY

- A. The Board repeatedly failed to disclose that the Trainee Evaluation Committee maintained a document tracking pilot trainees' (i.e., license applicants') ages and projecting their retirement dates before the TEC recommended whether to license them.
1. **Testimony by Board Commissioners failed to reveal that the Board projected retirement dates of Capt. Nelson and other trainees prior to making licensing decisions.**

The testimony elicited from Board Commissioner Capt. Harry Dudley at the administrative hearing indicated that the Board obtained what Capt. Dudley described as “PSP [Puget Sound Pilot] surveys, it’s [sic] *licensed pilots*, it’s [sic] *active pilots*, to get them to at least predict their retirement dates. Ms. Bell kept a record of that...” CP 226.

Commissioner Dudley and other Board members failed to indicate that the Board analyzed or made assumptions about the potential retirement dates of *pilot trainees* (i.e., pilot license applicants, who were not members of the PSP), such as Capt. Nelson, before the Board even decided whether to license them.

Even the Board’s argument in its brief concerning its purported “legitimate interest in planning for its own future” fails to acknowledge that the Board made projections about trainees like Capt. Nelson (i.e., license applicants). See Brief of Respondent, p. 15 (“Having a general idea of how many *current pilots* may retire soon helps the Board decide ... if

more trainees should be invited into the pool.”). *Accord* RP 22:13-16 (Board’s counsel: “[T]he Retirement Surveys ...[,] a compilation list that the Board keeps and it’s just the responses from *active* pilots.”).

Significantly, trainees such as Capt. Nelson were not asked when they would retire. CP 278, ¶ 2.¹ It was not until December 2012, when the Board at last disclosed the spreadsheet containing Nelson’s age and projected retirement date, that Nelson and his counsel first became aware that a document tracking the ages of pilot trainees was not only being considered but being used by the Board to compute potential retirement dates before and in anticipation of the recommendation and determination of whether pilot trainees would be licensed.

2. The Board’s response to civil written discovery was misleading and evasive, unnecessarily delaying disclosure of the Board’s projected retirement date for Nelson, despite Nelson’s repeated requests for production of electronic evidence being withheld.

Three months before the Court granted the Board’s motion for summary judgment, the Board gave written answers to Requests for Productions (“RFPs”). The Board’s answers gave no indication that the Board was withholding “retirement survey” documents. CP 112, 118. More significantly, there was no disclosure that any document existed containing the PSP’s retirement survey data side-by-side with the Trainee

¹ *See also* CP 53-54 (the “Source” column for “Expected Retirement” dates for pilot trainees Grobschmidt, Kalvoy, Marmol, and Nelson is left blank; while for trainees Bujacich, Carlson, Kelly, Sliker, and Ward the “Source” is listed as “Averages”).

Evaluation Committee (“TEC”)’s projected retirement dates for pilot trainees, generated prior to licensing decisions about Nelson.²

Nelson’s Request for Production (“RFP”) No. 7, sought “any and all Pilot retirement ‘surveys’ ... in their original electronic form, with metadata intact.” CP 112. The Board claims it “fully responded” to this request. *See* Brief of Respondent, p. 8, citing CP 284-303. In December 2011, three months before summary judgment was granted, the Board responded to RFP No. 7 by producing 19 pages of PDF image files, including a document entitled PSP Projected Retirements Based on Average Age and 2006 Survey Results. CP 302-303. This “retirement survey” produced by the Board in December in response to RFP No. 7 contained the (unredacted) “Date of Birth” and date of “Expected Retirement” for 49 PSP licensed pilots, but no reference to pilot trainee Nelson, his date of birth, or his expected retirement date. *Id.*; CP 282, ¶ 2. The footer of the document states “October 3, 2006”. CP 302-303.

The Excel spreadsheet at issue in this appeal, which the Board failed to produce in response to RFP No. 7 (CP 282, ¶ 2), curiously bears the identical title or header as the aforementioned document: PSP Projected Retirements Based on Average Retirement Age and 2006 Survey Results. *Compare* CP 202, CP 53-55 with CP 302-303. The

² See CP 282, ¶ 3 and CP 118 (Board’s response to RFP No. 7).

spreadsheet withheld by the Board, including Nelson's "Date of Birth" and his date of "Expected Retirement", likewise contains the identical footer ("October 3, 2006") as the retirement survey produced in response to RFP No. 7. It is reasonable to infer that both spreadsheet printouts derive from the same electronic file (albeit potentially different versions or iterations of that file). The Board should not have responded to RFP No. 7 by producing an innocuous iteration of the document, while it withheld another, more damaging version of the retirement survey.

- a. *The Board should be judicially estopped from claiming that the spreadsheet containing Nelson's age and projected retirement date is not responsive to RFP No. 7, as the Board claimed to the trial court that the withheld spreadsheet is "the retirement survey".*

In the Board's brief responding to this appeal, the Board inaccurately alleges that "Captain Nelson attempts to distort the record by focusing on Request for Production (RFP) 7 [concerning 'retirement surveys']...[;] [while] the actual [alleged] relevant request is RFP 8 [concerning 'manpower spreadsheets']." *See* Brief of Respondent, p. 8; and CP 112.

Yet, in the Board's brief to the trial court responding to Nelson's motion to vacate, the Board unequivocally claimed that "[t]he document attached to Mr. Rose's declaration [*i.e.*, CP 52-55] is misidentified as the manpower spreadsheet[;] [i]n fact, that document is the *retirement*

survey.” CP 148.³ The Board should be judicially estopped from now taking a contradictory position.⁴

After Nelson received the Board’s response brief to the CR 60 motion, claiming that the withheld “document is the retirement survey”, Nelson’s counsel submitted a supplemental declaration to the trial court, making clear that the Board’s “written response to RFP No. 7 was previously filed ... [and] that written answer made no indication that responsive ‘retirement surveys’ were being withheld....” CP 282, ¶¶ 1-3.⁵ Rather, the answer to RFP No. 7 included 19 pages of retirement surveys, none of which contained Nelson’s date of birth or projected retirement date. *Id.*

- b. *The Board’s response to RFP No. 8, which did not concern retirement surveys, was at best misleading and evasive.*

The Board’s written answer to RFP No. 8, which sought “manpower documents”, failed to indicate that the Board was withholding

³ The Board argued that the document was not a “manpower spreadsheet”, as the Board’s meeting minutes confirmed that the Trainee Evaluation Committee (“TEC”) in July 2007 reviewed a “manpower spreadsheet” prior to extending the training programs of Capt. Nelson and another trainee over 50 years old, in lieu of licensing them. CP 4; CP 61.

⁴ “Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.* 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

⁵ *Accord* RP 7:16-8:16; 12:13-20 (“[T]he Defendant, in its response papers, ... said that ... [this spreadsheet] is a retirement survey; that it’s not a Manpower spreadsheet. That’s very relevant, because in discovery ... we had served a specific request asking for all Retirement Surveys.... [‘Request No. 7 ... states: ‘Please produce any documents related to any and all Retirement Surveys’]. ... [T]he document that we’re [taking] issue with, that had Captain Nelson’s age ... was never produced to us.... [W]e received Retirement Surveys, and it wasn’t produced at that time.”)

documents containing the dates of birth of any *pilot trainees* (i.e., license applicants) including Capt. Nelson. See Board’s response to RFP No. 8, CP 119 (objecting that “requested information intrudes on the privacy of licensed pilots” and indicating the desire for “a protective order prohibiting disclosure of the dates of birth of the licensed pilots”).⁶

Three months later on March 25, 2012, Nelson’s counsel was preparing for trial⁷ and wrote the Board’s counsel:

In reviewing Defendant’s document production, we note that the Board has neglected to provide the ‘manpower’ spreadsheets and related electronic evidence that Defendant previously indicated it would produce in response to Requests for Production 8 and 9.... If pilots’ dates of birth (“DOB”) are included in the responsive data, we are willing to sign a protective order agreeing to redact a part of the DOB prior to using any such data.

CP 125.

The next morning, March 26, the Board’s counsel responded, in pertinent part, “If you want to draft a protective order and send it over for signature, [the Board’s counsel] will be able to sign for the Board.” *Id.*

Capt. Nelson’s counsel immediately generated a protective order. CP 124.

⁶ Although the Board premises its withholding of the Excel spreadsheet at issue in discovery on an alleged concern for the privacy and “privileged information” of “licensed pilots” calling for a protective order; the Board made no effort at obtaining or proposing a protective order for three months. After Nelson requested that the Board the protective order was entered, the Board acted without any concern for the privacy of pilots and filed with the Court a non-redacted copy of the spreadsheet containing the complete Dates of Birth for 58 individuals, in violation of the express terms of the protective order that the Board demanded. See CP 202; cf. CP 270-73 (Agreed Protective Order).

⁷ RP 35:10.

The next day, March 27, Judge McCarthy signed the protective order. CP 273. It was not until the following day, March 28 that the Court granted summary judgment. On March 29, Capt. Nelson's counsel asked the Board to produce whatever evidence it was still withholding. CP 7, ¶ 18. The Board refused to produce further evidence in discovery, arguing that its "obligation to produce discovery ended when the Court's summary judgment order was entered." CP 130. Ever diligent and undeterred by the Board's refusal, on March 29 Capt. Nelson made a request for the evidence under the Public Records Act. *See* CP 7, ¶ 19; CP 130.

The Board persisted in withholding the Excel file from Capt. Nelson; even after the trial court on May 4, 2013 *vacated* its denial of reconsideration of the summary judgment order and scheduled additional motion practice under CR 56(f) and CR 60 (b) based on allegations of wrongfully "withheld key evidence and ... inaccurate prior testimony in response to discovery requests, public records requests and depositions since 2008." CP 275.⁸

On May 8, 2012, four days after the Court vacated the denial of reconsideration, Capt. Nelson sent correspondence to "follow up" on the March 29 public records request for the evidence. *See* CP 7, ¶ 19. The

⁸ As Nelson was still then unaware what was the contents of the Board's withheld electronic evidence, the CR 56(f) and CR 60 motion heard by the trial court in May 2012 related to other issues.

Board still continued to refuse to produce the document.

It was not until May 21, 2012 that the trial court received Capt. Nelson's final brief in support of his request for CR 56(f) and CR 60(b) relief. CP 275. Although a protective order to protect pilot "privacy" was signed on March 27 and Nelson repeatedly requested production of the evidence responsive to his discovery requests thereafter, the Board continued withholding the evidence at issue; which wholly unknown to Nelson showed the Board's Trainee Evaluation Committee tracking the ages of Nelson and other trainees and projecting their retirement dates before the TEC made its licensing recommendations and the Board voted on whether to license Nelson.

3. Capt. Nelson acted with "due diligence" in seeking to obtain all "retirement surveys" and electronic evidence that the Board withheld until December 2012.

Diligence is not a consideration in determining whether a new trial is an appropriate remedy for a discovery violation. And, even in newly discovered evidence cases, where diligence is a factor, ... '[w]here a party has resorted to pretrial discovery procedures and the opposing party fails to comply in good faith therewith, such procedure constitutes the exercise of appropriate diligence.'

Roberson v. Perez, 123 Wn. App. 320, 334, 96 P.3d 420 (2004).

As the Board engaged in misconduct, by failing to produce "Retirement Survey 3-07" in response to Nelson's civil discovery requests and public records requests and by misrepresenting the fact that

supervisory pilots and Board members on the TEC knew Nelson's age, Capt. Nelson's "diligence" is not at issue. *See id.* Even if diligence was at issue, Nelson made discovery requests for the evidence and the Board failed to comply in good faith in responding thereto, "constitut[ing] the exercise of appropriate diligence". *Id.*

It was not until the Board produced the retirement survey at issue in December 2012 that Capt. Nelson learned that the Board had been withholding documents containing age-related information about trainees (*i.e.*, license applicants). The Board's response to RFP No. 7 gave no indication that any retirement surveys were withheld; and the objection of the Board in response to RFP No. 8 indicated only that the documents were withheld containing the dates of birth of "licensed pilots" – not trainees like Nelson. CP 119. *See also* Testimony of Harry Dudley, CP 226 ("PSP surveys, it's *licensed pilots*, it's *active pilots*").

The Board did not disclose the evidence at issue until after Nelson's counsel sent repeated follow-up correspondence for disclosure of "public records". The first follow up on the March 29 public records request was sent on May 8, 2012, shortly after the judge who granted summary judgment vacated denial of reconsideration of that order and was considering a motion for relief under CR 56(f) and CR 60.

Further follow-up emails were sent on September 14, 2012;

October 22, 2012; and December 18, 2012. CP 7, ¶ 19. Defendant finally produced the document containing PSP retirement survey data side-by-side with the Board and TEC's projected retirement date for Capt. Nelson on December 19, 2012.⁹ By that time, the "originally assigned Judge [had] retired". As a result of the Board's nearly one year delay in producing the spreadsheet responsive to RFP No. 7, the motion for relief under CR 60 based on "Retirement Survey 3-07" was heard by a judge other than the judge who granted summary judgment and heard Nelson's motion for reconsideration based on CR 56(f) and CR 60.¹⁰

B. The evidence withheld by the Board is material to Nelson's "fair presentation of his case" on summary judgment.

For purposes of CR 60(b)(4), a discovery violation is sufficiently "substantial" if "the withheld files were 'material to the Plaintiffs' fair presentation of their case" on summary judgment. *See Roberson*, 123 Wn. App. at 336-37.

The Board repeatedly avers that the withheld evidence was not "material" to Capt. Nelson's case, as "[t]here is no evidence in this record that this Excel spreadsheet was used by the Board for any decision making regarding the licensing of any trainee". Brief of Respondent's, p. 4. *See*

⁹ See *id.*, CP 53-55, and CP 232, ¶4 (noting that the excel spreadsheet at issue, containing "Retirement Survey 3-07", was authored and maintained by "members of the [Board's] Trainee Evaluation Committee").

¹⁰ See CP 144; CP 138, lines 8-10.

also id., p. 5 (“There is no evidence in this record... that the Excel spreadsheet was linked in any fashion to the licensing decisions regarding any trainees”); p. 16 (“there is no evidence that the Board ever saw that tab”); and pp. 18, 20-21. The Board’s focus on the “evidence [already developed] in this record” only highlights how the Board’s withholding of the spreadsheet prejudiced Capt. Nelson.

Withholding of discovery precludes not only presentation of that evidence but the opportunity to develop the web of knowledge and evidence to which it may lead.

If the evidence had been disclosed it would have been investigated and further evidence would have been developed by the plaintiff... Plaintiff would have had the opportunity to contact witnesses [about it] and would have done so.

See Magaña v. Hyundai Motor America, 167 Wn.2d 570, 588, 220 P.3d 191 (2009).

“[A] litigant who has engaged in misconduct is not entitled to ‘the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.’” *Roberson v. Perez*, 123 Wn. App. 320, 336, 96 P.3d 420 (2004), quoting *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 836-37, 696 P.2d 28 (1985).

In response to Capt. Nelson’s CR 60 motion, the Board failed to file testimony from any person claiming (or disclaiming) to be the person

responsible for generating Capt. Nelson's projected date of retirement. However, the Board's administrator testified that the spreadsheet containing this information was "authored and maintained by Puget Sound Pilots who were ... members of the Trainee Evaluation Committee ('TEC')" CP 232, ¶¶ 3-4. The TEC and its members are also responsible for recommending whether or not Capt. Nelson should be licensed. CP 278, ¶ 3.

The metadata for the withheld spreadsheet confirms that Pilotage Commissioner and TEC Chairman Capt. Snyder last modified the Excel file in which Nelson's projected date of retirement is found. CP 56; CP 278, ¶ 3, CP 304. The declaration that Capt. Snyder filed in response to the motion to vacate fails to deny his authoring Nelson's projected date of retirement. *See* CP 278. As the document was withheld until after entry of summary judgment and denial of reconsideration, Nelson has had no opportunity to cross-examine Capt. Snyder or any other TEC member about who generated or had access to the TEC's projected date of retirement for Nelson.

Despite the Board's claims to the contrary, the facts of this case remain similar to the facts of Shelley v. Geren, 666 F.3d 599 (9th Cir. 2012). Members of the Board's Training Evaluation Committee (who "did not make the [licensing] decision alone" but had "influence over the

process” through the TEC’s licensing recommendation to the Board and the individual TEC members’ licensing votes as Pilotage Commissioners) made inquiries and projections about when Nelson would retire, during the decision process for licensing. Under Shelley, such facts are evidence of age bias and give rise to an inference that the Board’s proffered explanation was a pretext. *See Shelley*, 666 F.3d at 610.

Although the fact is irrelevant to evaluation of whether the TEC projecting Nelson’s retirement date during the licensing process constitutes “direct evidence of age discrimination”, like Shelley, there is evidence in this case that Nelson had a similar or better performance record than younger comparators who the Board licensed. *See* RP 33:13-18; 37:1-9.¹¹ *Compare Shelley*, 666 F.3d at 610 (stating that “[e]vidence of a plaintiff’s superior qualifications, standing alone, may be sufficient to prove pretext.”).

There is no support for the Board’s claim that Capt. Nelson was not “significantly older than those other trainees who received a pilot’s

¹¹ The Board offers no support for its claim that “Nelson’s performance was wholly and objectively unsatisfactory”. The Board cites to the trial court’s summary judgment order throughout its brief, but that order was based substantially on findings of “res judicata” and “collateral estoppel” and offered no analysis of the comparator evidence showing that Capt. Nelson would have been licensed if he had been evaluated and treated as other trainees prior to and after him were. *See* CP 168-82. As the Court is aware, the summary judgment order is currently on appeal and is linked with this appeal for disposition. The extensive briefing in the appeal of the summary judgment order describes in detail how Nelson’s performance in training was equal to or better than other pilot trainees who the Board licensed.

license.” See Brief of Respondent, p. 18 (attempting to distinguish Shelley v. Geren, in which “[t]here was a twelve-year age difference”). In fact, the evidence withheld by the Board shows that Nelson was 11.75 years older than Capt. Kelly, a trainee who the Board licensed. See CP 53-54. Thus, the age difference between the plaintiff and her comparator in Shelley is nearly the exact same as the age difference between Nelson and his comparator, Kelly.

The cases cited by the Board in support of its position are all distinguishable from the facts of this case.¹² Significantly, unlike Shelley v. Geren, 666 F.3d 599 (9th Cir. 2012), none of the cases the Board cites concern discrimination claims for failure-to-hire, in which the employer inquires about a job applicant’s retirement plans during the hiring process and prior to the employer deciding against hiring the applicant.

In Hatfield v. Columbia Federal Sav. Bank, 68 Wn. App. 817, 846 P.2d 1380 (1993), the court observed that Plaintiff produced no direct, comparative or statistical evidence of age discrimination. Id. at 825. Given these facts, the Court evaluating Mr. Hatfield’s claim of discriminatory

¹² Many of the cases that the Board cites concern terminations allegedly based on a “pension” status tied to “years of service” – not age – a distinct form of discrimination made unlawful by ERISA. See, e.g., Hazen Paper Co. v. Biggins, 507 U.S. 604, 612-13, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). Capt. Nelson’s case differs, as it alleges that the Board made inaccurate projections about when Nelson would retire based solely on his age, which Nelson claims was a “substantial factor” in the Board’s decision to deny him a license and job as a Puget Sound Pilot.

termination wrote that “[i]nquiring into an employee’s pension status does not establish a prima facie age discrimination violation.” *Id.* See footnote 12, *supra*.

Significantly, Capt. Nelson’s case concerns the Board evaluating his potential retirement date while he was a license applicant and prior to the Board making a licensing decision; effectively, the hiring decision for becoming a Puget Sound Pilot. Also, in contrast to Mr. Hatfield, Capt. Nelson submitted not only substantial comparator evidence, *see, e.g.*, RP 37:5-7, and footnote 11, *supra*; but also filed “evidence ... that there were stereotypes ... documented in writings from the Puget Sound Pilots that indicated that older pilots tend to be less able to handle the rigors of being overworked; that they suffer more from the stress of the job.” RP 11:17. Capt. Nelson further testified that on his final training trip in April 2008, Captain Hannigan, a Board Commissioner, Trainee Evaluation Committee member, and supervising pilot, asked Capt. Nelson, “Why would you want to start this at this stage in your life?” CP 278, ¶¶ 4, 3. Thus, Capt. Nelson’s case is distinguishable from Hatfield on many points.

The Board also cites for support the unpublished Ninth Circuit Court of Appeals’ opinion Killingsworth v. State Farm Mut. Auto. Ins. Co., 254 F.App’x. 634 (2007). In that case, the court found the employer “had a legitimate business interest in knowing the plans of its retirement-

age [employees] and in getting them to make their plans more definite in order to plan for its own future.” Two important distinctions between Killingsworth and Capt. Nelson’s case must be acknowledged. First, the employer in Killingsworth was reviewing the plans of *active* employees, not job applicants; and second, the employer actually inquired of those employees to get them to make their retirement “plans more definite”.

The Board of Pilotage Commissioners’ Trainee Evaluation Committee (“TEC”), for its part, made retirement projections about trainees, or *prospective* pilots, persons who had not yet been hired or licensed; and without the TEC actually asking those persons about what they planned for their own retirement. *See* CP 278, ¶ 2; and CP 52-55. The Board’s TEC simply made its own assumptions about when trainees would retire based on their ages and before the Board decided whether or not to license Capt. Nelson (the equivalent of the Puget Sound Pilot “hiring” decision).

- C. The relevance of the withheld evidence to issues of “res judicata” and “collateral estoppel” was called to the attention of the trial court and actually litigated; though those issues are now moot based on the Summary Decision on Administrative Law Review.

In the declaration Nelson’s counsel filed in support of the motion to vacate, the following facts were called to the attention of the court:

Plaintiff’s counsel took fifteen (15) depositions during his administrative appeal and another nine (9) depositions

during the litigation of this civil suit. However, due to the Board's withholding of the 'manpower spreadsheet' throughout both proceedings, we were unable to ask any of the deponents about their review or consideration of date of birth and age data contained in the spreadsheet that is referenced in the Board's 'minutes'.

While the issue of "collateral estoppel" was not expressly called to the attention of the trial court in Capt. Nelson's initial motion, the Board called the issue to the attention of the trial court in both its responsive pleading and at oral argument.¹³ There is no doubt the Board "opened the door" on the issue, as the record is replete with discussion of the issue. At oral argument, the Board claimed that "nothing alleged here would alter the ... collateral estoppel ruling by Judge McCarthy". RP 18:1-5. Honorable Douglas North responded, asking the Board's counsel, "[a]rguably, though, ... wouldn't [the alleged newly discovered evidence]... undermine the decision in the administrative proceeding?" RP 18:8-11. Thus, the issue of whether the Board's withheld evidence was material to the trial court's order on collateral estoppel was actually litigated below. *See Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766-68, 733 P.2d 530 (1987) (issue argued at oral argument on summary judgment and directly addressed by the judge was properly before court of appeals on review).

¹³ *See, e.g.*, Board's response to motion to vacate, unsuccessfully seeking sanctions and stating at CP 157, "[i]t does not save Plaintiff to argue that the application of collateral estoppel justifies his attempt to conflate these two separate proceedings...."

The Board's counsel told Judge North , in essence, that "there's no order that you can give that would overrule Judge McCarthy's order from before because he's already excluded this kind of argument [concerning procedural unfairness in the administrative proceeding]." RP 20:5-7. Capt. Nelson's counsel responded that "the administrative proceeding should have no bearing on the civil suit, and that issue... is on appeal currently. ... [T]he issue of discrimination ... was not fully and fairly litigated, which is one of the requirements for collateral estoppel...." CP 34:4-9.

On June 13, 2013, Superior Court Judge Mary Yu entered her Summary Decision on Administrative Law Review, in which Capt. Nelson was determined to be the "prevailing party". Capt. Nelson is filing, contemporaneous with this Reply, Appellant's Motion to Take Additional Evidence on Review Under RAP 9.11, in order for the Summary Decision of June 13 to be considered in connection with this appeal. Consideration of that evidence ought to render any discussion of "res judicata" or "collateral estoppel" in this appeal moot.

CONCLUSION

For the reasons stated in the Brief of Appellant and this Reply, the case should be remanded for trial.

RESPECTFULLY SUBMITTED this 29th day of July, 2013.

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PROOF OF SERVICE

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the foregoing pleading to be served via messenger on the following attorneys:

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Dated this 29th day of July 2013 in Seattle, Washington.

s/Danielle J. Rieger
DANIELLE RIEGER, Paralegal