

NO. 37178-2-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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CAROLE JORDAN,

Appellant,

v.

STATE OF WASHINGTON, d/b/a LOWER COLUMBIA  
COMMUNITY COLLEGE,

Respondent.

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**BRIEF OF RESPONDENT**

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**I. COUNTERSTATEMENT OF THE ISSUES**

1. Did the trial court correctly dismiss Carole Jordan's age discrimination and employment retaliation claims where the facts upon which those claims were based had been found to be groundless by the Washington Public Employment Relations Commission (PERC)?
2. Did the trial court correctly dismiss Ms. Jordan's claim for negligent infliction of emotional distress where LCC owed Ms. Jordan no duty to avoid negligently inflicting emotional distress in handling her complaints about conflicts with her supervisor?
3. In the alternative, did the trial court correctly dismiss Ms. Jordan's claim for negligent infliction of emotional distress where the facts upon which her negligent infliction of emotional distress claim was based had been found to be groundless by PERC?

**II. COUNTERSTATEMENT OF THE CASE**

**A. Procedural History**

**1. PERC Complaint (Case No. 18740-U-04-4764).**

On August 4, 2004, Ms. Jordan filed a lengthy unfair labor practices complaint with PERC. CP 33-36. Ms. Jordan, who is employed as a graphic designer / illustrator by Lower Columbia College (LCC or

“the College”), alleged that her employer had discriminated against her on multiple occasions in violation of RCW 41.56.140(3). Appendix A (CP 33-36). Ms. Jordan’s charges against the College were detailed and factually specific, alleging thirty-three instances between February 5, 2004, and September 22, 2004, in which LCC had discriminated against her. CP 33-36; 71. Ms. Jordan was represented by her present counsel, Judith A. Lonquist, in the proceedings before PERC, which included briefing and a six-day hearing. CP 66, 67.

On November 18, 2005, PERC examiner David Gedrose issued findings of fact, conclusions of law, and an order dismissing Ms. Jordan’s discrimination complaint in its entirety. Appendix B (CP 66-88).

The examiner found that Ms. Jordan failed provide evidence sufficient to establish that *any* of her factual allegations, including allegations that on twelve occasions LCC had given her incomplete information on jobs, gave her short deadlines on jobs, or withheld jobs (CP 86, FF #4); that on six occasions LCC did not assign her work (CP 87, FF#5); that on one occasion LCC blamed her for a mistake on the job (CP 87, FF#6); that on two occasions LCC micro-managed her work (CP 87, FF#7); that on one occasion LCC engaged in disparate treatment toward her (CP 87, FF#8); that on two occasions LCC transferred her work to another employee (CP 87, FF#9); that on three occasions LCC

excluded her from work decisions (CP 87, FF#10); that on one occasion LCC withheld a customer's compliment (CP 87, FF#11); and that on three occasions LCC canceled meetings with her and her union business agent (CP 87, FF#12). Appendix B.

The PERC examiner dismissed Ms. Jordan's complaint, concluding, on the basis of her failure to establish even one of her factual allegations, that: "Lower Columbia College did not discriminate against, nor derivatively interfere with, Carole Jordan's rights under RCW 41.56.140(3) and (1)." CP 67.

Ms. Jordan timely appealed several of the PERC examiner's findings of fact and conclusions of law and requested reversal of the examiner's decision. CP 90-94. On July 11, 2007, the full Public Employment Relations Commission affirmed the examiner's dismissal of Ms. Jordan's case and adopted the examiner's findings of fact, conclusions of law, and order. CP 39-41; 260-62; 286. Ms. Jordan did not seek judicial review of the full Commission's ruling by the Thurston County Superior Court or seek direct review of that ruling by this court. RCW 34.05.514, 34.05.518.

**B. Thurston County Superior Court No. 05-2-01016-6.**

On May 25, 2005, Ms. Jordan filed the complaint in this case against LCC. CP 3-7. Ms. Jordan's complaint alleged age discrimination,

retaliation, violation of her right to free speech under the Washington Constitution, and negligent infliction of emotional distress, and specified that “[s]ince filing with the EEOC [in 2004], Plaintiff has experienced adverse action by Defendant, including but not limited to, threats to discipline and / or discharge her.” CP 3-7; see ¶3.4 and 3.5.

On August 11, 2006, the trial court dismissed Ms. Jordan’s claim for negligent infliction of emotional distress, limited her claim under the Washington Constitution to equitable relief, and postponed hearing on LCC’s motion for summary judgment on collateral estoppel grounds until a mutually agreed date in order to allow the full Public Employment Relations Commission to hear the appeal of the dismissal of Ms. Jordan’s PERC complaint. CP 19-20; 260-62.

On November 2, 2007, the trial court issued a letter opinion finding that Ms. Jordan was “barred from relitigating [PERC findings of fact 4 through 7] if the 7 [collateral estoppel] factors [identified in *Christensen v. Grant County Hospital District No. 1*, 152 Wn.2d 299, 306-308, 96 P.3d 957 (2004)] are present,” and granting LCC’s motion for summary judgment if there was no evidence of discrimination beyond

that alleged in Ms. Jordan's unfair labor practices complaint and ruled upon by PERC. Appendix C (CP 260-62).<sup>1</sup>

On November 30, 2007, the trial court entered an order granting LCC's motion for summary judgment as to those events and allegations Ms. Jordan made prior to September 22, 2004, the date of her amended PERC complaint. Appendix D (CP 39-41). The facts alleged in Ms. Jordan's Second Declaration (dated September 17, 2007) were excluded from the trial court's award of summary judgment. CP 25-28; 42.

Ms. Jordan appeals the trial court's November 30, 2007, summary judgment order.

On March 11, 2008, Ms. Jordan and Diane Plomedahl, a budget analyst also presently employed by LCC, filed a complaint against the College alleging age discrimination. This new case, based in part upon facts Ms. Jordan alleges occurred after September 22, 2004, is pending in the Thurston County Superior Court (Cause No. 08-2-00574-4). Appendix E.

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<sup>1</sup> Ms. Jordan filed a supplemental response on September 19, 2007. CP 22-28. On November 7, 2007, Ms. Jordan moved to amend her complaint to add an additional named plaintiff. CP 250-59. LCC objected to the amendment because the trial in this case was scheduled for February 2008. CP 263-84. The trial court denied Ms. Jordan's motion to amend. Brief of Appellant, p. 5.

**C. Counterstatement of Facts**

Lower Columbia Community College is part the Washington community college system. RCW 28B.50.040. Dr. James McLaughlin is the president of LCC, Ellen Peres is the vice-president of administrative services, and Janelle Runyon is the director of college relations and marketing, a sub-unit of administrative services. CP 67. Ms. Runyon has supervisory responsibility for LCC's publications. CP 67.

At the time Ms. Jordan filed her complaint in this case, Ms. Runyon supervised Ms. Jordan, JoAnne Booth, and Maggie Kennedy. Ms. Jordan is a graphic artist; Ms. Booth is a writer and editor; and Ms. Kennedy was a photographer who also performed other administrative tasks. CP 67. Ms. Jordan began to work for LCC in 2000. CP 67. Ms. Runyon began a year earlier. CP 67. Ms. Booth came at the end of 2001, and Ms. Kennedy in the fall of 2002. CP 67.

In the spring of 2002, Ms. Jordan, a member of the Washington Public Employees Association (WPEA), filed a grievance against Ms. Runyon for failure to evaluate her and for transferring some of her job duties to Ms. Booth. CP 67. LCC subsequently identified Ms. Jordan's position for a reduction-in-force, reduced Ms. Jordan's graphic artist position to half-time, and assigned Ms. Jordan to duties outside of college relations and marketing in order to keep her full time. CP 67. LCC did

not cut Ms. Jordan's pay. CP 67. The WPEA filed an unfair labor practice complaint on Ms. Jordan's behalf in May 2002. CP 67. On February 5, 2004, PERC found in Ms. Jordan's favor, ruling that the LCC had retaliated against Ms. Jordan for filing her grievance when it targeted her for reduction-in-force. CP 67-68. *Community College 13 (Lower Columbia)*, Decision 8386 (PSRA, 2004). By the time of PERC's February 2004 decision, Jordan had been restored to her full-time position in the college relations and marketing department. CP 68.

Ms. Jordan indicates that she filed "yet another charge" with the Equal Employment Commission (EEOC) in 2004. CP159.

It was against this background that Ms. Jordan filed both her 2004 unfair labor practices complaint and her 2005 age discrimination lawsuit against LCC.

Ms. Jordan's seven-page unfair labor practices complaint included broad discriminatory actions Ms. Jordan identified as occurring "between the months of February, 2004 and the filing date of this document [8/4/04, amended 9/22/04]." CP34. Ms. Jordan alleged that LCC "and in particular the office of College Relations and Marketing under the supervision of Janelle Runyon has continued with actions of retaliation and discrimination against Ms. Jordan." CP 34. The "discriminatory actions" Ms. Jordan alleged included:

- 1) Altering Ms Jordan's work assignments by not providing her the proper information necessary to complete her assignments efficiently
- 2) By not providing her with adequately filled out job request forms
- 3) By sending jobs with no job request form
- 4) By giving jobs very short deadlines or providing no deadline date
- 5) Within the past six months Ms Jordan has experienced a number of times of either full or half days when she has been provided no work at all. In two instances no work was given for a full work week yet the Publications office is swamped according to Ms Runyon
- 6) By making assumptions or implying that Ms Jordan is the person at fault in certain circumstances if there happens to be a problem with a job
- 7) By micro-managing and treating Ms Jordan differently than the other two staff members
- 8) By excluding Ms Jordan from the initial planning stages of projects
- 9) By excluding Ms Jordan from being a part of the process taking place with Interact Communications, a consulting firm hired by LCC to design a new college look, brand and website. Also, by not informing her of changes taking place within the department
- 10) By allowing or having others to do the layout and design and then passing the work along to Ms Jordan to be digitally assembled
- 11) By allowing the Information Specialist to do work traditionally done by Ms Jordan while she sits in her office and is given no work

12) By allowing the Information Specialist to withhold jobs and then later present them to Ms Jordan with a short deadline or as a “rush job”

13) When members of the college community have expressed to Ms Runyon that they are pleased with a job Ms Jordan has done, Ms Runyon does not pass information along to Ms Jordan

CP 34 (Appendix A).

The chronology Ms. Jordan provided with her unfair labor practices complaint included a detailed history of the discrimination she alleged. CP 35-36. Her complaint included events occurring no less than twice a month during the relevant period. Appendix A (CP 35-36). Her amended complaint included thirty-three discrete instances of discrimination during the period from February 5, 2004, through September 22, 2004. CP 71.

PERC held a six-day hearing on these allegations. CP 66-67. Ms. Jordan was represented by her present counsel throughout the proceeding and had the opportunity to subpoena, present, and question witnesses and to introduce documents and briefing. CP 66, 84. At the conclusion of the lengthy hearing, the PERC examiner noted:

Jordan produced few corroborating witnesses on her behalf. She did not call former or present co-workers or union members. The union business agent confirmed only Jordan's concerns about Peres' attitude. A customer testified that she liked to work with Jordan. The union president

testified solely about the McGlaughlin meeting, and McGlaughlin's comments and demeanor. The testimony did not provide evidence of discrimination. The three witnesses and Jordan's testimony failed to prove the existence of a discrimination plot against her.

CP 84.

After a detailed analysis of her allegations (CP 66-86, Appendix B), the PERC examiner found that Ms. Jordan had failed to establish even one of the thirty-three instances of discrimination she alleged. CP 84. The PERC examiner, in accordance with the Public Employment Relations Commission's role as an administrative fact finder, entered fifteen Findings of Fact regarding Ms. Jordan's allegations:

1. Lower Columbia College is a public employer within the meaning of RCW 41.56.030(1).
2. Carole Jordan is a public employee within the meaning of RCW 41.56.030(2).
3. In 2002, Jordan filed an unfair labor practice complaint against the employer. She prevailed in February 2004. *Community College 13 (Lower Columbia)*, Decision 8386 (PSRA, 2004).
4. Jordan failed to show that on 12 occasions the employer unlawfully gave her incomplete information on jobs, gave her short deadlines on jobs, or withheld jobs.
5. Jordan failed to show that on six occasions the employer unlawfully did not assign her work.

6. Jordan failed to show that on one occasion the employer unlawfully blamed her for a mistake on a job.
7. Jordan failed to show that on two occasions the employer unlawfully micro-managed her work.
8. Jordan failed to show that on one occasion the employer unlawfully engaged in disparate treatment toward her.
9. Jordan failed to show that on two occasions the employer unlawfully transferred her work to another employee.
10. Jordan failed to show that on three occasions the employer unlawfully excluded her from decisions at work.
11. Jordan failed to show that on one occasion the employer unlawfully withheld a customer's compliment concerning Jordan.
12. Jordan failed to show that on three occasions the employer unlawfully cancelled meetings with Jordan and her union business agent.
13. Jordan's claims as detailed in Findings of Fact 4-12 failed to show that the employer deprived her of ascertainable rights, benefits, or status.
14. Jordan failed to show that in a meeting on April 1, 2004, the employer's comments deprived Jordan of ascertainable rights, benefits, or status.

15. Jordan failed to show that, in a meeting on April 7, 2004, the employer's comments and demeanor toward Jordan deprived Jordan of ascertainable rights; benefits, or status.

CP 86-87.

These fifteen Findings of Fact were adopted by the full Public Employment Relations Commission on July 11, 2007, and serve as the basis for LCC's request that this court affirm the trial court's award of summary judgment on collateral estoppel grounds on Ms. Jordan's age discrimination and retaliation claims. Ms. Jordan's failure to establish any factual basis for her allegations of discrimination during the relevant time period in 2004 is dispositive. Ms. Jordan was not entitled to a second bite of the apple.

### **III. ARGUMENT**

#### **A. Standard of Review**

Summary judgment is appropriate where there are no disputed material facts, and the moving party is entitled to judgment as a matter of law. CR 56(c); *McGowan v. State*, 148 Wn.2d 278, 289, 60 P.3d 67 (2002). This court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the

nonmoving party. *Williamson, Inc. v. Calibre Homes, Inc.*, 147 Wn.2d 394, 398, 54 P.3d 1186 (2002).

Whether collateral estoppel applies to bar relitigation of an issue is reviewed de novo. *Christensen v. Grant County Hospital District No. 1*, 152 Wn2d at 305-6; *State v. Vasquez*, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002).

**B. PERC's Factual Findings in Case No. 18740-U-04-4764 Bar Ms. Jordan's Claims for Age Discrimination, Retaliation, and Negligent Infliction of Emotional Distress on Collateral Estoppel Grounds.**

Ms. Jordan asserts that after she unsuccessfully pursued a comprehensive unfair labor practices claim against LCC for more than three years, that involved extensive discovery, briefing, and testimony she is now entitled to relitigate her parallel age discrimination and retaliation claims over the same events. No Washington case supports the wasteful squandering of public resources she proposes.

**1. Collateral Estoppel Bars the Retrial of Determinative Facts.**

In *Christensen v. Grant City Hospital No. 1*, 152 Wn.2d at 306 through 322, the Washington Supreme Court provided a detailed analysis of the correct application of collateral estoppel (issue preclusion) to an individual, like Ms. Jordan, who had previously filed an unfair labor practice with PERC.

In *Christensen*, the Supreme Court began by contrasting collateral estoppel and res judicata (claim preclusion) and noting that “collateral estoppel is intended to *prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation* (emphasis added).” 152 Wn.2d at 306 (citing *Luisi Truck Lines, Inc. v. Wn. Utils. & Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967)). It is the retrial of *determinative facts* that is central to the application of collateral estoppel in this case.

The *Christensen* Court affirmed the public policy underlying issue preclusion that is articulated in *Reninger v. Dep' t of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998) and Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L.REV 805 (1985):

The collateral estoppel doctrine promotes judicial economy and serves to prevent inconvenience or harassment of parties. (Citation omitted) Also implicated are principles of repose and concerns about the resources entailed in repetitive litigation. (Citation omitted.) Collateral estoppel provides for finality in adjudications. (Citation omitted.)

152 Wn.2d at 306-307.

The *Christensen* Court noted that “the United States Supreme Court has applied issue preclusion to enforce repose where,” as in Ms. Jordan’s case, “an administrative agency has acted in a judicial

capacity and *resolved disputed issues of fact* (emphasis added).” 152 Wn.2d at 308, citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08, 111 S. Ct. 2166, 115 L. Ed .2d 96 (1991).

In making its analysis of the preclusive effects of the fact finding in a PERC proceeding, the *Christensen* Court affirmed the traditional test for issue preclusion under Washington law:

For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a 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 earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied (citations omitted).

The *Christensen* Court then supplemented the traditional test for application of collateral estoppel with additional factors that must be considered under Washington law before collateral estoppel may be applied to administrative agency findings: “[5]<sup>2</sup> whether the agency acted within its competence, [6] the differences between procedures in the administrative proceeding and court procedures, and [7] public policy considerations (citations omitted).” 152 Wn.2d at 308.

Ms. Jordan argues that, by legislative design, collateral estoppel

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<sup>2</sup> The three part test applicable to applying collateral estoppel to the findings of an administrative agency are renumbered here in order to clarify the analysis below. The trial court correctly applied all seven factors to analyze and apply collateral estoppel to bar Ms. Jordan’s age discrimination and retaliation claims. Appendix C.

should not be used to prevent “a victim of discrimination from pursuing her Washington Law Against Discrimination (WLAD) claim in Washington courts.” Brief of Appellant, p. 13. The applicable case law does not support this assertion. In *Jacobson v. Washington State University*, 2007 WL 26765 (E.D. Washington)<sup>3</sup>, the federal district court applied *Christensen* and other Washington collateral estoppel<sup>4</sup> precedents to dismiss a retaliation claim filed under WLAD.<sup>5</sup> Mr. Jacobson, the only African American officer employed by WSU’s Public Safety Department, claimed he had been retaliated against for complaining about WSU’s treatment of minorities as well as for filing a prior race discrimination suit. The federal court found this claim was barred by the factual findings made by the Washington Personnel Appeals Board (PAB). The PAB factual finding that was fatal to Mr. Jacobson’s claim is similar to the factual

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<sup>3</sup> Under GR 14.1(b), a “party may cite as an authority an opinion designated “unpublished,” “not for publication,” “nonprecedential,” “not precedent,” or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.” Under Eastern District of Washington LR 7.1(g)(2), unpublished decisions filed after January 1, 2007, may be cited. A copy of the *Jacobson* decision is included in Appendix F. GR 14.1(b).

<sup>4</sup> Relying upon *Christensen*, the *Jacobson* court notes that “collateral estoppel is distinct from claim preclusion in that applies even where a new cause of action has been asserted in the later proceeding.” Appendix F (*Jacobson*, p. 3.)

<sup>5</sup> The *Jacobson* court found that, by contrast, legislative intent precluded applying collateral estoppel to Mr. Jacobson’s Title VII retaliation claim. Appendix F (*Jacobson*, p. 5-6). Ms. Jordan’s reliance on Title VII case law in support of her argument that a WLAD claim cannot be barred by collateral estoppel is, therefore, misplaced. Brief of Appellant, pp. 14-16. Ms. Jordan’s WLAD claim can—and should—be barred by collateral estoppel.

findings made in Ms. Jordan's case by PERC: "[T]here is no evidence to substantiate [Mr. Jacobson's] claim that he was treated differently." Appendix F, *Jacobson*, p. 4. A factual finding that the plaintiff has completely failed to produce evidence that a discriminatory action *occurred* must, necessarily, have collateral estoppel effect on subsequent proceedings.

The *Jacobson* decision is well-supported by the relevant regulations of the Washington Human Rights Commission (HRC). HRC regulations specifically recognize that while WLAD claims can be pursued simultaneously in a variety of forums, *a decision in one forum may be binding upon other forums*. See WAC 162-08-061(1) and WAC 162-08-062. Specifically, the regulations indicate that:

The law against discrimination expressly preserves the right of complainants and/or aggrieved parties to seek other civil or criminal remedies in court or other available forums, either simultaneously with a complaint filed with the commission or in lieu of such a complaint, subject to any limitations or conditions provided in WAC 162-08-062 or elsewhere.

WAC 162-08-061(1). The limitations and conditions described in WAC 162-08-062, in relevant part, recognize the potential for decisions to be given preclusive effect:

No complainant or aggrieved person may secure relief from more than one governmental agency, instrumentality or tribunal for the same harm or injury.

Where the complainant or aggrieved person elects to pursue simultaneous claims in more than one forum, the factual and legal determinations issued by the first tribunal to rule on the claims may, in some circumstances, be binding on all or portions of the claims pending before other tribunals.

WAC 162-08-062(3)&(4) (emphasis added). Importantly, the HRC is the agency charged with formulating policies to effectuate the purposes of the WLAD and charged with carrying out the purposes of the WLAD. RCW 49.60.110-20. As such, the HRC's interpretation of the WLAD is entitled to deference. *Skamania County v. Columbia River Gorge Com'n*, 144 Wn.2d 30, 42-43, 26 P.3d 241 (2001).

In the present case, Ms. Jordan initially elected to bring her claim to PERC. LCC is entitled to the benefit of PERC's factual determinations.

**2. The "Mixed Motive" Cases Ms. Jordan Relies Upon Are Irrelevant to The Facts of This Case.**

Ms. Jordan relies upon two "mixed motive" cases to support her opposition to the use of collateral estoppel in this case: *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct., 104 L. Ed .2d 268 (1989); *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 898 P.2d 284 (1995). Brief of Appellant, p. 11. While this argument might be superficially attractive, it is irrelevant to the facts of this case. PERC found that the thirty-three things Ms. Jordan complained of either *didn't happen* or were done *for legitimate reasons*. It did not make a

decision based upon a finding that those events were simply not motivated by Ms. Jordan's prior (2002) unfair labor practices complaints and union activity. Had that been the basis for PERC's decision, Ms. Jordan's "mixed motive" and WLAD arguments would have value, but in this case, where the PERC examiner spent twenty-three pages outlining the complete absence of evidence supporting all of Ms. Jordan's factual allegations against LCC, they have none. Appendix B (CP 66-88).

As the trial court correctly noted:

In this case, the PERC examiner found:

(1) the use or non-use of blue publication request forms was not discriminatory; (2) Jordan failed to prove discrimination in the 12 projects cited by Jordan; (3) Jordan failed to prove discrimination based on no work assigned between February 5 and September 22, 2004; (4) Jordan failed to prove discrimination regarding her feeling blamed on a spring schedule publication; (5) no discrimination occurred as a result of micro-managing Jordan's work; (6) Jordan failed to prove disparate treatment between her and Booth; Jordan failed to prove assignment of work to Booth was discriminatory; (7) Jordan failed to prove she was discriminatorily excluded from decisions on three occasions; (8) Jordan failed to show harm to her from any failure to pass on a compliment to her; (9) the employer did not discriminate against Jordan during a meeting with the college president; and (10) Jordan failed to show that Peres was part of any discriminatory treatment by the employer. According to the Examiner, Jordan "did not prevail in any of the 33 ... complaints of retaliation."

The findings adverse to Jordan are set forth in Findings of Fact 4- 15. Under Christensen, Jordan is barred from

relitigating these facts if the 7 [collateral estoppel] factors are present.

Appendix C (CP 261).

Ms. Jordan's mixed motive argument has no relevance to the facts of this case and should be denied.

Ms. Jordan's reference *Smith v. Aufderheide* \_\_\_ F.Supp.2d \_\_\_, 2008 WL 2815544 (W.D. Wn., 2008), is similarly inapposite. Brief of Appellant, p. 14 and fn. 5. Employment Security findings are by statute not binding and are inadmissible. RCW 50.32.097 and 120. *See, Christensen*, 152 Wn.2d at 315. By law, they would have no collateral estoppel value, and, thus, the case has no precedential value for Ms. Jordan.

### **3. Collateral Estoppel Analysis.**

When the seven collateral factors outlined in *Christensen*, are applied to the facts of this case, summary dismissal is required as a matter of law. LCC satisfied the four elements of the traditional collateral estoppel test and the three elements of the test for applying collateral estoppel to administrative agency rulings.

- a. As the term "issue" is defined by the relevant case law, the issue decided in Ms. Jordan's 2004 PERC proceeding was identical to the issue presented in the 2005 Thurston County superior court proceeding.**

Issue preclusion is distinguished from claim preclusion "in that, instead of preventing a second assertion of the same claim or cause of

action, it prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted.” *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983) (emphasis added) (quoting *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978)).

The Washington Supreme Court has held that identity of causes of actions "cannot be determined precisely by mechanistic application<sup>6</sup> of a simple test," and instead considers the following criteria for a pragmatic result:

(1)[W]hether rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise from the same transaction nucleus of facts.

*Rains v. State*, 100 Wn.2d at 664 (citations omitted).

Like the state courts, the federal courts apply a flexible test to

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<sup>6</sup> Ms. Jordan appears to apply the simple, mechanistic test for determining whether two issues are “identical” that has been rejected by the Washington Supreme Court. She argues, for example: “The legal issue before PERC involved whether LCC had committed an unfair labor practice due to Carole Jordan’s union activity, in violation of RCW 41.56; the legal issue before the trial court was whether LCC discriminated against Carole Jordan because of her age, in violation of RCW 49.60. These are very different issues—both in terms of the respective statutes involved and in terms of the discreet public policies involved.” Brief of Appellant, pp. 10-11. This is precisely the claim preclusion analysis that was rejected by the Supreme Court in *Christensen*, 152 Wn.2d at 309-16 (limiting and interpreting the holdings of *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998), *State v. Vasquez*, 148 Wn.2d 303, 59 P.3d 648 (2002) and *Smith v. Bates*, 139 Wn.2d 793, 811, 991 P.2d 1135 (2000) on this issue).

determine whether two suits involve the same "cause of action." The Ninth Circuit has considered: (1) whether rights established in the original suit would be affected by allowing the second suit; (2) whether both suits involve presentation of largely the same evidence; (3) whether the same rights are involved in both suits; and (4) whether the suits involve the same "transactional nucleus of facts." *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982), *cert. denied* 459 U.S. 1087, 103 S. Ct. 570, 74 L. Ed. 2d 932 (1982). No factor is determinative, though many courts rely primarily on the "transactional nucleus of facts." *Id.*, at 1202; *International Union of Operating Engineers Pension v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993); *Sidney v. Zah*, 718 F.2d 1453, 1459 (9<sup>th</sup> Cir. 1983).

The "transactional nucleus of facts" shared between Ms. Jordan's 2004 unfair labor practices claim and her 2005 superior court WLAD claim overlaps in a manner that shatters her ability to proceed with her WLAD claim. The fifteen PERC findings of fact establish that *nothing adverse* happened to Ms. Jordan in the workplace between February 5, 2004 and September 22, 2004. LCC is entitled to the collateral estoppel effect of these findings of fact for the narrow period that is at issue in this appeal.

**b. The earlier proceeding ended in a judgment on the merits.**

Ms. Jordan's unlawful employment practices case (No. 18740-U-04-4764) ended in a judgment on the merits that was subsequently affirmed by the commission as a whole. CP 66-89.

**c. The party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding.**

The parties to PERC Case No. 18740-U-04-4764 and Thurston County Cause No. #05-2-01016-6 are identical.

**d. Application of collateral estoppel does not work an injustice on the party against whom it is applied.**

In *Christensen*, the Supreme Court found that the relief available from PERC would have provided Ms. Jordan with sufficient incentive to vigorously litigate and to provide the examiner with the evidence necessary to establish her factual allegations: "There is no significant disparity of available relief [between PERC and an action in Superior Court] that justifies the conclusion that application of collateral estoppel would work an injustice." 152 Wn.2d at 318.

Ms. Jordan experienced no procedural unfairness as a result of the application of collateral estoppel. She had a full and fair opportunity to litigate her factual allegations that the college treated her differently than

her colleagues throughout 2004. She failed to establish a single instance of discrimination, retaliation, or inappropriate treatment. Application of collateral estoppel to Ms. Jordan, after she failed to muster facts adequate to support even one of LCC's thirty-three allegedly discriminatory actions, does not work an injustice against her.

**e. PERC acted within its competence.**

In *Christensen*, the Supreme Court carefully distinguished between issue and claim preclusion in determining that PERC had acted within its competence in that case. Distinguishing *Smith v. Bates*, 139 Wn.2d 793, 991 P.2d 1135 (2000), *State v. Vasquez, supra*, *Vargas v. State*, 116 Wn. App. 30, 65 P.3d 330 (2003), and the Court of Appeals decision in *Christensen* (114 Wn. App. 579, 60 P.3d 99 (2002)), the Supreme Court noted that:

It does not matter that the cause of action Christensen seeks to pursue in superior court is not the same claim or cause of action that was decided by PERC, or that PERC lacks authority to decide the tort claim: this case does not involve claim preclusion, which applies to preclude the relitigation of the same claim or cause of action. (Citation omitted.)

The relevant inquiry here is whether PERC's determination of the issue in question is within its competence. That is, are its factual findings regarding the decision to discharge within its competence to determine?

152 Wn.2d at 319.

In the present case, it was within PERC's competence to make factual findings regarding Ms. Jordan's claims against her employer. *Christensen*, 152 Wn.3d at 319-320. It is irrelevant to the application of collateral estoppel that PERC lacked the authority to decide Ms. Jordan's WLAD claims. *See, Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987) (after a Bremerton civil service commission concluded a plaintiff's demotion was not retaliatory under RCW 41.12.090, collateral estoppel applied to bar a plaintiff's federal civil rights action under 42 U.S.C. §1983 despite argument that the commission was incompetent to decide civil rights claim).

PERC was competent to decide that Ms. Jordan's thirty-three allegations LCC were completely unsupported by evidence. LCC was entitled to the benefit of that factual determination in this proceeding.

**f. There were no substantive differences between procedures in the administrative proceeding and court procedures.**

Ms. Jordan's PERC proceeding lasted three years. She was represented by her present counsel throughout her six-day PERC hearing. She had the opportunity to subpoena, present and cross-examine witnesses and to provide the examiner with briefing. She had the opportunity to admit documents. PERC applied a substantial motivating factor test throughout its proceeding (CP 69); Ms. Jordan errs in suggesting that she

did not receive the benefit of this standard. Brief of Appellant, p. 11, ¶1.

Ms. Jordan had the opportunity to appeal the decision of the examiner to the full Public Employment Relations Commission, which she exercised. Under the Administrative Procedure Act, Ms. Jordan also had the opportunity to seek judicial review, which she did not exercise. RCW 34.05.514; *City of Seattle v. Public Employment Relations Comm. (PERC)*, 116 Wn.2d 923, 926-27, 809 P.2d 1377 (1991).

These procedural safeguards are sufficient to warrant application of the doctrine of collateral estoppel. *Shoemaker*, 109 Wn.2d at 509-511.

**g. Public policy supports application of collateral estoppel in this case.**

In *Christensen*, the Washington Supreme Court noted the authority the legislature had granted to PERC and the express legislative recognition of its expertise in RCW 41.58.005(1). In the present case, the PERC examiner was well qualified to make factual determinations regarding the actions of an employee and her employer.

The Supreme Court also noted in *Christensen*:

[T]he doctrine of collateral estoppel may be applied where important interests are at stake. The United States Supreme Court has held, for example, that findings by a state administrative body will be given preclusive effect in a subsequent 42 U.S.C. § 1983 claim of racially motivated discharge from employment, provided the requirements for issue preclusion are otherwise satisfied. (Citation omitted.) Similarly, under Washington law preclusive effect can be

given in a § 1983 civil rights action to an administrative agency's earlier factual findings that the employee's reductions in rank were not retaliatory. (Citing *Shoemaker*.)

In the present case, Ms. Jordan errs in suggesting that because her unfair labor practices claims and her WLAD claims implicate different public policies that the trial court erred in applying collateral estoppel principles. Brief of Appellant, p. 11. As the Supreme Court noted in *Christensen*, as it affirmed the use of collateral estoppel to preclude litigation of issues that have already been determined by an administrative tribunal, “simply because a subject implicates public policy does not mean that application of collateral estoppel contravenes public policy. 152 Wn.2d at 316.

In the present case, use of collateral estoppel supported the public policies inherent in judicial economy, repose, concerns about the resources entailed in repetitive litigation, and finality in adjudications. See, *Reninger*, 134 Wn.2d at 454. ([“Ms. Jordan was] entitled to one bite of the apple, and [she] took that bite. That should have been the end of it.”).

**h. Summary.**

In the present case, the trial court accurately applied the seven-part test articulated in *Christensen* to find that “Jordan is barred from relitigating [Findings of Fact 4 through 15]” and LCC was entitled to collateral estoppel on Ms. Jordan’s age discrimination and retaliation

claims. CP 260-262. The trial court might also have found, in the alternative, that being barred from relitigating the PERC findings of fact left Ms. Jordan's negligent infliction of emotional distress claim completely unsupported by evidence.<sup>7</sup>

LCC requests that this court affirm the trial court's use of issue preclusion to dismiss Ms Jordan's 2005 Thurston County superior court complaint.

**C. LCC Owed Ms. Jordan No Duty to Avoid Negligent Infliction of Emotional Distress in Handling Her Complaints About Conflicts with Her Supervisor.**

As the Washington Supreme Court held in *Snyder v. Medical Service Corp.*, 145 Wn.2d 233, 35 P.3d 1158 (2001): "There is no duty for an employer to provide employees with a stress free workplace." In *Snyder*, the Court noted *Bishop v. State*, 77 Wn. App. 228, 233 n. 5, 889 P.2d 959 (1995), with approval:

We believe *Bishop* correctly articulates the law in this state: "[A]bsent a statutory or public policy mandate, employers do not owe employees a duty to use reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes." *Bishop*, 77 Wn. App. at 234-35, 889 P.2d 959. See also *Johnson v. Dep't of Soc. & Health Servs.*, 80 Wn. App. 212, 907 P.2d 1223 (1996)

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<sup>7</sup> This court may affirm on any ground supported by the record. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

(holding employers have no duty to avoid infliction of emotional distress on employees when responding to employment disputes).

*Snyder*, 145 Wn.2d at 244.

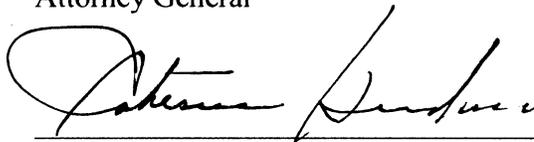
In the present case, the trial court ruled correctly on this issue in its initial summary judgment order. LCC owed Ms. Jordan no duty to use reasonable care to avoid inadvertently inflicting emotional distress when it responded to the workplace disputes in which she was involved. The trial court correctly dismissed this claim.

#### IV. CONCLUSION

LCC respectfully requests that this court affirm the trial court's dismissal of Ms. Jordan's complaint in Thurston County Cause No. #05-2-01016-6.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of August, 2008.

ROBERT M. MCKENNA  
Attorney General



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CATHERINE HENDRICKS, WSBA #16311  
Senior Counsel  
Attorneys for Respondent State Of  
Washington, D/B/A Lower Columbia  
Community College

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the State of Washington that I arranged for filing with the Washington State Court of Appeals, Division II, via legal messenger, the original and one copy of the preceding Brief of Respondents, at the following address:

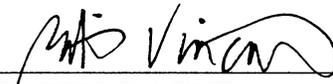
Court of Appeals of Washington, Division II  
950 Broadway Avenue, Suite 300  
Tacoma, WA 98402

And that I arranged for a copy of the preceding Brief of Respondents to be served on counsel at the following addresses, in the manner indicated below:

Service by legal messenger:

JUDITH A. LONNQUIST  
Attorney at Law  
Law Offices of Judith A. Lonnquist  
1218 Third Ave., Suite 1500  
Seattle, WA 98101-3021

DATED this 18<sup>th</sup> day of August, 2008 at Seattle, Washington

  
PATTI VINCENT

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
PERJURY

## INDEX TO APPENDICES

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Appendix A – Complaint Charging Unfair Labor Practices, dated August 4, 2004.

Appendix B – Findings of Fact, Conclusions of Law and Order, Case 18740-U-04-4765, Decision 9171, dated November 11, 2005.

Appendix C – Thurston County Superior Court Judge Chris Wickham’s decision letter granting State Defendant’s summary judgment motion, dated November 2, 2007.

Appendix D – Order Granting Lower Columbia College’s Motion for Summary Judgment for Collateral Estoppel, dated November 30, 2007.

Appendix E – *Carole Jordan & Diane Plomedahl v. State*, Thurston County Superior Court No. 08-2-00574-4 –Docket.

Appendix F – *Bryan Jacobson v. Washington State University*, 2007 WL 26765 (E.D. Wash.).

# **APPENDIX A**



**PUBLIC EMPLOYMENT RELATIONS COMMISSION**  
Street 603 EVERGREEN PLAZA BUILDING - 711 CAPITOL WAY  
Mail P O BOX 40919 OLYMPIA WASHINGTON 98504-0919  
(360) 753-3444

DO NOT WRITE IN THIS SPACE

**COMPLAINT CHARGING  
UNFAIR LABOR PRACTICES**

[ ] Amended Complaint in Case \_\_\_\_\_ -U- \_\_\_\_\_

Instructions See other side of this form Applicable Rules Chapters 10-08 391-08 and 391-45 WAC

**1 PARTIES** The named complainant alleges the named respondent has committed unfair labor practices in violation of the laws of the State of Washington, involving employees of the named employer

**a EMPLOYER** LOWER COLUMBIA COLLEGE  
  
CONTACT PERSON DR. JAMES McLAUGHLIN, PRESIDENT  
ADDRESS 1400 MARLE ST  
CITY/STATE WDNWVIEW, WA ZIP 98632  
TELEPHONE (360) 474-2101 EXT FAX (360) 474-2109  
  
ATTORNEY or REPRESENTATIVE NOLAN WHEELER - INTERIM DIRECTOR OF HUMAN RESOURCES  
ADDRESS (SAME AS ABOVE)  
CITY/STATE (SAME AS ABOVE) ZIP  
TELEPHONE (360) 474-2221 EXT FAX ( )

**b RESPONDENT** LOWER COLUMBIA COLLEGE  
  
CONTACT PERSON SAME AS ABOVE  
ADDRESS  
CITY/STATE ZIP  
TELEPHONE ( ) EXT FAX ( )  
  
ATTORNEY or REPRESENTATIVE  
ADDRESS  
CITY/STATE ZIP  
TELEPHONE ( ) EXT FAX ( )

**c COMPLAINANT** CAROLE A JORDAN  
  
CONTACT PERSON - SAME AS ABOVE  
ADDRESS 1129 13th AVE  
CITY/STATE WDNWVIEW, WA ZIP 98622  
TELEPHONE (360) 501-6251 EXT FAX ( )  
  
ATTORNEY or REPRESENTATIVE  
ADDRESS  
CITY/STATE ZIP  
TELEPHONE ( ) EXT FAX ( )

**2 STATEMENT OF FACTS** Attach separate sheets setting forth clear and concise statements of the facts constituting the unfair labor practices (including times, dates, places and participants in occurrences) in numbered paragraphs.

**3 REMEDY REQUESTED** Attach separate sheets setting forth the remedies requested for the claimed unfair labor practices.

**4 AUTHORIZED SIGNATURE FOR COMPLAINANT**  
NAME (PRINT) CAROLE A JORDAN TITLE GRAPHIC DESIGNER/ILLUSTRATOR  
SIGNATURE *Carole A Jordan* DATE 8/4/04

**5 RELATIONSHIPS**  
**a EMPLOYER'S PRINCIPAL BUSINESS** STATE AGENCY OF HIGHER EDUCATION  
**b DEPARTMENT OR DIVISION INVOLVED** COLLEGE RELATIONS AND MARKETING  
**c COLLECTIVE BARGAINING AGREEMENT** Indicate  
[ ] The parties have never had a contract OR  
[ ] A copy of the parties current (or most recent) collective bargaining agreement is attached  
**d STATUS OF GRIEVANCE PROCEEDINGS** Indicate  
[ ] No grievance has been filed on the dispute involved in this unfair labor practice complaint  
[ ] A grievance on the dispute involved in this unfair labor practice complaint is being processed under a contractual grievance procedure  
[ ] An arbitration award has been issued on a grievance on the dispute involved in this unfair labor practice case  
**e DESCRIPTION OF BARGAINING UNIT** Indicate inclusions/exclusions contract page or case/decision number  
ALL LEE CLASSIFIED STAFF

**1 NUMBER OF EMPLOYEES IN BARGAINING UNIT**

**6 ALLEGED VIOLATION(S)** Indicate  
[ ] EMPLOYER INTERFERENCE WITH EMPLOYEE RIGHTS [RCW 28B 52 073(1)(a) 41 56 140(1) or 41 59 140(1)(a)]  
[ ] EMPLOYER DOMINATION OR ASSISTANCE OF UNION [RCW 28B 52 073(1)(b) 41 56 140(2) or 41 59 140(1)(b)]  
[ ] EMPLOYER DISCRIMINATION [RCW 28B 52 073(1)(c) 41 56 140(1) or 41 59 140(1)(c)]  
 EMPLOYER DISCRIMINATION FOR FILING CHARGES [RCW 28B 52 073(1)(d) 41 56 140(3) or 41 59 140(1)(d)]  
[ ] EMPLOYER REFUSAL TO BARGAIN [RCW 28B 52 073(1)(e) 41 56 140(4) or 41 59 140(1)(e)]  
[ ] UNION INTERFERENCE WITH EMPLOYEE RIGHTS [RCW 28B 52 073(2)(a) 41 56 150(1) or 41 59 140(2)(a)]  
[ ] UNION INDUCING EMPLOYER TO COMMIT VIOLATION [RCW 28B 52 073(2)(b) 41 56 150(2) or 41 59 140(2)(b)]  
[ ] UNION DISCRIMINATION FOR FILING CHARGES [RCW 28B 52 073(2)(c) 41 56 150(3) or 41 59 140(2)(a)]  
[ ] UNION REFUSAL TO BARGAIN [RCW 28B 52 073(2)(d) 41 56 150(4) or 41 59 140(2)(c)]  
[ ] OTHER UNFAIR LABOR PRACTICE (Explain and specify statute on sheet of paper attached to this form)

EX. A N E D

0-00000033

- 9) Between the months of February, 2004 and the filing date of this document Lower Columbia College and in particular, the office of College Relations and Marketing under the supervision of Janelle Runyon has continued with actions of retaliation and discrimination against Ms Jordan. Often this behavior is more intensified shortly after Ms Jordan has been involved in a situation involving the union.

*These actions include but are not limited to*

- 1) Altering Ms Jordan's work assignments by not providing her the proper information necessary to complete her assignments efficiently
- 2) By not providing her with adequately filled out job request forms
- 3) By sending jobs with no job request form
- 4) By giving jobs very short deadlines or providing no deadline date
- 5) Within the past six months Ms Jordan has experienced a number of times of either full or half days when she has been provided no work at all. In two instances no work was given for a full work week yet the Publications office is swamped according to Ms Runyon
- 6) By making assumptions or implying that Ms Jordan is the person at fault in certain instances if there happens to be a problem with a job
- 7) By micro-managing and treating Ms Jordan differently than the other two staff members
- 8) By excluding Ms Jordan from the initial planning stages of projects
- 9) By excluding Ms Jordan from being a part of the process taking place with Interact Communications, a consulting firm hired by LCC to design a new college look, brand and website. Also, by not informing her of changes taking place within the department
- 10) By allowing or having others to do the layout and design and then passing the work along to Ms Jordan to be digitally assembled
- 11) By allowing the Information Specialist to do work traditionally done by Ms Jordan while she sits in her office and is given no work
- 12) By allowing the Information Specialist to withhold jobs and then later present them to Ms Jordan with a short deadline or as a "rush job"
- 13) When members of the college community have expressed to Ms Runyon that they are pleased with a job Ms Jordan has done, Ms Runyon does not pass this information along to Ms Jordan

*(Each of the above statements can be substantiated with evidence to support these claims)*

10 ) In addition the following is a further accounting of the facts as they have continued to unfold *after* the posting of PERC's notice to cease and desist from discriminating against Ms Jordan

a ) 3/16/04 - A heavily text driven job traditionally done by Information Specialist is given to Ms Jordan. The text is in Latin and heavily accented and Ms Jordan's printer wouldn't print the accents from the document sent for text placement from JoAnne Booth. As a result her only option to complete the job was to copy and paste every accent back into the text of the document. A great deal of tension culminated around this job.

b ) 3/17/04 - Ms Runyon wants to meet to discuss feedback on the job. Ms Jordan agreed but asked for her union representative, Vivian Miller to be present. Ms Runyon cancelled the meeting.

c ) 3/23/04 - Again Ms Runyon wants to meet to give feedback on the job and discuss Ms Jordan's evaluation. Ms Jordan had no objection to meeting but again requests that her union representative, Vivian Miller be present. Again Ms Runyon cancelled the meeting. Ms Miller now strongly advised Ms Jordan that she now needs to request a meeting with Ms Runyon with herself present. Ms Jordan complied and sent an e-mail to Ms Runyon requesting a meeting.

d ) 3/30/04 - A meeting is set up for the 3/31/04 to include Brian Poffenroth, LCC HR Director and Ellen Peres, LCC's new VP of Administrative Services. Mr Poffenroth informed Ms Jordan that Vivian Miller and Ellen Peres will meet first while he and she waited outside. He then added that there was no need for Ms Runyon to be there. Ms Jordan insisted that her union representative Vivian Miller cancel this meeting as the purpose of the meeting was to meet with Ms Runyon. The meeting was cancelled.

e ) 4/1/04 - At Management Council Dr McLaughlin appeals to the WPEA officers one of which is Carole Jordan. He voices his unhappiness citing the ULP decision and the article about the ULP that had appeared in the local newspaper on February, 21, 2004. He said that it is hurting the college. He is also unhappy with the information the WPEA is putting out including the WPEA newsletter, *ReUnion* which Ms Jordan is solely responsible for writing and publishing each month.

f ) 4/7/04 - A meeting takes place between Ms Jordan, Vivian Miller, Brian Poffenroth and Ellen Peres. Ms Peres enters this situation with no prior history or knowledge of this 3-year situation other than what she has been told by management. Her biased opinion of Ms Jordan was clearly demonstrated by her response to Ms Jordan when she asked Ms Peres if she was aware of the fact that she had requested a mediator/counselor in the past? As the meeting progressed, all voiced agreement to idea of a mediator except Ms Runyon who refrained from saying one way or the other. It was further mutually agreed to request the assistance of Lisa Hartrich of PERC in hopes that she might be able to serve in this capacity. If this could not happen within the following 2 weeks, then a *work plan* needed to be developed for Ms Jordan since according to Ms Runyon, the Publication Office is swamped with work yet Carole Jordan is receiving no work.

g) 4/21/04 - Both The WPEA and LCC jointly wrote a letter to Marvin Schurke requesting the mediation services of Lisa Hartrich to work with the College Relations staff. This same day Vivian Miller spoke to Marvin Schurke by telephone and he indicated that the decision would need to be made by PERC's Commission.

h) 4/27/04 - Vivian Miller e-mails a draft *work plan* for Ms Jordan to Brian Poffenroth who ultimately refuses to sign it claiming it is not in the contract.

i) 5/11/04 - Second meeting takes place with Carole Jordan, Vivian Miller, Brian Poffenroth and Ellen Peres in attendance. Ms Miller opens the meeting saying that after the ULP win last February that currently we have enough evidence to file another Unfair Labor Practice, but that it our desire is to settle this at the lowest level. In this meeting Ms Peres said that she would sign a statement that the college is not trying to let Ms Jordan go nor were they attempting to eliminate her job. Nothing was accomplished at this meeting. No *work plan* was signed nor would Ms Peres sign a statement now stating that she needed check with the "AG". Later that evening Mr Poffenroth notified Vivian Miller that the "AG" had said "no".

j) 5/24/04 - Letter from Marvin Schurke saying that the request for the help of mediator Lisa Hartrich was out of the scope of assistance that they are able to provide. He suggested that the Dispute Resolution Center (DRC) might be able to help.

k.) 6/10/04 - Since nothing had transpired after the meeting on 5/11/04 Vivian Miller wrote to Ellen Peres attaching a Memo of Understanding for her to sign and return. Ms Jordan has never been informed of the outcome concerning this letter.

l) 6/16/04 - LCC WPEA Chapter President Ron Adkisson is directed by WPEA Director Leslie Liddle to inform the LCC Board of Trustees at their regular scheduled meeting that amongst other pending campus issues, the WPEA would be filing another ULP on behalf of Carole Jordan. Mr Adkisson did follow through and inform the Board of Trustees of this fact.

m) 8/4/04 - As of this date nothing has been resolved and nothing has been filed by the WPEA.

## **APPENDIX B**

Community College District 13, Decision 9171 (PSRA, 2005)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CAROLE A. JORDAN,	)	
	)	
Complainant,	)	CASE 18740-U-04-4764
	)	
vs.	)	DECISION 9171 - PSRA
	)	
COMMUNITY COLLEGE DISTRICT 13	)	
(LOWER COLUMBIA COLLEGE),	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	
	)	

Law Offices of Judith A. Lonquist, P.S., by Judith A. Lonquist, Attorney at Law, for the complainant.

Rob McKenna, Attorney General of Washington, by Michael P. Sellars, Senior Assistant Attorney General, and Rachelle E. Wills, Assistant Attorney General, for the employer.

On August 4, 2004, Carole A. Jordan filed an unfair labor practice complaint with the Public Employment Relations Commission alleging that Lower Columbia College discriminated against her under RCW 41.56.140(3). The Commission issued a deficiency notice on September 7, 2004. Jordan filed an amended complaint on September 22, 2004. The Commission issued a preliminary ruling on September 27, 2004, finding a cause of action for:

Employer discrimination for filing an unfair labor practice charge in violation of RCW 41.56.140(3) [and if so, derivative "interference" in violation of RCW 41.56.140(1), by retaliatory actions against Carole Jordan].

The college timely answered the complaint. Examiner David I. Gedrose held hearings in Longview, Washington on February 22, 23,

24, and March 29, 30, 31, 2005. The parties filed post-hearing briefs.

The examiner finds that Lower Columbia College did not discriminate against, nor derivatively interfere with, Carole Jordan's rights under RCW 41.56.140(3) and (1). The complaint is dismissed.

#### BACKGROUND

Lower Columbia College (employer) is part of the community college system of Washington. At the time pertinent to this proceeding, Dr. James McLaughlin was the college president. Ellen Peres was vice-president of administrative services. Janelle Runyon was director of college relations and marketing, a sub-unit of administrative services. Runyon oversaw production of the employer's publications. She supervised Carole Jordan, Joanne Booth, and Maggie Kennedy. Jordan, the complainant, was a graphic artist. Booth primarily worked with text as a writer and editor. Kennedy was a photographer and performed other administrative tasks as assigned.

Jordan began working for the employer in 2000. Runyon began a year earlier. Booth came at the end of 2001, and Kennedy in the fall of 2002. In 2001, Jordan joined the Washington Public Employees Association (WPEA), the exclusive bargaining representative for her job class. In the spring of 2002, Jordan filed a grievance against Runyon for failure to evaluate her and for transferring her job duties to Booth. Less than three weeks later, the employer reduced Jordan's position to half-time, alleging a lack of funding. She was the only college employee selected for a reduction-in-force. The employer assigned her other duties outside the department to keep her at full-time. It did not cut her pay. The WPEA filed an unfair labor practice complaint in May 2002. On February 5, 2004, the Commission found in Jordan's favor, ruling that the employer

retaliated against Jordan for filing her grievance when it targeted her for reduction-in-force. *Community College 13 (Lower Columbia)*, Decision 8386 (PSRA, 2004).<sup>1</sup> By the time of the February 2004 decision, Jordan had been restored to her full-time position in the college relations and marketing department.

#### ISSUE

Did the employer discriminate against, and derivatively interfere with, Jordan's rights in violation of RCW 41.56.140(3) and (1)?

#### ANALYSIS

##### Legal standard-discrimination

RCW 41.56.140(3) states:

It shall be an unfair labor practice for a public employer to discriminate against a public employee who has filed an unfair labor practice charge.

The Commission decides discrimination allegations under standards drawn from decisions of the Supreme Court of the State of Washington. The injured party must make a prima facie case showing retaliation. To do this, the complainant must show:

- The exercise of a statutorily protected right, or communication to the employer of an intent to do so;
- The deprivation of some ascertainable right, benefit, or status; and

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<sup>1</sup> The parties resolved the underlying grievance in September 2002.

- The causal connection between the exercise of the legal right and the discriminatory action.

If a complainant provides evidence of a causal connection, a rebuttable presumption is created in favor of the employee. The complainant carries the burden of proof throughout the entire matter, but there is a shifting of the burden of production to the employer. Once the employee establishes his/her prima facie case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions.

The employee may respond to an employer's defense in one of two ways:

- By showing that the employer's reason is pretextual; or
- By showing that, although some or all of the employer's stated reason is legitimate, the employee's pursuit of the protected right was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

*Wilmot v. Kaiser Aluminum*, 118 Wn.2d. 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). See *Educational Service District 114*, Decision 4631-A (PECB, 1994); *Brinnon School District*, Decision 7210-A (PECB, 2001).

Legal standard-interference

RCW 41.56.140(1) states:

It shall be an unfair labor practice for a public employer to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter.

The Commission's test for an interference violation is:

Whether one or more employees could reasonably perceive employer actions as a threat of reprisal or force or promise of benefit associated with the pursuit of rights under Chapter 41.56 RCW. It is not necessary for a complainant to show that the employer intended to interfere, or even that the employees involved actually felt threatened.

*City of Omak*, Decision 5579-B (PECB, 1997); *City of Tacoma*, Decision 8031-A (PECB, 2004).

The legal standards for interference and discrimination claims are substantially different. A complainant may prevail in an interference claim by convincing the trier of fact that he or she had a reasonable person's perception of a threat or promise associated with the pursuit of collective bargaining rights. The complainant may prevail even if the employer inadvertently made a threat or promise and even if the threat was ineffective. For a complainant to prove interference, no discipline or sanction need exist, nor loss of work status or benefits result.

Discrimination, on the other hand, requires proof of an employer's intent to deprive the employee of a definable right, benefit, or status, and a showing that such a loss, or losses, actually occurred. Further, the employee must prove that he or she exercised a right given under Chapter 41.56 RCW (or told the employer of such an intent), and that a causal connection existed between that right and the actual harm suffered.

In discrimination cases, a derivative interference claim also exists and is dependent upon the underlying discrimination claim. If the complainant prevails in the discrimination claim, a finding of derivative interference automatically follows. However, if the

complainant fails to prove the underlying discrimination charge, the derivative interference claim also fails. Yakima School District, Decision 8612 (EDUC, 2004).

Jordan's complaint

Jordan alleged employer discrimination by Runyon and Booth acting in concert against her. Jordan provided 33 instances between February 5, 2004, and September 22, 2004, of the employer's alleged discriminatory actions. Jordan established the first element of her prima facie case for discrimination. She filed an unfair labor practice complaint against the employer in 2002. She prevailed on it by a Commission decision of February 5, 2004. The analysis thus turns to: (1) whether the employer deprived Jordan of ascertainable rights, benefits, or status, and if so (3) whether a causal connection existed between the exercise of the legal right and the discriminatory action.

Allegations of incomplete or no information given

Jordan alleged that on six jobs<sup>2</sup> Runyon and/or Booth, gave her incomplete or no information on Jordan's assigned tasks. She asserted that their intent was to have her fail at those tasks in order to build a case against her and justify her termination. Jordan believed a related purpose was to make her work environment so stressful that she would resign. At this juncture, Jordan's complaint centered around the use or non-use of "blue forms." Those were blue-colored job orders entitled "Publication Request Form." The blue forms included such information as the job number, date needed, date received, client name, project name, and project directions. Jordan testified that she preferred to use the blue

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<sup>2</sup> The term "job" in this context refers to specific work projects assigned to Jordan as a member of the production team of the college relations and marketing department. The terms "job" and "project" are used interchangeably.

forms because that was how she was trained, and she depended upon them. She asserted that the employer used them when she began her job in 2000, but changed its procedures after she filed her grievance in 2002. Jordan alleged that the new practices accelerated after the Commission's decision in February 2004.

However, in contrast to Jordan's claims, the employer presented convincing evidence that in June 2003, Runyon set forth a written set of guidelines for job requests, stating that job information can come: "(1) only on the blue sheet, (2) on the blue sheet and via e-mail, or (3) via e-mail only." Runyon stated that communication was key. Staff were instructed to ask for information on job requests if they found it lacking. Runyon repeatedly stressed the importance of communication among her staff. She urged staff to e-mail or telephone each other if they had questions on jobs. Staff were free to contact customers directly for needed information. By 2003, Jordan worked in an office separate from Runyon and Booth. Jordan agreed with this arrangement and did not allege that this separate work space constituted discrimination. Jordan also insisted that Runyon and Booth communicate with her solely by e-mail. Runyon and Booth complied with her demand. Jordan's contentions that blue form procedures dramatically changed in 2004, and that the blue forms were essential for job information, were contrary to Runyon's instructions in 2003. The examiner concludes that the employer's blue form procedures in 2004 were not discriminatory.

The six jobs Jordan identified in her complaint were: a parents' brochure, a spring concert project, a collage, projects for customers Adams and Hosenev, and a Latin text concert program. The employer pulled the parents' brochure project for production reasons. Jordan completed the spring concert, collage, and Adams projects without requesting more information or deadline exten-

sions. Hoseney cancelled his job request. The Latin text job did not revolve around a blue form. There is nothing in the extensive e-mail communication between Jordan, Runyon, and Booth about a fatal lack of information on the blue sheets. Jordan completed all the jobs and did not miss any deadlines in doing so. Runyon never counseled nor disciplined Jordan over any of those jobs.

According to the record, Runyon's department processed 42 job orders between February 5 and September 22, 2004. Thus, in the remaining 36 cases, or 86 percent of the time, Jordan did not have alleged problems with information on job orders. Jordan's only communication with Runyon and Booth was through e-mail. Jordan contended in this unfair labor practice that the employer purposely used the incomplete blue forms to cause her harm. Therefore, the examiner expected evidence of that in the e-mails. There was none. Jordan did not prove discrimination regarding the incomplete use or non-use of the blue Publication Request Forms.

Allegations of short deadlines and withheld work

Jordan alleged that on eight occasions Runyon or Booth gave her assignments with short deadlines, or withheld jobs from her until the deadlines were near. Jordan asserted that such actions were designed to have her fail on those jobs. The jobs Jordan complained of were: projects for customers Correll, Koski, Weiss, two projects for Adams (one in July and one in September), and jobs on the employer's summer schedule, the Longview Daily News, and the spring concert. The July job for Adams, and the spring concert job, were discussed above as allegedly having incomplete blue forms. As noted, Jordan recorded no problems completing those projects. Since Jordan separated the other six jobs from her incomplete information allegation, those six projects apparently had sufficient information.

Jordan stated that Runyon and Booth withheld the Correll, Koski, and Weiss jobs, the September Adams project, the summer schedule, and the Longview Daily News project from her, giving her the jobs only when the deadlines were near. The employer produced credible evidence that Correll, Koski and Weiss delayed getting all necessary information to Booth until their own deadlines were at hand. Booth provided Jordan the information when Booth received it. The record showed that the design work for the September Adams project was a near duplication of the one in July and apparently was timed for release, not withheld. The employer demonstrated that it notified Jordan of the summer schedule job seven days in advance, whereas Jordan testified she had been given only three days notice. Runyon offered to transfer the Daily News project to Booth, but Jordan declined and did that job herself.

Runyon made allowances for deadlines and moved them if necessary. Jordan completed all the jobs. Jordan was never counseled nor disciplined regarding deadlines. Jordan did not, in her e-mails, notify Runyon that the deadlines were impossible to meet or otherwise complain about short deadlines.

Jordan claimed that her December 2004 evaluation included references by Runyon to Jordan "rushing" jobs. She asserted that this proved that Runyon was setting her up for failure through short deadlines and withheld work. However, in the evaluation, Runyon referred to one job involving art work for a theater production, and another project for the employer's foundation. Runyon seemed to be saying in the evaluation that Jordan did not fully investigate the needs of the jobs and made errors in her administration of the projects, not in her artwork. Jordan cited neither of those jobs as incidents of short deadline or withheld jobs in the present unfair labor practice complaint.

Booth testified about the stress of the department's work as constantly entailing short deadlines. Runyon stated that customers came in with jobs and wanted them done immediately because the customers had delayed and faced their own deadlines. Runyon and Booth came from newspaper backgrounds and seemingly accepted as normal the situation they described.

The record indicated that Jordan was organized and detail oriented. The clash of working styles had more to do with personality conflicts in the department and patterns of work than conscious attempts by Runyon and Booth to infuriate Jordan. Purposely and needlessly withholding jobs would reflect badly on Runyon, not her subordinates, if the customers learned that jobs had been unduly delayed merely on the whim of the manager. Nothing in the record, including Runyon's testimony, showed that Runyon was self-destructively hostile to Jordan.

Jordan cited 12 projects out of 42 where she claimed incomplete information, short deadlines, or withheld work. Jordan did not notify Runyon of those alleged problems at the time Jordan claimed they occurred. Jordan completed all the jobs, was never counseled nor disciplined over them, and received only praise from Runyon about her artwork. Runyon complimented Jordan on meeting deadlines. Runyon's December 2004, evaluation of Jordan mentions only two jobs where Runyon was dissatisfied with Jordan's performance. As stated above, Jordan did not include those projects in her present unfair labor practice complaint. Jordan failed to prove discrimination in the 12 instances she cited.

Allegations of no work assignments

Jordan contended that Runyon did not assign her work on six days between February 5 and September 22, 2004 (the period covered by her unfair labor practice complaint and amended complaint). Jordan

believed that Runyon's purposes in not assigning her work were to build a case that Jordan's position was unnecessary, as well as being part of the employer's alleged harassment campaign against her. The days alleged were: March 1, 2, 3, and 5, May 12, and June 15. There were 161 working days during that period. Six days of no work amounted to four percent of the total. Four of the six days occurred in March. Three of the claimed days in March were for half days. There was no consistent pattern to the supposed lack of work.

An analysis of the days in question further disproves Jordan's claims. On March 1, Jordan met in the afternoon with her union business agent. On March 2, Runyon took sick leave. On March 3, Jordan was ill and had another meeting with her union business agent in the afternoon. There was no record for March 5, but on March 4 Jordan took part in a grievance mediation. Rather than showing a pattern of intentional withholding of work, the first work week in March was legitimately interrupted by a combination of illnesses and union meetings.

On May 11, Runyon asked Jordan if she needed work. Runyon stated that if Jordan needed work, that Runyon would find her an assignment. On May 12, Runyon went to a morning staff appreciation breakfast. Jordan forgot to attend. When Jordan told Runyon in the afternoon that she needed work, Runyon assigned her a project. On June 15, Jordan told Runyon she had no work. Runyon suggested she read some training manuals. Jordan later asked if she could attend a function for another employee at 2:30 pm. Runyon gave her permission to do so.

Runyon and Booth testified that the nature of the department's business was that there were down times, when projects did not come in. There were also hectic times when several jobs came in, some

with short turn-arounds. For portions of six days out of 161, Jordan had down times. When she told this to Runyon, Runyon attempted to find her work. Jordan failed to prove discrimination based on no work assigned.

#### Jordan felt blamed

Jordan alleged that Runyon and Booth blamed her for a mistake on a spring schedule publication. The schedule's cover featured a student standing against a background of the sky and a college building. The printer e-mailed Runyon stating that the color was distorted, with the sky and student's face unnatural colors, making the student look like an "alien or witch." Runyon, Booth, and Jordan were involved in resolving the issue and reached a quick solution. A review of the e-mail record revealed no evidence of blame assigned to Jordan, either directly or implicitly. Rather, the record showed that Jordan suggested ways to fix the problem, and that Runyon agreed with her ideas. The record demonstrated that Jordan received no blame for this incident.

#### Allegations of micro-managing

Jordan claimed that on two jobs, Runyon and Booth micro-managed her work. On one job, Jordan was tasked with preparing the artwork to advertise a Shakespearean play. Jordan submitted her design, but Booth disagreed with her concept. The customer, however, accepted Jordan's idea. The advertisement was produced using Jordan's design. Booth was a co-worker and had no control over Jordan's final product. The fact that Booth disagreed with Jordan on one occasion did not amount to discriminatory micro-managing.

On the second project, Jordan submitted a document to Runyon as an initial proof. Proofs were routinely submitted with stamps indicating whether the document was proof 1, 2, 3, etc. Jordan had used a new stamping method she learned about at a conference.

Runyon was unfamiliar with the method and was unsure whether the submitted document was the first or second proof. Runyon wanted to clarify the matter to make sure it did not reoccur. Jordan explained her purpose in using the new method. Runyon replied that she understood, but that nevertheless Jordan had caused confusion. Runyon did not reprimand or discipline Jordan as a result of this exchange. Runyon, as department manager, simply made clear her preference on proofing stamps. This was not discriminatory micro-management.

Allegation of disparate treatment

Jordan alleged that Runyon treated her differently than she treated Booth over Jordan's use of the new stamping method. Booth had used a new method of computer highlighting. Jordan asserted that Runyon did not challenge Booth over the new highlighting method, whereas Runyon made an issue out of Jordan's use of the new stamping method. However, Jordan also alleged that the disparate treatment arose because Runyon and Booth did not include Jordan in the decision to use the new highlighting method. Nothing in the record indicated that the highlighting method caused Runyon any concern. Thus, Runyon had no reason to discuss the highlighting method with Booth. As noted above, Runyon took no adverse job action against Jordan. Jordan's disparate treatment claim was confused and failed to establish discrimination.

Allegations of Jordan's work given to Booth

Jordan asserted that Runyon assigned Jordan's jobs to Booth on two occasions. Jordan stated that in March, Runyon had Booth do the layout and design on a project, with Jordan tasked only with digitally assembling it. The employer presented solid evidence that the customer, not Booth, had suggested the layout and design. Jordan also alleged that after telling Runyon she needed work on June 15, she discovered that Runyon had assigned design work to

Booth that day. Runyon and Booth testified that the job at issue required Booth to adapt schedules to some flyers. Booth had created the schedules and accomplished the task in twenty minutes. Both Runyon and Booth testified that neither of them are artists, and that they cannot do Jordan's work. Jordan's alleged lack of work on June 15 did not result from Booth's completing the flyers. Jordan failed to prove that Runyon discriminated against Jordan by assigning her work to Booth in either the March or June incidents.

Allegations of exclusion

Jordan claimed Runyon excluded her from decisions on three occasions: Kennedy's promotion, the use of Title III funds, and the development of a branding symbol for the employer. Branding referred to the employer's desire to develop a visual symbol that would immediately identify the employer, e.g., a logo.

Kennedy began work for the employer as an intern. In January 2004, she was promoted to a full-time staff position. Runyon and Kennedy testified that Jordan knew of this at the time. Jordan testified that she became aware of it in May 2004. Kennedy testified that Jordan congratulated her in January, but then confronted her over her promotion in May. Kennedy's testimony was more credible than Jordan's. However, even were that not the case, Jordan produced no evidence that she was entitled to that information. It is unclear how Jordan's knowledge, or lack of knowledge, of Kennedy's employment status affected Jordan's benefits, rights, status, or other working conditions.

Jordan alleged that Runyon did not inform her when using Title III monies to purchase office equipment. Runyon, Booth, and Kennedy convincingly testified that no Title III monies were used to purchase office equipment. Jordan received some of the new equipment. However, Jordan's claim was not about receipt of

equipment. Jordan's claim was that she was not included in the decision to purchase the equipment. Runyon, not Jordan, was responsible for department budget decisions. Jordan gave no evidence that she had a right to decide what equipment was or was not purchased.

The employer contracted with a company named Interact to develop its branding symbol. Runyon testified that Interact determined what it needed to complete the project and who among college staff it needed. Booth and Kennedy were only involved with logistical support. Runyon had more contact with Interact as the department manager. Interact did not consult with Jordan over the branding project. Jordan offered no proof that her exclusion was the result of the employer's decision, rather than Interact's.

The employer did not unlawfully exclude Jordan from meetings or projects and did not deprive her of ascertainable rights, benefits, or status.

Allegation of withheld compliment

Jordan charged that Runyon failed to pass on to her a customer's e-mail complimenting Jordan for her work on the customer's job. The customer addressed the e-mail to Jordan. Runyon stated that she did not see the e-mail until Jordan showed it to her. Runyon stated that she would place it in Jordan's personnel file should Jordan so request. Jordan had not made that request at the time of this unfair labor practice hearing. There was no harm to Jordan.

Cancelled union meetings

On three occasions in March, the employer cancelled meetings between Runyon, Jordan, and the WPEA business agent (March 17, 24, and 30). The originating incident for those meetings was the Latin text project given to Jordan earlier in the month. That job

involved producing a program for a choir concert. Runyon asked Jordan to work on the text. This was a task normally done by Booth, but Runyon told Jordan that Booth was overloaded with work and needed assistance.

The job involved working with Latin and placing accent marks in the text. Booth testified that Jordan did not do adequate work, and that Booth had to re-do and complete the project. Jordan's unfair labor practice complaint included the Latin text project as an incident of Runyon and Booth failing to fill out a blue form. However, the core problem in matter did not result from deficient blue form data. The main argument between Jordan and Booth was over the proper computer program the job required.

Runyon wrote an e-mail to Jordan and Booth stating that she had planned to relieve Booth's workload, but that her plan had "backfired." Runyon was disappointed that her intention of relieving Booth's workload had failed, but evidenced no displeasure with Jordan. Runyon did not admonish, counsel, or reprimand Jordan over this job. Runyon did not mention this matter in Jordan's December 2004 evaluation. Runyon eventually considered the matter resolved.

Runyon asked to meet with Jordan and Booth to find out what happened between them over the Latin text project. Runyon stated she was interested only in identifying the problem in order prevent similar occurrences. Jordan agreed to meet only if her union business agent could attend. Upon learning of Jordan's request, Booth agreed to meet only if Booth's union business agent could attend (Booth belonged to another union). Runyon cancelled the first meeting and deferred to her supervisor, Ellen Peres. Peres wanted to meet with the WPEA business agent first, since she had not met the agent before. Two more meetings were set, but the employer eventually cancelled those meetings as well.

Nothing in the record suggested that the employer intended the meetings as disciplinary. An employer may cancel such meetings without violating the provisions of *NLRB v. Weingarten*, 420 U.S. 251 (1975). See *University of Washington*, Decision 8794 (PSRA, 2004). In sum, the employer took no adverse job action against Jordan over the Latin text project. In declining to meet with Jordan and her union business agent, the employer did not commit an unfair labor practice.

Meeting with McGlaughlin

Jordan asserted that the employer discriminated against her during a meeting with the college president, James McGlaughlin, on April 1. Jordan was, at the time, secretary of the WPEA bargaining unit. She was also editor of the local union's newsletter. She and other union members, including the local's president, met with McGlaughlin and other administrators in a regularly scheduled labor-management meeting. McGlaughlin had seen a union newsletter publicizing the Commission's February 5, 2004, decision in Jordan's favor. McGlaughlin stated his concern that such material would make the employer look bad and professed his belief that everyone's job depended on the employer prospering. There was a dispute in the record as to whether McGlaughlin had seen the local union's newsletter, or the WPEA's statewide newsletter. Another area of disagreement in the record was McGlaughlin's exact wording and intent regarding potential job losses.

In any case, Jordan believed that McGlaughlin was reacting negatively not only to the Commission's decision and the union's publicity, but to her. She testified that she took the possible job loss reference as a threat against her. The employer asserted that McGlaughlin's only concern was that negative publicity hurt the employer, and that all jobs, including his, were at stake should the employer be harmed. In addition, the employer contended

that the remarks were made at a labor-management meeting, where the parties were encouraged to share concerns, implying that McGlaughlin's remarks should be protected.

Under a discrimination analysis, McGlaughlin's remarks, even taken in the worst light, do not meet the discrimination test. No action was taken against Jordan. She suffered no loss of ascertainable benefits, rights, or status.

Because McGlaughlin's remarks did not constitute discrimination, it is not necessary to reach conclusions about what he actually said, his intent, or whether his remarks were protected. Having failed to prove discrimination in this instance, Jordan cannot claim derivative interference by the employer due to McGlaughlin's statements. *Yakima School District*, Decision 8612.

#### Meeting with Peres

Jordan and her union business agent finally met with Peres and Runyon on April 7. According to the record, this was Jordan's first and only direct interaction with Peres during the time period pertinent to this unfair labor practice complaint. Jordan and the business agent testified that Peres was unfriendly toward them, especially toward Jordan. They stated that Peres seemed disinterested in, and even hostile to, Jordan's concerns. Jordan believed that Peres acted unprofessionally toward her. Jordan cites Peres' attitude as evidence of the employer's discrimination. Peres denied any bias toward Jordan. Peres testified that in the meeting the parties discussed mediating the issues between Jordan, Runyon, and Booth. Peres stated that she made it clear she was in favor of mediation.

Jordan had one encounter with Peres. There was disputed testimony over Peres' words and intentions. Peres took no job action against

Jordan. Jordan's evidence failed to show that Peres was part of the employer's alleged plan to discriminate against Jordan.

Jordan's complaint fails

Jordan's complaint arose from the employer's retaliatory attempt to deprive her of her full employment as a graphic artist by a reduction-in-force. *Community College 13 (Lower Columbia)*, Decision 8386. Jordan believed that the employer, through Runyon and Booth, discriminated against her for filing that charge. Jordan's theory was that Runyon and Booth wanted to disrupt Jordan's job performance in order to build a case against her and justify a performance based termination. Jordan also believed they wanted to drive her to a voluntary quit by using harassing techniques. Jordan described 33 incidents of alleged disruption or harassment over a seven month period. However, she did not prevail in any of the 33 instances. Of her 33 individual complaints of retaliation, 20 allegedly took place between February and April, while 13 allegedly happened between May and September. Thus, based on Jordan's own evidence, the level of alleged retaliation and harassment decreased after her April meetings with McGlaughlin and Peres. Under Jordan's theory of her case, the incidents of discrimination logically should have increased, not diminished with time.

Jordan produced few corroborating witnesses on her behalf. She did not call former or present co-workers or union members. The union business agent confirmed only Jordan's concerns about Peres' attitude. A customer testified that she liked to work with Jordan. The union president testified solely about the McGlaughlin meeting, and McGlaughlin's comments and demeanor. The testimony did not provide evidence of discrimination. The three witnesses and Jordan's testimony failed to prove the existence of a discrimination plot against her.

Runyon evaluated Jordan as organized, able to meet deadlines, and overall successful in her job performance. Both Runyon and Booth described Jordan as an excellent artist and the only person in the department capable of design work. Jordan failed to prove a conspiracy against her by Runyon and Booth.

Finally, a discrimination finding based on Jordan's evidence would require a reformulation of the discrimination standard. No longer would it entail an ascertainable loss of a benefit, right, or status. A potential loss would suffice. The definitions of benefit, right, and status would need to include such factors as freedom from emotional trauma, anxiety, pressures of work, and unpopular supervisors and coworkers. The examiner has no authority under statute or case law to make such changes in the legal standard for discrimination. The employer did not discriminate against Jordan, nor derivatively interfere with her rights, under RCW 41.56.140(3) and (1).

Cause of action

The Commission will not consider evidence or argument that does not apply to the cause of action specified in the preliminary ruling. *King County*, Decision 6994-B (PECB, 2002). Prior to the hearing, proposed amendments may be filed under WAC 391-45-070. After the hearing begins, amendments are allowed only upon a motion to conform the pleadings to the evidence received, without objection. WAC 391-45-070(2)(c); *City of Seattle*, Decision 8313-B (PECB, 2004). Interference claims alleged under RCW 41.56.140(1) must be asserted independently of discrimination claims proposed under RCW 41.56.140(3). *Yakima School District*, Decision 8612.

Jordan's cause of action was for employer discrimination for filing an unfair labor practice charge. In her closing brief, Jordan alleged an independent interference claim. No cause of action

existed for an independent interference claim. Jordan filed her unfair labor practice complaint using the standard Commission form. That form gives a complainant several options in charging alleged violations. For complaints against employers by employees, the options are: (1) employer interference with employee rights; (2) employer discrimination; (3) employer discrimination for filing charges; and (4) other unfair labor practice (which the complainant is asked to explain on an attached sheet of paper). Jordan indicated only that her claim was for "employer discrimination for filing charges." The preliminary ruling found that a cause of action existed for that claim, along with an automatic derivative interference claim. Jordan did not move to amend her complaint again prior to the hearing. At the hearing, Jordan did not move to amend her complaint to conform to the evidence. Accordingly, this examiner has considered evidence and argument related only to employer discrimination for filing charges under RCW 41.56.140(3).

FINDINGS OF FACT

1. Lower Columbia College is a public employer within the meaning of RCW 41.56.030(1).
2. Carole A. Jordan is a public employee within the meaning of RCW 41.56.030(2).
3. In 2002, Jordan filed an unfair labor practice complaint against the employer. She prevailed in February 2004. *Community College 13 (Lower Columbia)*, Decision 8386 (PSRA, 2004).
4. Jordan failed to show that on 12 occasions the employer unlawfully gave her incomplete information on jobs, gave her short deadlines on jobs, or withheld jobs.

5. Jordan failed to show that on six occasions the employer unlawfully did not assign her work.
6. Jordan failed to show that on one occasion the employer unlawfully blamed her for a mistake on a job.
7. Jordan failed to show that on two occasions the employer unlawfully micro-managed her work.
8. Jordan failed to show that on one occasion the employer unlawfully engaged in disparate treatment toward her.
9. Jordan failed to show that on two occasions the employer unlawfully transferred her work to another employee.
10. Jordan failed to show that on three occasions the employer unlawfully excluded her from decisions at work.
11. Jordan failed to show that on one occasion the employer unlawfully withheld a customer's compliment concerning Jordan.
12. Jordan failed to show that on three occasions the employer unlawfully cancelled meetings with Jordan and her union business agent.
13. Jordan's claims as detailed in Findings of Fact 4-12 failed to show that the employer deprived her of ascertainable rights, benefits, or status.
14. Jordan failed to show that, in a meeting on April 1, 2004, the employer's comments deprived Jordan of ascertainable rights, benefits, or status.

15. Jordan failed to show that, in a meeting on April 7, 2004, the employer's comments and demeanor toward Jordan deprived Jordan of ascertainable rights; benefits, or status.

CONCLUSIONS OF LAW

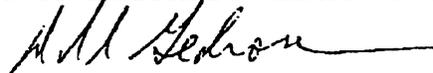
1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.
2. Based on Finding of Fact 3, Jordan engaged in protected activity under Chapter 41.56 RCW.
3. Based on Findings of Fact 4-15, the employer did not discriminate against Jordan for filing charges under RCW 41.56.140(3).
4. Based on Findings of Fact 4-15, and Conclusion of Law 3, the employer did not derivatively interfere with Jordan's collective bargaining rights under RCW 41.56.140(1).

ORDER

The complaint alleging unfair labor practices filed in case 18740-U-04-4764 is DISMISSED on the merits.

Issued at Olympia, Washington, on the 18<sup>th</sup> day of November, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



DAVID I. GEDROSE, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

# **APPENDIX C**

# Superior Court of the State of Washington For Thurston County

Paula Casey, Judge  
Department No. 1  
Richard A. Strophy, Judge  
Department No. 2  
Wm. Thomas McPhee, Judge  
Department No. 3  
Richard D. Hicks, Judge  
Department No. 4  
Christine A. Passeroy, Judge  
Department No. 5  
Gary R. Tabor, Judge  
Department No. 6  
Chels Wickham, Judge  
Department No. 7  
Anne Hirsch, Judge  
Department No. 8



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November 2, 2007

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Re: *Jordan v State of Washington*,  
Thurston County Superior Court No. 05-2-01016-6

Dear Counsel:

On August 11, 2006, after hearing argument on motion for summary judgment, this Court delivered an oral opinion granting the State's motion in some respects but deferring a ruling on collateral estoppel until after the Public Employment Relations Commission (PERC) decision became final.

Subsequently, Mr. Smith advised the Court that the PERC decision was now final. By letter dated August 31, 2007 this Court indicated it would issue a decision without further argument after submission of additional materials. Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment was filed September 20. Neither party requested further argument. The Court is now prepared to issue its decision.

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SUPERIOR COURT  
THURSTON COUNTY, WASH.  
07 NOV -2 PM 3:30  
RETTY J. GOULD, CLERK  
BY \_\_\_\_\_  
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November 2, 2007

Page 2

The primary case on point is Christensen v Grant County Hospital District No. 1, 152 Wn 2d 299, 96 P. 3d 957 (2004). That case also involved a prior PERC decision on issues common to the court and administrative proceedings. The Supreme Court said that

Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. [citation] It is distinguished from claim preclusion 'in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.'...

For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a 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 earlier proceeding; ... (4) application of collateral estoppel does not work an injustice against whom it is applied.... Three additional factors must be considered under Washington law before collateral estoppel may be applied to agency findings: (1) whether the agency acted within its competence; (2) the differences between procedures in the administrative and court procedures; and (3) public policy considerations." 152 Wn. 2d 299, 306-308.

In this case, the PERC examiner found (1) the use or non-use of blue publication request forms was not discriminatory; (2) Jordan failed to prove discrimination in the 12 projects cited by Jordan; (3) Jordan failed to prove discrimination based on no work assigned between February 5 and September 22, 2004; (4) Jordan failed to prove discrimination regarding her feeling blamed on a spring schedule publication; (5) no discrimination occurred as a result of micro-managing Jordan's work; (6) Jordan failed to prove disparate treatment between her and Booth; Jordan failed to prove assignment of work to Booth was discriminatory; (7) Jordan failed to prove she was discriminatorily excluded from decisions on three occasions; (8) Jordan failed to show harm to her from any failure to pass on a compliment to her; (9) the employer did not discriminate against Jordan during a meeting with the college president; and (10) Jordan failed to show that Peres was part of any discriminatory treatment by the employer. According to the Examiner, Jordan "did not prevail in any of the 33 ... complaints of retaliation." The findings adverse to Jordan are set forth in Findings of Fact 4- 15. Under Christensen, Jordan is barred from relitigating these facts if the 7 factors are present.

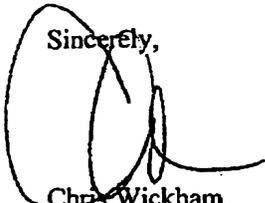
November 2, 2007  
Page 3

The issues of discrimination in the PERC proceeding are identical to the issues presented in this proceeding. The earlier proceeding ended in a judgment on the merits. Plaintiff in this proceeding was the plaintiff in the administrative proceeding. The application of collateral estoppel does not work an injustice. The PERC acted within its competence. There is no material difference between the administrative procedures and the procedures of this court. Public policy considerations do not prevent the application of collateral estoppel.

Accordingly, this Court will grant Defendant's motion to bar relitigation of all issues resolved adversely to Plaintiff before PERC. If Plaintiff can present evidence to show other bases of discrimination, her case can proceed without evidence of the acts alleged and ruled upon by PERC. If there is no other evidence, Defendant is entitled to summary judgment.

Counsel may contact my judicial assistant for a date to present an appropriate order on notice to the opposing party. At the hearing on presentation, the Court will hear argument as to whether there is additional evidence to permit the case to go forward. The parties should be prepared to present an appropriate order on that issue as well.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Wickham", written over a large, light-colored oval shape.

Chris Wickham  
Superior Court Judge

cc: Clerk, for filing

## **APPENDIX D**

07 NOV 30 P1 16

BEATTIE J. CLERK

BY \_\_\_\_\_ DEPUTY

1  EXPEDITE  
2  No Hearing Set  
3  Hearing is Set  
4 Date 11/30/07  
5 Time 11 00 AM  
6 The Honorable Chris Wickham

7 STATE OF WASHINGTON  
8 THURSTON COUNTY SUPERIOR COURT

9 CAROLE JORDAN,

10 Plaintiff,

11 vs

12 STATE OF WASHINGTON, d/b/a  
13 LOWER COLUMBIA COMMUNITY  
14 COLLEGE,

15 Defendant

NO 05-2-01016-6

ORDER GRANTING LOWER  
COLUMBIA COLLEGE'S MOTION  
FOR SUMMARY JUDGEMENT FOR  
COLLATERAL ESTOPPEL

16 This matter, having come duly and regularly before the undersigned Judge on Defendants'  
17 Motion for Summary Judgment and the Court having heard oral argument by counsel for the  
18 parties on August 11, 2006, and having deferred ruling on collateral estoppel until after the Public  
19 Employment Relations Commission (PERC) decision become final, and that decision now being  
20 final and the Court having considered the following

- 21 1 Motion for Summary Judgment,
- 22 2 Declaration of Aaron V. Rocke, with attachments,
- 23 3 Plaintiff's Response to Defendant's Motion for Summary Judgment for Collateral  
24 Estoppel,
- 25 4 Declaration of Carole Jordan in Response to Defendant's Motion for Summary  
26 Judgment for Collateral Estoppel,
- 5 Lower Columbia College's Reply Brief on Summary Judgment for Collateral  
Estoppel,

ORDER GRANTING LOWER COLUMBIA  
COLLEGE'S MOTION FOR SUMMARY  
JUDGEMENT FOR COLLATERAL  
ESTOPPEL-JORDAN

1

ATTORNEY GENERAL OF WASHINGTON  
Torts Division  
800 Fifth Avenue Suite 2000  
Seattle WA 98104-3188  
(206) 464-7352

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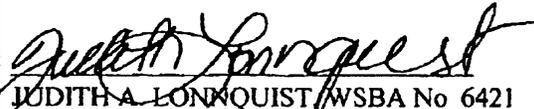
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Presented by  
ROBERT M MCKENNA  
Attorney General

  
\_\_\_\_\_  
NEWELL D SMITH, WSBA # 11974  
Assistant Attorney General  
Attorney for Defendant State of Washington

Approved as to form, and  
Notice of presentation waived by  
LAW OFFICES OF  
JUDITH A LONNQUIST, P S

  
\_\_\_\_\_  
JUDITH A LONNQUIST, WSBA No 6421  
Attorney for Plaintiff Jordan

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- 6 Letter of 8/15/07 from Defendant's counsel with PERC appeal decision attached,
- 7 Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment,
- 8 Second Declaration of Carole Jordan in Response to Defendant's Motion for Summary Judgment for Collateral Estoppel,
- 9 Letter ruling dated November 2, 2007

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment is GRANTED, and all claims against State of Washington, d/b/a Lower Columbia College are

dismissed with prejudice as to events and allegations occurring up to September 22, 2004. Facts alleged in Plaintiff's Second declaration dated September 17, 2007 are not subject to Res Judicata or Collateral Estoppel as to events occurring after September 22, 2004.

CW

CW

*[Handwritten initials]*

10 Defendant's Memorandum in Support of Proposed Order on Motion for Summary Judgment

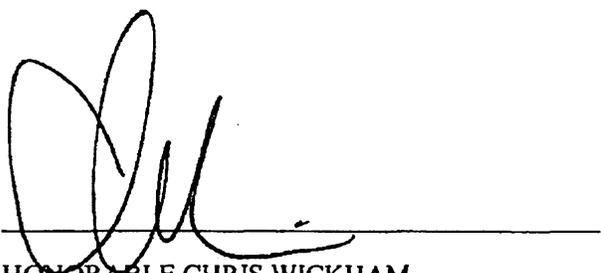
11 Declaration of N Smith and attachments

12 Plaintiff's Reply

13 Declaration of J Lennartz and attachments, and

14 Defendant's Reply in Support of Proposed Order

DONE IN OPEN COURT this 30 day of November, 2007



HONORABLE CHRIS WICKHAM

# **APPENDIX E**

Carole Jordan & Diane Plomedahl v. State

**Court:** Thurston Superior

**Case Number:** 08-2-00574-4

<b>Sub</b>	<b>Docket Date</b>	<b>Docket Code</b>	<b>Docket Description</b>	<b>Misc Info</b>
1	03-11-2008	CICS	Case Information Cover Sheet	
2	03-11-2008	\$FFR	Filing Fee Received	200.00
3	03-11-2008	NTAS ACTION	Notice Of Assignment Status Conference	06-13- 2008M7
4	03-11-2008	SM	Summons	
5	03-11-2008	CMP	Complaint	
6	03-14-2008	SM	Summons	
7	03-18-2008	NTAPR	Notice Of Appearance	
8	04-22-2008	AN	Answer	
9	06-13-2008	HCNTCC	Hearing Continued:calendar Conflict	06-17- 2008N7
10	06-20-2008	AFSR	Affidavit/dclr/cert Of Service	
11	06-20-2008	AFPRJ	Affidavit Of Prejudice Tabor	
12	06-23-2008	NTAS ACTION	Notice Of Assignment Status Conference	07-18- 2008M8
13	07-18-2008	STAHRG JDG0008	Status Conference / Hearing Judge Chris Wickham Cc Nastansky Cr Messing	
14	07-30-2008	ORSCS ACTION	Order Setting Case Schedule 8 Day Jury Trial	08-31- 2009J8
-	07-30-2008	NTC ACTION	Note For Calendar Pretrial Conference	08-21- 2009M8
15	08-04-2008	NTAB	Notice Of Absence/unavailability	

# **APPENDIX F**

➤ Only the Westlaw citation is currently available.

United States District Court,  
E.D. Washington.  
Bryan JACOBSON, Plaintiff,

v.

WASHINGTON STATE UNIVERSITY, a State  
agency, the State of Washington, and  
Steven J. Hansen, a married man and his marital  
community, Defendants.  
No. CV-05-0092-FVS.

Jan. 3, 2007.

Patrick Joseph Kirby, Dunn & Black PS, Spokane,  
WA, for Plaintiff.

Holly Ann Vance, Attorney General of Washington,  
Torts Division, Spokane, WA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN  
PART DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT

FRED VAN SICKLE, United States District Judge.

\*1 **THIS MATTER** came before the Court for a hearing on the Defendants' Motion for Summary Judgment, Ct. Rec. 10, on December 18, 2006. The Plaintiff was represented by Patrick J. Kirby. The Defendants were represented by Holly A. Vance.

**BACKGROUND**

The Plaintiff, Bryan Jacobson, began working for Defendant Washington State University ("WSU") on April 27, 1990. During the times relevant to this action, Jacobson was the only African American employed at WSU's Public Safety Department ("the Department"). In either 1999 or 2000, he was promoted to the position of Police Sergeant.

During his employment at WSU, Jacobson allegedly spoke out against what he perceived as racial hostility and discrimination in the Department. On July 18, 2000, Jacobson filed a law suit against WSU, alleging racial discrimination and retaliation in violation of the Washington Law Against Discrimination. The parties

settled the suit on March 13, 2001. The settlement agreement requires WSU to provide an additional 40 hours of training in law enforcement and diversity.

In November of 2000, WSU issued Jacobson an interest-free, non-revolving credit card. The card was to be used for work-related travel only. The parties dispute the point in time at which Jacobson became aware of this restriction. On December 9, 2003, J.P. Morgan Chase notified WSU that Jacobson's account was 90 days past due. An examination of Jacobson's account revealed that he had used his travel card for personal purchases totaling \$26,646.34. On June 7, 2004, Defendant Steven J. Hansen, the Chief of Police for WSU's Public Safety Department, discharged Jacobson on the grounds that he had used his travel card inappropriately.

Jacobson appealed his dismissal to the Personnel Appeals Board ("PAB"). The PAB held a hearing on May 17, 2005. During the proceedings, Jacobson argued that he was discharged in retaliation for his lawsuit against WSU and his subsequent attempt to enforce the settlement agreement. In support of his retaliation claim, Jacobson introduced evidence that persuaded the PAB that "there was uncertainty regarding the normal practice of WSU travel card use prior to 2003, and there was a common perception that it was acceptable to charge personal items on the cards as long as the balance was paid."

On July 8, 2005, the PAB issued its Findings of Fact, Conclusions of Law and Order of the Board. The PAB held that Jacobson's unauthorized use of his card constituted neglect of duty and willful violation of a published policy. The PAB also held that Jacobson had not committed malfeasance or gross misconduct. Based on these findings, the PAB concluded that the sanction of termination was too severe and modified Jacobson's sanction to demotion to the position of Police Officer.

In September of 2005, Chief Hansen took disciplinary measures against four other Department employees who had made personal purchases on their travel cards. Three employees received a reduction in pay for a number of months, while a fourth employee received a letter of reprimand. In September of 2006, Assistant

Chief Scott West also received a letter of reprimand.

\*2 On May 24, 2006, Jacobson filed the present suit, alleging six causes of action: 1) retaliation in violation of Washington's Law Against Discrimination ("LAD") and Title VII of the Civil Rights Act of 1964 ("Title VII"); 2) wrongful discharge in violation of public policy; 3) negligent retention and supervision; 4) negligent infliction of emotional distress; 5) outrage; and 6) a 42 U.S.C. § 1983 claim alleging deprivation of civil rights. The Plaintiff seeks to recover lost wages, special damages, general damages for emotional distress, his costs and attorney's fees, punitive damages, and prejudgment interest.

## DISCUSSION

### I. SUBJECT MATTER JURISDICTION

The Plaintiff alleges two federal causes of action and four state causes of action. The Plaintiff's federal claims arise under 42 U.S.C. § 2000e-3 and 42 U.S.C. § 1983. This Court has jurisdiction to hear these two claims pursuant to 28 U.S.C. § 1331.

The Court has discretion to exercise supplemental jurisdiction over the Plaintiff's four state law claims pursuant to 28 U.S.C. § 1367. Section 1367 provides that, when a federal district court has subject matter jurisdiction over a claim, the court may also grant "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." In this case, the Plaintiff's state law claims form part of the same case or controversy as the Plaintiff's Title VII and Section 1983 claims because all claims are based on the Plaintiff's discharge and the Defendants' treatment of other officers who similarly misused their travel cards.

### II. APPLICABLE LAW

A federal district court sitting in diversity must apply the substantive law of the forum state. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426-427, 116 S.Ct. 2211, 2219, 135 L.Ed.2d 659, 673 (1996); *Erickson v. Desert Palace, Inc.*, 942 F.2d 694, 695 (9th Cir.1991) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). A federal court exercising supplemental jurisdiction over a state

law claim must apply the law of the forum state just as it would if it were sitting in diversity. *Mangold v. California Pub. Utils. Comm'n*, 67 F.3d 1470 (9th Cir.1995). This Court accordingly applies Washington law to the Plaintiff's state law claims.

When called upon to determine the preclusive effect of a state administrative decision, federal district courts apply state law standards of res judicata. [FN1] *Northwest Sea Farms, Inc. v. United States Army Corps of Eng'rs*, 931 F.Supp. 1515, 1522 (W.D.Wash.1996). Federal courts give the factual findings of state agencies the same preclusive effect the findings would be given in the state's own courts when the agency, "acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 799, 106 S.Ct. 3220, 3226, 92 L.Ed.2d 635, 646 (1986) (internal quotation marks omitted); *Olson v. Morris*, 188 F.3d 1083, 1086 (9th Cir.1999). As a matter of federal common law, district courts also apply the law of preclusion articulated in *Elliot* to an administrative agency's legal conclusions. *Wherli v. County of Orange*, 175 F.3d 692, 694 (9th Cir.1999).

FN1. The term "res judicata" encompasses both the doctrine of claim preclusion and the doctrine of issue preclusion. *Christensen v. Grant County Hosp. Dist.*, 96 P.3d 957, 961 n. 3 (Wash.2004).

### III. SUMMARY JUDGMENT STANDARD

\*3 A moving party is entitled to summary judgment when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273-274 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir.1982).

Initially, the party moving for summary judgment bears the burden of showing that there are no issues of material fact for trial. *Celotex*, 477 U.S. at 317. Where the moving party does not bear the burden of proof at trial, it may satisfy this burden by pointing out that there is insufficient evidence to support the claims of

the nonmoving party. *Id.* at 325.

If the moving party satisfies its burden, the burden then shifts to the nonmoving party to show that there is an issue of material fact for trial. Fed.R.Civ.P. 56(e), Celotex, 477 U.S. at 324. There is no issue for trial "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Conclusory allegations alone will not suffice to create an issue of material fact. Hansen v. United States, 7 F.3d 137, 138 (9th Cir.1993). Rather, the non-moving party must present admissible evidence showing there is a genuine issue for trial. Fed. R. Civ. Fed. R Civ. P. 56(e); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir.1995).

#### V. RETALIATION UNDER THE LAW AGAINST DISCRIMINATION

In order to state a prima facie case of retaliatory discharge under Washington law, a plaintiff must establish three elements: 1) that he or she engaged in a protected activity; 2) that he or she was discharged; and 3) that "retaliation was a substantial factor behind the discharge." Vasquez v. State, 974 P.2d 348, 353 (Wash.Ct.App.1999); Hines v. Todd Pac. Shipyards Corp., 112 P.3d 522, 530-31 (Wash.Ct.App.2005).

The Plaintiff alleges that the Defendants terminated his employment in retaliation for the Plaintiff's complaints about WSU's treatment of minorities and the LAD suit he filed in 2000. Complaint ¶ 22. As evidence, the Plaintiff relies on his allegation that he was treated more harshly than the many other Department employees who used their cards for personal purchases.

The Defendants argue that the doctrine of collateral estoppel bars the Plaintiff's retaliation claims. Collateral estoppel, also referred to as "issue preclusion," bars the relitigation of a factual issue that has been previously decided in a proceeding between the same parties. Christensen, 96 P.3d at 960-61. Though frequently confused with the related doctrine of claim preclusion, collateral estoppel is distinct from claim preclusion in that it applies even where a new cause of action has been asserted in the later proceeding. *Id.*

\*4 Under Washington law, collateral estoppel applies when four elements are present. First, the issue decided in the earlier proceeding must be identical to the issue at stake in the later proceeding. Second, the earlier proceeding must have concluded with a judgment on the merits. Third, the party against whom collateral estoppel is asserted must have been a party to the earlier proceeding. Finally, the application of collateral estoppel must not work an injustice on the party against whom it is asserted. *Id.* at 961. The party asserting collateral estoppel bears the burden of proof. Smith v. State, 144 P.3d 331 (Wash.Ct.App.2006).

Collateral estoppel applies to factual findings made by state administrative agencies. Christensen, 96 P.3d at 961. Washington courts consider three additional factors before applying collateral estoppel to agency findings: first, whether the agency acted within its competence, second, the differences between procedures in the administrative proceeding and court procedures, and third, public policy considerations. *Id.* at 961-62.

According to the Defendants, all of the necessary factors are present in the Plaintiff's retaliation claim. First, according to the Defendants, the PAB determined that Jacobson was discharged because of his improper use of his government credit card. Second, the PAB decision resulted in a final determination on the merits. Third, Jacobson was a party to the PAB proceedings. Fourth, the Defendants argue that it would not be unfair to bar Jacobson's claims on the basis of collateral estoppel because he took full advantage of the procedures available in presenting his claim to the PAB. He also had the opportunity to appeal. The Defendants do not address the three additional factors that must be considered before administrative findings will be given preclusive effect.

The Plaintiff makes four arguments in support of his position that collateral estoppel does not bar his retaliation claim. First, the Plaintiff argues that the issues before the PAB and those before this Court are not identical. Second, the Plaintiff argues that applying collateral estoppel to his retaliation claim would work an injustice. Third, the Plaintiff argues that new evidence precludes the application of collateral estoppel to his retaliation claim. Fourth, the Plaintiff argues that the PAB was [FN2] not competent to decide his retaliation claim under the

LAD. The Plaintiff does not contest that Jacobson was a party to the PAB proceedings or that the PAB proceeding resulted in a final decision on the merits.

FN2. Since January 1, 2006, actions formerly appealed to the PAB have been appealed to the personnel resources board. 2006-03 Wash. Reg. 70 (Feb. 1 2006).

#### A. Identity of Issues

The Court finds that the issues before the PAB and this Court are identical. Jacobson presented his retaliation argument to the PAB and the PAB concluded "there is no evidence to substantiate Appellant's claim that he was treated differently." Def.'s Ex. 2 ¶ 2.20. Given that the Plaintiff relies upon this alleged disparate treatment to prove the third element of his retaliation claim, the PAB's finding is fatal to his retaliation claim.

\*5 Jacobson argued his retaliation claim at some length before the PAB. His retaliation claim was the central theme of Mr. Kirby's opening statement at the PAB hearing, as Mr. Kirby commenced and concluded his opening statement with the argument, "This case is simply about using a convenient opportunity to discharge a police officer who has exercised his civil rights." Def.'s Ex. 3 at 44. Through his cross examination of WSU witnesses, Jacobson sought to prove that many other employees similarly misused their travel cards and received less severe penalties. Jacobson questioned multiple witnesses about the use of travel cards by other officers for personal purchases, the Department's knowledge of this practice, and the disciplinary actions taken in response to travel card misuse by other officers. Def.'s Ex. 3 at 183-205, 317-339.

The PAB considered and rejected the evidence of disparate treatment. In its Order of July 8, 2005, the PAB noted that Jacobson, "raise[d] the argument of retaliation based on a lawsuit he filed against WSU for racial discrimination in 2000 because others who used their credit cards for personal purposes were not disciplined." Def.'s Ex. 2 ¶ 2.20. In its Findings of Fact, the PAB found the Plaintiff's argument was unsubstantiated by the evidence, explaining,

Appellant never provided Chief Hansen with any names of employees engaging in similar misconduct. Therefore, Chief Hansen did not have

direct knowledge regarding other employees' personal use at the time he imposed Appellant's disciplinary action.

*Id.*

#### B. Injustice

Under Washington law, "the injustice component is generally concerned with procedural, not substantive, irregularity." *Christensen*, 96 P.3d at 309. Thus, the application of collateral estoppel may result in injustice when the earlier proceeding was "an informal, expedited hearing with relaxed evidentiary standards." *Id.* The application of collateral estoppel may also be inappropriate where the relief available in the earlier proceeding was so disparate from that available in the present proceeding that "a party would be unlikely to have vigorously litigated the crucial issues in the first forum." *Id.*

The Court finds that applying collateral estoppel to the Plaintiff's retaliation claim would not work an injustice under Washington law. As the Defendants have observed, the Plaintiff enjoyed procedural protections in the PAB hearing that are similar to those available in a court proceeding. The Plaintiff was represented by counsel, introduced exhibits, presented testimony from witnesses, and cross-examined WSU's witnesses. The Plaintiff has not suggested that he lacked motivation to try his claims vigorously before the PAB and the almost five hundred pages of transcript of the hearing suggest that he did, in fact, pursue his claim vigorously.

The Plaintiff's argument that WSU presented false evidence to the PAB does not demonstrate unfairness. The Plaintiff is arguing, in essence, that the PAB erred in relying on WSU's evidence. As the Defendant observes, if the Plaintiff wished to relitigate the PAB's decision, he could have appealed the PAB's decision directly rather than bringing a separate action in this Court.

\*6 The Plaintiff's argument that the PAB did not address the knowledge of any officer other than Hansen is likewise unavailing. While the PAB cited Chief Hansen's lack of direct knowledge as the reason for its rejection of the Plaintiff's retaliation argument, Jacobson questioned other WSU officers about their knowledge of travel card misuse. Had the Plaintiff convinced the PAB that other WSU personnel were

aware of the widespread misuse of travel cards, the PAB's factual finding on the Plaintiff's retaliation argument would have been phrased differently.

### C. New Evidence of Disparate Treatment

Persuasive authority suggests that collateral estoppel does not apply to any claim based on facts that did not arise until after the initial proceeding. *Shaw v. Cal Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 606-607 (9th Cir.1986); *Gametech Internat'l, Inc., v. Trend Gaming Sys., LLC*, 264 F.Supp.2d 906, 911. Based on this authority, the Plaintiff argues that the disparity between his termination and the disciplinary measures imposed after the PAB hearing on five other employees constitutes new evidence that precludes application of collateral estoppel.

The Court does not find this argument persuasive. Neither of the decisions cited by the Plaintiff apply Washington law: *Shaw* applies California law, and *Gametech* applies Arizona law. In addition, the claims in *Shaw* and *Gametech* were both based on conduct that did not occur until after the termination of the prior proceeding. In contrast, the conduct underlying the Plaintiff's retaliation claim is his discharge. The allegedly disparate treatment of the Plaintiff is evidence presented for the purpose of illustrating the motive for his discharge. New evidence of disparate treatment is therefore just that: new evidence about conduct that has already been ruled upon. Most importantly, the transcript of the PAB hearing illustrates that the Plaintiff did present substantial evidence of disparate treatment to the PAB. The PAB was apparently unconvinced by the evidence, and it is not for this Court to question the PAB's finding.

### 4. PAB Competence to Determine Retaliation Issue

The PAB is generally competent to decide all employee defenses. The Washington Court of Appeals has held, "the PAB has authority to consider all defenses raised by an employee in an appeal of a disciplinary matter, so long as the appeal is properly before the PAB." *Goodman v. Employment Sec. Dep't*, 847 P.2d 29, 31 (Wash.Ct.App.1993). The Supreme Court of Washington more recently held that the Public Employment Relations Commission ("PERC"), the agency charged with resolving labor disputes, was "competent to decide factual issues raised in unfair

labor practices complaints, such as a claim of discharge in retaliation for engaging in union activity." *Christensen*, 96 P.3d at 968. By analogy, it appears that the PAB, as the agency formerly charged with hearing appeals from suspended employees, is competent to decide factual issues concerning "any properly supported defense that an employee asserts to a disciplinary action." *Goodman*, at 103-04. The Washington case law the Defendants rely upon does not refute this point, as it deals with the issue of claim preclusion rather than issue preclusion. See *Christensen*, 96 P.3d at 967-968.

\*7 Accordingly, the Court holds that the PAB's determinations have preclusive effect upon the Plaintiff's LAD claim.

### VII. RETALIATION UNDER TITLE VII

In order to state a prima facie case of retaliatory discharge under Title VII, a plaintiff must establish 1) that he or she engaged in a protective activity opposing an unlawful employment practice, 2) that he or she suffered an adverse employment action, and 3) the existence of "a causal link between the protected activity and the adverse action." *Raad v. Fairbanks N. Star Borough*, 323 F.3d 1185, 1196-97 (9th Cir.2003); *Fritag v. Ayers*, 468 F.3d 528, 541 (9th Cir.2006).

The Defendants argue that the Plaintiff's Title VII claim is unavailing for two reasons. First, the Defendants argue that the Title VII claim is barred by collateral estoppel for the same reasons that the LAD claim is barred. Second, the Defendants argue that the Plaintiff's protected activity occurred too long before his discharge to establish the necessary causal link. Noting that timing is an "important element" in assessing causation, the Defendants observe that the Plaintiff engaged in protected conduct by filing a lawsuit in 2000 and filing complaints with the Center for Human Rights ("CHR") in 1992 and 1998.

### A. Collateral Estoppel

Legislative intent may preclude the application of collateral estoppel to causes of action created by statute. *Christensen*, 96 P.3d at 964. This is the case with Title VII claims, as both the Supreme Court and the Ninth Circuit have held that unreviewed factual findings of administrative agencies do not have preclusive effect on court actions subsequently

brought under Title VII. Elliot, 478 U.S. at 795; McInnes v. California, 943 F.2d 1088, 1093-94 (9th Cir.1991). Accordingly, the Court holds that the Plaintiff's Title VII claim is not barred by collateral estoppel.

#### **B. Insufficient Evidence of Causal Nexus**

In order to state a prima facie case of retaliation under Title VII, an employee must prove the existence of a causal link between his protected activity and his or her discharge. Raad, 323 F.3d at 1196-97. An employee may satisfy the causal link element by introducing evidence of temporal proximity between protected conduct and discharge, evidence that the employer expressed opposition to employee speech, or evidence that the "employer's proffered explanations for the adverse employment action were false and pre-textual." *Id.* at 977.

The Defendants' suggestion that the length of time between the Plaintiff's protected conduct and his discharge creates a presumption against wrongful conduct is unpersuasive for two reasons. First, in the cases cited by the Defendants, the plaintiffs relied upon temporal proximity alone to establish causation. In the present case, the Plaintiff alleges that the more lenient disciplinary actions imposed on other employees who engaged in similar misconduct demonstrate that his discharge was retaliatory.

\*8 Second, the Defendants' argument presupposes that the passage of a certain amount of time negates the element of causation. The Ninth Circuit has expressly rejected this sort of bright line rule:

There is no set time beyond which acts cannot support an inference of retaliation, and there is no set time within which acts necessarily support an inference of retaliation. [ ... ] the length of time, considered without regard to its factual setting, is not enough by itself to justify a grant of summary judgment

Coszalter v. City of Salem, 320 F.3d 968, 978 (9th Cir.2003). The Plaintiff's Title VII claim therefore survives summary judgment.

#### **V. Wrongful Discharge**

In order to state a prima facie case of wrongful discharge in violation of public policy under Washington law, the Plaintiff must prove three

elements.

The plaintiff must prove (1) the existence of a clearly mandated public policy (the clarity element); (2) that discouraging the plaintiff's conduct would jeopardize that public policy (the jeopardy element); and (3) that the plaintiff's public policy-linked conduct was the reason for the dismissal (the causation element).

Gaspar v. Pschastin Hi-Up Growers, 129 P.3d 627, 630 (Wash.Ct.App.2006). See also Fosmo v. State Dept of Personnel, 59 P.2d 105, 107 (Wash.Ct.App.2002).

Collateral estoppel bars the Plaintiff's wrongful discharge claim. As with the Plaintiff's retaliation claim, the Plaintiff relies upon the more lenient treatment of other officers to prove the motive underlying his discharge. The PAB's determination that the Plaintiff was not treated differently precludes the Plaintiff from satisfying the causation element of his wrongful discharge claim.

The Court is not persuaded by the Plaintiff's argument that courts may not apply collateral estoppel to wrongful discharge claims based on findings of the PAB. In making this argument, the Plaintiff relies upon the Washington Court of Appeals' decision in Vargas v. State, 65 P.3d 330 (Wash.Ct.App.2003). The Supreme Court of Washington discredited the Vargas opinion in Christensen, explaining that the Varga s court confused the doctrine of issue preclusion with that of claim preclusion. An administrative agency may be incompetent to rule upon a common law tort claim and yet still be competent to decide a factual issue necessary to prove an element of that tort claim. 96 P.3d at 967 n. 11.

The Court holds that the PAB's determinations have preclusive effect upon the Plaintiff's wrongful discharge claim.

#### **VI. SECTION 1983**

Any person who deprives an American citizen of his or her civil rights under color of law may be held liable for injuries that result from the deprivation. 42 U.S.C. § 1983. The Plaintiff alleges that the Defendants deprived him of his First Amendment rights by discharging him in retaliation for "speaking out" against alleged racial hostility and discrimination within the Department and for filing the 2000 suit

under the LAD. In order to prevail upon this claim, the Plaintiff must prove that he engaged in protected speech, that the Defendants took an adverse employment action against him, and that his protected speech was a "substantial or motivating factor" for the adverse employment action. *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2004).

\*9 The Defendants argue that the Section 1983 claim should be dismissed for three reasons. First, the Defendants argue that they are absolutely immune to suit under Section 1983. Second, the Defendants argue that, even if Chief Hansen is not absolutely immune to suit, he is protected by qualified immunity. Finally, the Defendants argue that collateral estoppel bars the Section 1983 claim.

#### A. Absolute Immunity

Neither a state agency nor a state official acting in his or her official capacity is a "person" subject to a suit for damages under Section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 2308, 105 L.Ed.2d 45, 52 (1989); *Lapides v. Bd. of Regents*, 535 U.S. 613, 617, 122 S.Ct. 1640, 1642, 152 L.Ed. 806, 811 (2002); *Bank of Lake Tahoe v. Bank of America*, 318 F.3d 914, 918 (9th Cir.2003). Public universities, as state instrumentalities, are likewise immune to suit under Section 1983. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1442 (9th Cir.1989). While public officials enjoy immunity for actions taken in their official capacity, public officials sued in their individual capacities are persons subject to suit under Section 1983. *Hafer v. Melo*, 502 U.S. 21, 30, 112 S.Ct. 358, 363, 116 L.Ed.2d 301, 313 (1991).

Both the State of Washington and WSU are absolutely immune to the Plaintiff's Section 1983 claim. The Plaintiff acknowledges that WSU is a "state agency." The Plaintiff is seeking to recover only damages, rather than injunctive relief, from the State and WSU. The Plaintiff's Section 1983 claims against the State and WSU must accordingly be dismissed.

Chief Hansen, however, does not enjoy absolute immunity from suit under Section 1983 for actions taken in his individual capacity. The Defendants argue that Chief Hansen should be absolutely immune because, at all times relevant to this lawsuit, he was acting in his official capacity. However, the Supreme Court has explicitly rejected this argument,

explaining, "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Hafer*, 502 U.S. at 27. The Plaintiff in the present action has named Chief Hansen in his individual capacity. Chief Hansen therefore does not enjoy absolute immunity.

#### B. Qualified Immunity

Under the doctrine of qualified immunity, government officials are immune from civil liability for performing discretionary functions unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Morgan v. Morgensen*, 465 F.3d 1041, 1044 (9th Cir.2006)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396, 410 (1982)). Determining whether an official is entitled to qualified immunity entails a two step process. First, the Court must determine whether the facts alleged by the Plaintiff "show the officer's conduct violated a constitutional right[.]" *Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272, 281 (2001). Second, the Court must determine whether the right in question was clearly established such that a reasonable officer would know his or her conduct was unlawful. *Saucier*, 533 U.S. at 202; *Morgan*, 465 F.3d at 1044. The Plaintiff bears the burden of proving that the right was clearly established. *DiRuzza v. County of Tehama*, 206 F.3d 1304, 1313 (9th Cir.2000).

\*10 In this case, the Plaintiff alleges that Chief Hansen discharged him in retaliation for his First Amendment activities. The Defendants argue that Chief Hansen is entitled to qualified immunity because he considered a number of factors prior to discharging the Plaintiff and several other officers agreed with him that termination was the appropriate sanction for the Plaintiff's misuse of his travel card.

The Defendants misunderstand the standard for qualified immunity. On a motion for summary judgment, the Court must assume that all disputed facts will be resolved in favor of the nonmoving party. *Saucier*, 533 U.S. at 201-02. Assuming, as the Plaintiff alleges, that Chief Hansen discharged the Plaintiff in retaliation for his speech, this action would violate the Plaintiff's First Amendment rights. This

satisfies the first step noted above.

Turning to the second step of the inquiry, the right to be free from retaliation for First Amendment activities was clearly established at the time Chief Hansen discharged the Plaintiff. The Ninth Circuit has held, "as early as 1983, it could hardly be disputed that [ ... ] an individual had a clearly established right to be free of intentional retaliation by government officials based upon that individual's constitutionally protected expression." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1319 (9th Cir.1989). See also *DiRuzza*, 206 F.3d at 1313; *Hyland v. Wonder*, 117 F.3d 405, 410 (9th Cir.1997). Accordingly, Chief Hansen is not entitled to qualified immunity.

### C. Collateral Estoppel

In applying the doctrine of collateral estoppel, the Court considers whether the findings of the PAB preclude the Plaintiff from proving any of the required elements of his Section 1983 claim. The Plaintiff argues, and the Defendants do not dispute, that the Plaintiff's complaints about racial discrimination and his 2000 lawsuit under the LAD constitute protected speech. Nor have the Defendants disputed that discharging the Plaintiff constituted an adverse employment action. Rather, the Defendants' argument suggests that the PAB's findings preclude the Plaintiff from proving that his First Amendment activities were a substantial or motivating factor in his discharge.

The PAB premised its rejection of the Plaintiff's retaliation claim on its finding that the evidence did not support the Plaintiff's contention that he was treated differently from other employees who similarly misused their travel cards. While the Plaintiff has not explicitly indicated that his Section 1983 claim is premised upon such disparate treatment, he has made the same arguments concerning the application of collateral estoppel to his Section 1983 claim as he has for his retaliation and wrongful discharge claims, both of which rely upon the alleged disparate treatment. As the Plaintiff is precluded from arguing that he was treated differently from other employees, the PAB's ruling precludes him from satisfying the third element of his Section 1983 claim. The Section 1983 claim must accordingly be dismissed.

### VII. NEGLIGENT SUPERVISION AND

### RETENTION

\*11 An employer may be held liable for the negligent hiring, retention, or supervision of an employee when two elements are present. First, the plaintiff must show that the employer knew, or should have known by exercising ordinary care, that the employee was unfit. Second, the plaintiff must show that retaining or failing to supervise the employee was a proximate cause of the plaintiff's injuries. *Betty Y. v. Al-hellou*, 988 P.2d 1031, 1032-33 (Wash.Ct.App.1999); *Crisman v. Pierce County Fire Prot. Dist. No. 21*, 60 P.3d 652, 654 (2002).

The Plaintiff alleges that WSU was negligent in retaining and failing to investigate Chief Hansen. The Defendants argue that the Plaintiff's negligent retention and supervision claim is barred by collateral estoppel because the PAB found that Chief Hansen did not discharge the Plaintiff for a discriminatory purpose.

While the Defendants' argumentation on this point is far from clear, the Court finds that collateral estoppel bars the Plaintiff's negligent retention and supervision claim. As explained above, the Plaintiff must prove that Chief Hansen was somehow "unfit" for his position in order to state a claim of negligent retention and supervision. Given that the PAB's findings preclude the Plaintiff from arguing that Chief Hansen treated him differently from other employees, discharged him in retaliation for his First Amendment conduct, or discharged him in violation of public policy, there is no remaining basis for the Plaintiff's negligent supervision and retention claim. [FN3]

[FN3]. The considerations of legislative intent that exempt the Plaintiff's Title VII claim from the preclusive effects of the PAB's decision do not apply to a common law tort claim such as negligent retention and supervision.

### VIII. OUTRAGE

The tort of outrage, also referred to as "intentional infliction of emotional distress," has three elements in the state of Washington. *Orin v. Barclay*, 272 F.3d 1207, 1219 (9th Cir.2001). First, the plaintiff must demonstrate that the defendant engaged in "extreme and outrageous" conduct. Second, the plaintiff must

prove that the defendant intentionally or recklessly inflicted emotional distress on the plaintiff. Third, the plaintiff must prove that the defendant's actions actually resulted in "severe emotional distress." *Id.*

The Defendants argue that the Plaintiff's outrage claim should be dismissed for two reasons. First, the Defendants argue that the Plaintiff's outrage claim is duplicative of the Plaintiff's civil rights claims. Second, the Defendants' argue that the Plaintiff's outrage claim is barred by the doctrine of claim preclusion.

#### A. Duplication

A claim is duplicative and must be dismissed under Washington law when the plaintiff asserts the same factual basis for two claims. Washington courts have dismissed both negligent infliction of emotional distress and outrage claims as duplicative of discrimination claims. See *Francom v. Costco Wholesale Corp.*, 991 P.2d 1182, 1192 (Wash.Ct.App.2000)(dismissing negligent infliction of emotional distress claim as duplicative of LAD claim); *Anaya v. Graham*, 950 P.2d 16, 596 (Wash.Ct.App.1998)(dismissing outrage claim as duplicative).

\*12 The Court is not persuaded that the Plaintiff's outrage claim is duplicative of the Plaintiff's civil rights claims. As the Plaintiff argues, the outrage claim is based on a different set of facts from his retaliation and wrongful discharge claims. The Plaintiff's retaliation and wrongful discharge claims are based on the Defendants' decision to discharge the Plaintiff. In contrast, the Plaintiff's outrage claim is based upon the Defendants' alleged failure to investigate other employees. Dismissal of the Plaintiff's outrage claim on the basis of retaliation is therefore inappropriate.

#### B. Claim Preclusion

The doctrine of claim preclusion bars the relitigation of claims that were or should have been decided in a prior proceeding between the same parties. *Roberson v. Perez*, 123 P.3d 844, 848 (Wash.2005). Claim preclusion applies not only to claims that were actually litigated in a prior proceeding, but also claims that "could have been raised, and in the exercise of reasonable diligence should have been raised."

*DeYoung v. Cenex Ltd.*, 1 P.3d 587, 591 (Wash.Ct.App.2004). A claim is not barred by claim preclusion if it could not have been litigated earlier. *Kelly-Hansen v. Kelly-Hansen*, 941 P.2d 1108, 1113-1114 (Wash.Ct.App.1997).

The Defendants argue that the Plaintiff is barred from raising his emotional distress claims in the present suit because he could have raised them before the PAB. However, the Defendant has neither explained why, nor cited to any authority indicating, that the Plaintiff could have brought his emotional distress tort claims before the PAB. The purpose and responsibilities of the PAB suggest that it was not the appropriate forum for such tort claims. The purpose of the PAB was to "provide a system of adjudication of appeals for eligible state employees." Wash. Admin. Code 358-01-053. Its responsibilities included hearing appeals from state employees who had been "reduced, dismissed, suspended, or demoted." Wash. Admin. Code 35801-031. See also Wash. Rev.Code. § 41.06.170.

### X. NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS

The tort of negligent infliction of emotional distress has five elements in the state of Washington. First, the plaintiff must prove the four traditional elements of negligence: "duty, breach, proximate cause, and damage or injury." *Snyder v. Med. Serv. Corp.*, 35 P.3d 1158, 1163-64 (Wash.2001). In addition, the plaintiff's emotional distress must be "manifested by objective symptoms [ ... ] susceptible to medical diagnosis and proved through medical evidence." *Haubry v. Snow*, 31 P.3d 1168, 1193 (Wash.Ct.App.2001).

The Defendants argue that the Plaintiff's negligent infliction of emotional distress claims should be dismissed for two reasons. First, the Defendants argue that the negligent infliction of emotional distress claim is duplicative of the Plaintiff's discrimination claims. Second, the Defendants argue that the negligent infliction of emotional distress claim is premised upon facts that are not actionable in the state of Washington.

#### A. Duplication

\*13 The Court finds the Defendants' duplication argument no more persuasive when it is applied to the

Plaintiff's negligent infliction of emotional distress claim. As with outrage, the Plaintiff's negligent infliction of emotional distress claim is based upon the Defendants' alleged failure to investigate other employees rather than the Defendants' dismissal of the Plaintiff. Admittedly, the two sets of facts underlying the Plaintiff's emotional distress claims and discrimination claims are closely related. However, the Supreme Court of Washington has held that a negligent infliction of emotional distress claim is actionable despite being premised on facts closely intertwined with those underlying a discrimination claim in the same cause of action. See Chea v. Men's Warehouse, 85 Wash.App. 405, 407 (Wash.Ct.App.1997).

### B. Negligent Investigation

A claim for negligent infliction of emotional distress may only be premised on negligent investigation when the legislature has imposed a duty to investigate upon the defendant by statute. Pettis v. State, 990 P.2d 453, 456-57 (Wash.Ct.App.1999). Washington does not recognize the tort of negligent investigation outside the context of child abuse investigations. Donohue v. State, 142 P.3d 654, 667 n. 18 (Wash.Ct.App.2006). The Defendants accordingly had no general duty to investigate under the common law. See Pettis, 990 P.2d at 457.

As the Defendants have argued, the Plaintiff's negligent infliction of emotional distress claim is not actionable. The sole basis for the Plaintiff's negligent infliction of emotional distress claim is the Defendants' alleged failure to properly investigate other employees. Given that the Defendants had no duty to investigate their other employees, the Plaintiff can not satisfy the first element of a negligence claim. His infliction of emotional distress claim must therefore be dismissed.

### XI. LOST WAGES AS DAMAGES

The Defendants argue that the Plaintiff has no legal basis for seeking lost wages as damages in this lawsuit. According to the Defendants, it was the PAB and not WSU that ordered the Plaintiff's demotion. The Plaintiff's failure to appeal the PAB's decision should therefore preclude him from seeking lost wages from the Defendants. Laymon v. Wash. Dep't of Natural Res., 994 P.2d 232 (Wash.Ct.App.2000);

Chelan County v. Nykreim, 52 P.3d 1 (Wash.2002).

The Court is not persuaded by these arguments. In requesting lost wages, the Plaintiff is challenging not the PAB's decision to demote him, but the Defendants' failure to reinstate him following his demotion. The Ninth Circuit has expressly recognized "discriminatory failure to reinstate as a separately actionable claim" in the context of the Americans with Disabilities Act. Josephs v. Pac. Bell, 443 F.3d 1050, 1060 (9th Cir.2006). The authority from other circuits upon which the Ninth Circuit relied in reaching this conclusion deals with failure to reinstate under Title VII. See EEOC v. City of Norfolk Police Dep't, 45 F.3d 80 (4th Cir.1995); Samuels v. Raytheon Corp., 934 F.2d 388 (1st Cir.1991). The Defendant's allegedly discriminatory failure to reinstate the Plaintiff thus appears to be actionable.

\*14 The cases cited by the Defendants are inapplicable to the present case. Both Laymon and Chelan County address the necessity of exhausting administrative remedies prior to challenging the actions of a government agency in court. Laymon, 994 P.2d at 236; Chelan County, 52 P.3d at 17. The Defendants have not raised the issue of exhaustion of administrative remedies, and the Court declines to do so.

### CONCLUSION

The Plaintiff's Title VII and Outrage claims may proceed to trial. All other claims shall be dismissed. The Court being fully advised,

### IT IS HEREBY ORDERED:

1. The Defendants' Motion for Summary Judgment, Ct. Rec. 10, is **GRANTED IN PART AND DENIED IN PART**.
2. The Plaintiff's claim for Retaliation in violation of the Law Against Discrimination of the State of Washington, Wash. Rev.Code § 49.60.210 is **DISMISSED**.
3. The Plaintiff's second cause of action, Wrongful Discharge in Violation of Public Policy, is **DISMISSED**.

4. The Plaintiff's third cause of action, Negligent Retention and Supervision, is **DISMISSED**.

5. The Plaintiff's fourth cause of action, Emotional Distress, is **DISMISSED**.

6. The Plaintiff's sixth cause of action, Deprivation of Civil Rights, brought under 42 U.S.C. § 1983, is **DISMISSED**.

7. The Defendants' Motion for Summary Judgment, **Ct. Rec. 10**, is **DENIED** as to the Plaintiff's claim for Retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3 et seq., and the Plaintiff's fifth cause of action, Outrage.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

Not Reported in F.Supp.2d, 2007 WL 26765  
(E.D.Wash.)

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