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DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 287432

**STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III**

CHERYL BECKER,

Appellant,

v.

WASHINGTON STATE UNIVERSITY ET AL,

Respondents.

OPENING BRIEF OF BECKER

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I. STATEMENT OF THE CASE

In the fall of 2001, Cheryl Becker entered Washington State University's doctoral program in Experimental Psychology after an outstanding undergraduate and master's level education. She graduated Magna Cum Laude with a B.A. in Psychology in 1987 from the University of Wisconsin-Eau Claire. In 1998 she earned a Master of Science in Applied Psychology at the University of Wisconsin-Stout graduating with a 4.0 GPA. At Stout, she was hired as adjunct faculty, teaching at both the undergraduate and graduate levels (Becker Dep, CP 681; CP 271).

Becker entered WSU with a plan of study emphasizing cognition, specifically working memory. Social psychology was her secondary area. Becker applied to work with Department Chair Paul Whitney. Yet, over the course of three years, Cheryl Becker's research trajectory was halted multiple times and her academic career derailed as she was shifted from advisor to advisor and her preliminary examination schedule was delayed for reasons not of her choosing and outside of her control.

Ultimately, in the spring of 2005, her grade point plummeted as it was altered from 3.68 to 2.21 following WSU's arbitrary and capricious failure to use its standard placeholder practice regarding research credits (which differ from course credits) pending dissertation. As a result of the grade point

change, she was involuntarily terminated. WSU's accelerated action followed internal and external complaints of age discrimination and retaliation directed at the conduct of the Program's faculty and unaddressed by the administration of the Graduate School.

After hiring private counsel and a discrimination complaint failed to remedy her concerns, Becker brought this private action in Kittitas County Superior Court. In her complaint for damages, she raised concerns regarding the University's breach of its contractual obligations to her, negligent misrepresentations as well as its agents' discriminatory actions and violation of her constitutional rights (CP 1-28). Because the trial court erred in dismissing this suit before Becker had an opportunity to establish these claims to a jury of her peers, this Court must reverse and remand this case for trial.

II. SUMMARY OF ARGUMENT

"An academic dismissal from an institution of higher education can have a profound negative impact on the career and life of a student.... As such, all students....have a keen interest in ensuring they are not arbitrarily deprived of their hard-earned and costly education." See Joseph Flanders, *Academic Student Dismissals At Public Institutions Of Higher Education: When Is Academic Deference Not An Issue*, 34 J.C. & U.L. 19, 20 (2007). Here, the trial court erred in deferring to WSU's "failure to progress" defense

on its motion for summary judgment. Instead, CR 56 required it to construe all the evidence and inferences there in favor of Becker as the non-moving party.

Here, the record contains ample evidence from which a reasonable trier of fact or jury could find in Becker's favor. De novo review raises significant questions as to arbitrary and capricious actions by University officials, disregard for Becker's constitutional right to due process and statutory civil right to be free of age discrimination and unlawful retaliation when she complained. Equally important, the record reveals promissory statements in the University's publications and oral communications made by University agents that were breached and/or negligent and prevent summary disposition of her promissory estoppel, negligent misrepresentation and contractual claims. When there are clear questions as to the motives, good faith and arbitrariness of the WSU agents in taking these actions and failing to take others, this Court must reverse and remand this matter for a jury trial.

III. ASSIGNMENTS OF ERROR

1. The trial court erred under CR 56(c) when it failed to construe the evidence in favor of Becker as the non-moving party and reaching the conclusion that judgment was appropriate on each of Becker's causes of actions against WSU.
2. The trial court erred in not finding that Becker had produced evidence demonstrating genuine issues of material fact as to WSU's breaches of promises and representations made to Becker.

3. The trial court erred in not finding that Becker had produced evidence demonstrating genuine issues of material fact as to her detrimental reliance on negligent representations made to her by agents of WSU.
4. The trial court erred in not finding that Becker had produced evidence demonstrating genuine issues of material fact as to the motives of WSU agents in terminating her from the Experimental Psychology doctoral degree program and the Graduate School and otherwise retaliating against her following her complaints of age bias.
5. The trial court erred in not finding that Becker had produced evidence demonstrating genuine issue of material fact as to whether Becker was treated in a disparate manner from younger graduate students in WSU's Experimental Psychology in defendants' repeated reassignment of her to new program advisors and other actions that hampered her academic progress.
6. The trial court erred in not finding that Becker had produced evidence demonstrating genuine issues of material fact as to WSU's arbitrary and capricious actions in terminating her from the Experimental Psychology doctoral degree program and the Graduate School in violation of her 14th Amendment right to procedural and substantive due process in such deliberations.

IV. STATEMENT OF FACTS¹

A. Becker's Admission to WSU's Graduate School and PHD Program In Experimental Psychology and Her Reliance on Their Written Policies and Statements

Becker entered the Experimental Psychology Ph.D. program at WSU in the fall of 2001 (CP414; Becker Dec. CP681 ln. 16; Parks Dec. CP259 ln.

¹ References to sworn declaration and/or deposition testimony will be cited by declarant and Clerk's Paper reference, e.g. "Whitney Dep. CP ____."

12; Whitney Dec. CP235 ln. 4). She carefully read and relied on the promises set forth in its Graduate School Code (hereinafter “the Code”) (Becker Dep. CP100-101). These promises stated that graduate students at WSU have the right “[t]o be governed by clearly stated and justifiable academic procedures, rules, and regulations” and to be “protected from discrimination” (CP559 & 560). Also, graduate students should expect “[a] mentor [to be a] faculty person who assists scholarly development ... [and] will interact with them ... providing the guidance... necessary to complete their degree programs” (CP562). Becker also relied on the Psychology Department’s own Program Description promising that “the student can design a program of study that is suited to his/her particular interests and career objectives” (CP280) and its outline of preliminary examination process and committee responsibilities (CP285 & 286). She expected to receive, according to explicit Department and Graduate School Policy, substantive annual evaluations of her progress in “research, in relevant work assignments, and in general academic performance” (CP581, CP 552, #6.1). The Program Description notes that its “faculty are selective in the admissions process because it is their expectation that those students who enter the Ph.D. program will complete their degrees at WSU” (CP 281). Becker entered the program with a proven track record, eminently qualified to succeed, with a planned research trajectory and

expected that agents of WSU would honor their commitments to her (CP 920, Whitney Dec. CP235 Ins. 18-24, Becker Dec. CP681 Ins. 1-15, CP270-271).

B. Academic Year 1. Becker's 1st & 2nd semesters

1. Becker's T.A. and Research Responsibilities

Becker began her WSU career in the fall of 2001(CP414, Becker Dec. CP681 ln. 16). In her application, she identified her concentration area as cognition with social psychology as her secondary area (CP270). She intended to work with the Department's Chair, Paul Whitney, as she had been involved in research on factors influencing individual differences in working memory based on his research (CP270, Becker Dec. CP681 Ins. 1-4). In 1999, she met him at a national conference and again in 2000 (Becker Dep. CP103 Ins. 10-12, Whitney Dec. CP235 Ins. 22-24), as she co-authored a research poster presentation based on Whitney's research (Becker Dec. CP681 Ins. 13-15, see also CP269-271).

WSU's Psychology Department accepted Becker's master's thesis from another institution and therefore, at this level in her graduate studies, she should have been able to conduct research to lay the groundwork for her dissertation in her core area of training (CP293, Becker Dec. CP682 Ins. 25-28, CP278). This is referred to as "a program of research" or "a research trajectory" as the student, through independent and faculty-guided research,

builds on prior knowledge to prepare for the dissertation and future employment (Psychology Dept Policy, CP293, CP280).

In addition, graduate students must complete required coursework and reading, and pass their preliminary examinations (hereinafter “prelim exams”) prior to beginning their dissertation (CP285). As indicated, Becker was ready to progress toward taking these exams because she had a planned research trajectory upon her arrival to WSU (Whitney Dep. CP884 lns. 1-14 & CP 888 lns. 1-12). However, Whitney, (who also served as her advisor) was not interested in engaging Becker at this time (Whitney Dep. CP884 lns. 14-24, CP682 lns. 20-21, CP684 lns. 14-17). She was informed by Program Director Parks that the majority of her course work needed to be completed first (Becker Dep. CP86).

To take the prelim exams, students must have a committee consisting of four faculty members with relevant background in the student’s intended area of training (CP574). After the prelim exams are completed, the committee evolves into the dissertation committee and the student’s advisor continues as chairperson of the committees (CP574).

Anxious to get going so that she could complete her Ph.D. in a timely manner, Becker made request, early on, to carry out two studies related to Whitney’s expertise and consistent with her dissertation and employment

plans (Becker Dep. CP87, Becker Dec. CP681 Ins. 25-26). Whitney told Becker that there was no lab space available (Whitney Dep. CP884, CP681 Ins. 25-26) despite the fact that her research required little lab space (Becker Dep. CP87) and despite the Graduate Student Code's provision that students are provided with "[t]he best support systems [such as] laboratory space, [and] resources necessary for scholarship and research..." (CP558). Instead of providing lab space, Whitney requested Becker assist with a study on Parkinson's disease on which he was collaborating (Becker Dep. CP87; Whitney Dep. CP888). Becker became involved in multiple aspects of the project, coordinating and completing the control portion (CP353, Becker Dec. CP681 Ins. 20-22). Throughout Becker's first year and into the summer of 2002, she worked extensively on Whitney's Parkinson's project (Becker Dec. CP681 & CP353).

In her second semester, Becker was assigned to Robert Patterson as a Teaching Assistant (hereinafter "T.A.") (Parks Dec. CP261 Ins. 20-21). Patterson's research area, motion processing, was outside of Becker's intended training and future plans (CP 270, Becker Dec. CP 682 Ins. 1-3, CP353 Patterson evaluation). Nevertheless, Patterson had her conduct this research for him (CP353 where clear distinction is drawn between TA duties and research). The duties were more equivalent to a Research Assistant

(hereinafter “R.A.”) position (Graduate School Policy CP563, comparing TA & RA duties). Her required research duties were added to her existing T.A. duties (CP353). Although the expectations for research in Patterson’s lab were extensive, Becker did her best to accommodate his wishes (CP353 & CP356, Patterson evaluation).

At this time, Becker also enrolled in three graduate courses (CP414), continued her work on the Parkinson’s research (CP353, Whitney evaluation), completed her normal T.A. duties (CP353, Patterson evaluation), and worked for Lisa Fournier, another faculty member (CP 353, Patterson evaluation). Patterson shared Becker with Fournier as yet another part of her T.A. (Fournier Dep. CP254). Patterson and Fournier were collaborating on a project for which they had Becker create the stimulus (CP353, Patterson evaluation, Fournier Dep. CP892 ln. 9, Fournier Dep. CP894 ln. 12). To do so, Becker devoted multiple nights and weekends, and accomplished the task efficiently (Fournier Dep. CP892-894, CP635, Fournier Dep. CP894 Ins. 13-15, Becker Dec. CP614 Ins. 3-8). Conducting research activities outside of Becker’s area precluded her from conducting her own research because she was required to devote such a significant amount of time to Patterson and Fournier’s research, (CP353, Patterson evaluation, Becker Dec. CP 614 Ins. 25-31), and she still had not been provided lab space (Whitney Dep. CP884).

T.A. positions require students to perform duties such as grading, recording grades, teaching statistics or research methods labs, classroom set up, reviewing undergraduate course work, and holding group study sessions. (Graduate School Policy CP563, cf. CP353 & 356, Patterson evaluation where clear distinction is drawn between TA assignment and research). R.A. positions require students to perform distinctly different duties such as creating stimuli (sometimes programming it), protocol decisions and project design, preparing measures, scheduling, data collection entry, and analysis, and often supervising undergraduates (CP563). Graduate students are required to fulfill their T.A. duties as part of their stipend, but are encouraged, supported, and expected to devote the majority of their remaining non-classroom time to research in their area of training (trajectory) (Psychology Dept Policy CP293, especially “The most apparent implication of this policy for students in experimental psychology is that they will be involved in research as soon as they enter the program. This may involve participating in already existing research projects, developing their own research interests in collaboration with appropriate faculty, beginning work on a master’s thesis, or some other involvement, depending on the student’s needs, goals, previous experience, and other circumstances [emphasis added] CP280).

In contrast, Becker's T.A. duties included R.A. duties that were for the benefit of faculty research goals in areas far outside of her own training area (CP270, CP353) and for no additional pay. This research did not facilitate her progress or further her research trajectory (Becker Dec. CP682 lns. 28-34, in contrast to policy prohibiting exploitation in CP562 #9, CP 560 #13). Yet, everyone was very pleased with her work (CP353).

Because of her time constraints, Becker asked Parks (CP600 lns. 9-13) and Whitney (CP 600 lns. 5-9) for help. She needed time to do her own research (CP293, Becker Dec. CP614, lns. 21-31). Although the Psychology Department promised her that students "can design a program of study" (CP280), both Whitney and Parks told Becker that there would be no changes, and required her to continue doing as she was directed (CP600).

Parks' and Whitney's decision slowed Becker's progress toward her doctoral degree (Becker Dec. CP682 lns. 20-25 & 32-34). According to the Graduate Student Code, students are expressly "[t]o be protected from exploitation..." (CP560). In fact, it guarantees that "[g]raduate students should expect that advisors and mentors will... *[a]ssiduously* avoid impeding a graduate student's progress toward a degree because of benefit from the student's proficiency as a teaching or research assistant" (CP562). Becker had managed extreme time demands in the past, (CP 353, Whitney Dec. CP235

lns. 18-21 & CP920) but the lack of available lab space, along with the extensive work requirements, left her little opportunity or time to dedicate to her own area as the other students in the program were encouraged to do (Becker Dep. CP110 lns. 1-23, CP598). This action also violated promises made to Becker upon admission (CP280). Moreover, Becker could not engage Whitney's interest in advising her (Becker Dec. CP616 lns. 12-15) even though the Code indicates that "[d]epartments and programs are responsible for encouraging effective mentoring... during the course of [a student's]... graduate studies" (CP562).

2. Academic Year 1, Annual Student Review

Becker's first year review was not what she was promised (CP581 sec. C) or expected (Parks Dec. CP263 ln. 1). The annual reviews consisted of two completely separate documents (CP352). One section is signed and placed in a student's permanent file (CP352). The second section is a sheet of comments given by faculty identified by students as able to speak about their performance and progress that year (Parks Dec. CP262, 265). The comment section is not placed in the student's permanent file (CP352, distinction drawn between this evaluation for the student file and the faculty comment section, CP921, CP362, CP359, CP355).

According to policy, student reviews should include an evaluation of academic progress, research, and special work assignments (CP581). Other elements include a “[s]tatement as to the rate of progress, i.e., satisfactory or unsatisfactory” (CP552). Students are “to be provided with annual good-faith and unbiased evaluations of progress toward degrees” (CP559, #11). Becker’s first review contained no mention, evaluation or any feedback of her work in the section of the review placed in her permanent file (CP352). No statement was made concerning her progress (CP352). However, the faculty comments in the second section not placed in the file were uniformly favorable (CP352-353).

3. The Fournier Project

Toward the end of the spring 2002 semester, Lisa Fournier asked that Becker work with her as an R.A. on an interdisciplinary project (Fournier Dep. CP895 Ins. 1-5) for which she promised Becker professional benefits (Fournier Dep. CP896 Ins. 10-14, Fournier Dep. CP 897 Ins. 1-7). Because Fournier’s area was visual attention (Fournier Dec. CP253), Becker was hesitant at first (Becker Dec. CP684 ln. 3). However, Fournier told her the project had a working memory element (Fournier Dec. CP254 ln. 14-CP255 ln. 8) and she promised Becker a lead role on publications from this part of the project (Fournier Dep. CP896 Ins. 12-14, Fournier Dep. CP897 ln. 22- CP 898

ln. 13). Becker reasoned that it would be productive because she would receive the tangible benefits of publications in her training area, working memory (Fournier Dep. CP898 & CP270) while she waited for Whitney's active mentorship (Becker Dec. CP683 lns. 25-26). Because of her excitement about this opportunity (Whitney Dec. CP236), Becker immediately began an extensive literature search in late spring and summer (Fournier Dep. CP899-900) even though the project did not officially begin until fall 2002.

C. Academic Year 2 (3rd & 4th semesters)

In fall 2002 Becker worked on the Fournier R.A. project (Fournier Dec. CP254 lns. 4-5). However, Becker was also required to continue the motion processing project on which Patterson and Fournier were collaborating (CP356 Patterson evaluation). Even though Graduate School Policy states that "salaries for graduate assistants are negotiable," (CP 324, 2.7.3 ln. 1) her pay remained the same despite the double load. The extra requirements, again, took Becker's time away from her own program of study. Normally, graduate students carry out faculty-generated R.A. research with any additional research time allocated to their own area, and thus progress toward their Ph.D. (WSU Graduate School Policies and Procedures CP560 #13, CP562 #9, CP356).

In fall 2002 Fournier approached Becker about becoming her advisor instead of Whitney (Fournier Dep. CP895-896). Becker preferred Whitney because his area of specialization coincided with hers (CP270). According to Graduate School policy, she expected him to “interact with [her]... providing the guidance... necessary to complete [her] degree program...” (CP562). However, Becker still could not engage Whitney’s attention on her progress (Becker Dep. CP87 Ins. 5-8, Becker Dec. CP684 Ins. 15-18).

Before Thanksgiving 2002, Fournier suggested that Becker make the working memory portion of the R.A. project the basis for her prelim exams (Fournier Dep. CP505 ln. 1-CP507 ln. 14, Becker Dec. CP684 Ins. 19-26). Fournier would then become chair of Becker’s prelim exam committee and her advisor (Fournier Dec. CP254, Fournier Dep. 896). In light of Whitney’s indifference (Becker Dec. CP684 Ins. 14-22), Fournier’s offer was inviting (Becker Dec. CP684 Ins. 2-6 & 15-18). Becker relied (Becker Dec. CP684 ln. 34- CP685 ln. 5) on Fournier’s promises that this opportunity would permit her to progress towards her intended area of expertise and towards completion of her Ph.D. (Fournier Dep. CP896-897). After Thanksgiving break, Becker agreed to change advisors (Fournier Dec. CP254 ln. 25). Whitney gave his consent, and revealed that he would be on sabbatical (Becker Dec. CP684 ln. 22, CP190, CP 236 ln. 6). In December 2002, Fournier became Becker’s new

advisor and prelim committee chair (Becker Dec. CP684 Ins. 23-24). Becker immediately began putting together her committee (Becker Dec. CP 684 Ins. 23-26).

Without warning, in December 2002, Fournier told Becker that she was on a thesis committee for a master's degree student from Food Sciences also involved in the interdisciplinary study (Fournier Dec. CP255, Fournier Dep. CP901-902). Fournier said the student had expressed an interest in cognition, and that Becker's portion of the project would now become the basis for the younger (CP601) student's thesis (Becker Dep. CP89 Ins. 16-21, Fournier Dep. CP511 ln. 23- CP512 ln. 2). Also, that other student would now have the lead on any publications (Becker Dep. CP818). Fournier told Becker that the other study anticipated to serve as a segue to Becker's doctoral dissertation would also no longer be available (Becker Dep. CP88 ln. 15- CP90 ln. 4).

Fournier explained that her colleague, Professor Beerman in Food Sciences, wanted her student to base her master's thesis (Becker Dep. CP818 Ins. 8-12) on the project's cognitive portion (Fournier Dep. CP902) even though Becker had already been working on it for a period of eight months. Fournier knew that her promises to Becker had been the impetus for Becker's advisor switch from Whitney to her (Fournier Dep. CP254 Ins. 20-26,

Fournier Dep. CP 896 Ins. 17-23, Becker Dec. CP685 Ins. 8-9). Although Fournier apologized for her naiveté (Fournier Dep. CP901 Ins. 11-14), Becker was devastated (Becker Dec. CP685 Ins. 2-4, Fournier Dep. CP903 Ins. 9-13) WSU's Graduate Student Code provides that "students should expect that advisors and mentors will... [d]iscuss laboratory ... authorship policy ... in advance of entering into collaborative projects" (CP562 #5). In fact, WSU's policy stated that departments and programs are to "[h]ave a written policy to guide collaborative projects and authorship" (CP561).

After devoting eight months of work on this project, the whole rationale for changing advisors evaporated (Becker Dec. CP685). Moreover, Fournier did not advise Becker on alternatives that might ameliorate or remedy the delay caused by the situation (Becker Dec. CP685 Ins. 17-24). Rather, Fournier told Becker she was required to continue work on the R.A. project just the same (Becker Dec. CP685 Ins. 25-26). WSU policy clearly states that students are "[t]o be protected from exploitation such as delay of a graduate student's progress..." (CP560, #13). Despite her reliance on Fournier, Becker was left with nothing to go on for her program plan which was due into the Graduate School at the end of December 2002 (Becker Dep. CP93, CP244).

It appeared Becker could not obtain a concentration in cognition at WSU (Becker Dep. CP94 lns. 10-14) so she turned to her secondary training area, ---social psychology (CP270, Becker Dec. CP686 lns. 1-2). Parks strongly suggested (Becker Dep. CP94 lns. 18-19) that Jeff Joireman, a new faculty member in social psychology (Joireman Dec. CP151, Becker Dec. CP686 lns. 3-8), become Becker's advisor. Joireman recruited (Becker Dep. CP94 lns. 15-18, CP244) Becker and made many promises of benefits that would flow from Becker's association with him. For instance, he promised co-authorship on a review paper if he were to become her advisor (Joireman Dec. CP152 ln. 25-CP153 ln. 3, CP166 [May 1 2003 email], CP209, Becker Dep. CP618 lns. 9-11). He promised that he would be supportive of Becker's wish to take her preliminary exams and to progress (CP601, Becker Dec. CP618 lns. 13-16, Joireman Dec. CP153 lns. 9-10). He became Becker's advisor and she quickly configured her program plan and committee by the end of December 2002 (CP163).

Despite the fact that Joireman was her new advisor, Becker continued to be assigned to Fournier as her R.A. until August 2003 (CP601). At the start of the spring 2003 semester, Becker respectfully explained to Fournier why it no longer made sense for her to work on the project (CP601). Becker also offered to help Fournier make the transition (Becker Dec. CP686 lns.32-33)

but Fournier insisted that Becker had no choice but to continue working on the project just the same (Becker Dep. CP88 lns. 4-5, Becker Dec. CP686 lns. 33-34). Anxious to get into a situation in which she could progress in the program, Becker wrote to the interim Chair (Whitney was on sabbatical) asking for reassignment and eventually was assigned to Robert Patterson as a T.A. for the spring 2003 semester (Parks Dec. CP261 lns. 20-21, Becker Dec. CP687 lns. 3-4).

For Patterson, Becker taught five statistics labs and did other typical T.A. duties (CP601, Becker Dec. CP687 lns. 4-7). Although she later learned that teaching more than two was considered an overload and a basis for more pay, no one informed Becker of this policy at the time (CP602, Graduate School Policy CP324 2.7.3). With the same compensation, she continued to function as an R.A. along with her already overloaded T.A. duties; as a result, she was expected to work in excess of the customary T.A. hours of 20 hours weekly (Becker Dep. CP721 ln. 24- CP722 ln. 6, Parks Dec. CP 261, CP356, Becker Dec. CP687). Consequently, again, no time was allocated for Becker to work in her own area during spring 2003 because of Patterson's motion processing lab assignment (CP601). Concerned, Becker told Parks that she needed to be assigned to her new advisor (Joireman) as a T.A. for the next semester (Becker Dec. CP687 lns. 15-17), fall 2003, and further noted that she

needed to be allowed the opportunity to make progress on her own research area and toward her degree (Becker Dec. CP687 lns. 19-21). Parks finally agreed (Becker Dec. CP687 lns. 23-24).

During that same spring semester (2003), Joireman, contrary to Becker's desires, indicated he wanted to reconfigure Becker's prelim exam committee (Joireman Dec. CP153 lns. 11-12). Becker feared that reconfiguring her committee would further slow her progress and clearly stated her desire to leave the committee "as is" (CP166 [4/30/2003 email]). However, it continued to come up (Becker Dec. CP687 ln. 32-CP688 ln. 2, CP168 [5/21/2003 email], CP170 [6/11/2003 email]). Becker ultimately agreed to Joireman's proposal (CP170 [6/11/2003 10:16 AM email], CP246 & Becker Dec. CP687 ln. 32-CP688 ln. 2) but she asked that Tahira Probst, remain on her committee (CP163 doctoral committee) as the prelim section with Probst was essential to her professional research plans (CP161 [12/17/2002 2:20 PM email]).

At the end of the spring 2003 semester, Becker received her second annual student review (CP355-356). Once again the review section placed in her permanent file failed to record or to evaluate her work or academic performance (CP355). It did not state whether her progress was "satisfactory" or "unsatisfactory" (CP581). Instead, it implied that her changes in advisors

might mean that she “and [the] program are a mis-fit” (CP355). As indicated above, the advisor changes were beyond Becker’s control (CP598, Becker Dec. CP686 Ins. 3-8). Penalizing Becker was also contrary to Graduate School policy that stated “[s]tudents may ... change mentors at any time, without fear of reprisal” (CP562). Again, all the faculty comments were positive on the review’s second section which was not placed in the permanent file (CP356).

In the summer of 2003, Joireman reconfigured Becker’s prelim exam committee (CP174 [6/24/2003 8:45 AM email], Joireman Dec. CP153 Ins. 11-14). Joireman was the committee chair (CP176). The other members were Tahira Probst, Paul Strand, and Tom Brigham (CP176). Only Probst remained from Becker’s previous committee (Joireman Dec. CP153 Ins. 16-17, cf. CP163). Becker began working with Strand via email during the summer of 2003 as neither he nor Probst were located at the Pullman campus (Becker Dec. CP688 & CP128-130). Brigham gave Becker prelim exam materials during the fall 2003 semester (CP127, Becker Dec. CP688 In. 10). At first, Becker was to write a paper for her prelim exam section with Joireman but that was changed to an exam (Becker Dec. CP688). Becker received Joireman’s reading list of materials to study for her prelim exam on December 18, 2003 (CP924, Joireman Dec. CP154 & Becker Dec. CP689).

D. Academic Year 3 (5th & 6th semesters)

Becker immediately met with another unexpected requirement at the start of the fall of 2003 semester. Although Becker was assigned to Joireman for her T.A. that fall, Joireman wanted to provide a younger graduate student (CP602) more time to pursue her academic goals (Becker Dep. CP109 ln. 23-CP110 ln. 3). To do this, he directed Becker to perform a portion of that other student's T.A. work (Becker Dep. CP 109 ln. 21-CP110 ln. 11, CP602 lns. 9-11). Becker performed this added responsibility throughout the fall 2003 semester in addition to her own T.A. duties (Becker Dep. CP109-110). That fall (2003) Becker also contributed to a review article (CP 209), and collaboratively submitted a study proposal with Joireman to WSU's Institutional Review Board (IRB) which was quickly approved (Becker Dec. CP688). This study was the first of a series that Becker intended as a new, 3rd, research trajectory (in the area of self-regulation) (Joireman Dec. CP152 lns. 10-11, Becker Dep. CP111, lns. 18-19, Becker Dec. CP688 lns. 26-27). That semester, Joireman also asked Becker to carry out a complicated, multi-phase, study in a different area- aggression (Becker Dec. CP689). The aggression study was to supply support for Joireman's application for an outside grant (Becker Dec. CP689 lns. 1-2 & 26-27, CP208).

Although Becker completed the aggression study, many difficulties arose during the spring 2004 semester (Becker Dec. CP690-695 passim). In late January, Becker inadvertently discovered that the project submitted to the IRB the previous fall 2003 semester was moving forward without her (Becker Dec. CP690 lns. 25-30). According to the graduate school, “advisors and mentors will ... [d]iscuss laboratory...authorship policy with graduate students in advance of entering into collaborative projects” (CP562, #5, CP561, #7). Becker politely asked why the project was moving on without her (Becker Dec. CP690 lns. 27-30). Instead of an explanation of any change in her role, Joireman loudly and angrily informed her that it was none of her business (CP 603). According to WSU policy, mentors are to “interact in a professional and civil manner” (CP562). Becker experienced Joireman’s conduct as abusive, degrading and embarrassing (CP604, Becker Dec. CP 690 ln. 27-CP691 ln. 17). In the comment section of her last annual student review, Joireman had previously stated that she was a “model student” and an “excellent student” (CP356) but without any reason, things apparently had inexplicably changed.

In the midst of this situation, Becker submitted the aggression research project she completed in the fall 2003 to the American Psychological Society (CP211). It was accepted for a May 2004 poster presentation (Becker Dec.

CP690 Ins. 4-5, CP360 Joireman evaluation, CP211). Becker also presented a paper on a panel at a national conference in April 2004 (CP209 Ins. 7-10, Becker Dec. 690 In. 6), drawing from her prelim exam section materials with Tahira Probst (CP209 In. 10, CP161 [12/17/2002 2:20 PM email]). Becker also did planning with the materials and the design for the multi-phase aggression study that Joireman asked her to carry out that spring 2004 semester (CP360 Joireman evaluation, Becker Dec. CP689 Ins. 1-5 & 26-30). Joireman wanted this follow-up because the fall 2003 project Becker carried out had turned out well (Becker Dec. CP689 Ins. 24-26). Becker coordinated, trained, scheduled, and supervised other students involved in the study. She also collected data and held meetings (Becker Dec. CP692 Ins. 30-33). In addition, she continued to prepare for her prelim exams (CP187).

Hoping to take her prelim exams during the spring 2004 semester, Becker tried to coordinate her time on the follow-up project with Joireman (Becker Dec. CP689 Ins. 32-34). While he initially made some concessions, the project became his focus for her time (Becker Dec. CP689-690) and it became apparent to Becker that she had to postpone her prelims until the fall of 2004 (CP 187, Becker Dec. CP 690). Having been previously advised by Parks that students have twelve months to prepare after receiving their last prelim exam reading list to take the exam itself, Becker understood that it

would not be a problem to postpone (Becker Dec. 690 Ins. 12-16). Becker herself was disappointed to have to wait as she was anxious to progress toward her degree (Becker Dec. CP689 Ins. 12-14 & 22-24). To date, no one had been concerned with her progress or time (Becker Dec. CP691 Ins. 23-25). Nevertheless, she wrote Parks a note about her decision and copied Joireman (CP187). Much to her dismay, about a week or so after Becker copied the note to Joireman, he told Becker that she was an “awful student” and that she would still have to take her prelim exams by the end of the spring 2004 semester (CP603, CP925). Angrily, he indicated that he was prepared to immediately drop her from the program, but would think about it for two days (CP603-604, CP925).

Becker was stunned and terrified (CP604, Becker Dec. CP691 Ins. 14-21). According to Graduate School policy “[g]raduate students at WSU shall ... [expect] that departments and program... [e]stablish criteria for termination” and provide this information directly to all students (CP561 #4). Had Becker been informed of any termination procedure as the Graduate Student Code required, she would have known that Joireman did not have the authority to act as he’d threatened (CP561 #4). Instead, devastated by the news, she wrote asking for the forms necessary to take a leave of absence (Becker Dec. CP691). Whitney talked her out of taking such a leave and

instead arranged a meeting with Becker, himself, Joireman and Craig Parks (Becker Dec. CP691). Becker asked that Parks be present (Becker Dec. CP691 Ins. 27-28, CP189). Parks had told Becker that he did not understand older students (Becker Dep. CP114 Ins. 4-9, Becker Dec. CP692 Ins. 4-9, CP604), and Becker intended to address why she received different treatment than her younger peers had during her entire time at WSU (Becker Dep. CP114, Joireman report of 2/24/2004 meeting CP190, Becker Dec. CP691 Ins. 30-34).

At the February 24, 2004 meeting, Becker asked point blank whether the reason she was being treated so strikingly different from the other students in the program was due to her age (CP190). Most of the students were in their 20's and she was in her mid 40's (Becker Dec. CP691 ln. 33-CP692 ln. 2). Becker recounted what had happened, including the heightened expectations for her T.A.s, with the extensive research responsibilities far outside her own area of training area, and the shifts in advisors (Joireman report CP189). She asked that she be treated in the same manner as other students in both progress towards her educational goals and in her conditions of employment (Joireman report CP190, Becker Dec. CP 691-692). She understood that the Graduate School's policy expressly guaranteed that "[g]raduate students at WSU shall ... be protected from discrimination..." (CP559).

Instead of responding to her discrimination concerns, on February 25, 2004, Joireman drew up a contract and schedule to allegedly “assist” her (CP194-195) but Becker viewed it as portraying her as incompetent (Becker Dec. CP692 lns. 15-23). Thus, she told Joireman she could not sign the contract and schedule due to its inaccuracy (Becker Dec. CP692 ln. 20-CP693 ln. 16, CP 194-195 & and CP198). Joireman then resigned as chair of her committee, but made it effective after her prelim exams (Joireman Dec. CP156, Whitney Dec. CP238). According to the Experimental Psychology’s Program Description, the committee was intended to direct a student’s progress through graduation (CP285, CP545 & CP917). Also, it emphasized that “[w]hile not required... maximum continuity of training” is important and a different advisor for prelim exam, and then dissertation, would be uncommon and undesirable (CP582). Due to Joireman’s announcement, Whitney told Becker that she needed to find another advisor by the end of the semester (Whitney Dec. CP238 & CP605).

Ultimately, Robert Patterson became Becker’s advisor with Parks as a co-advisor (CP248, CP360 Patterson evaluation, Whitney Dec. CP238). Patterson and Parks had a mutual research interest that they decided to have Becker coordinate and carry out (Patterson Dep. CP135, CP358 & CP360). She was told that their mutual research interest would be the basis for her

dissertation research (CP360 Parks evaluation, Patterson Dep. CP133 ln. 18-CP135 ln. 3 passim). As a result, Patterson replaced Joireman as chair of her committee and Parks replaced Tahira Probst with himself (CP11, CP248 & CP962). Replacing Probst completely disregarded Becker's plan for progress toward her Ph.D. and for her future research in her profession (CP605, CP161). Moreover, Becker had already prepared to take her prelim exam in the area Probst had directed her on (Becker Dep. CP97). Yet Parks wanted Probst removed from Becker's committee and replaced her materials with new sections irrelevant to Becker's planned research focus (Becker Dec. CP695 Ins.5-7).

Parks and Patterson wanted Becker's research to combine the concept of "hysteresis" with group dynamics (Patterson Dep. CP134 Ins. 12-16, CP135 Ins. 2-3). Becker was entirely unfamiliar with the former subject, having first heard of it in late March or April, 2004(Becker Dec. CP694 Ins. 19-21, cf. Patterson Dep. CP135 Ins. 9-10). It was a concept derived from physics and visual processing (Patterson Dep. CP135 Ins. 13-22). Becker tried to be optimistic about its possibility but was also concerned as to its relevance to her planned program of study (Becker Dec. CP694 Ins. 22-24). She assumed that with the beginning of the next academic year, the fall semester of 2004, this new area would be approached with Patterson and

Parks cautiously, and her program would be restructured around it (Patterson Dep. CP133-136, Parks Dec. CP265, CP360, Becker Dec. CP694 Ins. 25-28). Yet, as Becker has no background in physics (CP414 & Patterson Dep. CP135), Patterson simply told her to find and study a physics textbook as part of her preparation for prelim exams in this area (Becker Dec. CP 695). Becker, however, understood that she was expected to understand, synthesize and integrate this material at a Ph.D. level of comprehension (Becker Dec. CP695 Ins. 1-11, CP606 Ins. 1-8). She knew that such preparation is “designed to make the examination most beneficial to the student’s progress in the program and the profession [and to] take into account the student’s career aspirations, research interests, and other needs and goals” (CP286b.2). Yet what she was being directed to do totally deviated from her professional plans and goals (CP606 Ins. 1-3, CP270, CP293).

Shortly after Patterson and Parks became her advisors, she received a third year student review (April 2004) (CP358-359). Once again, it did not record or evaluate any of Becker’s past research, work, or academic performance (CP358). Rather, the review focused on the Department’s apparent desire to drop her from the program (CP358). It also informed her that she had to take her newly configured prelim exams in October 2004 or

her appointment (i.e., employment. cf. CP323) would be terminated (CP358-359).

Becker understood from this review that she was expected to accomplish in five months what a typical Ph.D. graduate student is permitted to accomplish over their entire time in the program, i.e. develop a specialized area of study (CP606 lns. 1-8). The concentration chosen for her would be outside of Becker's area of training, knowledge, or future employment goals or plans (CP575b.1 &2 & CP606). Becker was stunned that they were asking her to take her prelim exams within five months of being introduced to entirely new topic areas (CP606, Becker Dec. CP695 ln. 12). She feared that this action was a form of retaliation for her February complaint of age bias given the Department's desire to get her out of the program (Becker Dec. CP 695 lns. 18-20, 7/12/2004 formal letter of complaint CP219).

E. Becker's Termination from the University

In early July 2004 Becker submitted a formal written complaint directly to both the dean of the College (Erich Lear) (CP224 & CP606) and to the dean of the Graduate School (Howard Grimes) (Grimes Dec. CP213 & CP218-219). Lear contacted her and said he would take her complaint to WSU's Center for Human Rights (hereinafter "CHR") (Grimes Dec. CP213, Becker Dec. CP695 lns. 20-22, CP219). He notified Becker that it was CHR's

policy to contact a complainant within five days (Becker Dec, CP695 lns. 20-22). In fact, CHR did not contact Becker until October 25, 2004 (Becker Dec. CP695 ln. 22)--- past the prelim exams deadline date (CP408) and after she was told her employment had been terminated (CP410).

In July 2004, Becker was also contacted by an associate dean of the Graduate School, Kristen Johnson (Grimes Dec. CP213 & CP221). Becker informed her of the events giving rise to her complaint but Johnson did not provide assistance (CP607 lns. 3-5). In fact, only “strictly academic issues ... are typically handled by the Associate Deans...” (CP564). Becker’s complaint to Grimes did not raise academic concerns but rather related to faculty conduct (CP218-219) which was to be referred to the Committee on Graduate Student Rights and Responsibilities (hereinafter “CGSRR”) (CP564). Policy states as follows:

Once allegations [of this nature] are brought to the Graduate School in writing, the CGSRR will be formed within 30 days and will deliberate and render a recommendation to the Dean of the Graduate School within 60 days. This recommendation will be acted upon by the Dean in consultation with the Provost and the Attorney General.

(CP219). Grimes never forwarded Becker’s complaint to the CGSRR (Grimes Dec. CP213 lns. 13-15).

Becker ultimately retained a Spokane attorney, Laurel Siddoway (hereinafter “Siddoway”) for help in addressing her concerns (Becker Dec. CP695 lns. 25-26). Siddoway wrote a letter offering to help resolve the

situation and also helped Becker obtain her student records through exercise of her FERPA rights (7/22/2003 letter CP909). Siddoway did not receive an initial response to her overture in regard to resolving the situation. Siddoway's office subsequently made a public records request because Siddoway wanted the records to prepare to write a lengthy letter assessing the situation in a further attempt to resolve the dispute (CP912 fn.1).

Becker expected to continue her T.A. duties and was assigned to Patterson (Parks Dec. CP261 Ins. 20-21, Becker Dec. CP696 Ins. 5-6). That fall's duties were more typical of T.A. duties she had observed the other younger students in the program performing (Becker Dec. CP695 In. 33-696 In. 8). Becker was only expected to perform T.A. duties and not both T.A. duties and R.A. duties, as she had in the past years (Becker Dec. CP696).

During that fall 2004, Parks delivered to Becker two notices in her student mail box advising her to take her prelim exams by the date set forth in her 3rd year student review (CP 406 & CP 408). At this time, Becker was still awaiting action on her complaint and understood her attorney to be engaged in resolving the situation (Becker Dec. CP695 In. 25-CP696 In. 3). Becker was alarmed by the lack of progress on the complaint because WSU policy states that graduate students have the right "[t]o have grievances addressed in a timely and confidential manner without fear of reprisal" (CP559). Until her

complaint was addressed and the situation corrected, Becker was “completely blocked” from taking prelim exams (Becker Dep. CP 825).

Becker received a third notice dated October 12, 2004 from Parks informing her that her “appointment” (employment) (CP 323) was terminated effective as of December 18, 2004 (CP410). It also stated that any further communication should go through the Graduate School (CP410). Then Becker received a letter from the Paul Whitney’s assistant telling her to vacate her Pullman office because her appointment had been terminated (CP 150).

Prior to the start of the spring 2005 semester, Siddoway’s office called Associate Dean Burkett at the Graduate School who said that Becker remained a student in good standing (CP345, CP414) with a GPA of 3.68.

Becker finally heard directly from Dean Grimes, via a letter, on January 10, 2005 (CP228-229). Instead of addressing or investigating her complaint, this letter stated that he received a memo from Whitney recommending that Becker be expelled from the Experimental Psychology Ph.D. program due to lack of progress (CP228 referencing CP226). Grimes informed Becker that if she did not meet him within four days (on or before January 14, 2005) she would be automatically terminated (CP229).

On January 11, 2005 Becker received a memo from Whitney indicating that her appointment (employment) was reinstated and she was again assigned to Patterson as a T.A. (Whitney Dec. CP238 Ins. 22-23, CP252). That same day, she also received a copy of a letter Whitney wrote to Grimes suggesting her termination (CP226). In that letter, Whitney clarified that the Department's intention was not to terminate Becker's appointment (employment) but to terminate Becker as a PhD student (CP226).

In response, Siddoway sent Grimes the lengthy letter she had been preparing, delivered separately from but immediately before Becker's meeting with him on January 14, 2005 (Becker Dec. CP696 Ins. 27-31, CP911-928). There, Becker detailed for two hours what had transpired over her entire time at WSU (Becker Dec. CP696 ln. 31). Grimes said he would look into it (Becker Dec. CP696 Ins. 32-33). A few days later he called Becker to assure her that he was taking her complaint seriously but emphasized it would take some time (Becker Dec. CP696 Ins. 33-34).

Similarly, during the first week of February 2005 Robert Patterson ceased giving Becker any T.A. work (Becker Dec. CP696 Ins. 12-13). Although she kept asking him in person and via email (Becker Dec. CP697 Ins. 14-15), Patterson just wrote to tell her to be patient and he would get back to her (Becker Dep. CP822 Ins. 9-11, Becker Dep. CP823 Ins. 13-20).

On February 3, 2005, WSU's Assistant Attorney General, Sylvia Glover, contacted Siddoway to tell her that the University wanted to work out an agreement with Becker (CP930). Siddoway was provided with what was referred to as a "skeleton of a proposal" (CP930) and Becker began to prepare a response (CP932-934).

Throughout that spring semester, the parties' respective attorneys continued to communicate (CP 932-934). Because of statutory time constraints (Becker Dec. CP697 Ins. 21-22), Becker filed age discrimination and retaliation charges related to her T.A. employment with the federal Equal Employment Opportunity Commission (hereinafter "EEOC") on April 29, 2005 (CP967). Becker received a copy postmarked on May 5, 2005 (Becker Dec. CP697 Ins. 24-25). A copy was sent to WSU (CP608 & 971 & 973), which WSU agents received by May 9, 2005 (CP975).

On May 11, 2005 Becker was given an "F" on her spring 2005 transcript without any prior warning or explanation of the basis (CP414, Becker Dec. CP698 Ins. 12-13 & 21-33). No agent of WSU had told her that absent some action from her, she would get an "F" for research credits that semester (CP932-934, Becker Dec. CP698 Ins. 21-33). Becker received a letter from Howard Grimes dated May 12, 2005 (postmarked on May 16, 2005) verifying that Becker was terminated from the program (CP231). In it,

Becker was informed that her grade point had been altered from a 3.68 to a 2.21 because she was given a letter grade of F on sixteen 800 level research credits (CP231). Becker also received a letter dated May 17, 2005 (postmarked on May 18, 2005) containing a 4th year student review that advised her formally that she had been terminated from the program (CP362).

WSU's policy at the time regarding graduate research credits provided for an "incomplete," signified by an "X" on the transcript until a student completes a dissertation (WSU Summary of Academic Policies 2004-2005 CP800). At the time the dissertation is completed, the "X"s are changed to "S"s indicating "satisfactory" completion of the doctoral research (CP414 & 800). Becker was not given placeholders for research credits that spring 2005, as would be expected and as she had in the past (CP414).

F. The Procedural History of This Litigation

Becker later brought a tort claim and provided WSU notice of her intention to pursue federal and state claims against it and its agents (CP595-610). This complaint and litigation followed (CP1-28). WSU moved for summary judgment on all claims and to strike portions of Becker's expert's testimony (CP46-47, CP705-712). The Court admitted that testimony (CP 990), but entered the order prepared by WSU dismissing the complaint in its entirety (CP 991). This appeal was filed in a timely manner (CP995).

V. ARGUMENT AND AUTHORITY

A. Standard And Scope Of Review Of Orders On Summary Judgment

1. The Court's Ruling Below

In the trial court, WSU successfully moved for summary judgment dismissing Becker's case in its entirety. Plaintiff's complaint included eight distinct causes of action and the following claims: 1) breach of contract, 2) promissory estoppel, 3) age discrimination and retaliation under the Washington Law Against Discrimination in both education and employment, 4) age discrimination in education in violation of federal and state law, 42 U.S.C. §6101 *et. seq.* and RCW 28B.04.120, 5) violation of 42 U.S.C. §1983, 6) negligent infliction of emotional distress, 7) negligent misrepresentations, 8) defamation, and 9) invasion of privacy (CP 1-28). The Court issued no oral ruling or memorandum opinion outlining its basis for its decision-making on each of these claims. Rather, it simply adopted the proposed order of WSU and the individual defendants below in summarily concluding that their dismissal as a matter of law was appropriate under CR 56 (CP991).²

² Becker has stipulated to the dismissal of the following claims: age discrimination in education under state law; negligent infliction of emotional distress, defamation and invasion of privacy. In waiving the latter, she is still reserving a damage claim for injury to reputation.

2. This Court's Review of Orders on Summary Judgment

This Court reviews summary judgment orders of dismissal under Civil Rule 56 *de novo*. Thus, the appellate engages in the same inquiry as the trial court and even though Becker is the appealing party, it remains the burden of WSU and individual faculty to demonstrate to this Court's satisfaction that there are no disputes of material fact and that judgment as a matter of law was appropriate on the record submitted below CR 56 (c). Summary judgment is appropriate *only* if there is no genuine issue as to any material fact, with *all* reasonable inferences made in favor of the non-moving party, Becker. In reviewing disposition on a motion for summary judgment, this court's inquiry is limited to determination of whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law and it is not to render any judgment or weigh competing inferences and evidence. *See e.g. Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996), citing *Fahn v. Cowlitz County*, 93 Wn.2d 368, 373, 610 P.2d 857 (1980). Summary judgment is improper if any material fact is in dispute. *Marquis*, 130 Wn.2d at 105, *Fahn*, 93 Wn.2d at 373. *See also Sellsted v. Washington Mutual Savings Bank*, 69 Wn.App. 852, 859, 851 P.2d 716 (1993).

It is only when reasonable minds can reach *but one conclusion* that summary judgment shall be granted and the issue decided without the benefit of jury deliberation. *Ruff v. King County*, 125 Wn.2d 697, 704, 887 P.2d 886

(1995), emphasis added. Even if the facts are undisputed, if reasonable minds can draw different conclusions from those facts, summary judgment of dismissal is improper. *Sheriffs' Association v. Chelan County*, 100 Wn.2d 282, 745 P.2d 1 (1987); *Fahn, supra*.

In this appeal, as the moving party below, WSU and the individual Respondents continue to bear the burden of proving that there are no material facts in dispute on each of the prima facie elements of the eight distinct claims identified above. If those factual disputes exist, the issue must be submitted to a jury. *Safeco Insurance v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992). A material fact is one upon which the outcome of the litigation depends. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). As the Washington Supreme Court stated in *Young v. Key Pharmaceuticals*:

It is important to note that the affidavit performs a radically different function in the defendant's case as opposed to the plaintiff's. A plaintiff, if he is the nonmoving party, must create an issue of fact in order to avoid summary judgment and an affidavit asserting any supportable, relevant fact inconsistent with the defendant's position will be sufficient to do so. The defendant's task, to show that there are no disputed facts, is necessarily much more difficult. In contrast to the plaintiff's situation,

Young v. Key Pharmaceuticals, 112 Wn.2d 216, 235, 770 P.2d 182,192 (1989). In other words, the issue for this court is “whether the trial court correctly determined, given the facts of this case, that [Becker wholly] failed to establish a legally cognizable cause of action” on each of the claims she

brought. *Atherton Condo. Assn. v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990). The answer is clearly no and reversal is mandated by law.

3. Summary Judgment Is Generally Disfavored in Discrimination, Retaliation, and Civil Rights Cases Such As This Appeal

Washington courts have routinely noted that summary judgment *should rarely be granted* in discrimination and retaliation cases litigated under the Washington Law Against Discrimination (hereinafter “WLAD”) such as the case at bar. Washington courts note particularly that summary judgment *in favor of employers* is seldom appropriate in discrimination cases. *Johnson v. Department of Social & Health Services*, 80 Wn.App. 212, 226, 907 P.2d 1223 (1996) [race claim]; *Sellsted supra*; *deLisle v. FMC Corporation*, 57 Wn.App. 79, 84, 786 P.2d 839, *rev. den.* 114 Wn.2d 1026 (1990) [both age claims]. This is because the central dispute in these cases is the motives of decision-makers. As the Court noted in *Hollingsworth v. Washington Mutual Savings Bank*, “[w]hether Hollingsworth’s or the Bank’s version [of the events leading to his discharge] *was more credible was a question of fact for the jury.*” *Hollingsworth, supra*, 37 Wn. App. 386, 392, 681 P. 2d 845 (1984), *emphasis added*. Thus, as for the trial court, this Court’s inquiry is a limited one:

The issue on summary judgment is, on the facts before the court, could a reasonable judge or jury find [WSU and/or its faculty and administrators] acted with an illegal motive? The plaintiff has no burden of persuasion at this point. Plaintiff's task is to show by argument from the evidence that a reasonable trier of fact could (but not necessarily would) draw the necessary inference.

deLisle, supra, emphasis in original. (reversing summary judgment in age discrimination case under WLAD). The Court stated in reversing another dismissal of an age discrimination case on summary judgment:

[T]his translates into a requirement that the plaintiff create an issue of fact calling into question the otherwise legitimate reasons proffered by the employer. This is, as we indicated above, because the employee's burden at this stage in the proceedings is only to produce sufficient evidence, including that adduced to support his prima facie case, to raise a genuine issue of material fact. As here, the record contains "reasonable but competing inferences of ... discrimination" because the employer's reasons have been called into question both by the conflicts among the reasons themselves and by evidence rebutting their accuracy believability, "it is the jury's task to choose between such inferences."

Sellsted, supra, quoting this Court in *Carle v. McChord Credit Union*, 65 Wash.App. 93, 101 n. 11, 827 P.2d 1070 (1992), other citations omitted. As that Court also noted:

The issue of the defendant's intent at the time of the plaintiff's discharge is clearly a factual question. The [U.S.] Supreme Court recently reaffirmed Lord Justice Bowden's treatment of the problem a century ago: "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

Edgington v. Fitzmaurice, 29 Ch. Div.459, 483 (1885).*Sellsted*, *supra*, other citations omitted. Our courts have also emphasized that such illegal motives are rarely announced orally or in writing. *Sellsted and deLisle*, *supra*. Questions involving motive, credibility, good faith and reasonableness, as are present in this case, are inherently susceptible to conflicting interpretations by juries, are inherently factual in nature, and thus not readily disposed of by summary judgment. *Id.*

B. There Are Genuine Issues Of Material Fact Regarding The University’s Breach Of Contract And Becker’s Detrimental Reliance Upon The University’s Representations.

1. A Jury Could Find That WSU Breached Promises Contained In Graduate School and Department Publications In Its Actions and Inactions Regarding Her Enrollment

It is well-established in Washington law that the relationship between student and educational institution is quasi-contractual in nature. In *Maas v. Gonzaga*, 27 Wn. App. 397, 400, 618 P.2d 106 (1980), this Court stated that the “relationship of students and universities is generally contractual rather than confidential or fiduciary.” *Id.* citing *Zumbrun v. University of S. Cal.*, 25 Cal. App.3d 1, 101 Cal. Rptr. 499, 51 A.L.R.3d 991 (1972); other citations omitted. As Division I stated in *Marquez v. University of Washington*, 32 Wn. App. 302, 305, 648 P. 2d 94 (1982), “[s]ince a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied,

with specific terms to be found in the university bulletin and other publications ..." *Id.* at 305 citing *Peretti v. Montana*, 464 F. Supp. 784, 786 (D. Mont. 1979)^h *rev'd on other grounds*, 661 F.2d 756, 757 (9th Cir.1981) quoting Note, *Expulsion of College and Professional Students — Rights and Remedies*, 38 Notre Dame L.J. 174, 183 (1962).

a. WSU failed to honor promises made regarding clear criteria for evaluating academic progress and performance

The Graduate Student Code states that students have a right “[t]o be governed by *clearly stated and justifiable* academic procedures, rules and regulations” (CP 559, emphasis added). It further states that students can expect the departments and programs to “[e]stablish criteria for termination of students from programs” (CP 561). WSU has maintained that Becker was removed from its doctoral program in Experimental Psychology because her grade point average fell below 3.0 and she failed to make timely academic progress towards the degree. The criteria for termination found in WSU’s General Catalog states in pertinent part:

Any graduate student who fails to maintain a cumulative grade point average of 3.0 or higher for all course work subsequent to admission to the Graduate School will be dropped from the University.

(CP 782).

It is undisputed that Becker's grade point average throughout her WSU experience regularly exceeded 3.0. However, in the one instance that she received an "F" for sixteen research credits in the spring of 2005 without any notice to her of this possible action, her grade point average drastically dropped below the required threshold (CP 414). As indicated in section IV.B.1a *supra*, the Court should note that graduate research credits differ from course credits; students with T.A. appointments must enroll for a certain number of research credits as part of their T.A. (CP 532). Yet no one grades the research or necessarily even reviews it (CP 482).

The record contains un rebutted expert testimony verifying the dearth of clearly stated rules or reasons or criteria by which it was determined that a student should receive an "F" for these credits (CP 482). With no published criteria provided as to how any functional difference between receiving an "X" or an "S" for progress on graduate research credits during the prelim exam and doctoral degree process, this evaluation is left to entirely unchecked faculty discretion. Becker's transcript (as produced by WSU) contains unidentified handwriting indicating "'F" in 800?" which creates an obvious inference that there were internal questions as to the propriety of that grade selection at the time (CP 414).

b. Becker Performed for TA –related credits in the 2004 -2005 academic year and was given feedback that she was progressing thorough WSU’s grading decisions in fall 2004

In the semester immediately before (fall 2004) her termination from WSU, Becker, per past practice, signed up for 600 and 800 research credits and as she expected, received an S for her 600 credits and an X for her 800 level credits. During this semester, she was also a T.A. for Robert Patterson.

Significantly, there is no dispute that just prior to the fall 2004 semester Becker had retained counsel and in July 2004 had filed a formal complaint with the Dean of the Graduate School regarding faculty conduct and age discrimination. Given that situation, and with her understanding of the Code and practices of WSU, she concluded it was inappropriate to take the prelim exams until the complaint was addressed and remedied (CP 218).

The reasonableness of her actions is a question for the jury given the fact that WSU had expressly failed to provide her with other criteria for measuring her academic progress in this situation. Indeed, one reasonable inference is that the faculty should have assigned her an “F” for that (fall 2004) semester since the exams were not taken by their allegedly inflexible deadline. Instead, the record is clear that she was assigned the customary “S” and “X” on her transcript for the fall 2004 research credits (CP 414). That faculty action could lead a reasonable graduate student to believe that her rate

of progress was sufficient and her academic career was not in jeopardy. It also raises a credibility question as to the good faith, arbitrariness and true motives of Department and Graduate School actors in the subsequent termination in the following spring. Again, these questions can only be resolved by a jury.

Becker also testified without rebuttal that she stopped receiving work assignments for her T.A. in her Spring 2005 semester (CP 823). Such inaction gives no rational basis for objectively measuring or formally assessing Becker's true progress. A trier of fact could conclude that WSU breached its obligations to give her clear expectations by which to measure that progress.

c. A significant factual dispute impacting the outcome of the litigation exists regarding the January 14, 2005 meeting and parties' sworn testimony as to the Dean's communication of expectations in spring 2005, thereby precluding summary judgment on Becker's breach of contract claim

It is undisputed that pursuant to his January 10, 2005 letter requiring her to meet within four days or face involuntary termination from the Graduate School, Becker met with Howard Grimes, Graduate School Dean, on January 14, 2005 (CP 214). Neither in that meeting nor at any time prior to it, had he ever formally responded to her July 2004 formal written complaint (CP 221). Nor had he referred that complaint to the appropriate committee for processing *Id.* Instead, almost half a year later, Grimes sent Becker a

letter stating that the Department of Psychology wanted him to drop her from the Graduate School's rolls because she had allegedly not progressed in its Experimental Psychology program. At the time she received this letter, without her knowledge, Departmental faculty had already decided to terminate and then reinstate her T.A., and had actually recommended her disenrollment from the University itself (CP 226, 228-229).

According to Becker, she met with Grimes for two hours as she recounted all that had happened to her over the last three and a half years. At the end of the meeting Grimes stated that he would look into it and get back with her. She further recalls that a few days later he called her at her home and indicated that she would be hearing from him but that it would take some time. Most importantly, she felt reassured that he was taking her complaint seriously (Becker Dec. CP 667).

On February 3, 2005, the University's Assistant Attorney General, Sylvia Glover, contacted Siddoway. Becker learned from her attorney that they wanted to work out an agreement with her (CP930). Becker eventually learned that WSU wanted her, for a 5th time, to again propose a prelim exam subject and new dissertation topic. She was asked to identify eight prospective committee members. In addition, she was to agree to give up her T.A. employment (CP 930).

Email communications continued between the two attorneys. On May 6, Glover requested a response as the professors would be hard to contact after the semester ended (CP 932-934). Unwilling to miss mandatory federal timelines for external discrimination complaints, Becker filed a charge with the EEOC on April 29, 2005. The University admits receipt of the EEOC charge by May 9, 2005. She received a letter dated May 12, 2005 from Dean Grimes stating that she had been disenrolled because she had received an “F” for sixteen 800-level research credits that semester. That assessment caused her grade point average to fall below 3.0, from a 3.68 to a 2.21 (CP 231).

Becker ‘s unambiguous testimony is that at no time was she advised that she was in jeopardy of getting an “F” nor had anyone suggested an “F” was possible for her research credits (Becker Dec. CP 698). No one told her that she needed to provide her proposed program or turn in a list of prospective Committee members to avoid getting an “F”. As far as she was concerned, and based on the communication from her attorney, discussion was ongoing to resolve the matter (CP 932-934).

In contrast, Grimes asserted that at the January 14, 2005 meeting, he gave Becker an ultimatum to take three measurable actions towards making progress on her degree and prelim exams. He also states that because she did not fulfill these requirements, it was upon that basis that her enrollment was terminated (Grimes Dep. CP 214-215). Becker is clear that Grimes never

gave her an ultimatum of any kind and that most of what he testified to regarding the January 14, 2005 meeting never happened (Becker Dec. CP 696).

Resolution of the truth as to this conversation creates a genuine disputed issue of material fact and must be placed before a jury to evaluate demeanor, motive and other factors impacting veracity. For this court, the analysis is disarmingly simple. The parties' accounts of this meeting differ so significantly as to form a material dispute which affects the outcome of this litigation. The trial court's grant of summary judgment on the breach of contract, misrepresentation and promissory estoppel claims was therefore clear error. Competing inferences from the disputed account of this central meeting minimally makes claims wholly inappropriate for summary disposition.

This Court is controlled by the precedent of *Ochsner v. Board of Trustees*, 61 Wn. App. 772, 811 P.2d 9685 (1991). In *Ochsner*, a panel of this Court reversed summary judgment in favor of a public educational institution on a student's claim for "breach of educational contract [and other] duties under Washington law." *Id.* at 772. There, as here, the trial court did not closely examine the competing affidavits with the inferences raised in favor of the student as the opposing party. *Id.* at 776. In that case, as the Court should here, the evidence suggested that the policies in question were

not applied “evenly” and that the evaluation of the student was “arbitrary and capricious.” *Id.*

A jury could find from these events that WSU’s promise of clearly stated rules, regulations and criteria for termination was obviously breached in Becker’s disenrollment. To dismiss a student because her grade for research credits brought her GPA below 3.0, when the criteria for measuring academic performance in the 800 level course series is never established, or disseminated, could be viewed by a jury as completely arbitrary and capricious, a violation of promises, and as established in Section V.E.2. *infra*, conduct that rises to the level of a due process violation. *See Ochsner, supra.*

2. A Jury Could Find Fournier’s Actions Constitute Negligent Misrepresentations or Promises Which Stalled Becker’s Progress Toward Her Degree And Negatively Impacted Her Reviews

In addition to her express contract claim, Becker also alleged equity-based claims grounded in negligent misrepresentations and promissory estoppel. In a negligent misrepresentation claim, the plaintiff is required to prove six elements:

that the defendant supplied information for the guidance of others in their business transactions that was false; (2) that the defendant knew or should have known that the information was supplied to guide the plaintiff in business transactions; (3) that the defendant was negligent in obtaining or communicating false information; (4) that the plaintiff relied on the false information supplied by the defendant; (5) that the plaintiff’s reliance on the false information supplied by the defendant was justified, that is, that reliance was reasonable under the

surrounding circumstances; and (6) that the false information was the proximate cause of damages to the plaintiff.

Lawyers Title Ins. Corp. v. Baik, 147 Wash. 2d 536, 55 P.3d 619 (2002).

A similar cause of action lies in promissory estoppel where the elements are (1) a promise which the promisor should reasonably expect to cause the promisee to change his position and which 2) does cause the promisee to change his position justifiably relying upon the promise in such a manner [and] 3) that injustice can be avoided only by enforcement of the promise. *Weitman v. Grange Ins. Ass'n*, 59 Wash. 2d 748, 370 P.2d 587 (1962).

The record on Fournier's conduct towards Becker creates triable inferences and factual disputes on the elements of each of these claims.

It is undisputed that Lisa Fournier induced Becker to change advisors from Whitney to Fournier by promising Becker the lead role and publication authorship on a portion of a collaborative inter-disciplinary research project on which Fournier was associated with another faculty member (Fournier Dep. CP 895-898). The portion involved working memory, one of Becker's desired areas of study and consistent with her intended research trajectory (Fournier Dec. 254). In addition, the work would form the basis of her prelim exams and provide a natural segue to her dissertation project. As Becker was having trouble getting her present advisor, Chair Whitney, engaged on

mutually beneficial research and program advising, Fournier's representations were welcome and enticing (Becker Dec. CP 684). Absent this clear indication, however, Becker would not have changed advisors as Fournier's primary research interest was not within Becker's planned area of study.

Becker undisputedly and justifiably relied on the Psychology Department's Program Description which promises that "the student can design a program of study that is suited to his/her particular interests and career objectives" (CP280). It is also undisputed that Becker worked on this portion of the project for most of calendar year 2002 (Fournier Dep CP 899-900) before she learned that Fournier's Food Science collaborator, Beerman, had chosen one of her own master's degree students to lead the "working memory" component for her thesis and obtain independent publication benefits (Fournier Dec. CP 255, Fournier Dep. CP 901-902). This action put Becker in an untenable position and made it necessary for her to seek out another advisor having now wasted eight plus months towards the completion of her Ph.D. In addition, this required change of advisors led Becker to be negatively viewed as a possible "mis-fit" with the program when her performance was thereafter evaluated (CP 355). In light of their later rationale for disenrolling her and the career-damaging harm caused by that action, a reasonable jury or fact finder could view these actions as creating a claim for promissory estoppels and/or negligent misrepresentation.

Becker rightfully relied on Fournier's representations to her detriment and Fournier acknowledged the promises made to Becker. She candidly testified that she made the representations without knowing of the competing interests in publication and leadership on the allegedly collaborative project (Fournier Dep. CP 901). According to WSU's graduate student code, "[g]raduate students should expect that advisors and mentors will... [d]iscuss laboratory ... authorship policy ... in advance of entering into collaborative projects" (CP562). In fact, WSU's policy stated that students should expect departments and programs to "[h]ave a written policy to guide collaborative projects and authorship" (CP561). Finally, having rightfully relied on these representations Becker was damaged both as to her internal WSU academic reputation and ultimately adversely affected in her ability to obtain both the doctorate and her long-held career goals.

3. A jury could find that WSU Breached Its Written Policies and Commitment Not to Impede Becker's Progress Towards Her Degree By Exploiting Her Research And Teaching Abilities

In the spring of 2002, Becker was assigned to Robert Patterson as a T.A. Above and beyond that role, she also had to do research for him. Plus, Patterson insisted that she also do additional work for Fournier. All these duties were in addition to taking her required course work and research for Dr. Whitney (CP 414, CP 353). She functioned as both a R.A. and T.A. without the additional compensation.

During her second year, she also continued to do double time in that she not only taught five statistics labs but she also did the equivalent of R.A. work for Patterson and Fournier. As discussed above, T.A.'s and R.A.'s are separate positions and normally students only have one position, a T.A. or a R.A. As outlined above, typically students finish with either their T.A. or R.A. duties, and then spend their time working on research for their own progress in the program. *See Section IV, supra.*

During her third year, in addition to her regular T.A. duties, Becker's advisor, Jeff Joireman added a portion of another *younger* student's T.A. duties (statistics labs) to hers in order to give the other student time to study (Becker Dep. CP 109-110). On February 24, 2004 she attended the meeting at which she complained of this overt form of differential treatment in her education and employment. She explicitly told Whitney, Joireman, and Parks that unlike her younger peers, she was being required to do double duty for her employment. She was glibly told to stop working when she reached 20 hours (CP 189-192).

Becker contends that following such a recommendation would have placed her in further jeopardy and led to deterioration in her reputation and good standing with the faculty. Instead, WSU code states that it is the responsibility of the faculty (not the student) to control the hours they require their assistants to work (CP 189). It notes:

Graduate students should expect that advisors and mentors will... [a]ssiduously avoid impeding a graduate student's progress toward a degree because of benefit from the student's proficiency as a teaching or research assistant.

(CP562, #9).

It is clear from the faculty comments in her annual reviews that Becker was historically viewed as a strong student, very competent researcher, and a hard worker (CP 353, CP 356, CP 360). Yet, the extra work specifically impinged on Becker's ability to progress towards her degree when, for instance, Joireman insisted that she take her prelim exams in the spring of 2004 and simultaneously complete the additional research work that he required of her. From the policy, Becker had enforceable expectations that the Department would refrain from exploiting her past Wisconsin success and adjunct faculty experience and her demonstrated proficiency as a T.A. or R.A. As the situation developed, it wasn't until Becker hired an attorney prior to the fall 2004 semester that she was finally provided with the type of T.A. assignment characteristically afforded the other, younger graduate students in the program. A jury could find WSU breached promises causing detrimental reliance by Becker and proven damages from this record.

C. There Are Genuine Issues of Material Fact that Preclude Summary Dismissal of Becker's State Law Retaliation Claim As A Matter Of law.

1. A Jury could find that Becker Has Established A Prima Facie Case With Triable Inferences Regarding The Illegitimacy of WSU's Motives for Its Action and Particularly Disenrollment

To make a prima facie case of retaliation under the WLAD, a plaintiff must show that 1) she complained of discrimination, 2) that she suffered adverse action, and 3) that there was a causal connection between the exercise of statutory rights and the defendants' adverse action. *Wilmot v. Kaiser Alum.*, 118 Wn.2d 46, 821 P.2d 18 (1991); *Allison v. Seattle Housing Auth.*, 118 Wn.2d 79, 821 P.2d 34 (1991); *accord: Graves v. Dep't of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994). The first element is typically met by establishing a) that the individual complained of actions or conduct she reasonably perceived to be unlawful discrimination, often referred to as "protected conduct"; b) that the other party knew of it; and (as is usually undisputed) c) that an adverse action ensued. *Graves, supra*.

Although these factors often are not disputed, our courts have observed that "[b]ecause employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose." *Estevez v. Faculty Club*, 129 Wn. App. 774, 799, 120 P.3rd 579, 799 (2005), citing, *Vasquez v. Dep't of Soc. & Health*

Servs., 94 Wn. App. 976, 985, 974 P.2d 348) (1999)(other citations omitted). That burden is typically met in a prima facie case simply by evidence of the temporal proximity between the events. Timing alone is sufficient to establish what is referred to as the “causal nexus” necessary to infer that opposition to discrimination was a substantial factor motivating the adverse action. *See e.g. Vasquez v. State*, 94 Wn.App. at 985, review denied, 138 Wn.2d 1019, 989 P.2d 1143 (1999); *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991).

Moreover, if the WLAD plaintiff “establishes that he or she participated in an opposition activity, the defendant knew of the opposition activity, and he or she was adversely treated, then a ***rebuttable presumption is created in favor of the [plaintiff] that precludes [trial and appellate courts] from dismissing the [plaintiff]’s case,***” *Kahn v. Salerno*, 90 Wn. App. 110, 131, 951 P.2d 321, emphasis added, review denied, 136 Wn.2d 1016 (1998) citing *Wilmot*, 118 Wn.2d at 69; *Graves v. Department of Game*, 76 Wn. App. at 712. In this case, as in many retaliation cases, Becker produced ample evidence and sufficient facts from which a jury could find she has established her *prima facie* burden and could infer retaliation was a substantial factor causing WSU to take the actions it did. WSU has not produced evidence that Becker’s evidence is unworthy of credence or irrelevant to pretext and thus this matter must be submitted to a jury.

2. There Is No Dispute That Becker Engaged in Protected Conduct and Was Adversely Treated Following Those Actions

WSU has conceded that Becker engaged in protected conduct at several critical junctures in her WSU career. **First**, as early as February 2004, in a meeting with Whitney (Chair), Parks (Program Director), and Joireman (her advisor at the time), Becker verbally raised concerns about age-biased conduct in her onerous work assignments and in delays of her educational progress when compared with the younger students. She suggested that the fact that she was asked to assume a portion of a younger peer's duties to facilitate that student's academic progress, and that the delay caused by WSU's favored treatment of the younger Beerman student in the Fournier project were illustrative of this pattern. After Becker made that complaint, she was given an inaccurate and highly negative evaluation. In it she was also given an ultimatum to take her newly configured prelims by an unreasonable October 2004 date or lose her employment. **Second**, in July of 2004 Becker submitted a written formal complaint of age discrimination and retaliation directly to Howard Grimes, Graduate School Dean, and to the Dean of the college, Erich Lear, who then forwarded it to WSU's Center for Human Rights. Soon afterwards, in October, with no evident performance deficiencies, the Department summarily ended Becker's T.A. appointment, a position faculty were later forced to retreat from. Significantly, Grimes also

never contacted the appropriate committee following her complaint; and her first contact from him was six months later with the threat of immediate disenrollment in January 2005. **Third**, she filed an external charge of discrimination and retaliation with a federal enforcement agency, the EEOC on April 29, 2005. WSU received the EEOC complaint by May 9, 2005. Shortly thereafter Becker's GPA was altered from a 3.68 to a 2.21 and she was terminated as a student. Thus, Becker has pled and established the required presumption of retaliation under RCW 49.60.210.

That statute importantly prevents *employers and others* from punishing people due to informal and formal opposition to perceived discrimination actions, *See Galbraith, infra*. As in *Wilmot*, an inference of retaliation stems not only from the timing alone, but other admissible testimony and documents raise credibility questions as to the rationales for WSU's actions. Many of the factors relevant to the arbitrary and capricious nature of the decision-making are equally probative to retaliatory and discriminatory intent. It is for a jury to consider the pretextual nature and inferences from this record which bear on WSU's unlawful motives.

For example, it is well established that in addition to the suspect nature caused by timing, retaliatory inferences can be gleaned from evidence of inconsistent application of existing policy and procedure and representations that are "not worthy of credence" *Sellsted, supra*, 65 Wn. App. at 860.

Becker's expert witness Loreleigh Keashley's report raised important questions for jury deliberation regarding timing of events and WSU's failure to adhere to customary academic practice and consistently apply its own practices before and after Becker's protected conduct (CP 479-487). On the disenrollment motives, she concludes in significant part that:

I found Graduate School policies regarding academic progress guidelines to be vague and inadequate as to what criteria form the basis for a determination of adequate academic progress and thus, the grounds for disenrollment. This lack of clarity stands out as an issue as such detail is considered necessary as exemplified in other Research I institutions policies and also WSU's own Graduate Student Code of Conduct in order to ensure students understand early on what is expected. This was complicated by no other written document either from the Graduate School or Department or those acting on their behalf, spelling out such criteria and how disenrollment would be accomplished.

Keashley Dec. Ex.B. CP486-487.

This Court recognized in *Hatfield v. Columbia Federal Sav. Bank*, 57 Wn.App. 876, 790 P.2d 1258 (1990) that Washington courts rely upon federal decisions under the Age Discrimination Employment Act and other civil rights mandates for persuasive but not mandatory authority for WLAD claims. *See also Allison, supra*, 118 Wn.2d at 94. One federal appellate court noted in the employment discrimination context, that "[w]hen the employee is able to produce sufficient evidence to establish that the employer

failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process 'unworthy of credence,' then any reliance placed by the employer in such a process cannot be said to be honestly held." *Smith v. Chrysler Corp.*, 155 F.3d 799, 807-808 (6th Cir. 1998), other citations omitted.

Similarly, Washington, **courts have recognized that** "multiple incompatible reasons given for [an adverse action] further suggests that none of the reasons given was the real reason, and thus also raises the inference that those reasons are pretextual and unworthy of belief." *Sellsted, supra*, 65 Wn. App. at 861, other citations omitted. Sellsted cautions this Court that "[a]t this stage, it is not for the trial court to resolve these inconsistencies but rather to recognize that they create material issues of fact as to the real reason for the [actions taken]." *Id.* other citations omitted.

Just as in the employment realm, inconsistent academic evaluation can raise inferences of unlawful discrimination and/or retaliation. *Id.* Here, the record shows that Becker was viewed as a good student, and one who consistently exceeded the expected grade point average and most significantly even received a satisfactory and the perfunctory placement X grade for fall 2004 semester when she was theoretically not progressing towards her degree in the same fashion as she did the following spring. A jury could easily infer that the only circumstance motivating the spring 2005's assessment of an "F"

was Becker's and her counsel's active advocacy for a non-discriminatory educational environment. A clear inference can be drawn by a jury that WSU actors tolerated her alleged lack of progress until she raised good faith concerns about their actions, and then viewed her as disruptive and disloyal and unworthy of retention on their rolls.

. In this respect, Becker's situation is analogous to that of many victims of discrimination. WSU's disenrollment action is comparable to Tom Galbraith's removal from membership in the TAPCO Credit Union. He was a member in good standing until he was identified as a witness in an employee discrimination case in September 1993. Two months later, he was expelled. *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 949, 946 P.2d 1242 (1997) Division II noted that although RCW 49.60.210 typically involves "employee claims against employers," its language is not so restrictive. *Id.* Here, Becker's educational status was jeopardized and ultimately destroyed and her employment ended because she had the temerity to challenge faculty on her experience of age bias in their practices, both educational and employment-related. As in Mr. Galbraith's case, the Court must recognize that Becker has demonstrated the existence of factual issues as to motives that preclude summary judgment. *Galbraith, supra*, 88 Wn. App. at 952.

D. There Are Genuine Issues of Material Fact Which Preclude Summary Dismissal of Becker's Federal and State Age Discrimination Law Causes of Action As A Matter Of Law.

1. Becker Has Satisfied All Procedural Requirements For Pursuit of her Federal ADA Claim

As outlined above regarding Becker's state law retaliation claim, she has also established a prima facie case of age discrimination in violation of the federal Age Discrimination Act of 1975. This statute is admittedly a rarely used vehicle for enforcing rights to the enjoyment of a non-discriminatory educational environment at WSU. That statute expressly provides that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." 42 U.S.C. § 6102.³

³.At the trial court, WSU argued unpersuasively that Becker had failed to provide the notice required by statute as a condition for bringing suit. The record contains admissible evidence from her counsel that indeed that notice was provided. *See* Rose Dec. CP 593-596. Other alleged procedural defects asserted clouded an unsupported allegation that state courts did not have concurrent jurisdiction to hear this claim although no authority for that assertion exists and comparable federal employment discrimination and civil rights claims are routinely filed in State court.

There appears to be no colorable dispute that WSU is not within the ambit of the statute as it is a program receiving federal financial assistance.⁴ In an analogous statutory context, the U.S. Supreme Court has recognized a cause of action for damages for victims of sex discrimination in education under Title IX. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

Courts have applied the employment discrimination framework for analysis of education discrimination. *Id.* The record contains demonstrable examples of favored treatment to younger graduate students in research and educational opportunities such as the Fournier /Beerman debacle (Fournier Dep. CP 901-902). There, Becker was forced to sacrifice her own research trajectory and publication in favor of a younger student. She also was similarly required to assume duties of a younger student by Joireman (Becker Dep. CP 109-110) for unjustifiable reasons. Neither faculty member has testified that these instances of favored treatment of younger peers did not occur. Summary judgment on Becker's ADA claim is thus inappropriate.

2. Becker Has Also Established A Cause of Action For Age Discrimination in Her T.A. /R.A. Employment Under RCW 49.60.030 and RCW 49.60.180.

As indicated in fn.2 *supra*, Becker is not seeking recovery for educational discrimination in her education at WSU under state law but does retain an employment discrimination action under that statute-the WLAD. As stated above, Becker has testified to disparate treatment from similarly situated graduate students under forty years of age. She has described a pattern of specifically requiring her to defer her own educational objectives to assume employment responsibilities of younger students. It is explicitly unlawful to discriminate against employees over forty years of age in the terms and conditions of employment in favor of younger employees.

The *Allison*, *Sellsted* and *deLisle* courts have all emphasized the nature of the burdens required of Washington age discrimination litigants. *See Allison*, 118 Wn. 2d at 84; *Sellsted*, 65 Wn. App. at 852, and *deLisle*, 57 Wn. App. at 84. Unlike the federal law framework, our state law's mandate of liberal construction requires expressly that this Court broadly construe Becker's WLAD claims and imposes a lesser causation burden on age discrimination plaintiffs. *Allison, supra*, 118 Wn. 2d at 84. The trial court apparently erred by seemingly imposing a more onerous burden on Becker than the one she obviously met. She simply had to testify to disparate treatment from her peers with inferences that her age was a substantial but not

necessarily the sole factor for faculty decision-making. Here, she even had limited probative evidence of specific age-biased commentary by one faculty member as to his discomfort in dealing with “older students” (Becker Dep. CP 114). These attitudinal predispositions, coupled with other uncontested disparate treatment evidence, raise sufficient evidence of pretext to avoid summary judgment on Becker’s WLAD age discrimination claim.

E The Trial Court Erred in Dismissing Becker’s Civil Rights Cause of Action Under 42 U.S. C. §1983 as a Matter Of Law

1. WSU Actors Are Not Entitled to Qualified Immunity.

Here, Becker has asserted and established that WSU’s conduct under color of state law deprived her of several clearly established constitutional and /or federally protected civil rights. In addition to her federal statutory right to be free of age discrimination under the ADA, the record supports her claim to violation of clearly established constitutional rights. She also contends that her guarantee of equal protection of the law was violated in defendants’ intentional age discrimination and that she was deprived of her first amendment right due to retaliation following protected speech opposing WSU’ s actions. As Division One recently stated:

Qualified immunity protects government officials from insubstantial and harassing litigation without foreclosing suits for damages that may be the only avenue for the vindication of constitutional rights. Qualified immunity is a judicially created doctrine that stems from the premise that few people would enter public service if it entailed the risk of personal liability for official decisions.....

[However, d] efendants are [only] entitled to summary judgment based on qualified immunity if plaintiffs' complaint fails to state a claim¹ or, in light of clearly established principles governing their conduct, they objectively could have believed their conduct was lawful, *or when there is no genuine issue of material fact about whether they engaged in conduct violating a plaintiff's clearly established constitutional rights.*

Jones v. State, 140 Wn.App. 476, 166 P.3d 1219 (2007), rev. granted ,
195 P.3d 89 (2008), citations omitted and emphasis added.

**2. There Are Genuine Factual Disputes As To Violation of
Becker's Clearly Established Rights To
Procedural and Substantive Due Process.
Due Process Rights In Graduate Education Were
Clearly Established When Becker Was
Involuntarily Disenrolled in spring 2005.**

Due process challenges by public university students have led to extensive litigation in the courts. *See Flanders, supra*. For over twenty years before the actions in this case, the U.S. Supreme Court has assumed that a student enrolled in a graduate or professional degree program has an enforceable expectation of not being subject to arbitrary and capricious actions and particularly dismissal actions for both academic and disciplinary reasons. *See e.g. Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 223, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985) and *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 84-85, 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978).

The fundamental requirement of due process is the “opportunity to be heard at a meaningful time and in a meaningful manner” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (citation omitted). What process is due has always been measured by a flexible standard that depends on the practical requirements of the circumstances. *Id.* at 334, 96 S.Ct. at 902; *Goss v. Lopez*, 419 U.S. 565, 577-78, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975). In *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961). For summary judgment purposes, the existence of the right should have been known to any tenured faculty and administrator at WSU as there was also long-established Washington state decisional law articulating the right to non-arbitrary and bad faith decision in graduate student evaluation. *See e.g. Board of Regents v. Enns*. 32 Wn. App. 898, 650 P.2d 1113 (1982).

Similarly, the Ninth Circuit and other federal appeals courts have long recognized that individuals have “the liberty interest in pursuing an occupation of one’s choice.” *See Dittman v. California*, 191 F.3d 1020, 1029. (9th Cir. 1999) and that “a plaintiff can make out a substantive due process claim if she is unable to pursue an occupation and this inability is caused by government actions that were arbitrary and lacking a rational basis.” *Sagana*

v. Tenorio, 384 F.3d 731, 742-43 (9th Cir. 2004), *cert. denied*, 543 U.S. 1149 (2005).

Since the due process clause of the Fourteenth Amendment has historically provided students and public sector employees with procedural and substantive protections, WSU officials in 2005 surely should have known that the U.S. Constitution provides a guarantee against arbitrary decisions that would impair Becker's constitutionally protectable interests in her continued enrollment and in pursuit of her chosen occupation.

This State has followed these U.S. Supreme Court precedents. *See Enns, supra*. Critically for this Court, it has mandatory authority in *Ochsner v. Board of Trustees, Washington Community College District*, 61 Wn. App. 772, 811 P.2d 985 (1991). There, Division III faced a due process claim stemming from a student-faculty dispute. *Id.* at 774-775. The trial court, as in this case, appeared to defer entirely to the faculty and/or administration's subjective judgment without meeting the requirement of meaningful review where "*arbitrary and capricious decision-making or bad faith is present.*" *Id.*, emphasis in *Ochsner*. That Court distinguished the College's authority and reaffirmed that state courts do have jurisdiction "to review arbitrary and capricious official action that may have led to a student receiving a particular grade." *Id.* at 777.

As discussed *infra*, the trial court ignored *Ochsner* and expert opinion on the ultimate issue of the arbitrary and capricious nature of WSU's decisions towards Becker, i.e. directing advisor changes, requiring prelim exam schedules by fixed dates, and, most importantly, to disenroll Becker from the Graduate School and WSU itself. In each context, there are inferences from which the jury could find that agents of WSU failed to provide her sufficient notice and opportunity to correct her alleged failure to progress before taking such drastic actions in such an inhumane fashion. *See* Keashley Dec. Ex.B (CP487).

The trial court appropriately and expressly denied WSU's motion to strike the un rebutted expert affidavit of Dr. Loreleigh Keashley (CP990). Thus, her opinion concluding that there was evidence of the arbitrary and capricious nature of WSU's decision-making was properly before the Court and should have precluded summary judgment. *Id.*

2. There Are Genuine Factual Disputes As To Violation of Becker's Clearly Established Rights To Equal Protection Under the Law

The Equal Protection Clause ensures that "all persons similarly situated should be treated alike." *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004). Many public sector employees have brought 42 U.S.C. §1983 claims to redress acts of age discrimination.

Here, as discussed *supra*, this Court can find the existence of disputed facts as to WSU motives for treating Becker differently than similarly situated younger students and /or that suggest arbitrary and capricious actions that implicate Becker's right to equal protection under the law as well

3. There Are Genuine Factual Disputes As To Violation of Becker's Clearly Established Rights To Free Expression Under The First Amendment

Becker made public complaints regarding her opposition to WSU conduct and practices and particularly as to age discrimination. Whether Becker's speech is constitutionally protected is a question of law. *Edwards v. Dep't of Trans.*, 66 Wash.App. 552, 558, 832 P.2d 1332 (1992). As in the case of due process, there is ample authority for the proposition that graduate students, like other public employees, have free speech rights in communicating internal concerns regarding faculty and administrator misconduct in non-disruptive ways or in ways that have no detrimental effects on other work or professional relationships. *See e.g. Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 980 P.2d 742 (1999).

Here, unlike *Benjamin*, no question was raised by faculty or administration as to any alleged disruption from Becker's complaint activity. That is because there was none, as she simply followed existing protocols and procedures. Thus, the "fact-intensive" query for the jury, as in her statutory retaliation claim, is whether Becker's constitutionally permissible conduct

could, but not necessarily would, have led decision-makers to inappropriately view her disloyal or place her in an unfavorable light. *Id.* Here, after being viewed as excellent, she was suddenly perceived as deficient. As the rationale for the clear deterioration in the faculty's subjective evaluation of Becker's doctoral candidacy depends on credibility and demeanor assessments reserved for a jury, the same analysis applies as in her statutory discrimination and retaliation claims. Summary judgment and dismissal was in error.

VI. CONCLUSION

WSU cannot meet the burden of establishing that the University, and its faculty and administrators are entitled to judgment as a matter of law dismissing each of Becker's carefully pled claims. Each is factually grounded and based in common law or statutory principles of law and equity. There are genuine issues of material fact from which a jury could easily conclude that WSU and its agents acted arbitrarily and capriciously in breach of many promises made to Becker when she was a graduate student. There are also genuine issues of material fact as to negligent action of at least one of those agents in representations made to Becker and evidence that Becker relied on those statements in choosing her program of study. Expert testimony alone raises factual disputes as to the true motives for actions that may have violated Becker's constitutional rights to due process, equal protection and free speech as she progressed through her doctoral degree process. The record is likewise

replete with credibility questions raised by WSU's actions and omissions from which a jury could find that the University and its actors discriminated against Becker due to her age in both the terms and conditions of her T.A./R.A. employment and in her education as whole, and then retaliated against her because she challenged them on the legitimacy, good faith and rationale for such prejudiced and biased actions. For all of these reasons, the trial court's dismissal of this complaint must be reversed and remanded to the trial court with instructions to set the matter for trial.

Respectfully submitted this 22nd day of October 2010.

LAW OFFICE OF PATRICIA S. ROSE

A handwritten signature in black ink that reads "Patricia S. Rose". The signature is written in a cursive, flowing style.

Patricia S. Rose, WSBA #19046
Attorney for Cheryl Becker

DECLARATION OF SERVICE

The undersigned, being first duly sworn, on oath deposes and says:

That I am a citizen of the United States, of legal age, not a party interested in the above entitled matter, and competent to be a witness in said cause; and

That on October 22nd 2010, I arranged for delivery by US Priority mail a properly addressed envelope, containing one copy each of the following documents: an original and one copy of Becker's Corrected Opening Brief addressed to the following

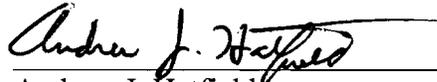
Office of the Clerk
Division III, Washington State Court of Appeals
500 Cedar Street
Spokane, Washington 99201

I also emailed and delivered a true and correct copy of the same to counsel for Respondent as follows:

Kathryn M. Battuello
Assistant Attorney General
State of Washington
800 Fifth Avenue, Suite 2000
Seattle, Washington 98104

I swear under penalty of perjury under the laws of the State of Washington that the foregoing statement is true and correct.

Dated at Seattle, Washington this 22nd day of October 2010


Andrew J. Hatfield