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JAN 18 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 293611

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROBERT J. FISCHER,

Appellant

v.

CITY OF ROSLYN,

Respondent

RESPONDENT'S OPENING BRIEF

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I. INTRODUCTION

Robert Fischer (“Fischer”) has limited his appeal to two issues: (1) did the trial court properly dismiss Fischer’s claim alleging the City breached a promise of specific treatment in a specific situation found in its personnel policy? and, (2) did the trial court properly dismiss Fischer’s claim, alleging he was wrongfully discharged in violation of public policy?

Fischer’s complaint alleged four different causes of action: (1) age discrimination in violation of the Washington Law Against Discrimination (“WLAD”); (2) disability discrimination and/or retaliation in violation of the WLAD; (3) “breach of implied-in-fact contract/promise of specific performance in a specific situation; promissory estoppel” and, alternatively, (4) wrongful discharge in violation of public policy. The trial court dismissed Fischer’s third and fourth claims at summary judgment. Fischer’s remaining claims (age discrimination, disability discrimination, and retaliation) (collectively referenced as Fischer’s “WLAD claims”) were presented to a jury. The jury returned a defense verdict as to those remaining claims, which Fischer has not appealed.

Robert Fischer was an “at-will” employee of the City of Roslyn (“City”). Fischer’s claims on appeal are based on exceptions to the terminable at-will employment doctrine. Fischer’s claim for breach of a

promise of specific treatment is based upon *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984) and its progeny. Fischer has failed, however, to establish that the City's personnel policy created a promise of specific treatment as required in *Thompson*. Moreover, Fischer has failed to provide sufficient evidence showing that the City breached its personnel policy. Thus, the trial court properly dismissed Fischer's promise of specific treatment claim.

Fischer's other appealable claim, i.e. his wrongful discharge in violation of public policy allegation, is also an exception to the at-will employment doctrine. This claim also fails. At summary judgment, Fischer claimed that his discharge violated the public policies found in the Family Medical Leave Act ("FMLA"), 29 U.S.C. §2601, *et seq.*, and the Workers Compensation Act, anti-retaliation provision, found in RCW 51.48.025. On appeal for the first time, Fischer has now claimed that his discharge violated the public policy found in the Washington State Family Leave Act ("WFLA"), RCW 49.78, *et seq.* As the trial court correctly noted, Fischer's wrongful discharge in violation of public policy claim was duplicative of his WLAD claims. Furthermore, Fischer has failed to establish the requisite elements of a wrongful discharge in violation of public policy claim. Consequently, Fischer has failed to present a basis for overturning the trial court's dismissal.

II. APPELLANT'S ASSIGNMENT OF ERRORS

A. Did the trial court misapply the summary judgment standard when it dismissed Fischer's claim that his discharge breached a promise of specific treatment in a specific situation found in the City's personnel policy?

B. Did the trial court misapply the summary judgment standard when it dismissed Fischer's claim that he was discharged in violation of public policy?

III. STATEMENT OF THE CASE

A. Procedural Background

On May 28, 2010, the trial court dismissed Counts III ("Breach of Implied-in-Fact Contract/Specific Employer Representations; Promissory Estoppel") and IV ("Wrongful Termination in Violation of Public Policy") of Plaintiff's complaint. CP 924-925. This order was based on a December 17, 2009 opinion letter from Judge Sparks. CP 923. Fischer's Complaint alleged four claims: (1) age discrimination in violation of the Washington Law Against Discrimination ("WLAD"); (2) disability discrimination and/or retaliation in violation of the WLAD; (3) "breach of implied-in-fact contract/specific employer representations; promissory estoppel;" and, alternatively, (4) wrongful termination in violation of

public policy found in the Family Medical Leave Act, 29 U.S.C. 2601, *et seq.*, and RCW 51.48.025. CP 4-6. From July 27, 2010 through August 3, 2010, Fischer's WLAD claims were presented to a jury. CP 929-930. The jury returned a complete defense verdict as to those claims. *Id.*; CP 942-944. On September 3, 2010, the trial court entered final judgment against Fischer as to all claims. CP 929-930. On September 15, 2010, Fischer filed his notice of appeal as to the court's summary judgment dismissal of Counts III and IV of Plaintiff's Complaint. CP 931.

Fischer's appeal is limited to a determination of whether the trial court erred in dismissing Fischer's promise of specific treatment claim and his wrongful discharge in violation of public policy claim. *See Appellant's Opening Brief, Assignments of Error, p. 1.* Although Fischer pled a breach of implied-in-fact contract claim in this third cause of action, which was summarily dismissed, he has not assigned error to that ruling. *Id.* Fischer has also included in his appeal a claim that Fischer was wrongfully terminated pursuant to the public policy found in the WFLA. *Id.*, p. 42. Fischer's claim that his discharge violated the WFLA was not presented to the trial court despite extensive briefing. *See CP 1-9; 281-323; 642-648; and 689-710.*

B. Factual Background

1. Parties Involved.

The City of Roslyn (“City”) has approximately 1000 residents. CP 070. Roslyn is a code city with a mayor-council form of government. RCW 35A.01, *et seq.* Roslyn had four full-time employees, four part-time employees and a volunteer fire chief. CP 071. The Mayor at the City of Roslyn is a part-time position. CP 119. Jeri Porter has been the City Mayor since 2004. CP 121 (*J. Porter Dep. 14:8-20*). Mayor Porter was Fischer’s direct supervisor. CP 77 (*Fischer Dep. 18:12-19:2*).

Fischer was hired to work for the City in 1987. CP 76 (*Fischer Dep. 14:10-12*). Fischer was later promoted to the Street Superintendent of the Public Works Department. CP 78 *Fischer Dep. 24:10-11*). He held that position until his discharge date. CP 78-79 (*R. Fischer Dep. 24:10-11; 25:4-7*). CP 240. The Public Works Department had two other employees: Joe Peck and Stan Georgeson. CP 240. Joe Peck was the Water and Sewer Superintendent. CP 241. Peck and Fischer were required to work together on certain projects, even though they supervised different areas. CP 78-79 (*R. Fischer Dep. 24:17-25:3*). Fischer was responsible for any heavy equipment operation that was required for water and sewer problems. *Id.* Stan Georgeson was a Public Works crew

member. CP 279. Georgeson was supervised by both Fischer and Peck. CP 79 (*R. Fischer Dep. 25:9-11*).

2. Fischer's Termination of Employment.

On March 19, 2007, the City discharged Fischer from his employment. CP 104. Mayor Porter was the deciding official. *Id.* Mayor Porter terminated Fischer's employment for "[g]ross insubordination, the inability to get along with other employees, and specifically, not following the corrective action outlined in a letter dated April 16, 2006." CP 104.

Fischer failed to follow the Mayor's direct orders and was terminated as a result. CP 104, 150-51 (*J. Porter Dep. 132:21-134:10*). In Mayor Porter's April 16, 2006 disciplinary letter to Fischer, she had ordered Fischer to conduct daily meetings at 7:00 a.m. with the Public Works employees at the "shop." CP 257. In March 2007, Mayor Porter learned that Fischer had only conducted two of those daily meetings over the past year. CP 130 (*J. Porter Dep. 52:8-24*). Prior to finding out that Fischer was not conducting the daily meetings, Fischer had given Mayor Porter the impression he was conducting the meetings. CP 144-45 (*J. Porter Dep. 109:14-110:16*). These meetings were ordered to improve the working relationship between Joe Peck and Fischer. CP 130 (*J. Porter Dep. 51:20-23*). The April 2006 disciplinary letter also directed Fischer to "get along with other crew members, treating them with respect and

reason.” CP 257. Fischer’s ability to get along with his co-workers did not improve and was also a basis for termination. CP 150-151 (*J. Porter Dep. 133:16-22; 134:14-16*). In addition, Mayor Porter had difficulty communicating with Fischer, even though he had a City-issued cell phone. CP 130 (*J. Porter Dep. 51:14-23*). She had previously instructed Fischer to carry his cell phone with him. CP 86 (*R. Fischer Dep. 54:12-14*). He failed to make himself available to Mayor Porter by cell phone, even after she had directed him to do so. CP 150 (*J. Porter Dep. 133:14-22*). Fischer had also given half truths about projects he did not want to perform, delayed assigned work, and generally failed to perform work as directed. CP 130 (*J. Porter Dep. 51:14-53:19*); 150 (*J. Porter Dep. 133:14-22*).

3. Fischer’s History of Performance Problems.

Fischer’s termination cannot be viewed in a vacuum. One must also consider all facts leading to his discharge. In November 2005, Fischer was warned during his performance review that his attitude required improvement. CP 226-230. While noting Fischer’s satisfactory performance, Mayor Porter provided Fischer with a clear performance objective: “get along with the public, no ‘get even attitude.’” CP 229. The City had received numerous citizen complaints regarding Fischer. CP 220-224, 233-234, 237. Fischer acknowledged the citizen complaints

noting that the part of the job he liked least was “when people complain and cause trouble for no reason.” CP 227. Along with warning Fischer about his attitude, Mayor Porter did accept for the moment Fischer’s explanation as to the citizen complaints. CP 229.

Fischer’s performance, however, did not improve. The City continued to receive citizen complaints regarding his attitude and performance. CP 243-244; 246-253. The rift between Fischer and Peck continued to undermine the work of the Public Works Department. CP 85 (*R. Fischer Dep. 51:16-19*); CP 129 (*J. Porter Dep. 47:7-48:1, 48:18-24*); CP 241. Fischer has admitted he did not get along with Peck. *Id.* Mayor Porter met with all of the Public Works crew members informing them that they needed to work on getting along better. CP 905 (*J. Peck Dep. 87:23-88:10, 89:2-9*). Mayor Porter also took disciplinary steps to correct Fischer’s behavior. CP 145 (*J. Porter Dep. 111:14-22*). She provided Fischer with oral warnings regarding his behavior. *Id.* Fischer acknowledged these oral warnings by signing the April 2006 letter of discipline, which states: “this warning is also a follow-up of past discussions when the oral warnings have been ineffective.” CP 257 (emphasis added).¹

¹ Fischer’s brief disputes the fact that Fischer received any oral warnings. *See* Appellant’s Opening Brief, p. 36. This issue for summary judgment is not, however, whether Fischer believes he received an oral warning. The material undisputed fact is

By April 16, 2006, Fischer's performance had not improved. As a result, he was provided a written letter of discipline. CP 257. Fischer signed the disciplinary letter, acknowledging the written discipline, as well as the prior oral warnings. *Id.* The April 16, 2006 disciplinary letter also provided Fischer with specific corrective action instructions: he needed to get along better with his co-workers, he was required to meet every day at 7:00 a.m. with the Public Works crew at the "shop" and he was to generally act in a professional manner. *Id.*

Despite the repeated warnings, Fischer's attitude did not improve. This is evidenced by a City Council executive session meeting held in the summer of 2006 to discuss Fischer's employment. CP 134 (*J. Porter Dep. 68:16-69:8*); CP 232-234; CP 236-238; CP 873 (*J. Porter Dep. 338:24-339:10*); CP 878-879 (*D. Porter Dep. 77:10-78:17*); and, CP 909 (*Sikon Dep. 54:24-56:18*). In that executive session meeting, Mayor Porter received unanimous support to take whatever employment action was necessary, including termination. *Id.* Fischer attempts to infer that the focus of the executive session was reorganizing the crew. *See* Appellant's Opening Brief, p. 20-21. This inference is contrary to the facts. The executive session was called by Mayor Porter to discuss Bob Fischer's

that the City informed Fischer, through the April 16, 2006, disciplinary letter that he had received prior oral warnings. Thus, Fischer – after this date – cannot claim a justifiable belief that Mayor Porter did not believe he had received prior oral warnings. *See* Section V.B.5 for analysis.

employment. CP 740 (*J. Porter Dep. 334:5-14*). The continued rift among the crew members was an ongoing concern. CP 742 (*341:4-19*). The Mayor did discuss all available options to improve the relations in the crew, but the primary purpose of the meeting was to gain City Council support for actions necessary to correct Fischer's behavior. CP 134 (*J. Porter Dep. 68:16-69:8*); CP 232-234; CP 236-238; CP 873 (*J. Porter Dep. 338:24-339:10*); CP 878-879 (*D. Porter Dep. 77:10-78:17*); and, CP 909 (*Sikon Dep. 54:24-56:18*).

Fischer's performance did not improve. On March 14, 2007, Mayor Porter asked Peck how the daily meetings were proceeding. CP 241; CP 272. Peck reported that there were no daily meetings because Fischer and Stan Georgeson were out in the morning viewing the elk being fed rather than being at the shop. CP 157 (*J. Porter Dep. 159:25-160:17*); CP 241; CP 272-273. Mayor Porter also learned that for the past year Fischer had only held two of the "daily" Public Works crew meetings, despite direct orders. CP 130 (*J. Porter Dep. 52:18-24*). This knowledge was in stark contrast to the impression that Fischer had given Mayor Porter that he had been holding the daily meetings. CP 144-45 (*J. Porter Dep. 109:14-110:16*). To confirm the Mayor's instructions regarding the Public Works Department work schedule, Mayor Porter immediately issued a directive to the Public Works crew members confirming a 7:00

a.m. to 3:30 p.m. shift. CP 275. In response to the Mayor's clear directive, Fischer immediately sought a change to his working hours. CP 277. Fischer's brief makes a large point of stating that his winter hours began at 6:00 a.m. The need for winter hours, however, had concluded. CP 143-44 (*J. Porter Dep. 105:25-106:16, 107:14-23*). The winter hours also did not excuse Fischer from holding the daily crew meetings, nor do they explain why Fischer only held two crew meetings during the remaining portion of the non-winter season. *Id.*

Over the weekend, Mayor Porter deliberated as to what course of action she should take regarding Fischer's employment. CP 157 (*J. Porter Dep. 158:17-18*). Mayor Porter reviewed the City policy on disciplinary procedures, as well as Fischer's personnel file. CP 167-168. Mayor Porter was also aware that Fischer was an "at-will" employee. CP 161 (*J. Porter Dep. 177:6-14*). The Mayor concluded that she had followed the City's policies; she then prepared a draft letter of termination, even though she was still uncertain whether she would discharge Fischer. CP 160 (*J. Porter Dep. 173:12-22*).

On Monday, March 19, 2007, Mayor Porter arrived unannounced at the Public Works "shop" at 6:50 a.m. for the daily 7:00 a.m. crew meeting. CP 159 (*J. Porter Dep. 167:11-169:6*). By 7:20 a.m., Fischer had still not arrived. *Id.* Mayor Porter called Fischer's cell phone, but did

not get an answer. CP 159 (*J. Porter Dep. 167:20-168:2*). She eventually spoke with Stan Georgeson—who often rode with Fischer—on Georgeson’s cell phone, and ordered them both to come back to the shop. *Id.* When Fischer finally arrived, Mayor Porter provided him with the termination letter. *Id.*

4. Non-Material Facts Asserted by Fischer.

Fischer extensively quotes sections from performance reviews in an attempt to show that he was a good employee. *See* Appellant’s Opening Brief, p. 8-9. Fischer neglects to state, however, that he is quoting performance reviews from 1988 and 1989. CP 503-05, 507-10, 512-15. The only material performance review was the one conducted by Mayor Porter in November 2005. CP 226-30. Fischer has also cited performance reviews from the Department of Transportation. CP 523, 525. Again, none of these reviews were conducted by Mayor Porter, nor do any of the reviews address material aspects of why Fischer was discharged by Mayor Porter.

Fischer has also claimed that his alleged comment to Mayor Porter at the December 12, 2006 Safety Meeting creates a material dispute. CP 102; CP 259-261. For summary judgment, the City has assumed this statement occurred. CP 025-26. The comment does not create a material dispute. The City is entitled to summary judgment regardless of whether

the comment was made. However, this issue was also already decided by a jury in Fischer's WLAD claims, where he asserted the City's proffered reason for his discharge was pretext. As discussed later in this brief, Fischer is collaterally stopped from relitigating this issue².

IV. SUMMARY

In Washington, the general rule is that an employment contract of an indefinite duration is terminable at-will. There are three recognized exceptions to the at-will doctrine: (1) statutory or congressional modification of the at-will relationship limiting the employer's right to terminate the employee, e.g., RCW 49.60 (Washington Law Against Discrimination); (2) employers and/or employees' modification of the at-will relationship; and (3) a narrow public policy exception preventing an employee's discharge in violation of a clear public policy. *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 152-55, 43 P.3d 1223 (2002). A jury has already determined that Fischer's WLAD claims under RCW 49.60 had no merit. CP 929-930; 942-944. Fischer has not appealed this jury verdict. As a result, Fischer's appeal stands on the notion that one of the other exceptions to the at-will doctrine exist in his case.

² Fischer has made a number of inappropriate allegations in his footnotes, alleging discovery improprieties. The City vehemently denies Fischer's assertions; however, more importantly, for the purpose of this appeal, none of these issues are before the Court. As a result, the City will not spend further time on these baseless allegations.

The trial court properly dismissed Fischer's implied-in-fact employment claim, his promise of specific performance in a specific situation claim and his wrongful discharge in violation of public policy claim. CP 923, 924-925. First, Fischer has not argued that his implied-in-fact employment claim was improperly dismissed. *See Fischer's Opening Brief, Assignment of Error*, p. 1. Fischer presented no evidence or argument in summary judgment or in his appellate brief that he has met the requisite elements of an implied-in-fact contract claim. CP 281-323; 642-648; and 689-710.³

Second, this Court should affirm the trial court's dismissal of Fischer's promise of specific treatment in a specific situation. This type of claim was created in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). The Supreme Court found that an employer could in certain circumstances unilaterally modify the at-will employment relationship. *Id.* at 233. If an employer makes "promises of specific treatment in specific situations" in its employee handbook or manual, then the employer will be obligated to adhere to those promises. *Id.* The City's personnel policy, however, does not create promises of specific treatment in specific situations as elucidated in *Thompson* and its progeny. In the

³ To the extent Fischer changes his position in his reply brief to include an argument regarding the implied in fact claim, the City may request leave of the Court Scheduling Order to address that specific issue. *See* RAP 10.1(h).

City's policy, (1) the City retains discretion to determine appropriate discipline, (2) the policy is general in nature, (3) the policy has a valid disclaimer, (4) the policy was not breached, and (5) Fischer did not justifiably rely upon the personnel policy. As a result, the City policy does not create a promise of specific treatment in a specific situation. Thus, this Court should affirm the trial court's ruling on this claim.

Third, this Court should affirm the trial court's dismissal of Fischer's wrongful discharge in violation of public policy claim. Fischer has alleged that his discharge violated the public policies found in the FMLA, the Workers' Compensation anti-retaliation provisions, and the WFLA. Fischer's public policy claim is duplicative of his WLAD claims. Moreover, Fischer fails to show he has met the requisite elements for this narrowly tailored exception to the at-will employment doctrine. Thus, the trial court properly dismissed Fischer's wrongful discharge in violation of public policy claim.

Finally, for the first time on appeal, Fischer claims that his specific treatment claim and his wrongful discharge in violation of public policy claim is based on pretext. The trial court did not consider this argument and Fischer should be prohibited from raising it on appeal. RAP 2.5(a). Furthermore, Fischer is collaterally stopped from raising this pretext issue

because it is the same issue already decided by the jury, which Fischer has failed to appeal.

V. ARGUMENT

A. Standard of Review

This case presents issues of whether summary judgment was properly awarded against Appellant. The appellate court engages in the same inquiry as the trial court. *Bulman v. Safeway, Inc.*, 144 Wash.2d 235, 351, 27 P.3d 1172 (2001). Thus, summary judgment must be granted where the pleadings, depositions, answers to interrogatories and admissions on file show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* The moving party meets its burden by either affirmatively showing the plaintiff cannot establish a critical element of his claim or by pointing out to the court the absence of evidence to support the non-movant's claims. *Young v. Key Pharmaceutical*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989).

Even in an employment contract, “the interpretation of a writing is a question of law for the court.” *Stewart v. Chevron Chemical Co.*, 111 Wash.2d 609, 613, 767 P.2d 1143 (1988). “In interpreting the language of employment policies, ‘if reasonable minds cannot differ as to whether language sufficiently constitutes an offer or a promise of specific treatment in specific circumstances, as a matter of law the claimed

promise cannot be part of the employment relationship.” *Bulman*, 144 Wash.2d at 351 (quoting *Swanson v. Liquid Air Corp.*, 118 Wash.2d 512, 527, 826 P.2d 664 (1992)).

B. The Trial Court Properly Dismissed Fischer’s Promise of Specific Treatment in a Specific Situation Claim

In *Thompson*, the Supreme Court created an exception to the at-will employment doctrine. *Thompson*, 102 Wn.2d at 231-33. An employment policy may modify the at-will relationship but only if the employee establishes that the policy contained promises of specific treatment in specific situations that the employee justifiably relied upon. *Bulman*, 144 Wn.2d at 340-41. An employee must prove: (1) the statements in an employment policy manual amount to promises of specific treatment in specific situations; (2) the employee justifiably relied upon any such promises; and (3) the employer breached its promises of specific treatment. *Id.* at 344.

Employers are not bound by all statements in a policy manual. *Thompson*, 102 Wn.2d at 231. Promises written in a manner that retain employer discretion do not create an employment obligation under *Thompson. Id.* Moreover, policies written in general terms do not amount to “promises of specific treatment.” *Id.* Additionally, conspicuous

disclaimers that the employment policy is not intended to alter the employment relationship prohibit a *Thompson* claim. *Id.*

In the instant action, Fischer's specific treatment claim fails for a number of reasons. First, the statements in the City's personnel policy do not create promises of specific treatment in specific situations as required by *Thompson*. The policy leaves discretion to the City to determine appropriate discipline, and thus does not create a promise of specific treatment. Moreover, the wording of the personnel policy is too general to constitute a "promise," and therefore, the employer did not "promise" any specific treatment. Next, the City's personnel policy has a conspicuous disclaimer that expressly informs all of its employees that the personnel policy is not an employment contract. Furthermore, there is no evidence that the City breached its "promise" in the personnel policy. Finally, Fischer has failed to show that he justifiably relied upon the City's personnel policy.

1. **The Personnel Policy Retains Disciplinary Discretion in the City.**

A policy that leaves discretion with the employer to determine appropriate levels of discipline does not create a promise of specific treatment in specific situations. *Hill v. J.C. Penney, Inc.*, 70 Wash.App. 225, 236, 852 P.2d 1111 (1993) (citing *Stewart v. Chevron Chem. Co.*,

111 Wn.2d 609, 613, 762 P.2d 1143 (1988)). “A “promise” in a [policy] is not binding if its performance is optional or discretionary on the part of the promisor.” *Id.* If the employer’s policy provides the employer with discretion “in applying the discipline procedures, courts have held as a matter of law that the [policy] does not provide a promise of specific treatment in a specific circumstance.” *Drobny v. Boeing Co.*, 80 Wash.App. 97, 103, 907 P.2d 299 (Div. I, 1995) (emphasis added). Moreover, “when an employer retains the discretion to decide what types of offenses will be serious enough to merit immediate dismissal, the employer makes no promise of specific treatment.” *Id.* at 105.

The City’s personnel policy provides the City with discretion as to its disciplinary procedures. CP 535-37 (2.48.130). The City policy also leaves the City with the discretion to determine if an offense warrants immediate termination. CP 536-37 (2.48.130, Step 4). Contrary to Fischer’s assertions, the City policy does not provide that the employer must adhere to each step described in its policy. The City can only be bound by the express language of its policy. *Baldwin v. Sisters of Providence in WA, Inc.*, 112 Wash.2d 127, 138, 769 P.2d 298 (1989). After all, a *Thompson* claim is based on the employer unilaterally restricting its right to terminate an employee at-will. *Id.* As a result, the Courts will not infer a transfer of authority where one was not intended by

the employer. *Id.* The City's policy does not expressly limit its right to terminate an employee at-will. The preamble of the discipline section states:

[I]t is the policy to take appropriate action when an employee engages in a practice which is in conflict with the best interests...of the City of Roslyn.

In determining the degree of disciplinary action to be applied, full consideration will be given to the seriousness of the offense, the intent and attitude of the individual, and the environment in which the offense took place.

CP 535 (2.48.130). The City policy also expressly provides that a Step 1 – oral warning is not required to issue a Step 2 – written warning. CP 536 (2.48.130, Step 2)(“A written warning should be utilized when warranted by the seriousness of the offense or when an oral warning has been ineffective.”)(emphasis added). The City policy further provides that termination is appropriate “when the severity of the offense dictates or when the employee fails to respond positively to the demands that an untenable situation be corrected.” CP 536 (2.48.130, Step 4). Of note, the policy does not require any of the steps described in Steps 1-3 be performed for an employee's dismissal. *Id.* Fischer cannot create a promise that is not expressly provided. *Cf. Baldwin*, 112 Wash.2d at 138-39 *with Drobny*, 80 Wash.App. at 105-06.

In *Birge v. Fred Meyer, Inc.*, 73 Wash.App. 895, 872 P.2d 49 (Div. 3, 1994), Division III affirmed the summary judgment dismissal of a *Thompson* specific treatment claim. Division III examined the employer policy, which provided that certain violations, including dishonesty and unspecific employment conduct of an “equally serious nature” would result in immediate termination. *Id.*, 73 Wash.App at 897. The court found that the employer’s policy retained discretion to terminate at-will. *Id.*, at 900. The basis of the Court’s finding was that the employer’s policy, included a non-exhaustive list of offenses, i.e. offenses of an “equally serious nature,” that warranted immediate termination without warning. *Id.*, at 892. The employer’s policy also expressly provided that certain acts would result in discipline and may result in termination. *Id.* The City’s policy states – similar to *Birge* –

“[i]n the event of extremely serious offense, i.e. theft, violence, or gross insubordination, it may not be necessary and appropriate for the mayor to use all or part of the initial states of the procedure.” *Id.*

The City in its policy retains discretion to determine when certain acts warrant immediate discharge. The City’s policy– like *Birge* – also lists a number of offenses that may warrant dismissal, including the inability to get along with other employees. As a result, the statements in the City’s discipline procedures do not constitute promises of specific performance.

Moreover, in *Drobny*, the appellate court affirmed the trial court's summary judgment dismissal of a *Thompson* specific treatment claim, in part, because the employer's policy provided the employer with discretion in applying its disciplinary procedures. The employee was terminated without progressive discipline, even though the employer's policy stated: "discretionary actions supervisors take are to be governed by progressive discipline" and then provided a list of the discipline to be imposed. 80 Wash.App. at 102. The employer's policy also noted, however, that "acts warranting severe discipline" may warrant immediate discharge and "[d]ismissal is appropriate when efforts at corrective action fail or the seriousness of the violation or problems warrants it." *Id.*

The language between *Drobny*, *Birge* and the City's policy regarding immediate discharge is nearly identical, and *Drobny* even required a warning prior to dismissal, except in "serious" or "intentional" acts of severe misconduct. The City's policy, however, has no such requirement. In the above cases, the policies are silent as to who will determine when facts require immediate discharge. As a result, just as the employer is *Drobny* "retained discretion to determine on a case by case basis whether conduct would be deemed serious enough to merit dismissal without recourse to progressive discipline" so has the City in its policies retained the same discretion. *Id.* at 103. The City's policy also retains

discretion as to what level of discipline is appropriate for any disciplinary action, including when an employee's conduct warrants immediate discharge. Thus, the City's disciplinary policy is not a promise of specific treatment because the employer has retained discretion to determine when discharge is appropriate.

Fischer ignores the discretionary language of the City's personnel policy and attempts to assert that the facts in his case do not warrant immediate discharge⁴. Fischer's argument confuses two different aspects of his claim. The question of whether an employee's conduct warrants discipline under the policy relates to whether the employer breached its promise of specific treatment, not whether the policy created the promise⁵. The employee's conduct is not relevant to determine whether the employer's policy created a promise. If the policy does not create a promise, Fischer is at at-will employee, and his specific treatment claim fails. Here, the City policy, similar to *Drobny*, makes a non-exclusive list of possible offenses warranting possible discharge, including failure to get along with others and general misconduct. CP 536 (2.48.130, Step 4). The policy also provides that gross insubordination is an extremely serious offense, warranting immediate termination. CP 535 (2.48.130, Step 4).

⁴ For the purposes of this section, the City will ignore the fact that Fischer had received oral warnings and a written warning prior to his discharge.

⁵ For the City's breach of promise argument, see V.B.4 of this Brief.

This standard was further expressed in the disciplinary letter provided to Fischer on April 16, 2006. CP 257. The letter expressly informed Fischer:

If you do not correct your behavior, the disciplinary action would range from suspension without pay for up to two weeks, or even dismissal. This would depend on the severity of the offense. An extremely serious is gross insubordination.

CP 257. The letter followed the City's policy retaining discretion to determine when discipline is appropriate and to what degree.

The City also has retained the right to make its own factual determination as to what constitutes terminable misconduct. *Drobny*, 80 Wash.App. at 105-06; *see also, Baldwin*, 112 Wash.2d at 137-38. “[T]he meaning intended by the drafter, the employer, is controlling and there is no reason to infer that the employer intended to surrender its power to determine whether facts constituting cause for termination exists.... In the absence of any evidence of express or implied agreement whereby the employer contracted away its fact-finding prerogative to some other arbiter [the court] shall not infer it.” An employer does not make a promise, or relinquish discretion, if the employer remains silent in its policy as to those issues. *Id.* In fact, if the employer's policy is silent as to discretionary factual determinations, the court must conclude the

employer retained discretion. *Id.* Fischer ignores this legal fact and attempts to alter the personnel policy with statements made by Mayor Porter at her deposition⁶. Of note, Fischer was informed during his employment that he worked at the “pleasure of the Mayor⁷.” CP 081-82 (*R. Fischer Dep.* 36:23-37:15); CP 109. The City policy, however, cannot be changed by a supervisor’s comments. *Drobny*, 80 Wash.App. at 107 (citing *Winspear v. Boeing Co.*, 75 Wash.App. 870, 880, 880 P.2d 1010 (1994), *rev. den’d*, 126 Wash.2d 1006, 891 P.2d 78 (1995)). Fischer is required to show through the policy a promise of specific treatment. Fischer has failed to show the City’s policy limits its discretion to determine when an employee’s offense warrants discharge. As a result, Fischer’s claim of a promise of specific treatment in a specific situation fails.

2. **The City’s Personnel Policies are not “Promises” because they are Written as General Statements.**

A statement of general policy does not create a claim under *Thompson. Hill v. J.C. Penney*, 70 Wash.App. 225, 235, 852 P.2d 1111 (Div. II, 1993). The promise in an employer’s policy must be a “clear and

⁶ Mayor Porter did adhere to the policy steps, however, that does not mean she was required by law to do so. *See* Respondent’s Brief, Section V.B.4.

⁷ The City does not agree with Fischer’s characterization of Mayor Porter’s understanding of the personnel policy. However, it is a disagreement without meaning in this context. Any comments made by a City official after Fischer’s employment cannot, as a matter of law, cannot be a basis for Fischer’s justifiable reliance on the City’s policy.

definite promise.” *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 173, 876 P.2d 435 (1994). When an employer’s policy contains permissive or non-binding language no promise has been made. *Hill*, 70 Wash. App. at 236. The City’s policy – contrary to Fischer’s assertions – is general in nature. The policy not only leaves the discretion as to what discipline should be applied to the decision-maker, the policy also does not make clear and definite promises. The policy, for instance, never states that an employee will receive a warning prior to termination. E.g., *Swanson v. Liquid Air Corp.*, 118 Wash,2d 512, 524, 826 P.2d 664 (1992)(“in all other instances of misconduct, at least one warning, shall be given”)(emphasis added).

The City policy, for instance, expressly provides that an oral warning does not have to precede a written warning: “A written warning should be utilized when warranted by the seriousness of the offense or when an oral warning has been ineffective.” CP 536 (2.48.130, Step 2). Whether an oral warning must be given is left to the discretion of the employer.

Another example of the general nature of the policy is the Step 3 – investigatory suspension. CP 536 (2.48.130, Step 3). An investigative suspension is defined as a period of time when the employer investigates potential misconduct that could result in severe disciplinary action. *Id.*

Under Step 3, there is no requirement that an investigative suspension be done regarding serious misconduct. In fact, one of the courses of action under the investigation is that the employee be paid for lost time as a result of the investigation when no disciplinary action occurs. The plain and simple meaning of Step 3 is that it provides the City an opportunity to place an employee on unpaid leave while it conducts an investigation into potential misconduct. *Id.* The City has total discretion to determine if an investigative suspension is required under the circumstances. Discipline may or may not result after an investigation has ensued. The general nature of the section provides the City with the choice of whether to perform an investigatory suspension prior to discipline.

Finally, Step 4 does not provide that any of the previous steps must have previously occurred. CP 535-36. An employer's promise must be expressly provided. *See* Section V.B.1. of this Brief; *see also Baldwin*, 112 Wash.2d at 137-38; *Drobny*, 80 Wash.App. at 105-106. Here, the language of Step 4 provides that “[d]ismissal is to be invoked when the severity of the offense dictates.” CP 536 (2.48.130, *Step 4*). This section also provides that any or all of the steps described in the policy are not necessary for extremely serious offenses, such as gross insubordination. *Id.* Again, the policy is general in nature, allowing the City to determine when termination is appropriate. *Id.*

Fischer argues that because the policies have mandatory language (will, shall, etc.) the policy is not general. Fischer's argument, however, is misplaced. None of the mandatory phrases in the policy create a promise that Fischer will receive a specific type of notice prior to discharge. In *Stewart v. Chevron Chemical Corp.*, 111 Wash.2d 609, 613-14, 761 P.2d 1143 (1988), the Court examined a policy that included both mandatory and permissive language. However, because the language regarding employee lay-offs was not obligatory, the manual did not create a promise of specific treatment. Here, there is no mandatory language requiring certain steps, i.e., warnings prior to discharge; instead, the language regarding the level of discipline is permissive and left to the City's discretion.

3. **The Disclaimer in the City Policy ensures that the Policy does not Modify the At-Will Relationship.**

The City's personnel policy also does not create a promise of specific treatment because it contains a conspicuously articulated disclaimer. The City policy expressly states: "This chapter is not, however, an employment contract." CP 529 (2.48.020). Since the policy is not an employment contract, the employee cannot rely upon it to modify the at-will relationship. Division III has already determined that this language regarding "an employment contract" is sufficiently clear to be a

disclaimer. *Birge*, 73 Wash.App. at 898, 901. In *Birge*, the employee signed an acknowledgment, which provided that the employee manual “[did] not constitute an employment contract.” Division III found that the language was sufficiently clear to be a disclaimer. *Id.*, at 901.

Fischer claims that the validity of the disclaimer is an issue of fact. *See* Appellant’s Opening Brief, pp. 28-29, 33-35. An issue of fact exists, however, only if there are any material inconsistencies as to the meaning of the disclaimer. An employer’s inconsistent statements can negate the disclaimer. *See Kuest v. Regent Assistant Living, Inc.*, 111 Wash.App. 36, 53, 43 P.3d 23 (Div. I, 2002). However, there must be enough factual conduct inconsistent with the express terms to negate the disclaimer. Here, the City’s policy itself is not ambiguous or inconsistent. The City’s personnel policy expressly informs its employees that the policy is not an employment contract. *See* CP 529 (2.48.020). The discipline section informs employees that it is the City’s “policy to take appropriate action when an employee engages in a practice which is in conflict with the best interests, and impairs the functioning of the City of Roslyn.” CP 535 (2.48.130). The policy does not relinquish the City’s right to terminate an employee at-will.

Fischer’s argument really rests upon the misguided notion that the City’s failure to identify the “at-will” employment relationship in the

policy raises the inference of inconsistency that an employee can only be terminated “for cause.” Appellant’s Opening Brief, p. 29. Fischer’s argument is contrary to the law. *See Hill*, 70 Wash.App. at 235 (employer not required to inform employee that he could be fired at-will). An employer’s at-will relationship with its employees is only changed through express promises, not inferred by silence. *See Drobny*, 80 Wash.App. at 105-06. Fischer has presented no evidence that the City provided Fischer with any belief that his employment was for cause. In fact, Fischer was told that he could be fired at the “pleasure of the Mayor,” inferring that he was an at-will employee. CP 081-82 (*R. Fischer Dep.* 36:23-37:15); CP 109.

4. The City has not Breached any “Promises” Found in the Personnel Policy.

To the extent the Court finds the City created obligations through the personnel policy, the City did not breach any of the “promises” found in that policy. *See CP 535-36 (2.48.130)*. Even if the Court finds the City created an enforceable promise, the City is only obligated to the extent of its promises. The City may have to adhere to the terms in its policy, but has no additional obligation. Here, the City policy expressly states that “[d]ismissal is to be involved when the severity of the offense dictates or when the employee fails to respond to the demands that an untenable

situation be corrected.” CP 536 (2.48.130, Step 4). The City’s policy does not require that Steps 1-3 be performed prior to termination, nor does a reasonable reading of the policy infer such a requirement. The City’s policy also includes a non-exhaustive list of offenses that may result in an employee’s termination, as well as other offenses that would be considered extremely serious. *Id.* At all times, the City retained the discretion to make a factual determination of whether discipline was warranted and to what degree. *See* Section V.B.1. of this Brief.

Although Fischer has used the term “just cause” to define the City’s policy, the term is not found in the City policy.⁸ The City policy does not require just cause to discharge an employee. Moreover, the court cannot infer that the City intended a just cause inference by the language used. If the terms ‘serious’ or ‘intentional’ “do not incorporate a promise of termination only ‘for cause’ into an employment manual”, then one cannot infer that “extremely serious” incorporates a promise of termination only ‘for cause.’ *Drobny*, 80 Wash.App. at 105.

The undisputed facts show that Fischer received a written letter of warning on April 16, 2006. CP 257. Even though the written discipline, signed by Fischer, acknowledges prior oral warnings, the City’s policy

⁸ Fischer has also used quotes around “just cause” providing a possible inference that the usage is derived from the City policy. This term, however, is not found in the City’s personnel policy, nor is the term ‘for cause.’

does not require a verbal warning to precede a written warning. CP 536 (2.48.130, Step 2); see also Section V.B.1 and 2 of this Brief. Furthermore, the written letter of discipline was issued because of Fischer's inability to get along with Joe Peck. The policy provides that the inability to get along with other employees is an offense that may warrant discipline, up to and including discharge. Cf. CP 257 with CP 536 (2.48.130, Step 4).

The facts further show that Fischer's ability to get along with Joe Peck did not improve. Moreover, Fischer was required to hold daily crew meetings per the written letter of warning. CP 257. In a year's period of time, Fischer held two of those daily crew meetings. CP 130 (*J. Porter Dep.* 52:8-24). Furthermore, the undisputed facts show that Mayor Porter repeatedly asked Fischer to have his cell phone with him and turned on. *Id.* (*J. Porter Dep.* 51:14-23). On March 19, 2007, Fischer did not show up at the "shop" at 7:00 a.m. for the daily meeting, even after an additional direction. CP 159 (*J. Porter Dep.* 167:11-169:6). Fischer was also not available by cell phone. *Id.* Fischer was also not providing the Mayor with half-truths and delaying work assignments. CP 130 (*J. Porter Dep.* 51:10-54:11); CP 150 (*J. Porter Dep.* 133:16-22). Mayor Porter determined Fischer's actions amounted to "gross insubordination." CP 104. The City policy permits Mayor Porter to make this factual

determination. Both offenses would permit immediate discharge under the City's policies, which is what occurred.

5. Fischer has not Shown that He Justifiably Relied upon the City's Policy.

Fischer must show the City's policy creates a promise for specific treatment, the City breached its promise, and Fischer had relied upon that promise. To rely upon a policy, Fischer must show that he was actually aware of the policy. *Bulman*, 144 Wash.2d at 350. In *Bulman*, the Supreme Court determined that an employee failed to show he justifiably relied upon a company policy when he testified that he had "probably" seen the document, "but did not demonstrate any familiarity with [the employer's policy]." *Id.* at 348. "[A]s a matter of law, there is not an enforceable promise of specific treatment in specific circumstances where the employee did not know about the 'promise' until after he was discharged." *Id.* at 341 (quoting *Swanson v. Liquid Air Corp.*, 118 Wash.2d 512, 522, 826 P.2d 664 (1992)). Fischer's claim is contradicted by his own clear understanding that he worked at the "pleasure of the Mayor." CP 082 R. *Fischer Dep.* 37:1-15). Fischer's knowledge of the policy is evidenced by the fact that he was not aware the City's policy mandated a grievance procedure for any dispute regarding the City policy. CP 081 R. *Fischer Dep.* 33:4-21). Fischer has not sufficiently provided

evidence that he had actual knowledge of the policy to justifiably rely upon it as required by *Bulman*.

Furthermore, if Fischer claims that he justifiably relied upon the promise of specific treatment, then Fischer must adhere to the employee obligations under the same policy. The City's promise is limited by the grievance procedure. CP 534-35 (2.48.120) ("An aggrieved employee shall first refer the grievance to the Mayor within five (5) working days of the occurrence.... An employee grievance must follow this chain of appeal.) Any rights Fischer may have obtained as a result of promises made in the personnel policy must be tempered by the mandatory grievance procedure of that policy. Fischer cannot justifiably rely on a select portion of the policy, neglecting to adhere to the policy as a whole. Fischer must exhaust his remedies under the policy before bringing a claim. *See, e.g., Moran v. Stowell*, 45 Wn.App. 70, 724 P.2d 396 (1996). Fischer's subjective belief alone in the futility of filing a grievance is insufficient to invoke the exception. *See Smith v. General Elec. Cp.*, 63 Wash.2d 624, 625-27, 388 P.2d 550 (1964).

C. The Trial Court Properly Dismissed Fischer's Wrongful Discharge in Violation of Public Policy Claim

Washington allows for a very narrow exception of the at-will doctrine when an employee's discharge contravenes a clear mandate of

public policy. *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d at 153-54. The Supreme Court has continuously cautioned that the exception must be narrowly construed. *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001). To survive summary judgment, an employee must provide sufficient elements of the following: (1) the plaintiff must prove the existence of a clear public policy (the clarity element); (2) the employee must prove that the discouraging conduct in which the employee engaged would jeopardize the public policy (the jeopardy element); (3) employee must show the public policy linked conduct caused the dismissal (the causation element); and (4) the employer must not be able to offer an overriding justification for the dismissal (the absence of justification element). *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001)(quoting *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996)). As a result, the employee must provide sufficient evidence of the employer's intentional conduct.

The public policy exception is generally allowed in only four situations: (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege such as filing workers compensation claims; and (4) where employees are fired in retaliation for reporting

employer misconduct, i.e. whistleblower. *Id.* citing *Gardner*, 128 Wn.2d at 936.

Fischer identifies three statutes as possible bases for his claim: FMLA, Workers' Compensation Act, anti-retaliatory provision and the WFLA. Absent a clear mandate of public policy, courts should proceed cautiously. *Thompson*, 102 Wash.2d at 233 (quoting *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 652 P.2d 625, 631 (1982)). The question of what constitutes a clear mandate of public policy is a matter of law. *Dicomes v. State*, 113 Wash.2d 612, 617, 782 P.2d 1002 (1989). "Courts must 'find' not 'create' public policy, and the existence of such public policy must be 'clear.'" *Blinka v. WSBA*, 109 Wash.App. 575, 586, 36 P.3d 1094 (Div. I, 2001). The employee must prove the existence of a clear public right, which includes exercising a legal right. The drafting of the statute is the best method for determining the public purpose of that statute. *Sedlacek*, 145 Wash.2d at 392-93.

To establish the jeopardy element, Fischer must show there is not an adequate alternative basis of promoting the public policy on which he relies. *Korslund v. Dyncorp Tricities Serv., Inc.*, 156 Wash.2d 168, 181, 125 P.3d 119 (2005). The jeopardy element is not concerned about the plaintiff's ability to bring suit, but instead whether there are other methods of protecting the public policy. The question of whether an adequate

alternative theory exists is question of law. *Id.*, at 182. If other means exist and are adequate to protect the public policy, then summary judgment as to Fischer's claim is appropriate. *Id.*, at 185.

1. **The Family Medical Leave Act was not designed to protect employees in Fischer's position.**

The Family Medical Leave Act ("FMLA") is not applicable in this case. The FMLA requires covered employers to provide eligible employees with up to twelve weeks of unpaid, job-protected leave per year. *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 726 (10th Cir. 2006). An eligible employee must meet the time and hour requirements of the FMLA as well as be employed with an employer that employs 50 employees at a worksite. *Id.* This requirement includes public employees. "[E]mployees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (e.g. State) employ 50 employees at the worksite within 75 miles." 29 CFR 825.108. Fischer has now acknowledged that he was not eligible for FMLA- leave as a legal right. *See* Appellant's Opening Brief, p. 43. Fischer now claims, however, that because the City of Roslyn is a covered employer, then the FMLA-leave requirements should be extended through the tort of wrongful discharge in violation of public policy.

The City is a covered employer. This fact, however, relates to posting and other requirements under the FMLA and explicitly does not include an employee's ability to request protected leave, if the public agency has less than 50 employees. 60 Fed. Reg. 2180, 2185 (January 6, 1995) ("FMLA" special rules of defining a public agency employer for other unique purposes mandated under FMLA are not analogous to FMLA leave situations, and we do not believe that any special rules are required under FMLA"); *see also, Faine v. Wayne County Auditor's Office*, 388 F.3d 257, 258 (7th Cir. 2004)(explaining that even though a public agency is an "employer" under the statute regardless of the number of employees, the 50-employee limit is resurrected in the definition of "eligible employees.") The FMLA has purposefully decided that the leave requirements do not extend to small business, i.e., less than 50 employees. 29 CFR 825.108.

The FMLA is a federal statute carefully crafted to balance the needs of small businesses with the needs of employees. 29 U.S.C. 2601(b)(1); 29 CFR 825.101(b). The FMLA expressly avoids creating a public policy with regard to employers with less than 50 employees at a worksite. 29 CFR 825.108. The City employees are not eligible for FMLA leave. CP 071.

In *Sedlacek*, the Supreme Court dealt with a directly analogous issue. In that case, was an employer with less than 15 employees required to adhere to the requirements of the Americans With Disability Act (“ADA”). *Id.* The ADA’s statutory remedy does not apply to employers with less than 15 employees. 42 U.S.C. §12111(5)(A). The *Sedlacek* employer had fewer than 15 employees. 145 Wash.2d at 389. The Supreme Court refused to extend Washington public policy to include ADA requirements for employers with less than 15 employees. *Sedlacek*, 145 Wash.2d at 389.

The FMLA does not extend its protection to employees who are employed by an employer with less than 50 employees. “[W]hen there is no violation or potential violation of an enforceable law, as is the case here, a plaintiff cannot rely on the state’s interest in ensuring that its citizens comply with the law.” *Sedlacek*, 145 Wash.2d at 392-93. After all, “the Legislature is the fundamental source for the definition of this state’s public policy and [the court] must avoid stepping into the roles of the legislature by actively creating the public policy of Washington. ‘This court should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principal that ‘the drafting of a statute is a legislative, not a judicial, function.’” *Id.* at 390 (quoting *State v. Jackson*, 137 Wash.2d 712, 725, 976 P.2d 1229

(1999)). Fischer does not present a case where his potential leave was a protected right. Instead, Fischer seeks for the Court to expand the statutory protection beyond what the legislature intended. This act would be the very definition of creating public policy instead of finding a pre-existing public mandate. As a result, Fischer's claim that his discharge was wrongful because it violated the policies found in the FMLA is without merit.

This is not a case where the law applies to all citizens, but the remedy is limited, such as *Dudley v. Roberts*, 140 Wash.2d 58, 993 P.2d 901 (2000). In *Roberts* the court analyzed the WLAD discrimination policy applicability to an employer with less than eight employees. The *Roberts* court based its ruling, in part, on a prior court ruling, *Marquis v. City of Spokane*, 130 Wash.2d 97, 922 P.2d 43 (1996) (“the purpose of the law [against discrimination] is to deter and to *eradicate* discrimination in Washington’ which has been recognized as a ‘policy of the highest priority.’”) *Id.*, at 66 (emphasis added). The court also found that Washington statutes provided a general right for all employment to be free of discrimination, RCW 49.12.200 and RCW 49.60.010. *Id.*, at 67-71. Moreover, the statutory definition of employer (i.e., 8 or more employees) under the WLAD does not exclusively limit the policy against discrimination to large employers. *Id.* at 71 (citing *Bennett v. Hardy*, 113

Wash.2d 912, 784 P.2d 1258 (1998)). On the contrary, in this situation, there is no case support extending FMLA coverage to small employers. There is also a clear legislative mandate that the requirements of the FMLA should not extend to small employers, i.e. less than 50 employees. As a result, this case is not analogous to *Roberts*, but instead to *Sedlacek*.

Furthermore, there is no Washington case support to extend the federal leave requirements to all employers, as there was in *Roberts*. There are, however, a number of other states that have refused to extend the requirements in this type of scenario. See *Upton v. JWP Businessland*, 425 Mass. 756, 682 N.E.2d 1357, 1359-60 (1997)(no public policy protecting employees refusing to work long hours due to having young children); *Dorricott v. Fairhill Center for Aging*, 2 F.Supp.2d 982, 993 (N.D. Ohio 1998) aff'd 187 F.3d 631 (table) (6th Cir. 1999)(The FMLA demonstrates a clear policy of protecting longer-term employees for large employers, not employees who have worked for less than 6 months with the employer); *Hundley v. Dayton Power & Light Co.*, 148 Ohio App. 3d 556, 774 N.E.2d 330, 334-35 (Oh. Ct. App. 2002) (court rejected arguments that the FMLA created a clear public policy that employees should not be penalized for taking leave to care for injured children); *Lloyd v. AMF Bowling Centers, Inc.*, 195 Ariz. 144, 985 P.2d 629, 632 (Ariz. Ct. App. 1999)(public policy did not cover employee, who was

fired for refusing to cover for ailing coworker, because he had to watch his young son).

Finally, Fischer argues that the public policy found in the FMLA should apply in the instant matter precisely because Fischer was not an eligible employee. *See* Appellant's Opening Brief, p. 43. Fischer's argument misapplies the jeopardy portion of the test, and ignores the clarity portion. The jeopardy question is not whether there is a law that protects Fischer's interest, but instead is there a law that protects the public policy. *See Korlund*, 156 Wash.2d at 181-183. Under the FMLA, Congress has created a comprehensive statute to protect employees covered by the statute. The FMLA has set forth a specific remedy to redress violations of that public policy. As a result, a tort claim for wrongful discharge in violation of the policy found in the FMLA fails because there already is an adequate method to protect that public policy.

2. The Workers Compensation Act, Anti-Retaliation Provision does not Provide Fischer with a Claim.

Fischer next contends that his discharge violated the anti-retaliation provision of the Workers Compensation Act. RCW 51.48.025. Fischer presents no argument in his Appellant brief as to why the Workers Compensation anti-retaliation provision applies. *See* Appellant Opening Brief, pp. 40-49. The only fact in Fischer's entire brief related to a

Workers Compensation claim is that Mayor Denning informed Fischer he would be fired if he filed a Workers Compensation claim. Appellant Opening Brief, p. 22. According to Fischer, he started having knee problems in 1987 when he started working for the City. CP 54 (*R. Fischer Dep. 96:20-22*). Since that time, Fischer has been supervised by the following mayors, Jack Denning, Dave Drelbliss, Dave Gerth, and Jeri Porter. CP 077 (*R. Fischer Dept. 18:12-24*). Denning's last year was 1994. Fischer has presented no evidence, nor could he make a reasonable inference that Mayor Porter was aware of any alleged attempt to restrict Fischer's ability to file a worker's compensation claim. Moreover, according to Fischer's medical records, he originally injured his knee in 1994 as the result of acute inflammatory arthritis. CP 262 (p. 10 of 25 of sealed document). Fischer also alleges that on December 12, 2006, he informed Mayor Porter at a safety meeting that he intended to take time off in the summer of 2007 to have knee surgery. CP 96 (*R. Fischer Dep. 92:14-95:14*); CP 102 (*R. Fischer Correction Sheet*). Fischer had not scheduled knee surgery, nor had he ever met with a surgeon to discuss surgery. *Id.* There is also no evidence that Fischer filed or intended to file a worker's compensation claim as to his recent knee problems.

Wrongful discharge in violation of public policy is an intentional tort. *Hibbert v. Centennial Villa, Inc.*, 56 Wash.App. 889, 893-94, 786

P.2d 309 (Div. I, 1990). Accordingly, there must be some specific evidence that Mayor Porter was aware of the protected activity. *Id.* Fischer is required, even to survive summary judgment, to present specific facts. An injury that may-or-may-not-have occurred on-the-job over twenty years prior to his discharge is not sufficient.

Moreover, RCW 51.48.025 is an anti-retaliation statute. The Court permitted Fischer to continue with his retaliation claim under the WLAD. Fischer was permitted to present evidence of his knee injury, which was the source of his “disability” to the jury. CP 923. Fischer was further permitted to present evidence that he was fired because his knee injury as well as being fired in retaliation. Fischer has already been allowed to present evidence that he asked Mayor Porter for time off to fix his knee and was fired as a result. Wrongful discharge in violation of public policy is not proper if other means of promoting the public policy are adequate. *Korlund v. Dyncorp Tri-Cities Serv., Inc.*, 156 Wash.2d 168, 181-82, 125 P.3d 119 (2005). The adequacy of an alternate means for promoting the policy may present a question of law. *Id.* In this instance, the remedies under the WLAD, 49.60, and the anti-retaliation provision provide an adequate remedy for employees’ injured-on-the-job. In fact, Fischer presented his retaliation claim to the jury, and he has not appealed the jury’s defense verdict. If another means of protecting the public policy is

adequate, the Court should refrain from extending the very narrowly construed exception to the at-will doctrine. *Id.* Thus, the trial court properly dismissed Fischer's claim as unnecessarily duplicative.

3. **The Washington State Family Medical Leave Act is not Applicable.**

Fischer for the first time on appeal claims that his discharge violated the public policy found in the Washington Family Leave Act. An appellant is not permitted to raise new issues on appeal. RAP 2.5(a).

To the extent the Appellate Court will entertain Fischer's argument, the Respondent's FMLA argument is equally applied to his WFLA claim. The only divergence is that the WFLA offers more leave regarding pregnancy-related leave. Under the WFLA, similar to the FMLA, the purpose is to promote a balance between the needs of the family and the needs of small businesses. RCW 49.78.010. The purpose of the Act is almost identical to the FMLA. Cf. RCW 49.78.010 with 29 CFR 829.101(a), (b). The Act purposely does not include coverage for small businesses (less than 50 employees). The purpose of the Act is best determined by the language of the Act. The WFLA has expressly determined its scope is limited to employers with 50+ employees. Fischer cannot be permitted to create a claim when none exists. Here, there is simply no public policy that covers Fischer's situation.

D. Fischer does not have a Claim for Pretext.

Fischer did not assert or argue that his specific treatment claim, or his wrongful discharge claim should survive summary judgment because of pretext. CP 295-304; CP 707-710. Fischer did assert a pretext argument as it related to his WLAD claims. CP 304-311; CP 704-707. Fischer was also allowed to present evidence of pretext to the jury on his WLAD claims. CP 923. Fischer should not be permitted to create new arguments on appeal that were not presented to the trial court. RAP 2.5(a).

A jury has already determined that Fischer's age, disability and retaliation were not pretext for his termination. "When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel." *City of Arlington v. Cent. Puget Sound Growth Mngmt. Hearings Bd.*, 164 Wn.2d 768, 792, 193 P.3d 1077 (2008)(quoting *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995)). Collateral estoppels requires: (a) identical issues; (b) final judgment on the merits; (c) the party against whom the claim is asserted must have been in privity; and (d) application of the doctrine must not work an injustice against whom the doctrine is applied. *Id.* Fischer's failure to appeal his WLAD claims, means that his age, disability and

discrimination claims have been decided on the merits. Fischer is now attempting, however, to relitigate an issue previously decided by a jury. Fischer has received a judgment on the merits as to whether his termination was pretextual and actually based on his age and/or knee problems. Fischer's WLAD claims were based on his believe that the City's proffered reason for his discharge was pretextual. Fischer's proof of pretext, included a comment he allegedly told Mayor Porter at a December 12 safety meeting that he was going to have knee surgery sometime in the summer of 2007, and the age of his replacement⁹. See CP 923; CP 305-310; CP 706-707. Fischer has re-packaged the exact issue that was presented to a jury and now attempts to relitigate that issue in other claims. See Appellant's Opening Brief, p. 1, 2, 7, 21, 22, 41, 45, 48. This attempt violates the doctrine of collateral estoppels and should not be allowed. (Fischer's assignment of error even reiterates this issue).

Even if the court does entertain Fischer's pretext argument as to these claims, Fischer has failed to present evidence of pretext. Fischer's entire argument is based on an improper understanding of pretext. Pretext is not concerned whether the employer acted correctly, but instead that the reasons provided were the real reasons for termination. *Douglas v. Anderson*, 656 F.2d 528, 533 n. 5 (9th Cir. 1981)(directed verdict dismissing age discrimination claim affirmed finding that plaintiff failed

⁹ Fischer's pretext argument as to his knee involves only a temporal connection between his December 6, 2006 safety meeting comment and his March 19, 2007 termination.

to produce substantial evidence of pretext). To show pretext, Fischer must provide specific, material facts. Fischer's 1988 and 1989 performance reviews (*see* Appellant's Opening Brief, p. 8-9) are not material; neither is his DOT performance review after his employment with the City. (*Id.*, at p. 9-10). Fischer's main argument ignores the facts the Mayor relied upon and grossly distorts testimony in an attempt to make it appear that her reasoning has changed. The only evidence shows that the Mayor adamantly believed that Fischer was insubordinate and could not get along with other people. Mayor included a note on Plaintiff's last performance evaluation expressing her concerns he could not get along with others. CP 229. The Mayor then gave Plaintiff a written warning that he could not get along with people, and he was required to meet at the "shop" with his co-workers. CP 257. Then, the Mayor called an executive session to discuss the problems with the crew and discuss Fischer's employment. CP 134 (*J. Porter Dep.* 68:16-69:8); CP 232-34; CP 236-38. In March 2007, she found out that Fischer was not working at the scheduled work time and was not conducting any of the meetings that she had ordered. CP 157 (*J. Porter Dep.* 159:25-160:17); CP 241; CP 272-73. The Mayor then ordered Plaintiff to report to work at a specific time. CP 275. Fischer failed to show up on and conduct a daily meeting with the crew as she directed. CP 159 (*J. Porter Dep.* 167:11-169:6). Mayor Porter discharged Fischer, because she had been trying to work with Mr. Fischer for over a

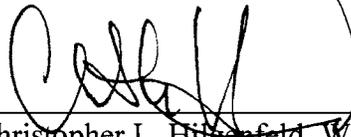
year on communication issues and workplace problems due to his refusal to work with the Water and Sewer Department Superintendent, Joe Peck. CP 104.

Fischer's argument that he believes he was a good employee and he made a comment at the December 12, 2006 safety meeting about having knee surgery in the summer of 2007, is insufficient to survive summary judgment. Fischer's subjective belief that he was a good employee, is not relevant to determine if he was meeting Mayor's Porter employment expectations. *See Grohs v. Gold Bond Building Products*, 859 F.2d 1283, 1287 (7th Cir. 1988). Moreover, Fischer's alleged knee surgery comment is not temporally-related. Mayor Porter had known of Fischer's knee problems since she was on City Council, even before she became Mayor. CP 136 (*J. Porter Dep.* 77:8-22). She was even aware that sometime in the future Fischer would need surgery and she had even encouraged him to have surgery. *Id.* A comment by Fischer that he was going to follow-up on a plan of action that both had known he needed to do for years does not create the necessary evidence of a temporal connection. Not to mention a jury has already reviewed this evidence and determined that Fischer's comment at the safety meeting was not a significant motivating factor in his discharge. CP 923l; CP 942.

VI. CONCLUSION

For all of the aforementioned reasons, the trial court's dismissal of Fischer's claims should be affirmed.

DATED this 17 day of January, 2011.



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FILED

JAN 18 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 293611

COURT OF APPEALS

DIVISION III OF THE STATE OF WASHINGTON

Robert J. Fischer,

Appellant

v.

City of Roslyn,

Respondent

**CERTIFICATE OF SERVICE BY
ELECTRONIC TRANSMISSION
AND U.S. MAIL**

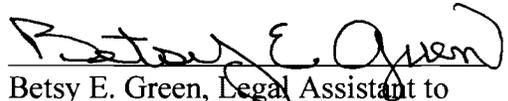
I, Betsy E. Green, Legal Assistant to Christopher L. Hilgenfeld, attorney for City of Roslyn, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen (18) years, not a party to or interested in the above-entitled action, and I am competent to be a witness herein.

That on the 17th day of January, 2011, I forwarded by electronic transmission addressed to lhagin@mcnaul.com a true and correct copy of the City of Roslyn's *Respondent's Opening Brief* along with a copy of this *Certificate of Service* and subsequently deposited the same in the United States Mail at Seattle, Washington, with first class postage fully prepaid, addressed to Plaintiff's counsel at his last known address, as set forth herein.

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DATED this 17 day of January, 2011, at Seattle, WA.


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