

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jul 08, 2013, 4:04 pm
BY RONALD R. CARPENTER
CLERK

E

Supreme Court Case No. 88323-8
Court of Appeals No. 68343-8-I

RECEIVED BY E-MAIL

kyh

**SUPREME COURT
OF THE STATE OF WASHINGTON**

DUANE STORTI, and a class of faculty members,

Appellant,

v.

UNIVERSITY OF WASHINGTON

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

HILLIS CLARK MARTIN & PETERSON P.S.
LOUIS D. PETERSON, WSBA #5776
MARY CREGO PETERSON, WSBA #31593
JAKE EWART, WSBA #38655
1221 SECOND AVENUE, SUITE 500
SEATTLE, WASHINGTON 98101-2925
TELEPHONE: (206) 623-1745

Attorneys for Respondent

ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. FACTS	4
A. The Handbook Contains Three Provisions Notifying Faculty the Policy Can Be Changed.....	4
B. Storti Agrees the Proper Procedure Was Followed to Change the Policy.	6
C. The Faculty Senate Chair Cited the Issuance of the New Executive Order As an Example of the Process Working the Way It Should.	7
III. ARGUMENT.....	8
A. The Court of Appeals Correctly Applied the Law....	8
1. Substantial case law supports an employer’s right to revise its handbook.....	8
2. The Handbook must be interpreted to give meaning to all its terms.....	9
3. The Handbook’s terms allow changes, and make changes effective immediately.	10
B. The Cases Cited by Storti Do Not Apply to this Situation.	12
1. Prior cases do not prohibit a reevaluation process that involves employees.....	12
2. Employment cases are decided based on the specific terms at issue, and here the terms expressly allow the change.	15
C. Res Judicata Does Not Apply Because the Facts Are Different.	18
IV. CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

<i>Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.</i> , 166 Wn.2d 475, 209 P.3d 863 (2009).....	9
<i>Caritas Servs., Inc. v. Dep't of Soc. & Health Servs.</i> , 123 Wn.2d 391, 869 P.2d 28 (1994).....	14
<i>Carlstrom v. State</i> , 103 Wn.2d 391, 694 P.2d 1 (1985).....	13, 14
<i>Cole v. Red Lion</i> , 92 Wn. App. 743, 969 P.2d 481 (1998).....	8
<i>Gaglidari v. Denny's Rests., Inc.</i> , 117 Wn.2d 426, 815 P.2d 1362 (1991).....	8
<i>Goodpaster v. Pfizer, Inc.</i> , 35 Wn. App. 199, 665 P.2d 414 (1983).....	9, 10
<i>Govier v. N. Sound Bank</i> , 91 Wn. App. 493, 957 P.2d 811 (1998).....	8, 9
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 974 P.2d 836 (1999).....	9
<i>Knuth v. Beneficial Wash., Inc.</i> , 107 Wn. App. 727, 31 P.3d 694 (2001).....	18
<i>Kuhlman v. Thomas</i> , 78 Wn. App. 115, 897 P.2d 365 (1995).....	18
<i>Navlet v. Port of Seattle</i> , 164 Wn.2d 818, 194 P.3d 221 (2008).....	16, 17
<i>Nye v. Univ. of Wash.</i> , 163 Wn. App. 875, 260 P.3d 1000 (2011), <i>review denied</i> , 173 Wn.2d 1018, 272 P.3d 247 (2012).....	3, 4, 11, 16

<i>Powell v. Republic Creosoting Co.</i> , 172 Wash. 155, 19 P.2d 919 (1933)	16
<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983).....	18
<i>Schoeman v. N.Y. Life Ins. Co.</i> , 106 Wn.2d 855, 726 P.2d 1 (1986).....	18
<i>Scott v. J.F. Duthie & Co.</i> , 125 Wash. 470, 216 P. 853 (1923)	16
<i>Seattle-First Nat'l Bank v. Westlake Park Assocs.</i> , 42 Wn. App. 269, 711 P.2d 361 (1985).....	9
<i>Simon v. Riblet Tramway Co.</i> , 8 Wn. App. 289, 505 P.2d 1291 (1973).....	16
<i>Storti v. Univ. of Wash.</i> , No. 68343-8-I, 2012 WL 6554827 (Dec. 17, 2012).....	3, 6, 10, 11, 15, 18, 19, 20
<i>Trimble v. Wash. State Univ.</i> , 140 Wn.2d 88, 993 P.2d 259 (2000).....	9
<i>Wash. Fed'n of State Employees v. State</i> , 127 Wn.2d 544, 901 P.2d 1028 (1995).....	14
STATUTES	
RCW 28B.20.130(1)	5
RCW 41.06.070(3).....	2
TREATISES	
<i>Corbin on Contracts</i> , § 6.2 (1995).....	17

I. INTRODUCTION

The University's relationship with its faculty is governed by the University of Washington Handbook, which sets forth various terms of employment, including promotion procedures, grievance processes, and a salary policy. At the outset, the Handbook informs all faculty members that the Board of Regents—who are appointed by the governor and ultimately govern the University—can change any rule or policy in the Handbook. The Handbook also informs faculty that the President can issue executive orders, provided he follows specified procedures for consulting with the faculty first, and that such orders are effective as soon as the President signs them.

Regarding salaries, the Handbook used to contain a salary policy in the form of an executive order that included a two percent annual raise for faculty members. That same policy informed faculty members the raises were dependent on adequate legislative funding, and, if funding did not increase, “a reevaluation of this Faculty Salary Policy may prove necessary.”

Unfortunately, it did prove necessary. The global recession struck the University hard. State funding decreased dramatically, leaving the University with a large budget shortfall. The governor called on all state agencies and universities to cut back. The legislature prohibited raises for

certain state employees, including University faculty.

RCW 41.06.070(3) (2009).

In 2009, the University began the process in its Handbook to reevaluate the two percent raises. Unlike most other employment contexts, the University faculty had an active role in reevaluating this policy. First, the Faculty Senate Chair and the University President appointed a joint faculty-administration Committee to Reevaluate Executive Order No. 64. The committee proposed changes, which were reviewed by the President and developed into a proposed new executive order. The draft executive order was sent to the Faculty Senate, which provided feedback the President used to revise the executive order. The President also consulted with the Faculty Senate Chair regarding the revisions. At the end of this process, the President issued Executive Order No. 29, which, under the Handbook's terms, became effective when he signed it. Executive Order 29 suspended the two percent faculty raises. The University's Board of Regents endorsed the President's action. The Faculty Senate Chair praised this as an example of the process working the way it should.

The executive order suspending the raises was issued in April 2009. Storti filed this lawsuit in December 2010. He admits the language of the Handbook allowed the University to suspend the raises,

and that the University followed the proper procedure for doing so. Nevertheless, he argues the suspension could not become effective until another full academic year had passed, in this case approximately 15 months later. There is no basis, either in the Handbook or case law, for a 15-month waiting period before the implementation of an executive order.

Storti's lawsuit was dismissed on summary judgment, and the dismissal was affirmed by an unpublished decision of the Court of Appeals. *Storti v. Univ. of Wash.*, No. 68343-8-I, 2012 WL 6554827 (Dec. 17, 2012).¹ The court rejected Storti's argument to impose a waiting period not provided by the Handbook. "[W]e find no language in the salary policy or elsewhere in the Handbook that suggests that changes to the policy would not be effective until the following academic year. To the contrary, the Handbook states that an executive order 'become[s] effective on the day signed by the President....'" *Storti*, Op. at 9.

A different panel of the Court of Appeals had already dismissed a similar lawsuit filed by a faculty member regarding the same suspension. In *Nye v. Univ. of Wash.*, 163 Wn. App. 875, 260 P.3d 1000 (2011), *review denied*, 173 Wn.2d 1018, 272 P.3d 247 (2012), the court held

¹ The Court of Appeals decision in this case is attached as an Appendix to the Petition for Review. In this brief, the University will cite to that opinion as "Op."

“[T]he evidence in the record clearly demonstrates that the university acted pursuant to its statutory and contractual authority when it suspended the faculty merit raises.” *Id.* at 888.

The Court of Appeals has now twice correctly applied the facts and the law. The terms of the Handbook govern, and unquestionably allow the University to change the policy. Once it did so, the change was effective immediately, in accordance with the terms of the same Handbook. This Court should affirm the unpublished decision of the Court of Appeals in *Storti*, which is consistent with the published decision in *Nye*.

II. FACTS

The facts are described in detail in the University’s previous briefing. Br. of Resp. at 2-13; Ans. to Pet. for Review at 2-10; CP 1203-1210 (Univ. of Wash.’s Mot. for Summ. J.); CP 1378-1381 (Def.’s Opp’n to Pl.’s Mot. for Partial Summ. J.). However, three important facts bear emphasizing.

A. The Handbook Contains Three Provisions Notifying Faculty the Policy Can Be Changed.

Three sections of the Handbook inform faculty the policy can be changed: Section 12-12, Section 12-21, and Executive Order No. 64 (which is also part of the Handbook). **Section 12-12** notifies employees that the Board of Regents appointed by the governor retains the “right to

intervene and modify any rule, regulation, or executive order formulated by the President or the faculty, the right to amend or rescind any existing rule, regulation, or executive order, and the right to enact such rules, regulations, and orders as it deems proper for the government of the University.” CP 1229 (University of Washington Handbook (“Handbook”) § 12-12(A)); *see also* RCW 28B.20.130(1).

Section 12-21(B) addresses the President’s right to issue executive orders and the proper process for doing so, which includes sending a proposed order to the faculty senate for review (and requiring the review to be completed within 60 days), and consulting with the Faculty Senate Chair regarding any revisions proposed by the faculty. CP 1234. “Following such consultations, the decision of the President is final.” *Id.* An executive order “become[s] **effective on the day signed by the President**” CP 1234 (emphasis added).

Finally, the salary policy itself, which was issued as Executive Order No. 64 and included in the Handbook, contains a specific warning to faculty. In a section titled “**Funding Cautions**,” the Handbook states:

This Faculty Salary Policy is based upon an underlying principle that new funds from legislative appropriations are required to keep the salary system in equilibrium. Career advancement can be rewarded and the current level of faculty positions sustained only if new funds are provided. Without the infusion of new money from the Legislature into the salary base, career advancement can

only be rewarded at the expense of the size of the University faculty. **Without the influx of new money or in the event of decreased State support, a reevaluation of this Faculty Salary Policy may prove necessary.**

CP 1243 (Executive Order No. 64) (emphasis added).

B. Storti Agrees the Proper Procedure Was Followed to Change the Policy.

When he accepted a position at the University, Storti was notified that “All appointments with the University are subject to adequate funding,” and that his employment would be subject to “the rules and regulations of the University *as they may be amended...*” CP 1142 (Storti’s appointment letter) & CP 1072 (Pl.’s Mot. for Partial Summ. J.) (emphasis added). When Storti filed his Complaint more than a year after the raises were suspended, he admitted from the outset that the University had the authority to suspend its salary policy, and did so properly. CP 5 (Complaint ¶ 26). Storti repeated this position on appeal. He agreed the Funding Cautions language “notified the faculty that the duty to provide the 2% raise was not permanent and it could be changed in the future.” Br. of App. at 25. Storti also admitted that he “did not, and does not, contend that the University cannot suspend the Faculty Salary Policy or that it was inadequately suspended.” *Id.* at 38; *accord Storti*, Op. at 8.

C. The Faculty Senate Chair Cited the Issuance of the New Executive Order As an Example of the Process Working the Way It Should.

In April 2009, the Board of Regents reviewed the new executive order. Before passing a resolution endorsing the order, the Regents invited Faculty Senate Chair David Lovell to speak.² He said:

Well sure, I will make, I will comment about it. Mostly just to confirm what your chair has said that we've been talking about this very actively for several months. And the Executive Order which the Resolution is endorsing and declaring as the policy of the University is an executive order that was the work of a joint committee appointed by me and the President. And that executive order was reviewed in a Faculty Senate meeting. As I reported to you at your previous meeting and what has happened since then is that the Secretary of the Faculty and I in accordance with the Faculty Code prepared a set of comments for the President's consideration, reflecting what we took to be the concerns of the faculty as expressed in that meeting and other venues. And made some suggestions about the wording of the Executive Order—what should be and what should not be in it. Mostly additional things that should be in it. And those suggestions were incorporated into the Executive Order. **We were very pleased to see that our advisory role—not only did we advise but we were listened to and in fact our advice was taken. So we believe the process—it's a cliché—but we believe that the process worked in this case. And appreciate the Regent's [sic] respect for that process.**

CP 1250-51 (emphasis added).

² The Faculty Senate Chair is the Senate's sole spokesperson "[o]n all matters concerning the publication or public explanation of Senate actions." CP 1240 (Handbook § 22-54).

III. ARGUMENT

A. The Court of Appeals Correctly Applied the Law.

1. Substantial case law supports an employer's right to revise its handbook.

Washington courts have long upheld an employer's right to change its policies, particularly when that right is expressly reserved in the policy as the University did here. CP 1210-13 (Univ. Mot. for Summ. J). In *Gaglidari v. Denny's Rests., Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991), for example, this Court found that an employer could unilaterally change employment policies related to termination provisions without the employee's consent. 117 Wn.2d at 434-36; *accord Cole v. Red Lion*, 92 Wn. App. 743, 751-2, 969 P.2d 481 (1998) (affirming employer's ability to modify its policies without employee consent and upholding termination); *Govier v. N. Sound Bank*, 91 Wn. App. 493, 494, 497-99, 957 P.2d 811 (1998).

In *Govier*, the court upheld unilateral changes to employee policies that modified the duration of employment and eliminated vacation leave, sick pay and holiday pay. 91 Wn. App. 501-502. The employee was given three days' notice of the changes, then terminated when she refused to sign an agreement incorporating the changes. *Id.* at 496. The court held that the changes were valid, and the employee could not rely on the old terms. "Although the Bank's policies regarding

benefits and job security were legally enforceable, its obligations existed only while its policies were in effect.” *Id.* at 501-502. Here, Storti received notice of the change to the University’s policy in April 2009 (CP 1251), well before he performed any work for the following academic year (2009-2010).

Washington courts also uphold an employer’s reservation of discretion. *E.g., Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 95, 993 P.2d 259 (2000) (concluding university did not breach employment policies because policies reserved discretion for university); *Goodpaster v. Pfizer, Inc.*, 35 Wn. App. 199, 203, 665 P.2d 414 (1983) (granting summary judgment to employer where bonus was discretionary).

2. The Handbook must be interpreted to give meaning to all its terms.

It is a well-established principle that a court must give effect to all language of an agreement. *Seattle-First Nat’l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985). This Court has repeatedly stated that contract terms must be read together so that no term is rendered ineffective or meaningless. *E.g., Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009). A court should not vary or add terms to a contract. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999). The rule is the

same for employment policies. A court must “give meaning to all the terms of the policy statement and cannot ignore the qualifications.”

Goodpaster, 35 Wn. App. at 203.

3. The Handbook’s terms allow changes, and make changes effective immediately.

Storti claims the “unilateral contract”³ he is seeking to enforce is “set forth in the Faculty Handbook and the President’s Executive Order 64 . . .” Pet. for Review at 1. His Petition for Review does not even refer to Handbook Sections 12-12 (Regents’ right to change) or 12-21 (executive orders effective on signing). Storti focuses on the use of the word “shall” in Section 24-71, but ignores other nearby provisions that make any raises dependent on resources. CP 1383-85 (Def.’s Opp’n to Pl.’s Mot. for Partial Summ. J.). He also makes no reference to the Regents’ Resolution, which declares that the new executive order will “prevail over any University policies, rules or codes or regulations....” CP 1247.

³ Storti falsely claims “The parties agreed below that the Faculty Salary Policy is a unilateral contract.” Pet. for Rev. at 10. In fact, the University has never agreed with Storti’s argument, but has consistently maintained that “whether the salary policy is characterized as a unilateral contract, a bilateral contract, or a policy, its terms (along with other provisions in the Handbook) permitted the University to suspend the raise provision for 2009-2010 and informed faculty that it could do so.” *Storti*, Op. at 10; *accord*, e.g., Br. of Resp. at 18 n.6; CP 1211-13. The Court of Appeals also did not make a determination as to whether the Handbook was a unilateral contract because it was not necessary to resolve the case, which turns on the language of the Handbook regardless of how it is characterized. *Storti*, Op. at 10.

In addition, the Handbook expressly reserves the University's right to reevaluate its policy. As the Court of Appeals found—twice—that reserved right includes the right to change the policy. *Storti*, Op. at 8; *Nye*, 163 Wn. App. at 886. As previously described, faculty members are notified in the Handbook of the University's right to change its salary policy at least three different times: the Funding Cautions, Section 12-21 regarding executive orders, and Section 12-12 regarding the Regents' authority. None of these sections contains a 15-month waiting period for changes to take effect, which is, in essence, a new term Plaintiff is attempting to add to the alleged contract.

A 15-month waiting period would be contrary to the express language of the Handbook. Section 12-21 establishes a specific timeline for new executive orders, and notifies faculty the review must happen within 60 days and new orders can take effect immediately. This provision makes practical sense, establishing a process for faculty input but allowing the President to respond quickly to urgent situations, such as the budget cuts in this case. For Executive Order No. 64's Funding Cautions and reevaluation warning to have meaningful effect, the President must be able to exercise the right to reevaluate for the very next academic year, to coincide with the real time of legislative cuts. To impose a 15-month waiting period would tie the University's hands in

responding to changing economic conditions and potentially lead to even deeper cuts because of the delayed response.

The Handbook includes a timeline for issuance of executive orders, which was followed in this case. The Court should reject Storti's attempt to impose new timelines that are not in the Handbook and undermine the purpose of express provisions.

B. The Cases Cited by Storti Do Not Apply to this Situation.

Storti does not cite a single case in his brief that involves a similar situation, where all parties agree an employee handbook can be changed, and the only issue is when the change becomes effective. The cases he does cite do not alter the outcome of this case, which is based on the express language of the Handbook that allowed the University to reevaluate and suspend its policy.

1. Prior cases do not prohibit a reevaluation process that involves employees.

Storti tries to create a new subset of unilateral contracts, by claiming the Court of Appeals "misapplied the law on subjecting public contracts to a legislative funding contingency." Pet. for Review at 10. The main cases Storti relies on in this section involve constitutional claims for contract impairment, which is not an issue in this case. Even if these cases did apply, they would not alter the basic premise that a policy, handbook or contract is interpreted based on its terms.

The foundation for Storti's argument is *Carlstrom v. State*, 103 Wn.2d 391, 694 P.2d 1 (1985), which Storti uses to argue the Handbook provisions were not specific enough. Pet. for Review at 12-13. But the facts in *Carlstrom* were significantly different. In *Carlstrom*, although the state knew of a financial emergency before signing a contract between a community college and its faculty, the contract merely stated generally that it was "subject to all present and future acts of the legislature." 103 Wn.2d at 393. When the state later tried to rely on that general statement to rescind faculty raises during a severe economic downturn, the Court held that other more specific contractual provisions relating to the raises, which contained no funding conditions, indicated that "the parties did not intend to make the salary increases contingent on the availability of legislative appropriations." *Id.* at 395. *Carlstrom* did not forge new ground, as Storti suggests, but simply interpreted the contract language and the parties' intent. *Carlstrom*, 103 Wn.2d at 395 (referring to "unique" contract language and concluding "parties did not intend to make the salary increases contingent on the availability of legislative appropriations").

Storti claims "this Court has often employed *Carlstrom's* directive;" but he cites only two cases, neither of which involves raises or employee handbooks. Pet. for Review at 13-14, citing *Wash. Fed'n of*

State Employees v. State, 127 Wn.2d 544, 548, 901 P.2d 1028 (1995) (considering constitutionality of ballot initiative preventing deduction of political action committee contributions from state workers' paychecks); *Caritas Servs., Inc. v. Dep't of Soc. & Health Servs.*, 123 Wn.2d 391, 395-96, 869 P.2d 28 (1994) (considering constitutionality of retroactive amendments to statutes and regulations regarding valuation of land for purposes of calculating nursing home's return on investment allowance). Neither of these cases contains a "directive" regarding when changes to an employer handbook can become effective.

The contract in *Carlstrom* stated generally it was subject to any future acts of the legislature. 103 Wn.2d at 393. In contrast, the University's language was far more explicit: it specifically informed faculty the policy could be reevaluated if legislative funding decreased. The raise provision was not an unequivocal, unilateral promise by the University, but a policy with clear limitations. The Funding Cautions language, particularly when combined with the other reservations of discretion in Sections 12-12 and 12-21, make clear there was no guarantee of future raises.⁴ The University implemented the two percent raise by executive order, and suspended it the same way.

⁴ Although Storti admits in this lawsuit the Handbook can be, and was properly, changed, he nonetheless also includes hearsay statements he claims show the raises were "guaranteed." Pet. for Rev. at 2-4. Of course, external evidence cannot be used to alter

Unlike a provision that is solely contingent on legislative funding, here the reevaluation involved faculty participation—from the Committee to Reevaluate Executive Order No. 64, to the Faculty Senate review, to the revisions made by the President based on Faculty Senate input. None of the cases cited by Storti involves this type of consultation and cooperation. This Court’s prior case law does not prohibit this type of collaborative process, nor should it. These terms are part of the Handbook that govern the University and its faculty, and the Court should enforce all of them, including the Funding Cautions and Sections 12-12 and 12-21.

2. Employment cases are decided based on the specific terms at issue, and here the terms expressly allow the change.

Storti cites three cases related to bonuses, and he claims—without any support—that bonuses and raises are the same. Pet. for Rev. at 10 n. 11. In fact, there are significant differences between bonuses and raises, as the Court of Appeals noted in both *Storti* and *Nye*. *Storti*, Op. at 12 (“[T]here is a critical distinction between bonuses that are

the plain meaning of Handbook, and it is particularly irrelevant here, where Storti himself admits the Handbook was properly changed. The University moved to strike the inadmissible statements in the trial court (CP 1334-42), but the court did not rule on the motion because it dismissed the case. The University also submitted rebuttal external evidence from the former University President and former Faculty Senate Chair showing discussions at the time were consistent with the University’s position in this case. CP 1379 (Def.’s Opp’n to Pl.’s Mot. for Partial Summ. J.), CP 1343-1352 (Decls. of Richard McCormick and Gerry Philipsen).

compensation for work already completed and raises that are conditioned on and based on past meritorious performance but relate to future, as-yet unearned compensation.”); *Nye*, 163 Wn. App. at 887 (“[A] raise compensates for the performance of future work. Here, before Nye performed that future work during the 2009-2010 academic year, the merit raise had been properly suspended by the university.”); CP 1215-17 (Univ. of Wash. Mot. for Summ. J.). Setting the pay an employee will receive for doing *next year’s* work is much different than setting the pay a person will receive for doing *last year’s* work. The bonus cases Storti cites also do not offer any guidance in this situation. Two cases address whether an employer created an implied promise to pay a bonus by paying one for many years. *Powell v. Republic Creosoting Co.*, 172 Wash. 155, 156-57, 19 P.2d 919 (1933); *Simon v. Riblet Tramway Co.*, 8 Wn. App. 289, 290, 505 P.2d 1291 (1973). The third case did not involve a change to an employer’s written policy, but an employer’s refusal to pay bonuses after all work was performed. *Scott v. J.F. Duthie & Co.*, 125 Wash. 470, 470-72, 476, 216 P. 853 (1923) (addressing whether bonus was supported by consideration in addition to regular work performance).

Storti also cites *Navlet v. Port of Seattle*, where this Court found a vested right in retirement benefits because “benefits conferred in a

collective bargaining agreement constitute deferred compensation where the parties negotiate for such benefits as part of the total compensatory package.” 164 Wn.2d 818, 841, 194 P.3d 221 (2008). Storti’s case does not involve vested retirement benefits, collective bargaining, deferred compensation, or retirees who found themselves without health care benefits long after they were in a position to find “alternative ways to prepare for retirement.” *Id.* at 849; *Storti*, Op. at 12. Instead, Storti is seeking a raise that he was told would depend on funding, and that he was informed well in advance of performance that he would not be getting.

Finally, Storti cites general provisions from *Corbin on Contracts*. Br. of App. at 18-19; Pet. for Review at 11-12. However, he glaringly omits reference to the provision most relevant to this case. Even when the employer has an obligation to its employees, “the extent and character of that obligation are dependent on the terms of the promise that induced the service.” *Corbin on Contracts*, § 6.2, p. 213 (1995). As every court to consider the suspension has concluded, the University’s action to suspend its policy was proper and effective immediately under the Handbook’s terms.

C. Res Judicata Does Not Apply Because the Facts Are Different.

Storti continues to claim the University should be barred from defending itself in this case because it settled a case involving faculty raises for the 2002-03 academic year. Pet. for Rev. at 15. The superior court and the Court of Appeals properly rejected this argument. *Storti*, Op. at 13-16. The law of res judicata is well established, and uniformly requires the evidence and facts to be the same. *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1 (1986); *Knuth v. Beneficial Wash., Inc.*, 107 Wn. App. 727, 731, 31 P.3d 694 (2001); *Kuhlman v. Thomas*, 78 Wn. App. 115, 122, 897 P.2d 365 (1995) (quoting *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983)). Here, the facts are not the same.

As has been explained in more detail in previous University briefing, the University did not take any action to reevaluate or suspend the raises in 2002; it simply did not fund them. Br. of Resp. at 29-31; Ans. Pet. for Review at 14-16; CP 1024 (Def.'s Resp. to Pl.'s Mot. for J. on Pleadings); CP 1390-91 (Def. Opp'n to Pl.'s Mot. for Summ. J.). The superior court specifically said it "need not reach the question of what process would have been utilized to repeal, evaluate, or modify the

[policy].” CP 1260. The question of when a change in the policy would become effective was never raised, because there was no change in 2002.

In 2009, the facts are different. Br. of Resp. at 30-31. This time, the University followed the language of the Handbook to the letter, and even Storti admits the procedure to suspend the policy was proper. *E.g.* Br. of App. at 25, 38. As the Court of Appeals held, “The claims here (based on events in 2008-2009) could not have been litigated” in the case Storti filed in 2004. *Storti*, Op. at 15.

Storti’s res judicata argument also fails because there was no final judgment in the earlier case. The University reached a settlement in that case, and the settlement stated it could not be used to establish liability in any subsequent proceeding.⁵ CP 709. Storti cannot rely on the old settlement agreement in these proceedings, and, regardless, the facts now before the Court are markedly different. The superior court and Court of Appeals properly rejected his res judicata argument, and this Court should affirm those decisions.

IV. CONCLUSION

The superior court and the Court of Appeals correctly applied legal precedent to the facts, and concluded the University properly

⁵ The settlement agreement, signed by the same lawyers representing Storti in this case, states: “The Agreement shall not constitute, be construed as, or be admissible in evidence in this Action or any other action as an admission of the viability of any claim or any fact alleged by Plaintiff...” CP 709, 730.

suspended faculty raises in accordance with the terms of its Handbook. “The Handbook plainly and expressly cautioned faculty that the salary policy, including the raise provision, was subject to change and that any changes, if imposed by executive order, would be effective when the order was signed.” *Storti*, Op. at 2.

Storti agrees, as he must, that the salary policy can be changed by the executive order process, but he then refuses to accept the consequence of that process—that the new executive order is effective immediately. There is no basis for this position. All the terms of the policy should be given meaning, including the term that specifies executive orders take effect immediately upon signature of the President. There is no basis in the Handbook or case law for the 15-month delay Storti is seeking. This Court should affirm the Court of Appeals’ decision.

RESPECTFULLY SUBMITTED this 8th day of July, 2013.

HILLIS CLARK MARTIN & PETERSON P.S.

By



Louis D. Peterson, WSBA #5776
Mary Crego Peterson, WSBA #31593
Jake Ewart, WSBA #38655
Attorneys for Respondent

7/08/13

OFFICE RECEPTIONIST, CLERK

To: Lou Peterson
Cc: phil@tal-fitzlaw.com; skstrong@bs-s.com; davidfstobaugh@bs-s.com; mforsgaard@ydnlaw.com; skfestor@bs-s.com; mdragoiu@bs-s.com; Mary Crego Peterson; Jake Ewart; Suzanne Powers
Subject: RE: Case No. 88323-8 - Duane Storti v. University of Washington - Supplemental Brief of Respondent

Rec'd 7-8-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Suzanne Powers [<mailto:smp@hcmp.com>] **On Behalf Of** Lou Peterson
Sent: Monday, July 08, 2013 4:04 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: phil@tal-fitzlaw.com; skstrong@bs-s.com; davidfstobaugh@bs-s.com; mforsgaard@ydnlaw.com; skfestor@bs-s.com; mdragoiu@bs-s.com; Mary Crego Peterson; Jake Ewart; Suzanne Powers
Subject: Case No. 88323-8 - Duane Storti v. University of Washington - Supplemental Brief of Respondent

Re: Duane Storti v. University of Washington, Supreme Court Case No. 88323-8

Attached are copies of the Supplemental Brief of Respondent and Certificate of Service.

The person submitting this brief is Louis D. Peterson, Telephone: (206) 623-1745, WSBA No. 5776, e-mail address: ldp@hcmp.com.

This brief is being served on all counsel of record by email and U.S. mail.

Suzanne for
Louis D. Peterson
Suzanne Powers - Legal Assistant
Hillis Clark Martin & Peterson P.S.
1221 Second Avenue | Suite 500 | Seattle, WA 98101
d: 206.470.7686 | 206.623.1745 | f: 206.623.7789
smp@hcmp.com | www.hcmp.com

Confidentiality Notice:

This communication (including all attachments) is confidential and may be attorney-client privileged. It is intended only for the use of the individuals or entities named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately.