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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CAPTAIN BRUCE NELSON,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE  
BOARD OF PILOTAGE COMMISSIONERS,

Defendants/Respondents.

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REPLY BRIEF OF APPELLANT CAPTAIN BRUCE NELSON

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## ARGUMENT IN REPLY

- A. Capt. Nelson's evidence raises a genuine issue of fact as to whether he was discriminated based on his age.

Capt. Nelson is not required to prove age discrimination through the *McDonnell Douglas* framework,<sup>1</sup> although he does meet the elements even as set forth by the Board. On summary judgment, Capt. Nelson meets his burden of production with admissible direct or circumstantial evidence and inferences therefrom that would allow the factfinder to find unlawful discrimination.<sup>2</sup> “To establish a prima facie case of ... discrimination ... [Capt. Nelson] must show [the Board] ‘simply treats some people less favorably than others because of their [protected status]’.”<sup>3</sup>

At the summary judgment stage, a plaintiff's prima facie burden is not onerous. ... The requisite degree of proof necessary to establish a prima facie case ... is *minimal* and does not even need to rise to the level of a preponderance of the evidence.

Fulton v. DSHS, 169 Wn.App. 137, 153, 279 P.3d 500 (2012).

To make out a *McDonnell Douglas* prima facie case of wrongful discharge due to age, a plaintiff must show that he or she (1) was within the statutorily protected age group; (2) was discharged by the defendant; (3) was doing satisfactory work; and (4) was replaced by a **significantly younger person**.

Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 188, 23 P.3d 440 (2001),

Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 753 P.2d 517 (1988).

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<sup>1</sup> See, e.g., Johnson v. DSHS, 80 Wn. App. 212, 227, n. 21, 907 P.2d 1223 (1996).

<sup>2</sup> Id., at 227, n. 21.

<sup>3</sup> Id., at 226, quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

In failure-to-hire cases under *McDonnell Douglas*, the elements are similar, but instead include “(2) that he was qualified for a job ... (3) that despite his qualifications, he was rejected.” See Hill, 144 Wn.2d at 181.

As for the fourth element, it is established that Capt. Nelson is “not required to show that he was replaced by someone outside [the 40 to 70 year old] range.”<sup>4</sup> Further, “the element of replacement by a younger person ... is not absolute; rather the proof required is that the employer ‘sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the need same services and skills.’”<sup>5</sup>

There is no dispute that Capt. Nelson was 53 years old, within the protected age group, and that the Board denied him a pilot’s license, which is the “hiring decision” for Puget Sound Pilots.

**1. Capt. Nelson was “qualified” for licensing and “doing satisfactory work”, yet the Board denied him a license.**

The Board misconstrues how the *prima facie* element of *McDonnell Douglas* related to being “qualified” would apply in this case.

[S]ubjective criteria should not be considered in determining whether a plaintiff is ‘qualified’ for purposes of establishing a *prima facie* case under *McDonnell Douglas*. ... [T]he qualifications that are most appropriately considered at step one [of *McDonnell Douglas*] are those to which objective criteria can be applied. ... [S]ubjective criteria... are best treated at the later

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<sup>4</sup> Griffith v. Schnitzer Steel Indus., Inc., 128 Wn.App. 438, 446-47, n. 5, 115 P.3d 1065 (2005) (recognizing that the suggestion to the contrary in Kirby v. City of Tacoma is based on case law that has been overturned).

<sup>5</sup> Grimwood, 110 Wn.2d at 363.

material issue fact that Capt. Nelson met the final requirement for licensing and “successfully complete[d]” the pilot trainee program. *See* RCW 88.16.090(2)(a)(iv). It is sufficient to create an issue of fact as to whether Capt. Nelson was “performing satisfactory work” or “qualified” for licensing. *See, e.g., Grimwood*, 110 Wn.2d at 364 (1988) (concluding letters from discharged food services director’s customers expressing satisfaction with work met the prima facie element); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 468, 98 P.3d 827 (2004) (“Kirby satisfies the elements of the prima facie case ... [H]is work was satisfactory for a time and in some respects.”)

**2. The Board continued to train and license pilots after it failed to license Capt. Nelson in September 2007.**

After the Board failed to license Capt. Nelson in September 2007, despite a TEC recommendation in favor of licensing, the Board continued to train and license pilots, “demonstrating a continued need for the need same services and skills.”<sup>9</sup> The Board began Capt. 13 and Capt. 14 in pilot training on October 1, 2007. CP 4465. At the time, they were aged 40 and 44, respectively. CP 1971. Also, following the denial of licensing for Capt. Nelson in September 2007, the Board next licensed Capt. 11, who at the time was 40 years old. *See* CP 4482; CP 3447.

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<sup>9</sup> *See Grimwood*, 110 Wn.2d at 363.

**3. The Board treated substantially younger trainees differently than Capt. Nelson under similar circumstances, which taken with the evidence of ageist stereotypes, raises an issue of fact as to whether the Board's reasons for denying a license to Capt. Nelson are unworthy of belief, or are pretextual.**

Capt. Nelson's different treatment from substantially younger trainees is circumstantial evidence of the Board's discriminatory intent and that its stated reason for denying him a license is in fact pretextual.<sup>10</sup>

"Once ... the record contains *reasonable but competing* inferences of *both* discrimination *and* nondiscrimination, it is the jury's task to choose between such inferences." Hill, 144 Wn.2d at 186.

The analysis in Kirby v. City of Tacoma that Defendant relies on to require that Capt. Nelson's comparators be "outside the protected age group" is based on case law that has been overturned.<sup>11</sup> It is enough that pilot trainees treated differently than Nelson were "substantially younger".

There was a 13 year difference in age between Capt. 1, who was 40 years old when the Board licensed him after his first training program "extension"; CP 3447 and Capt. Nelson, who was 53 years old in September 2007, when the Board denied him a license after he had completed his first extension. A genuine issue of fact exists as to whether

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<sup>10</sup> See, e.g., Dumont v. City of Seattle, 148 Wn. App. 850, 867, 200 P.3d 764 (2009); Johnson, 80 Wn.App. at 229 (holding that "evidence regarding the comparator 'necessarily ... raised a genuine issue of material fact with respect to the legitimacy ... of the employer's articulated reason for its employment decision.")

<sup>11</sup> See Griffith, 128 Wn.App. at 446-47, n. 5 (stating that Kirby relied on Brady v. Daily World, 105 Wn.2d 770, 718 P.2d 785 (1986), *overruled by Hill*, 144 Wn.2d at 188 n. 10).

Capt. 1, whose training program was “extended” like Capt. Nelson’s after the Board determined he needed more training and evaluation, CP 1558, is “similarly situated” to Nelson for purposes of McDonnell Douglas.

Other employees are similarly situated to the plaintiff when they ‘have similar jobs and display similar conduct.’ ... The employees need not be identical; they simply must be similar ‘in all material respects.’... Materiality depends on the context and is a question of fact that ‘cannot be mechanically resolved.’... [T]he similarly situated inquiry.... [‘]is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees’ because one can always find distinctions in ‘performance histories or the nature of the alleged transgressions.’

Earl v. Nielsen Media Research, Inc., 658 F.3d 1108, 1114-15 (9th Cir. 2011), quoting Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1157 (9th Cir. 2010), and Humphries v. CBOCS West, Inc., 474 F.3d 387, 405 (7th Cir. 2007), aff’d 553 U.S. 442, 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008).

On Trip No. 162, two weeks after Capt. 1 had his training “extended”, Capt. 1 had an “intervention needed to prevent damage or to stop a dangerous situation from developing” while piloting an Oil Tanker. CP 1082-83; CP 4343. The training pilot was “uncomfortable with the ship’s increasing speed”, CP 1083; as it was “approaching a speed that, if the ship took a sheer, [the supervising pilot] would have been hard pressed to check it... no more than two ship lengths from the dock.” CP 4343. Capt. 1 received a “Below Average” score for the trip, CP 4343, “adding ... fuel to the fire” against licensing him. CP 4343. Nevertheless, two (2)

weeks later without objection about the lack of unanimity or “consistency” in Capt. 1’s evaluations; the TEC gave a split recommendation in favor of licensing Capt. 1, and he was licensed. CP 4412.

In contrast, Capt. Nelson had no “below average” ratings during his first training “extension” and no interventions for more than 6 weeks prior to the Board vote to deny him a pilot’s license in September 2007,<sup>12</sup> when the three (3) pilot members of the TEC recommended that the Board license Capt. Nelson. CP 5308 (46:13-47:3).

Although the three (3) pilot members of the TEC recommended that Nelson be licensed in September 2007, the Board now attempts to allege that his performance was “markedly deficient”. (Respondent’s brief, at p. 42) As evidence, the Board cites three (3) alleged “interventions” recorded during his first “extension”. However, there were no interventions between the end of Nelson’s seven (7) month initial program and the September 13, 2007 licensing decision; a period of six (6) weeks. See Mann Decl., Exh. 9, Trip 127-143.

The Board did not provide guidelines or criteria for how to treat interventions; rather each Commissioner “set [their] own”. See CP 2781 (52:5-24). Taking all facts and reasonable inferences in favor of Capt. Nelson, the three alleged “interventions” (July 14-27) combined are far

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<sup>12</sup> See Mann Decl., Exh. 9, at Trips 118-143 (e.g., “A”, “AA”, and “Ready”).

recorded. *See, e.g.*, CP 5662. Capt. Nelson testified there was no “apparent intervention” on the trip, and he was surprised to learn one was recorded. CP 5221 (203:24-204:12). As comments, the evaluator wrote Trip No. 122 was “overall, a reasonably good job”, scoring it “AA” (above average). CP 5829 (BO129-122); Mann Decl., Exh. 9, at Trip 122. The Board did not call the evaluating pilot to testify, so there is no admissible evidence to support any concern about Nelson’s “above average” performance.

The final alleged “intervention” in July 2007 was on July 27, 2007, Trip No. 126. The evaluator on that trip was Capt. Bujacich, who wrote in the comments, in relevant part, “I felt we were getting too close to Browns Point for my comfort.” CP 5830, at AX133-126. Capt. Bujacich completed training and was licensed as a pilot only one year earlier. (CP 2745, 83:17-20). The TEC admits “evaluations by newly licensed pilots” like Bujacich were “harsher” and that this needs to be “take[n] ... into account”.<sup>16</sup>

Moreover, Bujacich’s recording of an “intervention” is contested, where he did not record an “intervention” for another trainee under similar circumstances. Bujacich evaluated Capt. 18 on his Trip No. 186 (*i.e.*, 60 trips further in extended training than Capt. Nelson). After that trip, Bujacich wrote a page of comments describing numerous instances where Bujacich “felt it was time to take some action” and acted to adjust the

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<sup>16</sup> See CP 5308 (47:15-48:15).

shiphandling, communications, and speed of Capt. 18. See CP 4808-09. Even though Bujacich took numerous actions, he did not record any “intervention” on Trip No. 186 for Capt. 18. See Mann Decl., Exh. 18, at Trip No. 186 (SUM 6 left blank). The *next week* the TEC recommended Capt. 18 for licensure, and the Board licensed him. CP 5630.

Capt. Nelson raises an issue of fact as to whether Bujajich treated Nelson inconsistently in recording an intervention on Trip No. 126 under circumstances where he did not document “intervention” for others. An issue of fact exists as to whether the Board treated Nelson differently in September 2007 by denying him a license after the qualified TEC pilots found he had successfully completed his first training “extension”.

Other trainees had interventions close in time to votes by the Board, yet they were licensed in lieu of having training “extended”. Capt. 8 had five (5) interventions recorded during his training program, CP 1971, including one trip where his supervising pilot commented, “[t]here were several occasions where I stepped in and verbally told Capt. [8] what to do. ... We very well might have made contact with the ‘Tilbury barge’ without some coaching.”<sup>17</sup> This occurred just one (1) month before the last trip in Capt. 8’s training program.<sup>18</sup> The Board was inconsistent in

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<sup>17</sup> CP 5794; CP 1873, n. 70; Mann Decl., Exh. 8, at 117.

<sup>18</sup> See Mann Decl., Exh. 8 (dates for Trips 117 and 139).

using “extensions” as opposed to allowing a single “do-over” trip for an intervention or “below average” experience.

Capt. 8 was only directed to “repeat” a specific training trip. CP 1600; CP 1109. Unlike Capt. Nelson, he received a “do-over” for Trip 117. The TEC did not “extend” his training for a period of further evaluation, as Defendant claims (see Respondent’s brief, at p. 42); even after Capt. 8 had another intervention not much later, on Trip 129.<sup>19</sup> At the time of licensing, Capt. 8 was 44 years old -- nine (9) years younger than Capt. Nelson was in September 2007, when he was denied licensing.

The Board claims that it did not treat Capt. 8 or others differently from Capt. Nelson. “In each instance a trainee struggled, the Board’s response was ... [to] ask[] the trainee to repeat trips to demonstrate the problem had been anomalous.” (Respondent’s brief, p. 45) However, Commissioner Lee was asked directly “with respect to Capt. Nelson, was there any *training response* to [the] three interventions [alleged to have occurred between July 14 and July 27] that caused your doubt [about licensing him in September]?” Lee could not recall any TEC training response or opportunity to repeat trips before the Board voted to extend Nelson’s training on September 13, 2007. See CP 5334 (151:12-152:3).

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<sup>19</sup> See CP 5796 (At AX136-129: “Not using vessel’s engine & rudder until prompted leaving berth. Turning in basin was too tentative; I needed to tell him half astern to open distance on bow.”; BO136-129: “ \* ... I had to tell him half astern to open distance on the bow turning in basin.”). Accord Mann Decl., Exh. 8, at Trip 129 (Sum 6 = “ \* ”)

In addition to the evidence of Capt. Nelson's different treatment raising an inference of discrimination, Nelson also presents evidence of "denigrating generalizations about age" and "stereotype[s] about the work capacity of 'older' workers relative to 'younger' workers."<sup>20</sup>

TEC members and Board Commissioners Craig Lee and Ole Mackey both irrationally raised concerns about Capt. Nelson taking days off at the suggestion of Capt. Hannigan.<sup>21</sup> Although younger trainees, including Capt. 1 (40 years old), took more days off and longer breaks off than Capt. Nelson, Lee expressed concern that Nelson's days off were due to his being "stressed out", or an "attitude [about extra duty] which ... could be difficult to correct". CP 1140; CP 1457 (at 20:18-21:5). A third Commissioner, Vince Addington, also voted against licensing Capt. Nelson in September 2007, out of concern that Nelson took a "break" from training, indicating "there were issues with stress that might be affecting [Capt. Nelson's] performance." CP1464-65 (95:1-97:1, 99:19).

Similar concerns were not expressed about younger trainees who struggled in training and took similar "breaks". Capt. 1 (40 years old) took numerous breaks between trips, including one break of 10 days; another break of 13 days; and a break of seven (7) days during his "extension" --

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<sup>20</sup> See, e.g., Kentucky Retirement Systems v. E.E.O.C., 554 U.S. 135, 146-47, 128 S.Ct. 2361, 171 L.Ed.2d 322 (2008); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610-612, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

<sup>21</sup> See Mann Decl., Exh. 30 (Goodenough report, pp. 50, 28)

the same length of “break” Capt. Nelson took during his “extension”.<sup>22</sup> Even taking the break, Capt. 1 had a serious “intervention” aboard the Oil Tanker, and questions were not asked whether he was “stressed out”.<sup>23</sup>

Similarly, Capt. 6 (45 years old) took eight (8) days off between trips two weeks prior to his licensing. That break was followed by two (2) trips in which he received “below average” scores. His evaluator’s comments on one trip said he “exhibited a lack of understanding of basic ship handling characteristics”.<sup>24</sup> While no “intervention” was formally recorded, the comments said “tug use was inappropriate and ineffective” and that Capt. 6 “did not follow some specific **instructions given** before and during docking evolution.” (Mann Decl., Exh. 6, at BPC-130). Likewise, Capt. 8 (44 years old) stopped making *any* training trips less than two weeks after the TEC directed him to “do-over” a trip where he nearly made contact with the Tilbury Barge; although the Board was not voting on whether to issue him a license for another month.<sup>25</sup>

These trainees (Capt. 1, Capt. 6, and Capt. 8) were 8 to 13 years younger than Capt. Nelson and took “breaks” in trips comparable to him,

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<sup>22</sup> See Mann Decl., Exh. 24; accord *id.*, Exh. 1 (showing Capt. 1’s “extension” began 7/14/06, and he made *no* trips from 7/20/06 to 7/26/06); and see CP 1495 (at 98:7-9), CP 5708 (showing Nelson made trip on 7/30/07), CP 5668 (Nelson made trip on 8/08/07).

<sup>23</sup> See Mann Decl., Exh. 1 (Trip. No. 162 occurred on 7/28/06).

<sup>24</sup> Mann Decl., Exh. 6, at BPC-130.

<sup>25</sup> See CP 1600 (direction to “do-over” on 4/17/2007); Mann Decl., Exh. 8 (last trip was made on 4/26/2007); see also CP 1116; CP 1564 (Board vote to license, 5/23/2007).

**5. The TEC and Board’s failure to discriminate against all “older pilots” is irrelevant.**

“The fact that one person in the protected class has lost out to another person in the protected class is ... irrelevant, so long as he has lost out *because of his age*.” O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996), cited in Hill, 144 Wn.2d at 188, n.10. *See also* Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc., 473 F.3d 11, 21 (1st Cir. 2007) (“the failure to treat all members of a class with similar discriminatory animus does not preclude a claim by a member of that class who is so treated”), *citing, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (“A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.”); Chadwick v. WellPoint, Inc., 561 F.3d 38, 42, n. 4 (1st Cir., 2009) (“discrimination against one employee cannot be remedied solely by nondiscrimination against another employee in that same group.”)

**6. David Goodenough is qualified to render opinions about biases and Capt. Nelson’s inconsistent treatment.**

David Goodenough gave testimony as an expert with respect to “assessment, training and licensing processes”. CP 5234 (27:22-23) ALJ Roberts heard testimony about Mr. Goodenough’s “experience ... in the development, the administration, and the assessment of testing and

selection processes with respect to employees and employment.” CP 5230-5234. Mr. Goodenough testified, *inter alia*, about his experience in the case of Pham and Lara v. City of Seattle where he “assessed the process [the City] used for testing and training [electrical technicians], the way that testing and training procedure was developed” and found “bias ... and inconsistent practices”. CP 5231. The ALJ found Goodenough possessed the “experience, training and education” necessary for expert testimony and ruled that Goodenough’s report was admissible. CP 5230-5234.

Neither Goodenough nor the substance of his testimony is similar to the alleged expert in Estate of Borden v. State, 122 Wn.App. 227, 246-47, 95 P.3d 764 (2004), cited by Defendant. In that case, the Court upheld a trial court’s decision to exclude a potential expert testifying about “what a judge would have done in [an] SRA violation hearing if the [parole officer] had reported [a drunk driver’s] driving condition violation to the court.” Id., 246. The expert’s opinions had no basis and would have only been speculative. He was not a judge, and he had attended no SRA violation hearings. Id., 246-47. Goodenough, in contrast, has experience preparing selection procedures and making similar assessments, had reviewed the Board’s treatment of other pilot trainees, and based his opinions about Nelson’s licensing, in part, on what the Board did in prior circumstances. *See, e.g.*, CP 5231 (16:3-8, Goodenough testifying about

review of materials cited at pp. 10-11 of his report, concerning the Board's "process for training and assessment of pilot trainees, ultimately resulting in a licensing decision"); *accord* Mann Decl., Exh. 30, pp. 10-11.

B. Capt. Nelson's evidence raises a genuine issue of fact as to whether the Board retaliated for his alleging different treatment.

As stated in his opening brief, Capt. Nelson raised issues of different treatment and "being set up" to fail in late September 2007. CP 1168. Following this, Nelson was given no program for weeks (see CP 1440, 120:7-17); was told "to keep out of the way of other trainees," (see CP 1472-73, at 15:12-16:4); his completion of his January 2008 successful completion of training was misrepresented (*cf.* CP 1608; CP 4479; CP 1475, 25:2-12); and the pilots' votes shifted. (CP 1475, at 26:25-27:4).

At the Board's October 8, 2008 meeting Nelson's counsel presented evidence of "different treatment".<sup>27</sup> The presentation opposed conduct that was "at least arguably a violation of the law".<sup>28</sup> Afterward, a document was circulated "papering" Nelson's file with unfair and prejudicial excerpts of training comments, with no notice to Nelson of the inequitable maligning of his training record to the Board and no opportunity for him to respond before the Board's vote on his licensing.<sup>29</sup> The Board's secret memorandum evidenced prejudice and unlawful

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<sup>27</sup> See CP 516 (at ¶ 10); CP 559-560; Mann Decl., pp. 3-4, ¶ 3.

<sup>28</sup> Kahn v. Salerno, 90 Wn. App. 110, 129, 951 P.2d 321 (1998).

<sup>29</sup> CP 518 (at ¶ 14); CP 568-71; CP 574 (at 34:20-35:24); CP 579 (voted Dec. 4, 2008).

retaliation, as it was “materially adverse, ... mean[ing] it well might have ‘dissuaded a reasonable worker from making ... a charge of discrimination.’”<sup>30</sup> The “proximity in time” -- nearly six weeks between Nelson’s presentation and the Board’s issuance of the secret memo -- and the fact that the Board did not notify Nelson of the memo or allow him to respond, raises a material issue of fact as to whether Nelson’s opposition to different treatment was a “substantial factor” in the Board creating a disparaging, inequitable, unsigned secret memo about him in a public state licensing process.<sup>31</sup>

C. Res judicata and collateral estoppel do not apply to this case.

**1. The administrative hearing did not litigate “identical issues” as those raised by Capt. Nelson’s civil action.**

Collateral estoppel is an affirmative defense. The party asserting it has the burden of proof. ... Application of collateral estoppel is limited to situations where the issue presented in the second proceeding is identical in all respects to an issue decided in the prior proceeding, and ‘where the controlling facts and applicable legal rules remain unchanged.’ Further, issue preclusion is only appropriate if the issue raised in the second case ‘involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment,’ even if the facts and the issue are identical.

Lemond v. State, DOL, 143 Wn.App. 797, 805, 180 P.3d 829 (2008),

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<sup>30</sup> See Thompson v. North American Stainless, LP, U.S. , 131 S.Ct. 863, 868, 178 L.Ed.2d 694 (2011), *quoting* BNSF Ry. Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).

<sup>31</sup> See Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 862, 991 P.2d 1182 (2000), Wilmot v. Kaiser Aluminum and Chemical Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991).

quoting Standlee v. Smith, 83 Wn.2d 405, 408, 518 P.2d 721(1974).

The prior administrative proceeding did not involve “the same bundle of legal principles. Id. ALJ Roberts was explicit that “the issue that [he] [had] to decide [was] whether [Capt. Nelson’s treatment] was arbitrary and capricious[;] not whether it was different.”<sup>32</sup>

As a consequence, “the controlling facts” in the prior case did not involve the performance records or treatment of other trainees who the Board licensed. Standlee, 83 Wn.2d at 408. *See also* Seattle-First Nat. Bank v. Kawachi, 91 Wn.2d 223, 228, 588 P.2d 725 (1978) (collateral estoppel does not apply if “[n]ot only were claims not adjudicated, but ... evidence concerning them formed no essential part of the claim at issue” in the prior proceeding). Collateral estoppel may “extend[] only to ‘ultimate facts’, *i.e.*, those facts directly at issue in the first controversy upon which the claim rests, and not to ‘evidentiary facts’ which are merely collateral to the original claim.”<sup>33</sup>

The ALJ repeatedly and consistently denied Capt. Nelson the opportunity to offer testimony and cross-examination regarding different

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<sup>32</sup> CP 1413, CP 629-630.

<sup>33</sup> McDaniels v. Carlson, 108 Wn.2d 299, 306, 738 P.2d 254 (1987), citing Seattle-First Nat. Bank, 91 Wn.2d at 228-229. Black’s Law Dictionary (9th ed. 2009) similarly defines “evidentiary fact” (“1. A fact that is necessary for or leads to the determination of an ultimate fact. — Also termed *predicate fact*. 2. A fact that furnishes evidence of the existence of some other fact. — Also termed *evidential fact*. 3. See *fact in evidence*. [‘A fact that a tribunal considers in reaching a conclusion; a fact that has been admitted into evidence in a trial or hearing.’]”) and “ultimate fact” (“A fact essential to the claim or the defense. — Also termed *elemental fact*; *principal fact*.”)

treatment.<sup>34</sup> Such exclusion of testimony and cross-examination meant, for example, that Capt. Nelson could not ask Commissioner Mackey questions asked at his deposition, including whether he had a “similar standard for the trainees, to treat them the same?” Mackey admitted in the deposition, “As far as standards go, everybody is an individual. ... Each one stands alone[.]” CP 1329. Thus, the administrative case was not a “full and fair hearing”<sup>35</sup> on whether Capt. Nelson successfully completed the training program, or performed “inconsistently”, as measured by the standard(s) the Board applied to trainees who it licensed.

Furthermore, the issues in the two cases are not “identical”. The ALJ’s order makes no findings as to whether Capt. Nelson was “qualified” for licensing under the RCW, WAC standards, or comparative analysis; or “doing satisfactory work”. *See* CP 306-18. The order merely concludes that Nelson did not show his treatment was “arbitrary ... even though one may believe an erroneous conclusion has been reached.” *See* CP 316-17. To the extent the ALJ’s order can be construed to reach pertinent issues, it shows Nelson was performing satisfactorily and “qualified” for licensing. *See* CP 312, ¶ 19 (“on September 12, 2007, the three Washington marine

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<sup>34</sup> *See, e.g.*, CP 5049, 7:24-8:9; CP 5050, 11:10-19; CP 5161, 237:12-14; CP 5176, 24:8-25:9; CP 5177, 28:1-8; CP 5222, lines 19-20; CP 5229 (7:10-8:12); CP 5291, lines 1-6; CP 5353, 18:2-8 (Mackey: “What other trainees did is not being decided here today. I’m only concerned with Captain Nelson and his time off....”); CP 5339, 170:16-21.

<sup>35</sup> *Christensen v. Grant Co. Hosp.*, 152 Wn.2d 299, 309, 96 P.3d 957 (2004).

pilot members of the TEC voted to license the Appellant....”); *cf.* Kirby, 124 Wn. App. at 468 (“Kirby satisfies the elements of the prima facie case ... [H]is work was satisfactory for a time and in some respects”).

“If there is ambiguity or indefiniteness in [the prior] judgment, collateral estoppel will not be applied as to that issue.” Mead v. Park Place Properties, 37 Wn.App. 403, 407, 681 P.2d 256 (1984).

Finding of Fact No. 41, which the Board’s former Asst. Attorney General, Commissioner Adams, added after the Board’s motion for summary judgment was pending in this case, stating that the discrimination claim was “not supported by the record”,<sup>37</sup> is completely irrelevant. The hearing record excluded all testimony and cross-examination about different treatment, thus prohibiting that evidence from being in the record, preventing a “full and fair adjudication of the issue”.

Capt. Nelson had no opportunity to use the “circumstantial, indirect and inferential evidence” generally required to prove discriminatory animus.<sup>38</sup> In a discrimination case, “comparator evidence is relevant *and* admissible....”<sup>39</sup> It is relevant to the prima facie case<sup>40</sup> and

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<sup>37</sup> CP 1998 (FOF 41).

<sup>38</sup> deLisle v. FMC Corp., 57 Wn. App. 79, 83, 786 P.2d 839 (1990); Johnson, 80 Wn.App. 212, 227, n.20 (“The purpose of showing disparate treatment is to create an inference of discriminatory animus because direct evidence of discrimination is rarely available.”)

<sup>39</sup> Johnson v. Chevron U.S.A., 159 Wn. App. 18, 33, 244 P.3d 438 (2010).

<sup>40</sup> *See, e.g.*, Johnson, 80 Wn.App. at 226-27.

to proof of “pretext” to show that the Board’s reasons for not licensing Nelson were not applied in its decisions to license others in similar circumstances.<sup>41</sup>

Thus, Defendant fails to meet its burden of showing that issues it now seeks to determine are “identical in all respects” to issues previously determined; that the “controlling facts” remain unchanged; and that the issues previously determined “involve substantially the same bundle of legal principles”. See Standlee, 83 Wn.2d at 408.

## **2. Applying collateral estoppel would result in injustice.**

Defendant discusses *Thompson v. State*, 138 Wn.2d 783, 982 P.2d 601 (1999). In that case, the State had the opportunity to correct the erroneous evidentiary ruling, but “did not do so”. Id., at 799. Under those facts, the Court held the State “must abide the result it did not appeal from.” Id., at 800. However, the Court wrote that “[m]anifest injustice in application of collateral estoppel would result where litigant did not have a meaningful opportunity to appeal prior decision.” Id., at 795, n. 7.

In Capt. Nelson’s case, he has timely appealed the prior administrative decision, including the issue related to exclusion of testimony concerning different treatment. However, his appeal has not yet been heard. As the appeal is “still pending, this court’s mandate should be

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<sup>41</sup> See, e.g., Dumont, 148 Wn. App. at 867; Johnson, 80 Wn.App. at 227, n.20.

fashioned so that [Nelson] [can] prosecute [the appeal] to conclusion on its merits” and “determine whether there was prejudicial error”, warranting “a remand [of this case] for further proceedings constituting his *first* fair adjudication”. See Lejeune v. Clallam County, 64 Wn.App. 257, 272-73, n. 13, 823 P.2d 1144 (1992).

Defendant also discusses Shoemaker v. City of Bremerton, 109 Wn.2d 504, 745 P.2d 858 (1987). In Shoemaker, the Civil Service Commission held a prior hearing and determined that Mr. Shoemaker’s “demotion was not retaliatory”. Id., at 506-07. The Court observed that Shoemaker appealed that decision to Superior Court; “[h]e did not, however, pursue this appeal to completion.” Id., at 507. That is significant because, unlike Capt. Nelson’s case, in Shoemaker there was no claim that critical evidence pertaining to the alleged discriminatory treatment was improperly excluded at the administrative hearing and remained an unresolved issue still under appeal. See id.

The Court in Shoemaker acknowledged that the appropriateness of applying collateral estoppel depends, in part, on the “agency and court procedural differences”. Id., at 508-09. Unlike Capt. Nelson, the appellant counsel in Shoemaker was permitted “to present any witnesses of her own choosing... and to compel attendance of any witnesses she felt had relevant information.” Id., 509-10. In contrast, Capt. Nelson was unable to

Wn.2d 819, 821, 576 P.2d 62 (1978) (final judgment is res judicata); Pinkney v. Ayers, 77 Wn.2d 795, 796, 466 P.2d 853 (1970) (interlocutory order is not res judicata). As defined by Black's Law Dictionary (9th ed. 2009), an "interlocutory order" is "any order other than a final order. Most interlocutory orders are not appealable until the case is fully resolved."

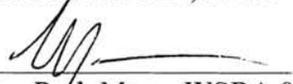
The order the ALJ issued is clear: "This is an Initial Order. ... [T]he Board ... [will] prepar[e] ... a final order." CP 319. Unlike courts hearing a case on appeal, the "officer reviewing the initial order ... exercise[s] all the decision-making power ... to decide and enter the final order [as if he] presided over the hearing." RCW 34.05.464(4). He may make his "own findings of fact and ... set aside or modify ... findings...." Tapper v. State Employment Sec. Dept., 122 Wn.2d 397,404, 858 P.2d 494 (1993). Until this process is complete, there is not a "final" order.

### CONCLUSION

For the reasons stated in Capt. Nelson's Opening Brief and this Reply, the case should be remanded for trial.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of February, 2013.

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CAPTAIN BRUCE NELSON,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE  
BOARD OF PILOTAGE COMMISSIONERS,

Defendants/Respondents.

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DECLARATION OF SERVICE

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The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the Reply Brief of Appellant Captain Bruce Nelson and this Declaration of Service to be served via messenger on the following attorneys:

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