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2
3 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

4 BRADLEY N. THOMA,

No. CV-12-0156-EFS

5
6 Plaintiff,

7 v.

**ORDER GRANTING IN PART (AS TO
BREACH OF CONTRACT AND PROMISSORY
ESTOPPEL) AND RESERVING RULING IN
PART DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

8 CITY OF SPOKANE, a municipal
corporation in and for the State
of Washington; and ANNE E.
9 KIRKPATRICK, a single person,

10 Defendants.

11
12 **I. INTRODUCTION**

13 On February 20, 2014, the Court heard from counsel as to
14 Defendants' Motion for Summary Judgment, ECF No. 71. After reviewing
15 the pleadings and hearing argument, the Court took the matter under
16 advisement and directed the parties to file supplemental briefing on
17 the contract issue. Having reviewed supplemental briefing the Court
18 is fully informed and for the following reasons grants Defendants'
19 Motion for Summary Judgment as to breach of contract and promissory
20 estoppel. The Court's ruling on other pending motions will follow.

21 **II. BACKGROUND**

22 **A. Factual History¹**

23 Plaintiff Bradley Thoma, began working for the City of Spokane
24 Police Department ("SPD") on October 1, 1989.

25 ¹ In ruling on the motion for summary judgment, the Court has considered the
26 facts and all reasonable inferences therefrom as contained in the submitted
affidavits, declarations, exhibits, and depositions, in the light most
favorable to the party opposing the motion. See *Leslie v. Grupo ICA*, 198
F.3d 1152, 1158 (9th Cir. 1999).

1 On the evening of September 23, 2009, Plaintiff was involved in
2 an off-duty vehicle accident. He was arrested and charged with
3 driving under the influence and failure to remain at the scene of the
4 accident. On September 24, 2009, Defendant City of Spokane ("City")
5 placed Plaintiff on administrative leave and initiated an internal
6 investigation.

7 During the prosecution on the criminal charges, Plaintiff sought
8 a deferred prosecution in which he was evaluated, and on October 9,
9 2009, diagnosed by Colonia Clinic with moderate alcohol dependence.
10 ECF Nos. 79-10 & 91-1. On November 13, 2009, the Spokane County
11 District Court entered an Order deferring prosecution. As part of
12 that deferred prosecution agreement, Plaintiff was required to obtain
13 an Ignition Interlock Driver's License ("IIL"), which limited him to
14 driving only vehicles equipped with an ignition interlock device
15 ("IID"). At the time of the November 13, 2009 Order deferring
16 prosecution, Washington State law allowed, but did not require,
17 employers to issue a "waiver" (referred to by statute as a
18 "declaration") of the IID requirement on employer-owned vehicles used
19 during working hours.

20 During the City's internal investigation, on November 9, 2009,
21 Plaintiff's Spokane Police Guild representative advised Defendants
22 that Plaintiff "was evaluated and determined to have an alcohol
23 problem." ECF No. 79-8, at 19. This was the "first time [Plaintiff]
24 had informed [his] employer of [his] alcoholism." ECF No. 79-5, at
25 47:17-19. The parties agree that "[p]rior to Plaintiff's arrest for
26 DUI, there was no record in Plaintiff's personnel, civil service, or

1 medical files of any report that Plaintiff had any issue with alcohol
2 abuse." ECF No. 72 at 4 ¶ 19; ECF No. 113.

3 On December 9, 2009, Defendant Police Chief Anne Kirkpatrick
4 provided Plaintiff with a Notice of Intent to Terminate, pursuant to
5 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). The Notice
6 explained that driving was a required essential function of
7 Plaintiff's job which Defendant Kirkpatrick believed Plaintiff was
8 unable to perform because he was required to maintain an IID on any
9 vehicle he drove. Defendant Kirkpatrick further explained that it was
10 not reasonable to place an IID on a police vehicle and that she did
11 not believe it was reasonable to waive the IID requirement. On
12 December 11, 2009, Plaintiff filed a complaint with the Human Rights
13 Commission ("HRC").

14 On December 14, 2009, Plaintiff's physician Dr. Mark Hart faxed
15 a short, hand-written letter to Defendants in which he stated that he
16 had diagnosed Plaintiff with alcoholism and suggested accommodations.
17 Whatever Plaintiff's alcohol consumption may have been up to that
18 time, he had always been able to perform his job duties as a police
19 officer. Plaintiff was never intoxicated while at work for the SPD.
20 Plaintiff reported that drinking caused him to drink with friends
21 instead of going to the gym, caused him to spend less time with his
22 daughter, but did not affect his ability to go to work.

23 During the December 17, 2009 *Loudermill* hearing Defendants
24 declined to equip Plaintiff's vehicle with an IID or to sign a waiver
25 allowing Plaintiff to operate a police vehicle without an IID.
26 Instead Defendant Kirkpatrick offered to put Plaintiff in non-

1 commissioned layoff status for two years, the time he was required to
2 have an IIL, during which he would be placed at the top of the Civil
3 Service list for other jobs with the City for which he may be
4 qualified. As part of the offer, at the conclusion of the two-year
5 period, he would become reemployed with the City as a fully-
6 commissioned Detective, rather than as a Sergeant, as discipline for
7 his conduct leading to the criminal charges. Plaintiff rejected
8 Defendants' offer.

9 On December 21, 2009, Defendants terminated Plaintiff's
10 employment, and issued a Termination of Employment Letter on December
11 30, 2009, finding that the accommodations requested by Plaintiff had
12 been evaluated but rejected as unacceptable and unreasonable. That
13 same day, a grievance was filed on behalf of Plaintiff by the Spokane
14 Police Guild ("Guild").

15 On October 18, 2010, the Guild filed an unfair labor practices
16 claim against the SPD. On January 5, 2011, the City and the Guild
17 drafted an agreement between the City and the Guild to resolve the
18 discipline grievance, and read the agreement over the phone to
19 Plaintiff. The Guild did not sign the agreement. ECF No. 79-17.

20 Around January 2011, the SPD became aware that the law changed
21 reducing driving restrictions for DUI deferred sentences from two
22 years to one year.

23 On July 7, 2011, the HRC and the City began considering a
24 settlement. In December 2011, the HRC, City, and Plaintiff discussed
25 the terms of a settlement agreement in which Plaintiff would dismiss
26 his HRC complaint, Guild grievance, and lawsuit in consideration for

1 reinstatement as Detective with payment of back wages at a Sergeant's
2 pay rate. In February 2012, these terms were reduced to a written
3 Settlement Agreement between Plaintiff, City, and the HRC. See ECF
4 No. 1, at App. C. The Settlement Agreement had an integration clause
5 which stated:

6 This agreement comprises the entire agreement of the
7 parties with respect to the above-referenced complaints.
8 No other agreement, statement, or promise made by any party
with respect to this complaint, which is not included in
this agreement, shall be binding or valid.

9 ECF No. 1, at App. C. Importantly, the agreement was "contingent on
10 approval by the Spokane City Council and will become effective upon
11 approval by the Washington State Human Rights Commission." *Id.* The
12 Settlement Agreement was signed by Plaintiff, Mayor Condon, and an
13 assistant city attorney.

14 On February 22, 2012, the HRC informed the parties that it would
15 not approve the Settlement Agreement. On February 27, 2012, the City
16 Council voted unanimously to reject the Settlement Agreement. The
17 same day, Plaintiff sent a letter to the City notifying Defendants
18 that Plaintiff had withdrawn his HRC Complaint and offered a new
19 settlement agreement containing the same terms as the previous
20 agreement but not including the HRC as a party. No representative of
21 the City signed or accepted the newly proposed settlement agreement.
22 Plaintiff filed the instant action the next day.

23 **B. Procedural History**

24 On February 28, 2012, Plaintiff filed suit in Spokane County
25 Superior Court alleging a eleven different claims, including violation
26 of due process under 42 U.S.C. § 1983 and violations of the Americans

1 with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and the Washington
2 Law Against Discrimination (WLAD), RCW Chapter 49.60. ECF No. 1. On
3 March 15, 2012, Defendants removed the lawsuit to this Court pursuant
4 to 28 U.S.C. §§ 1331 and 1441(b)-(c). *Id.* A telephonic scheduling
5 conference was held on June 19, 2012, ECF No. 12, and a jury trial was
6 set for April 14, 2014, ECF No. 14.

7 On February 4, 2013, Plaintiff moved for partial summary
8 judgment, asking the Court to find, as a matter of law, that Plaintiff
9 was "disabled" within the meaning of both the Americans with
10 Disabilities Act (ADA) and Washington's Law Against Discrimination
11 (WLAD). ECF No. 17. Plaintiff contemporaneously filed a motion to
12 seal eleven of the exhibits. ECF No. 21. On April 3, 2013, the Court
13 granted in part and denied in part Plaintiff's Motion to Seal, and
14 denied Plaintiff's Motion for Partial Summary Judgment. ECF No. 32.

15 On September 27, 2013, Defendants moved to exclude expert
16 witnesses Mark Mays and Scott Stephens, ECF Nos. 37 & 39. On October
17 3, 2013, Defendants' moved for a protective order for the continuation
18 deposition of Anne Kirkpatrick. Subsequently, on October 15, 2013,
19 Plaintiff's moved to compel production of communications and documents
20 pertaining to Plaintiff's employment history, termination, and
21 *Loudermill* hearing. ECF No. 49. After the November 7, 2013 hearing,
22 the Court permitted the parties to supplement their expert reports.
23 On November 19, 2013, Defendants filed supplemental replies addressing
24 the new expert reports. ECF Nos. 64 & 66. On November 25, 2013,
25 Defendants filed for summary judgment. ECF No. 71. On November 27,

1 2013, Plaintiff moved to exclude Defendant's expert Michael Brasfield.
2 ECF No. 84.

3 **III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

4 **A. Legal Standard**

5 Summary judgment is appropriate if the "movant shows that there
6 is no genuine dispute as to any material fact and the movant is
7 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
8 Once a party has moved for summary judgment, the opposing party must
9 point to specific facts establishing that there is a genuine dispute
10 for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If
11 the nonmoving party fails to make such a showing for any of the
12 elements essential to its case for which it bears the burden of proof,
13 the trial court should grant the summary judgment motion. *Id.* at 322.
14 "When the moving party has carried its burden under Rule [56(a)], its
15 opponent must do more than simply show that there is some metaphysical
16 doubt as to the material facts. . . . [T]he nonmoving party must come
17 forward with 'specific facts showing that there is a genuine issue for
18 trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
19 574, 586-87 (1986) (internal citation omitted) (emphasis in original).
20 When considering a motion for summary judgment, the Court does not
21 weigh the evidence or assess credibility; instead, "the evidence of
22 the non-movant is to be believed, and all justifiable inferences are
23 to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
24 242, 255 (1986).

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1 **B. Discussion**

2 First, as required by the Court's Scheduling Order, ECF No. 14,
3 Plaintiff filed notice on November 22, 2013, that with discovery
4 completed he would continue to pursue all of his original eleven
5 claims. ECF No. 68. The same day, Defendants filed notice of each
6 affirmative defense they planned to pursue at trial. ECF No. 69. On
7 November 25, 2013, Defendants filed for summary judgment on all of
8 Plaintiff's eleven claims. However, at the February 20, 2014 hearing,
9 Plaintiff withdrew his Fifth (Emotional Distress), Sixth (Negligence),
10 Seventh (Outrage), and Eleventh (Equitable Estoppel) Claims. The
11 Court addresses the remaining claims in turn.

12 1. Second Claim: Breach of Contract

13 Defendant moves for summary judgment on Plaintiff's breach of
14 contract claim. Plaintiff maintains that an enforceable settlement
15 agreement was reached in a conversation in 2011, and was later reduced
16 to writing in February 2012 to the Settlement Agreement. Plaintiff
17 argues that either the conversation in 2011 or the Settlement
18 Agreement created an enforceable contract between Plaintiff and the
19 City.

20 Washington follows the objective manifestation test for
21 contracts. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn2d
22 692, 69 (1998). For a contract to form, the parties must objectively
23 manifest their mutual assent. *Yakima County (W. Valley) Fire Prot.*
24 *Dist. No. 12 v. City of Yakima*, 122 Wn2d 371, 388 (1993). Settlement
25 agreements are governed by general principles of contract law.
26 *Stottlemire v. Reed*, 35 Wn. App. 169, 171 (1983).

1 Here, the Court finds that no enforceable contract existed. In
2 December 2011, the HRC, City, and Plaintiff discussed a settlement
3 agreement in which Plaintiff would dismiss his HRC complaint, Guild
4 grievance, and lawsuit in consideration for reinstatement as Detective
5 with payment of back wages at a Sergeant's pay rate. See ECF No. 95-
6 6. In February 2012, these terms were reduced to a written Settlement
7 Agreement between Plaintiff, City, and the HRC. See ECF No. 1, at
8 App. C. The Settlement Agreement had an integration clause which
9 stated:

10 This agreement comprises the entire agreement of the
11 parties with respect to the above-referenced complaints.
12 No other agreement, statement, or promise made by any party
with respect to this complaint, which is not included in
this agreement, shall be binding or valid.

13 ECF No. 1, at App. C. Plaintiff signed this agreement with the
14 integration clause, objectively indicating that Plaintiff believed
15 there were no other agreements between the parties. Included in this
16 agreement was the requirement that it was "contingent on approval by
17 the Spokane City Council and will become effective upon approval by
18 the Washington State Human Rights Commission." *Id.* Plaintiff
19 acknowledged that at the time he signed the Settlement Agreement he
20 "underst[ood] that it would not become effective until the Human
21 Rights Commission approved it." ECF No. 79-5, at 71: 8-11. However,
22 on February 22, 2012, the HRC informed the parties that it would not
23 sign the Settlement Agreement. Furthermore, on February 27, 2012, the
24 City Council voted unanimously to reject the Settlement Agreement.
25 Accordingly, no enforceable agreement existed because the necessary
26 approval of both the HRC and City Council did not occur. Even if a

1 valid contract existed between the City and Plaintiff at the time
2 Plaintiff and Mayor Condon signed the Settlement Agreement, the
3 approval by the HRC and City Council were necessary conditions
4 precedent, which when such approval did not occur, any performance
5 under the agreement was excused. See *Ross v. Harding*, 64 Wn.2d 231
6 (1964) (holding that obtaining written consent was a condition
7 precedent to specific performance where the contract provided that the
8 offer was made subject to written consent); Restatement (Second) of
9 Contracts § 224 (1981) (A condition is "an event, not certain to
10 occur, which must occur, unless its non-occurrence is excused, before
11 performance under a contract becomes due."). Therefore, the record is
12 clear that the only proposed contract was the agreement reduced into
13 writing in the Settlement Agreement, signed by Plaintiff and Mayor
14 Condon, which would reinstate Plaintiff on the terms established in
15 December 2011, upon the approval of HRC and the City Council. Such
16 approval did not occur meaning a contract either was not formed, or
17 alternatively, any performance did not become due.

18 Accordingly, Defendant's motion as to Plaintiff's Second Claim
19 of Relief, breach of contract, is granted.

20 2. Tenth Claim: Promissory Estoppel / Implied Contract

21 Defendant's also move for summary judgment on Plaintiff's claim
22 of promissory estoppel and implied contract. Plaintiff maintains that
23 he reasonably relied upon the promise of reinstatement when he
24 resigned his employment in Alaska in order to resume his position with
25 SPD. To succeed on a claim of promissory estoppel Plaintiff must
26 establish:

1 (1) [a] promise that (2) the promisor should reasonably
2 expect to cause the promisee to change his position and (3)
3 that does cause the promisee to change his position (4)
4 justifiably relying upon the promise, in such a manner that
5 (5) injustice can be avoided only by enforcement of the
6 promise.

7 *Bakotich v. Swanson*, 91 Wn App. 311, 319 (Wash. Ct. App. 1998) (citing
8 *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 259 n.2
9 (1980)). However, as discussed above, the Settlement Agreement
10 required, and Plaintiff acknowledged, that the reinstatement depended
11 upon the independent decision of two other organizations, the HRC and
12 the City Council. Accordingly, Plaintiff knew that if either
13 organization rejected the agreement he would not be reinstated. At
14 the time Plaintiff resigned his employment in Alaska the condition of
15 approval by HRC and the City Council had not been satisfied. Under
16 such facts, the Court finds only one possible conclusion - any
17 reliance was unjustified. See *Pacific Cascade Corp. v. Nimmer*, 25
18 Wash.App. 552, 559-560 (conditional promise can serve as basis of
19 estoppel claim only if condition is satisfied prior to action taken in
20 reliance on that promise); *Havens v. C & D Plastics, Inc.*, 124 Wash.2d
21 158, 181 (1994) ("Ordinarily, whether reliance was justifiable is a
22 question of fact, but when reasonable minds could reach but one
23 conclusion, summary judgment is appropriate."). Accordingly,
24 Defendant's motion as to Plaintiff's Tenth Claim of Relief, promissory
25 estoppel and implied contract, is granted.

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1 3. Remaining Claims

2 As to the remaining claims of disability discrimination,
3 violation of due process, vicarious liability, wrongful withholding of
4 wages, and retaliation, the Court continues to take Defendant's Motion
5 for Summary Judgment under advisement.

6 IV. CONCLUSION

7 Accordingly, **IT IS HEREBY ORDERED:** Defendants' Motion for
8 Summary Judgment, **ECF No. 71**, is **GRANTED IN PART** (Plaintiff's Second,
9 Fifth, Sixth, Seventh, Tenth, and Eleventh Claims) and **TAKEN UNDER**
10 **ADVISEMENT IN PART** (remainder).

11 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
12 Order and provide copies to all counsel.

13 **DATED** this 28th day of February 2014.

14 s/ Edward F. Shea
15 _____
 EDWARD F. SHEA
 Senior United States District Judge