IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DUANE STORTI, and a class of faculty members,	)	No. 68343-8-I
Appellants,	)	DIVISION ONE
v.	)	
UNIVERSITY OF WASHINGTON,	)	UNPUBLISHED OPINION
Respondent.	)	FILED: December 17, 2012

Spearman, A.C.J. — Duane Storti, representing a class of over 3,000 faculty members at the University of Washington, appeals an order dismissing the class's breach of contract claim against the University on summary judgment. At issue in this appeal is (1) whether the University breached the terms of the Handbook by suspending 2 percent raises for meritorious faculty for the 2009-2010 academic year and (2) whether res judicata bars the University's arguments. We hold the University did not breach the terms of the Handbook as a matter of law. Although the raise provision set forth in the Handbook made percent raises for meritorious faculty mandatory, the provision was not in effect at the relevant time, in the beginning of academic year 2009-2010. To the extent

the class claims the raise provision made an offer for a unilateral contract, we must give effect to all of the Handbook's terms in defining the nature of any offer or promise. 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. Finally, res judicata does not apply. Concluding that the trial court properly dismissed the class's breach of contract claim, we affirm.

FACTS

This appeal involves provisions in the University's handbook ("the Handbook") addressing faculty salary.[1] On January 7, 2000, University president Richard McCormick issued Executive Order No. 64 (EO 64), titled "Faculty Salary Policy" ("salary policy"). Clerk's Papers ("CP") at 254, 1241-43. The salary policy, incorporated into the Handbook, was designed "to allow the University to recruit and retain the best faculty" by "[providing] for a predictable and continuing salary progression for meritorious faculty." CP at 1241. One provision ("raise provision") of the salary policy, in a section titled "Allocation Categories," states:

> All faculty shall be evaluated annually for merit and for progress towards reappointment, promotion and/or tenure, as appropriate. A faculty member who is deemed to be meritorious in performance shall be awarded a regular 2% merit salary increase at the beginning of the following academic year. Higher levels of performance shall be recognized by higher levels of salary increases as permitted by available funding.

[1] The Handbook contains rules, regulations, and executive orders related to students, faculty, staff, and the administration.

CP at 1243. The salary policy concludes with a "Funding Cautions" Section that 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 at 1243.[2]

From academic year 2000-2001 through academic year 2008-2009, the University awarded 2 percent raises for meritorious faculty each year, except for academic year 2002-2003. In 2002, the Washington State Legislature did not appropriate funds for University employee pay raises. That year, the University's board of regents, in adopting a university budget, made the decision not to provide 2 percent raises to faculty for academic year 2002-2003.

Subsequently, Storti, an associate professor at the University, filed a class action lawsuit ("Storti I") in superior court, alleging that the University had

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[2] A section titled "Allocation Procedure" further describes funding of faculty salaries:

> Resources from both external and internal sources are used to fund faculty salaries. The Faculty Salary Policy anticipates new resources being made available from the Legislature, including legislative allocations for faculty salary increases and special legislative allocations for recruitment and retention, or through funds from tuition increases. Funds centrally recaptured from faculty turnover, grant, contract, and clinical funds available to individual units, and other internal resources which the Provost might identify are also used to support the plan.

CP 1241-42.

breached a contractual obligation under the salary policy to pay merit increases to eligible faculty during the 2002-2003 academic year. The court certified the class of faculty members. It then granted the class's motion for summary judgment, concluding that "the plain language [of the salary policy] creates a mandatory duty that requires the University to provide meritorious faculty an annual merit increase of at least 2%." CP at 704. The court found that "the word 'reevaluation' reserves the right of the University to change the policy at some future date," but the court did not reach the question of "what process would have been utilized to repeal, evaluate, or modify the Faculty Salary Policy." CP at 705-06. Before the court entered final judgment, the University settled with the class. The settlement agreement was approved by the court on May 12, 2006.[3]

In March 2009, faced with a 12 percent budget reduction for the 2009-2011 biennium, University president Mark Emmert and David Lovell, chair of the faculty senate, appointed faculty and administration members to a "Committee to Re-Evaluate Executive Order No. 64." CP at 1226. The committee's reevaluation resulted in a proposed executive order, which Emmert submitted to the faculty senate for review in accordance with the procedures set forth in the Handbook. The faculty senate reviewed the proposed executive order. Lovell consulted with Emmert about revisions proposed by the faculty, and Emmert incorporated many of those suggestions into his executive order.

[3] The settlement agreement provided that the agreement could not be used to establish liability in any subsequent proceeding.

On March 31, 2009, Emmert issued Executive Order No. 29 ("EO 29"). EO 29 suspended certain portions of EO 64 (the salary policy), including the 2 percent raise provision, until the conclusion of the 2009-2011 biennium. It states, in pertinent part:

> *Partial Suspension of Executive Order No. 64*. In light of the economic circumstances facing the University, the following portions of Executive Order No. 64 must be and are immediately suspended:
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> 1. The phrase "regular merit" in the first sentence of the subsection entitled *Allocation Categories.*
> 2. The sentence that reads, "A faculty member who is deemed to be meritorious in performance shall be awarded a regular 2% merit salary increase at the beginning of the following academic year."
> 3. The sentence that reads, "If deemed meritorious in the next year's review, the faculty member shall receive a regular 2% merit increase at the beginning of the following academic year."
> 4. The phrase, "In addition to regular merit salary allocations," in the sentence in the subsection entitled *Promotion.*
>
> All other portions of Executive Order No. 64 remain in effect. This suspension shall expire at the conclusion of the 2009-11 biennium.

CP at 1244.

Faculty members were notified of the promulgation of EO 29 in an April 10, 2009 e-mail from Lovell. The board of regents endorsed EO 29 and directed that it be added to the Handbook on April 16. The board resolved that EO 29 "will prevail over any University policies, rules, or codes or regulation to the extent they may be inconsistent." CP at 1247. In May 2009, the class members' performance for academic year 2008-2009 was found to be meritorious. But because EO 29 was in effect, they did not receive raises in academic year 2009-

2010.

In October 2009, associate professor Peter Nye filed a putative class action lawsuit in superior court, alleging that the University committed a breach of contract by suspending the 2 percent raises for the 2009-2011 biennium. Nye argued that the University lacked authority to unilaterally suspend the salary raise and that, even if it had such authority, the suspension could not apply to the 2009-2010 academic year because he had already earned a merit raise for that year. The superior court dismissed Nye's action on summary judgment. This court affirmed, and review was denied. Nye v. University of Washington, 163 Wn. App. 875, 260 P.3d 1000 (2011), rev. denied, 173 Wn.2d 1018, 272 P.3d 247 (2012).

While Nye's appeal was pending, Storti filed the present class action against the University in December 2010.[4] The superior court certified the same class of faculty members as in Storti I.[5] The action was, like Nye's, a breach of contract claim based on the University's suspension of the 2 percent raises for the 2009-2010 academic year. The class's theory was that the University breached a unilateral contract by suspending raises for 2009-2010 because the class had substantially performed in the 2008-2009 academic year. The class also argued that res judicata principles precluded the University from relitigating issues resolved in Storti I.

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[4] Nye was granted permission to intervene in this case, but only for the limited purpose of opposing certification. The superior court certified the class, excluding Nye from the class.

[5] A different superior court judge was assigned to the second class action case brought in Storti's name.

Both the class and the University moved for summary judgment. The class also filed a motion for judgment on the pleadings. The superior court granted the University's motion and dismissed the action. The court stated it is "implicit in the promise [of a 2 percent raise] that it is changeable upon review" and that the inquiry was "really the nature of the promise." Report of Proceedings (RP) at 24. It denied the class's motions. This timely appeal followed.

DISCUSSION

We review the trial court's summary judgment decision de novo. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). Summary judgment is appropriate only when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. CR 56(c).

Breach of Contract

In determining whether the trial court properly ruled that the University did not breach its contract as a matter of law, we focus on the terms of the salary policy and the greater Handbook. Our review of those terms is governed by traditional principles of contract law. Kloss v. Honeywell, Inc., 77 Wn. App. 294, 298, 890 P.2d 480 (1995) (employment contracts governed by same rules as other contracts). Under such principles, our goal is to effectuate the intent of the parties by giving the words in a contract their ordinary, usual, and popular meaning unless a different meaning is clearly indicated. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). We read the terms of a contract together, so that no term is rendered ineffective or

meaningless. Cambridge Townhomes v. Pac. Star, 166 Wn.2d 475, 487, 209 P.3d 863 (2009).

The main issue in dispute is when EO 29 and its changes to the salary policy—specifically, its suspension of the raise provision—could begin to take effect; the parties agree that the University had the authority to reevaluate the salary policy and that it followed the Handbook-prescribed procedures for doing so. The class argues EO 29 could not take effect until academic year 2010-2011, while the University maintains it was effective on the date EO 29 was signed by Emmert (March 31, 2009) and therefore applied to academic year 2009-2010.

We agree with the University. First, we observe that the salary policy made the 2 percent raises mandatory ("shall be awarded"[6]) if the specified conditions were met and the raise provision was in place at the time faculty reviews were conducted and raises were determined. But the raise provision was suspended and not in effect at the beginning of academic year 2009. Moreover, such suspension was undisputedly proper. The University's contractual obligation to provide the raise did not exist at the relevant time.

Furthermore, it is also undisputed that the "Funding Cautions" and other language of the Handbook notified faculty that the salary policy was subject to modification.[7] The "Funding Caution" states that "[w]ithout the influx of new

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[6] The word "shall" creates a mandatory duty, not a discretionary or optional duty. Scannell v. City of Seattle, 97 Wn.2d 701, 704-05, 648 P.2d 435 (1982).

[7] The class's brief concedes this point, stating, "[T]he 'reevaluation' language notified the faculty that the promise of a 2% raise for meritorious work was not permanent and it could be changed

money or in the event of decreased State support, a reevaluation of this Faculty Salary Policy may prove necessary."[8] Furthermore, Section 12-21 of the Handbook addresses the president's authority to promulgate executive orders and describes the process and timeline for doing so. Finally, Section 12-12 declares the board of regents' ultimate authority to manage the University and to amend or modify any existing rule or executive order.

The class argues, however, that under the "reevaluation" language of the "Funding Cautions Section," any changes to the salary policy could only apply prospectively. But we 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. . . ." CP at 1234. Likewise, we are unable to ascertain any promise in the salary policy that as soon as meritorious work is performed for most of an academic year, the raise is vested or earned at that time. Indeed, such a promise would be untenable where a faculty member's performance over an academic year cannot be determined meritorious until the conclusion of that year.

The class's position that the suspension of the raise provision could not begin until academic year 2010-2011 is based on its theory that the salary policy

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in the future, but such a change could apply only prospectively." Brief of Appellant at 2.

[8] "Reevaluation" is defined as "the act or result of evaluating again." Webster's Third New Intern. Dict. Unabridged, p. 1907 (1976). "Evaluate" means "to examine and judge concerning the worth, quality, significance, amount, degree, or condition of." Id., p. 786. Therefore, the condition of the raise provision could be reexamined, with the clear implication that upon reexamination it could be changed.

made, at the beginning of the 2008-2009 academic year, an offer for a unilateral contract.[9] Specifically, an offer of a 2 percent raise to be awarded at the beginning of the 2009-2010 academic year if meritorious work is performed for 2008-2009. The class asserts that it accepted the offer by performing meritoriously (i.e., substantially performing) for most of the 2008-2009 academic year, thus triggering the University's obligation to award the raise for 2009-2010. The University responds 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.

We again agree with the University. The interpretation of a unilateral contract, as with any other contract, is governed by the specific language of that contract. St. John Medical Center v. State ex rel. Dep't of Soc. & Health Servs., 110 Wn. App. 51, 65, 38 P.3d 383 (2002). Regardless of how the raise provision specifically is characterized, all of the terms of the salary policy and the greater Handbook must be read together in determining whether the University breached the contract. Even if the raise provision constituted an offer for a unilateral contract, any terms of the offer necessarily included the "Funding Caution" and its express warning that the salary policy could be reevaluated.[10]

[9] The difference between a unilateral contract and a bilateral contract is the method of acceptance; the latter is created by a mutual exchange of promises while the former is created by the offeree's performance in response to the offeror's offer. Higgins v. Egbert, 28 Wn.2d 313, 317-18, 182 P.2d 58 (1947); Multicare Medical Center v. Dep't of Soc. & Health Servs., 114 Wn.2d 572, 584, 790 P.2d 124 (1990). In a unilateral contract, once the party to whom the offer is made performs, the offer is accepted and the contract becomes executed. Cook v. Johnson, 37 Wn.2d 19, 23, 221 P.2d 525 (1950).

The class's reliance on cases involving implied or unilateral contracts for bonuses is misplaced. It cites Powell v. Republic Creosoting Co., 172 Wash. 155, 19 P.2d 919 (1933), Scott v. J.F. Duthie & Co., 125 Wash. 470, 216 P. 853 (1923), and Simon v. Riblet Tramway Co., 8 Wn. App. 289, 505 P.2d 1291 (1973). In Powell and Simon, the courts held that employers' practices of paying annual bonuses for over ten years created implied contracts for bonuses, which the employees accepted and earned by working. Powell, 172 Wash. 155 at 158-60; Simon, 8 Wn. App. at 291-93. In Scott, the court held that an employer was bound by its promise of a bonus to an employee, made to induce the employee to continue working for the employer until the completion of a project, where the employee accepted the offer by performing. Scott, 125 Wash. at 471-72.

These cases are distinguishable because they do not involve the contractual language present in this case, informing faculty that the salary policy could be reevaluated and informing faculty that changes made by executive order are effective when the order is signed. Such language makes this case more similar to cases in which employers expressly informed employees that they retained discretion to withhold or decrease bonuses. See Spooner v. Reserve Life Ins. Co., 47 Wn.2d 454, 457-59, 287 P.2d 735 (1955) (no enforceable contract for bonus where company told employees in bulletin that bonuses were voluntary and could be withheld by employer with or without

[10] We need not, and do not, make a determination as to whether the raise provision constituted a unilateral contract or a bilateral contract.

notice); Goodpaster v. Pfizer, Inc., 35 Wn. App. 199, 200-03, 665 P.2d 414 (1983) (no enforceable contract for bonus where employment manual stated bonuses were discretionary and employer reserved right to make decisions affecting amount of bonus). While the salary policy did not make the raises themselves discretionary if the conditions were met and the policy was in place, the policy expressly warned that it could be reevaluated.

Furthermore, Powell, Scott, and Simon involve bonuses owed to employees for work already completed. The class argues that a raise is similar to a bonus because they are both "additional compensation" earned after satisfactory performance, a bonus being added to an employee's base pay and a raise increasing an employee's base pay. But for purposes of the issue before us, we believe there is a critical distinction between bonuses that are 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. See Nye, 163 Wn. App. at 887 (past wages earned differ from raise, an increase in future wage or salary).

A future raise is also unlike a vested right to retirement benefits, so the class's citation to Navlet v. Port of Seattle, 164 Wn.2d 818, 194 P.3d 221 (2008) is likewise inapposite. The Navlet court held:

> [R]etirement welfare benefits conferred in a collective bargaining agreement constitute deferred compensation where the parties negotiate for such benefits as part of the total compensatory package. The compensatory nature of the benefits creates a vested right in the retirees who reached eligibility under the terms of the applicable collective bargaining agreement. Once vested,

> the right cannot be taken away and will survive the expiration of the agreement.

Id. at 841 (citing Litton Fin. Printing Div. v. Nat'l Labor Relations Bd., 501 U.S. 190, 207, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991). The circumstances in Navlet are not present here. This case does not involve vested retirement benefits or any other type of deferred compensation.

Our conclusion that the University did not breach its contract is supported by our decision in Nye, which involves substantially the same facts and the same legal claim, breach of contract. See Nye, 163 Wn. App. at 877. We held there was no breach of contract because "the 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. To distinguish Nye, the class contends that Nye asserted different arguments—specifically, that the suspension of the salary policy breached a bilateral or implied contract and that EO 29 was insufficient to suspend the raises. Id. at 885-88. But we stated:

> Nye also contends that the handbook is a bilateral contract, which the president and board may not unilaterally amend. Even if Nye is correct, any distinction between bilateral and unilateral contracts makes no difference when the provisions of that contract allow for the modification that occurred. The handbook's express terms warn faculty that the provision of merit raises may be reevaluated, allow the president to issue executive orders, and state that the board may modify rules formulated by the president or faculty.

Nye, 163 Wn. App. at 886 (emphasis added). Though the class's specific argument may be different from Nye's, both plaintiffs asserted a breach of contract claim based on the University's alleged failure to abide by the salary

policy. The class's arguments as to why unilateral contract principles merit a different result here are not well taken.

Res Judicata

The class also argues that summary judgment should be reversed because res judicata principles preclude the University from relitigating issues decided in Storti I. Res judicata is an issue of law reviewed de novo. Martin v. Wilbert, 162 Wn. App. 90, 94, 253 P.3d 108 (2011), rev. denied, 173 Wn.2d 1002, 268 P.3d 941 (2011). Res judicata is a doctrine of claim preclusion designed to bar the relitigation of claims that were or should have been litigated in a former action. Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 859, 762 P.2d 1 (1986). It applies where the subsequent action involves the same (1) subject matter, (2) cause of action, (3) persons or parties, and (4) quality of persons for or against whom the decision is made as did a prior adjudication. Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 730, 254 P.3d 818 (2011). To apply res judicata, the prior case must have been resolved by a valid and final judgment on the merits. Schoeman, 106 Wn.2d at 860.

The University argues that res judicata does not apply because the "same cause of action" requirement was not met.[11] We agree. The following criteria are helpful in determining whether two causes of action are identical:

> (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same

[11] The University also disputes that Storti I was resolved by a final judgment on the merits.

transactional nucleus of facts.

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)) (emphases added).

This lawsuit does not involve "substantially the same evidence" as Storti I, nor does it arise out of the "same transactional nucleus of facts." Storti I involved the University's refusal to fund raises in 2002 while leaving EO 64 intact. This case arises from the University's 2009 decision to reevaluate and suspend raises under EO 64 by promulgating EO 29. The purpose of res judicata is to "bar the relitigation of claims that either were or should have been litigated in a former action." Schoeman, 106 Wn.2d at 859. The claims here (based on events in 2008-2009) could not have been litigated in Storti I (filed in 2004).

The class's language in arguing that the two cases involve the same cause of action is telling; it repeatedly stresses that the "issues" are identical. It argues that the "claims by the class here mirror those in Storti I" and that "[t]he case involves the same subject matter and virtually the same issues and defenses (only the year of the University's breach of its unilateral contract with the faculty is different)." Brief of Appellant at 36. But similarity of subject matter, legal issues, or legal arguments is not the inquiry under the "same cause of action" requirement.

The class cites Riblet v. Spokane-Portland Cement Co., 41 Wn.2d 249, 248 P.2d 380 (1952) overruled on other grounds by Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985) and Riblet v.

Ideal Cement Co., 54 Wn.2d 779, 345 P.2d 173 (1959), cases involving property owners' claims against a cement company for dust emanating from the company's plant.[12] Those cases are of no assistance to the class. In the first, our supreme court reversed the dismissal of the landowners' claims and held that they stated a cause of action in nuisance but that a two-year statute of limitations applied and damages were limited to the two years preceding suit. Riblet, 41 Wn.2d at 256-60. After that decision, the landowners filed claims against the company every two years. Riblet, 54 Wn.2d at 781. The second case was an appeal from a verdict against the company. The class cites the portion of that case in which the court stated that "[i]n the absence of a major factual change, the prior judgment binds these parties." Id. at 782 (quoting Bodeneck v. Cater's Motor Freight System, 198 Wash. 21, 86 P.2d 766 (1939). But the court was discussing the effect of collateral estoppel on the landowners' consecutive suits. Id. Indeed, the court specifically noted that collateral estoppel was different from res judicata, "for which the requirements are more stringent and which has a wider range of conclusiveness." Id. at 782 n.1. Here, the class does not argue collateral estoppel.

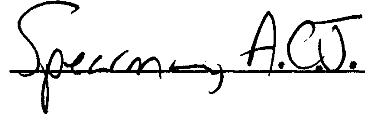
Attorney's Fees on Appeal

The class requests attorney's fees on appeal, citing RCW 49.48.030 and the "common fund exception" to the general rule against attorney's fees (the

[12] The Spokane-Portland Cement Co. was predecessor to the Ideal Cement Co. Riblet, 54 Wn.2d at 781.

latter as described in Covell v. City of Seattle, 127 Wn.2d 874, 891-92, 905 P.2d 324 (1995)). Because the class does not prevail, we do not award fees.

Affirmed.



WE CONCUR: