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Washington Supreme Court's *Storti* Decision: A Reminder to Check Your Employee Handbook

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Washington courts have long recognized that employee handbook provisions may form the basis for unilateral contracts between employers and employees. The Washington Supreme Court's recent decision in *Storti v. Univ. of Wash.*, No. 88323-8, 2014 Wash. LEXIS 570 (2014) serves as an important reminder for employers to pay close attention when drafting employee handbooks, and also offers valuable guidance on how, if necessary, employers can preserve the right to modify handbook language construed as a promise.

When Employer Statements Lead to Unilateral Contracts: Employers that do not carefully craft language in employee handbooks may find themselves bound by statements they never intended as promises. At issue in *Storti* was whether a University of Washington merit raise policy incorporated into the faculty handbook amounted to a unilateral offer that the faculty accepted by substantially performing; and if so, whether the University breached the contract when it later suspended the policy. The policy specified that a faculty member deemed to be meritorious in performance "shall be awarded a regular 2% merit salary increase at the beginning of the following academic year." The policy also included a "Funding Cautions" provision, which explained that, in the event of diminished funds or a decrease in state support, a "reevaluation" of the faculty salary policy may prove necessary. The provision also set forth a specific procedure for the reevaluation. In 2009, faced with a deep recession and budget cuts, the University formed a committee to reevaluate the policy, and the committee proposed that it be suspended. The University president later issued an order that adopted the committee's proposal and suspended the merit raise policy.

Professor Storti challenged the University's suspension of the policy, arguing that the University made a unilateral offer that the faculty accepted by performing meritoriously for most of the academic year. Under Professor Storti's theory, the University could not retroactively retract its promise to issue raises after the faculty substantially performed, and by doing so it breached the contract. The Washington Supreme Court agreed that the merit raise language constituted an offer because the University showed "intent to be bound by its promise" through its use of the word "shall." Importantly, the court formally adopted the reasoning set forth in the RESTATEMENT (SECOND) OF CONTRACTS § 45, and held that an employee's substantial performance—or partial completion—creates an option contract that requires an employer to keep a unilateral offer open. As such, the University faculty accepted the University's offer of a raise by performing meritoriously for the majority of the academic year.

While the University's promise was binding, the court ultimately determined that the University did not breach the contract. The court closely examined the "Funding Cautions" provision of the policy, in particular the ordinary usage of the term "reevaluation" and its meaning in light of the entire handbook. The court held the University was authorized to revise the policy given that (1) the faculty was on notice of the potential for reevaluation; (2) the handbook established clear procedures for reevaluation, including assembling a committee for review; and (3) the University followed those procedures.

The *Storti* decision highlights the importance of including well-crafted language in all handbooks and policies issued to employees. Employers should take care to avoid language that in any way shows intent to be bound by specific promises. The need for careful language is even more important now that an employee's substantial performance constitutes acceptance of an employer's unilateral offer. However, *Storti* highlights that even if a unilateral contract does exist, employers can minimize their risk of breach by providing employees notice of the potential for modification, establishing clear procedures for the modification, and by closely following those procedures.

The Importance of General Disclaimers: *Storti* also serves as an important reminder that employers should be sure to include a general disclaimer in all handbooks. As explained years ago by the Washington Supreme Court, an employer can avoid being bound by a statement in an employment manual if it specifically states in a conspicuous manner that nothing contained in the handbook is intended to be part of the employment relationship, but rather the handbook is intended to convey general statements of company policy. In order to be enforceable, the employer must effectively communicate disclaimers to employees. While it will not render a disclaimer effective in every instance, it is a good idea for employees to sign a document acknowledging the disclaimer. Finally, an employer's inconsistent representations and conduct may negate or override a disclaimer, so employers should act in a manner consistent with their handbooks at all times.

Recommendations: In summary, follow these suggestions when drafting employee handbooks:

- Be careful to avoid language that suggests an intent to be bound, such as "shall," unless you intend to make an enforceable promise
- If a policy could be construed as a unilateral offer, be sure to include a provision that (1) puts employees on notice of the employer's ability to modify the policy; (2) outlines specific procedures to go about making the modification; and (3) follow those procedures in the event of a modification
- Always include a general disclaimer that specifically states nothing in the employee handbook is intended to be part of the employment relationship
- Require employees to sign a document acknowledging the disclaimer

As always, if your employee handbook or policies are in need of an update or review, any of the attorneys at Sebris Busto James are available to assist you.