No._____

THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 341038

Spokane Superior Court No. 15-2-00466-7

In re:

DAVID MARTIN,

Plaintiff/Appellant,

vs.

GONZAGA UNIVERSITY,

Defendant/Respondent.

REPLY RE: PETITION FOR REVIEW

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THE SUPREME COURT OF THE STATE OF WASHINGTON

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I. ARGUMENT

A. The decision to reverse the trial court's summary judgment order based on Martin's RCW 49.12.250 claim is not in conflict with Washington law or decisions of this Court.

Martin's RCW 49.12.250 claim was remanded to the trial court for the determination of genuine issues of material fact, and no determination was made as to the cause of action itself. The absence of resolution on a wide variety of factual questions, as identified by the Lead Opinion, demonstrates the difficulty of attempting to entertain the matter on appeal without remand for trial.

Gonzaga does not dispute that such issues exist; rather, it argues that this Court should adopt the reasoning of the Dissenting Opinion, which concluded that Martin's RCW 49.12.250 claim is not justiciable on its face because RCW 49.12.250 does not explicitly create a judicial cause of action. However, "[i]t has long been recognized that a legislative enactment may be the foundation of a right of action." *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990), quoting *McNeal v. Allen*, 95 Wn.2d 265, 274, 621 P.2d 1285 (1980)(Brachtenbach, J., dissenting.).

In the *Bennett* case, two plaintiffs sued their former employer alleging age discrimination and wrongful discharge. *Bennett*, 113 Wn.2d at 916. The employer was exempt with respect to RCW 49.60 because the employer maintained fewer than eight employees and was therefore not within the statute's definition of an employer. *Bennett*, 113 Wn.2d at 916. The trial court dismissed plaintiffs' case on summary judgment because it concluded that the law precluded the claims. *Id.* This Court reversed the trial court's dismissal and

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remanded the matter for trial, holding that "a cause of action for age discrimination is implied under RCW 49.44.090." *Id.* In doing so, it stated that this Court may "assume that the legislature is aware of the doctrine of implied statutory causes of action and also assume that the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights." Bennett, 113 Wn.2d at 920. "When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action." *Id*, quoting Restatement (Second) of Torts §874A (1979).

The test for determining whether to imply a cause of action has three considerations: "first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Id,* citing *In re WPPSS Securities Litigation*, 823 F.2d 1349 (9th Cir. 1987).

1. Martin is within the class for whose especial benefit the statute was enacted.

RCW 49.12.240 and .250 creates a right on the part of employees to inspect their personnel files and to receive the removal of any "irrelevant or erroneous

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information in the file(s)" or to include "the employee's rebuttal or correction." The "right of rebuttal or correction" exists for a period not to exceed two years. RCW 49.12.250(3). Martin was an employee and was entitled to inspect his personal file(s), to request removal of any irrelevant or erroneous information in the file, and to exercise his "right of rebuttal or correction" during the statutory time period. Gonzaga denied him those rights.

2. Legislative intent explicitly and implicitly supports creating a remedy.

As in the *Bennett* case, the statute explicitly created a right on the part of employees "but does not indicate explicitly an intent to create a remedy." As the *Bennett* court concluded, "we may rely on the assumption that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights." *Bennett*, 113 Wn.2d at 921.

The language of the statute indicates that its purpose is to protect employees from irrelevant or erroneous information in their employer's personnel file(s), which is against public policy. While there remain genuine issues of material fact that make this particular issue impossible to fully resolve on appeal, it is not difficult to see the circumstances in which the statute both explicitly and implicitly supports the creation of a remedy.

The first remedy, as explicitly stated by the statute and recognized by the Dissenting Opinion, is to allow Martin to see his file(s) and exercise his rights accordingly. The Dissenting Opinion assumes that because Gonzaga is not *obligated* to have maintained its employee files longer than the original statutory

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period, that has not, in actual fact, maintained those files, but this is not information that is known to the Court. Further, in this particular case, it seems unlikely that Gonzaga would have destroyed these files given the litigation that immediately ensued. If Gonzaga has maintained its files, it ought to be required to comply with the statute and provide the remedy of inspection, the right to request removal of irrelevant and inaccurate information, and the right to include information in rebuttal or correction.

The second remedy is implied. This statute provides employees with the right to be protected from the maintenance and promulgation of false and irrelevant information in their employment files, and Martin has been damaged to the extent that Gonzaga violated the law by denying him that right. Employees ought not to have to appeal to the Supreme Court of Washington in order to see their personnel files as is their explicit right under Washington law.

The Dissenting Opinion concludes that because the statutes contained in RCW 49.12 are enforced by the Director of Labor and Industries, a civil right of action is necessarily precluded; however, the State of Washington has the ability to pursue criminal enforcement of many laws for which there is also a private, civil right of action. This is true even within RCW 49.12 itself. Pursuant to RCW 49.12.130, an employer who discharges or discriminates against any employee because the employee has testified, is about to testify, or may testify in the investigation of enforcement activities under RCW 49.12 "shall be deemed guilty of a misdemeanor" and "shall be punished by a fine of from twenty-five dollars to one hundred dollars for each such misdemeanor." RCW 49.12.130.

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The ability of the Director of Labor and Industries to convict such an employer of a crime and assign a fine does not prevent the employee from pursuing a wrongful termination lawsuit against the employer for his personal damages as a private, civil action.

Further, RCW 49.12 does not clearly provide any avenue for an employee to complain about an employer's failure to allow inspection of personnel files and obtain individual relief. RCW 49.12 explicitly provides such guidance in other contexts; e.g., RCW 49.12.140 states that "any worker or the parent or guardian of any minor to whom RCW 49.12.010 through 49.12.180 applies may complain to the director that the wages paid to the workers are less than the minimum rate and the director shall investigate the same and proceed under RCW 49.12.010 through 49.12.180 on behalf of the worker." RCW 49.12.140. No such avenue exists for an individual's request to inspect his own employment records.

3. Implying a remedy is consistent with the underlying purpose of the legislation.

The underlying purpose of the legislation is to prevent employers from maintaining false or irrelevant employee records which would be damaging to employees and would undermine public policy. The best way to ensure this outcome is to permit employees to inspect their own records (as the legislature explicitly stated they have a right to do). Providing employees with the ability to ensure that an employer's refusal to comply with the law is specifically addressed is consistent with the underlying purpose of the legislation.

This is particularly true when employers attempt to evade the requirements of

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the law, as Gonzaga did, by maintaining separate files under synonymic titles, like "personnel file" and "employee relations file" for the express purpose of avoiding employee inspection as required by statute. Such behavior is clearly contrary to the public policy interest embodied by RCW 49.12.

Conclusion: It may ultimately be determined (as the Dissenting Opinion appears to conclude) that Martin's claims would be found without *merit* at trial; however, that is a different conclusion than the determination that his claim is not *justiciable*. As the *Bennett* case demonstrates, private enforcement of explicit/implied statutory remedies is an established justiciable claim pursuant to Washington law, which provides a three-part test for that very inquiry.

B. The decision to reverse the trial court's summary judgment order based on Martin's RCW 49.12.250 claim is not an issue of substantial public interest and should not be accepted by this Court for review.

It is a matter of well-settled Washington law that a litigant is permitted to claim a private right to enforce an explicit/implied statutory remedy. The question is clearly justiciable. In light of the undisputed genuine issues of material fact that remain, Martin's RCW 49.12.250 claim should proceed to trial and is not an issue of substantial public interest to this Court. This issue should not be accepted by this Court for review.

RESPECTFULLY SUBMITTED this 12th day of January, 2018,

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OF THE STATE OF WASHINGTON

In re: **DAVID MARTIN,** **Petitioner/Appellant,** **and** **GONZAGA UNIVERSITY,** **Defendant/Respondent.**	**COURT OF APPEALS NO. 341038** **CERTIFICATE OF SERVICE**

On January 12, 2018, I arranged for hand-delivery of a true and correct copy of the *REPLY RE: PETITION FOR REVIEW* to the individual listed below:

Michael Love
Michael Love Law Firm, PLLC
905 W. Riverside Ave., #404
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RESPECTFULLY SUBMITTED THIS 12th DAY OF JANUARY, 2018.

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