No. 95269-8

THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 341038

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

DAVID MARTIN,

Plaintiff/Appellant

vs.

GONZAGA UNIVERSITY,

Defendant/Respondent

ANSWER TO PETITON FOR REVIEW

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THE SUPREME COURT OF WASHINGTON

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I. IDENTITY OF RESPONDENT

The respondent is Gonzaga University ("Gonzaga").

II. DECISION BELOW

The Court should deny Martin's Petition for Review pursuant to RAP 13.4(1) and (4) because the decision of the Court of Appeals, in particular Justice Pennell's concurring opinion which was joined by Justice Korsmo in his concurring in part and dissenting in part opinion, is not in conflict with a decision of this Court and the petition does not involve an issue of substantial public interest that should be determined by the Court.

In its Answer Gonzaga is specifically asking this Court to address an assignment of error and issue not raised in Martin's Petition for Review: whether a *justiciable claim* can be asserted under RCW 49.12.250 relating to employee personnel files which was addressed in Justice Korsmo's dissenting opinion (Petition for Review Appendix A. pg. 1) This is a case of first impression before the Court. RAP 13.4(4)

The Court should grant Gonzaga's Petition for Review on this issue alone and reverse the Court of Appeals and reinstate the trial court's finding of summary judgment on Martin's claim against Gonzaga under RCW 49.12.250 because the Court of Appeals decision is in conflict with prior

precedent of this Court and the Court of Appeals relating to statutory construction. See RAP 13.4(1) and (2)

III. ASSIGNMENT OF ERROR AND ISSUES PRESENTED IN GONZAGA'S ANSWER

A. Whether Martin's Petition for Review meets the criteria for acceptance under RAP 13.4 subparts (1) and (4).

B. Whether the Court of Appeals committed reversible error when it reversed the trial court's summary judgment order, in part, relating to Martin's alleged claim that Gonzaga violated RCW 49.12.250 (a decision in conflict with prior appellate court decisions relating to statutory construction). RAP 13.4(1) and (2)

C. Whether Gonzaga's petition involves an issue of substantial public interest that should be accepted by the Court for review. RAP 13.4(4)

IV. STATEMENT OF THE CASE

In 2003, Gonzaga opened the Rudolf Fitness Center ("Fitness Center). CP 149

The purpose of this new facility was to provide students with additional recreational activities. CP 149

The Fitness Center is part of the Athletic Department at Gonzaga. CP 180

The Fitness Center has a fieldhouse where students play basketball. CP 111, 122

Until 2012 there was no padding on the walls directly behind the baskets of the fieldhouse. CP 111

The lack of padding on the walls behind the baskets was not a compliance issue. CP 111 There was no legal code requirement or NCAA regulation that required padding on the walls. CP 111, 206

Since 2004, there had been a discussion for a long time among many employees (including assistant directors of the Fitness Center) and administrators as to whether padding should be installed on the walls. CP 111, 122, 170, 204-206

Christopher Standiford, Senior Associate Athletic Director at the time, had assigned to Dr. Jose Hernandez in 2004 to work with a risk manager in determining whether or not pads were necessary on the walls behind the basketball courts. CP 65 More than one vendor was consulted to provide an estimate as to the cost. CP 65

Dr. Hernandez had recommended to the administration that pads be installed on the walls behind the basketball court as early as 2007. CP 68-70

There had been some Gonzaga students who had been injured over the years by running into the walls during pickup basketball games. Other assistant directors, and not just Martin, had expressed concern about this issue. CP 111, 122, 206

As a result and wanting to always ensure as best it can a safe environment for the students, Gonzaga made the decision on the recommendation of a risk manager, Joe Madsen (an employee of Gonzaga), to invest around $18,000 to place pads on the walls behind the baskets in the fieldhouse in 2012. CP 59, 73, 111, 122

Martin was hired by Gonzaga on January 2, 2008, to work as an assistant director of the Fitness Center. CP 181, 209 Martin was an at-will employee. CP 167, 176-177, 209 Martin was not subject to a written contract for a definite term of employment with Gonzaga. CP 167, 176-177

Martin during his employment with Gonzaga was familiar with the term "chain of command" or "organizational structure." CP 178

In 2012, the chain of command or organizational structure of the Athletic Department in relation to the Fitness Center from the bottom to the top was as follows: all assistant directors of the Fitness Center reported to the director Dr. Jose Hernandez. CP 109, 119-120, 162-163, 169-170, 179 Dr. Hernandez reported directly to the Assistant Athletic Director, Joel

Morgan. CP 109 Mr. Morgan reported to Mr. Standiford. CP 109 Mr. Standiford reported to the Athletic Director of Gonzaga Mike Roth. CP 109, 162-163, 169-170, 179-180

Martin throughout his employment with Gonzaga had performance issues relating to his inability to get along with others in the Fitness Center. CP 119-120, 134-135, 199 Dr. Hernandez had been counseling Martin on this issue as early as April of 2011. CP 119-120, 199 Dr. Hernandez had also been counseling Martin on his overall job performance. CP 119-120, 134-135, 190

Dr. Hernandez was also responsible for completing Martin's performance evaluation and counseling Martin on his technical and interpersonal communication skills. CP 119-120, 126-129, CP 134-135, 189, 200

On February 29, 2012, Martin had an initial email exchange with Mr. Standiford relating to a proposal Martin had to keep a pool on campus for the students. CP 114-115

The initial email from Martin to Mr. Standiford does not address a lack of padding on the walls of the Fitness Center or raise any other safety issue or concern. CP 114-115

Martin had initially advised Dr. Hernandez that he wanted to take his proposal directly to Mr. Standiford. CP 120 Dr. Hernandez advised Martin "this is not a good idea" because it was outside of the protocols and chain of command of Gonzaga. CP 120 Martin had been counseled in the past for not following protocol. CP 120

Martin's email specifically stated, in part, the following:

> "I have a very specific plan, along with other ideas, on how to generate revenue to keep the pool operational and buy time for the future. I have a short term, five year plan for the pool, and another proposal to follow that. The ultimate goal being: keep a pool on campus for the students." CP 115

Mr. Standiford specifically instructed Martin to present his proposal to Dr. Hernandez first. CP 109, 183-184

Martin refused to follow this instruction. CP 114 Martin's stated reason for his refusal was based upon Martin's personal concern that he did not want someone else receiving credit for his "golden ticket idea. Something I don't want others corrupting or taking credit for." CP 102-103, 114, 213

After his email communication and in person meeting with Martin on February 29, 2012, Mr. Standiford called Dr. Hernandez and Mr. Morgan. CP 110, 166 Mr. Standiford instructed both of them to contact Gonzaga's Human Resource Department ("HR") for advice and

consultation on how to proceed based upon Martin's refusal to follow the direction of Mr. Standiford. CP 110, 166 Mr. Standiford had also contacted HR for advice and consultation. Mike Roth had also been made aware of the situation. CP 110, 166

On March 1, 2012, at 4:00 pm Dr. Hernandez and Mr. Morgan met with, at the time, the Associate Director of HR, Heather Murray, for the purpose of receiving advice and consultation relating to Martin's "continued unprofessional behavior, lack of respect for protocol and poor job performance." CP 121, 216 A decision was made to provide Martin with a formal letter of expectation to "define his role and proper protocols within the University." CP 216 Ms. Murray drafted the letter of expectation for Martin. CP 165-166

On March 1, 2012, at around 5:15 pm Dr. Hernandez, Mr. Morgan and Martin met for the purpose of advising Martin that he would be receiving a letter of expectation. CP 121

Martin initially refused to meet with Dr. Hernandez and Mr. Morgan. CP 121

At the meeting Martin was advised that he had been insubordinate in not following Mr. Standiford's instructions relating to presenting his proposal to Dr. Hernandez first. CP 185-189, 213-214, 216

Dr. Hernandez also advised Martin that he never gave Martin consent to take his proposal to Mr. Standiford. CP 75-76, 186-188, 216

Martin exhibited unprofessional behavior during the meeting by arguing with Dr. Hernandez and Mr. Morgan. CP 121, 216

Martin was responsible for closing the Fitness Center at the end of his shift, but instead walked off the job without the permission of Dr. Hernandez. CP 121, 191-193

Martin's behavior was reported to Mr. Standiford who, in turn, reported it to HR. CP 110, 216

As a result of Martin's behavior during and after the March 1, 2012, meeting he was placed on administrative leave by HR and his IT access was removed. CP 122, 166, 193-194, 216

Martin was also instructed not to have any contact with anyone associated with Gonzaga during his administrative leave, with the exception of HR or Dr. Hernandez. CP 110, 122, 166-167, 194, 202-203

Martin violated the terms of his administrative leave by contacting the Executive Assistant to the President of Gonzaga, Julia Bjordahl, on March 5, 2012. CP 110, 167, 195-197

The purpose for Martin's contact was to set up a meeting with Gonzaga President Thayne McCulloh to present his earlier proposal to preserve a pool on campus for the students. CP 95-96, 110, 167

Pursuant to instructions from Dr. McCulloh, Ms. Bjordahl asked Martin "if he had vetted this up the chain of command in the Athletic Department." CP 95-96 Martin was advised Gonzaga policy required that he "vet" this through his "next in command." CP 100

Martin was terminated on March 8, 2012, and provided a letter of termination. CP 110, 118 Martin was advised the reasons for termination were insubordination and past performance issues that had not been resolved. CP 110, 118-120, 167, 198, 201-203

Martin admitted he should have received "a written warning for insubordination." CP 105

There are two separate files which are kept on employees: the employee relations file and a personnel file. CP 167

After Martin's termination he was provided with a complete copy of his personnel file. Martin acknowledged receiving a copy of his personnel file. CP 211

There is no evidence in the record that Martin filed an administrative charge with the Department of Labor and Industries ("DLI") under RCW 49.12.250.

V. Argument

1. The Court should deny Martin's Petition for Review under RAP 13.4(1) because the Court of Appeal's decision does not conflict with a decision of this Court.

The Court in denying the Petition for Review should focus on Justice Pennell's concurring opinion which was joined by Justice Korsmo. There is nothing in the text of Justice Pennell's concurring opinion which conflicts with the prior decisions of this Court. See Appendix A. Justice Pennell's concurring opinion pg. 1-3

It is undisputed Martin was an at-will employee. *Thompson v. St. Regis Paper Company*, 102 Wash.2d 209, 222 (1984). ("Generally, an employment contract, indefinite as to duration, is terminable at will by either the employee or employer.") (Citing *Roberts v. Arco*, 88 Wash.2d 887, 894 (1977).

The Washington Supreme Court in *Thompson* adopted for the first time a "narrow public policy exception" to the at-will employment doctrine which precluded even at-will employees from being terminated either with or without cause in some limited situations. *Thompson*, at 222.

The Court has addressed the situation where the public policy tort claim can arise where an employee is fired in retaliation for reporting employer misconduct, i.e., whistleblowing. *Dicomes v. State*, 113 Wash.2d 612, 618 (1989)

A. Clarity Element

The *Thompson* court and its progeny have made clear the employee has the burden initially of proving the "existence of a clear public policy (the *clarity* element)". *Thompson*, at 232; *Gardner*, at 941

Martin alleges he was wrongfully terminated. There is no evidence in the record that Martin acted in furtherance of public policy. *Id.* at 222; *Rickman v. Premera Blue Cross*, 184 Wash.2d 300, 313 (2015)

Martin was obligated to present sufficient evidence to survive summary judgment that his "conduct furthers public policy goals." *See Gardner v. Loomis Armored, Inc.*, 128 Wash.2d 931, 945 (1996) (finding employees must show "they engaged in particular conduct," which "directly relates to the public policy"); *Thompson*, 102 Wash.2d at 232 (finding the employee must demonstrate the dismissal violates a clear mandate of public policy). Martin must show that he "sought to further the public good, and not merely private or proprietary interests." *Dicomes v. State*, 113 Wash.2d at 620; compare *Bennett v. Hardy*, 113 Wash.2d 912, 924-25 (1990)

(allowing a claim when the employee hired an attorney to protect himself from discrimination, an act for which she was later fired), with *Farnam v. CRISTA Ministries*, 116 Wash.2d 659, 672 (1991) (finding the employee did not seek to further the public good because she knew the employer's conduct did not violate the law).

Martin failed to present sufficient evidence that he acted in *furtherance of public policy. Thompson,* at 222. The email communications from Martin to Mr. Standiford fail to mention anything remotely related to Martin furthering the public good. CP 114-115

The omission on Martin's part was noted in Justice Pennell's concurring opinion affirming summary judgment dismissal for Gonzaga.[1]

Martin also acknowledged there was no legal requirement to put padding on the walls of the Fitness Center. CP 111, 206; *Farnam*, at 672 (nurse unsuccessfully claimed retaliatory wrongful discharge when fired for complaining to the media about the nursing home's legal practice of removing food tubes from terminally ill patients.)

B. Causation Element

[1] Although Justice Pennell did not specifically mention that summary judgment was appropriate on the clarity element, she did note that Martin's emails "mentioned nothing about gymnasium padding or student safety." See Appendix A. concurring opinion of Justice Pennell at pg. 1.

Justice Pennell's concurring opinion which was joined by Justice Korsmo also does not conflict with prior decisions of this Court on the element of *causation* in wrongful discharge cases. See Appendix A. Justice Pennell's concurring opinion pg. 1 and Justice Korsmo's concurring and dissenting opinion, in part, pg. 1.

Martin was also obligated to produce sufficient evidence at time of summary judgment that the actions he took in furthering an alleged public policy was the cause of his firing. The legal test is whether Martin's alleged furtherance of a public policy was a "substantial factor" for his termination. *Rickman*, at 314

Martin alleges a substantial factor for his termination was his actions in raising safety issues pertaining to the lack of padding on the walls of the Fitness Center. This assertion is not supported by any evidence in the record. See Justice Pennell's concurring opinion pg. 1-3.

What the record does reflect is the lack of padding was an issue that was discussed dating back to 2004 among Gonzaga administrators and employees. CP 163

The record substantiates Martin's termination of his at-will employment for legitimate reasons. Martin had been counseled in the past

by Dr. Hernandez relating to his inability to get along with others. CP 111, 119-120, 134-135, 190, 199, 206

Later, Martin engaged in insubordination on February 29, 2012, by refusing to follow the directive of Mr. Standiford relating to his pool proposal. CP 109, 114, 183-184, 213

Martin then engaged in additional acts of insubordination both during and after the March 1, 2012 meeting with Dr. Hernandez and Mr. Morgan which caused Martin to be placed on administrative leave. CP 121, 191-193, 216

Finally, after being placed on administrative leave Martin violated the terms of his leave by contacting the assistant to the President of Gonzaga to attempt to schedule a meeting with the President for the purpose of presenting his pool proposal outside the chain of command and against the prior directive of Mr. Standiford and HR. CP 95-96, 110, 167, 195-197

2. The Court should deny Martin's Petition for Review because it does not involve an issue of substantial public interest.

The Court should also deny Martin's petition because it does not involve an issue of substantial public interest. RAP 13.4(4)

Unlike the past decisions of the Court that clarified the *jeopardy* element of the tort of wrongful discharge in Washington[2] this case does not rise to this level.

This is a *garden variety* wrongful discharge case that does not present any conflicting legal issues that need to be resolved by this Court.

3. The Court should grant Gonzaga's Petition for Review on the issue of whether the Court of Appeals errored in reversing the trial court's grant of summary judgment on Martin's claim under RCW 49.12.250.

The Court should grant Gonzaga's Petition for Review relating to the Court of Appeals reversal of the trial court's summary judgment dismissal on Martin's claim under RCW 49.12.250. The Court should reverse the Court of Appeals based upon the analysis set forth in Justice Korsmo's dissenting opinion because the Court of Appeals decision reversing the trial court, in part, conflicts with prior precedent of this Court and the Court of Appeals relating to statutory construction and the *plain meaning rule.* Therefore, Gonzaga's Petition for Review on this assignment of error should be granted under RAP 13.4(1) and (2).

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[2] *See Rose v. Anderson Hay and Grain Co.*, 184 Wash.2d 268 (2015); *Rickman v. Premera Blue Cross*, 184 Wash. 2d 300 (2015); and *Becker v. Community Health Systems, Inc.*, 184 Wash.2d 252 (2015).

Under prior Supreme Court precedent, the "[c]onstruction of a statute is a question of law reviewed de novo." *State v. Wentz,* 149 Wash.2d 342, 346 (2003). "A court interpreting a statute must discern and implement the legislature's intent." *State v. J.P.*, 149 Wash.2d 444, 450 (2003). Pursuant to the *plain meaning rule* of statutory construction, "[w]here the plain language of a statute is unambiguous and legislative intent is apparent," the courts "will not construe the statute otherwise." *Nat'l Elec. Contractors Ass'n v. Riveland,* 138 Wash.2d 9, 19 (1999). "Plain meaning may be gleaned 'from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 11 (2002) (citing *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 808 (2001).

Gonzaga's petition also "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(4)

The issue is whether a separate cause of action exists under RCW 49.12.250. Gonzaga is not aware of any prior decision of this Court relating to this issue.

The statute, in relevant part, provides an employer shall make the personnel files of the employee available within a reasonable period of time

after the employee requests the personnel file. Gonzaga satisfied Martin's request after he was terminated even though he was no longer an employee of Gonzaga. While the statute references making the file "available" it does not command that an actual copy be provided. RCW 49.12.250; CP 211

The statute does not provide any type of remedial scheme within the judicial system even in the event of a violation of RCW 49.12.250. The employee may make a complaint with the DLI. If a complaint is made DLI will determine whether the employee is entitled to the rights set out in RCW 49.12.240-260. DLI takes no enforcement position pertaining to disputes over the contents of a personnel file. Martin never made a complaint to DLI. *Administrative Policy State of Washington Department of Labor and Industries Employment Standards Title: Employee Access to Personnel File, Number: ES.C.7, Chapter: RCW 49.12.240, .250, .260, Issued: 1/2/2002.*

Justice Korsmo's analysis and opinion is correct and should be adopted by this Court:

> Nothing in the statutes or the associated administrative code suggests that Mr. Martin's personnel file claim currently is justiciable. We should not accidentally create a new cause of action by remanding this issue to superior court. The trial judge correctly dismissed the claim at summary judgment.

See Appendix A. Judge Korsmo's dissenting opinion pg. 3.

VI. Conclusion

The Court should deny Martin's petition and grant Gonzaga's petition relating to its assignment of error on Martin's claim under RCW 49.12.250.

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CERTIFICATE OF SERVICE

David Martin v. Gonzaga University

Case No. 341038

I, Michael B. Love, certify under penalty of perjury that I served by regular mail a copy of respondent, Gonzaga University's, Answer to Appellant Martin's Petition for Review to the Washington Supreme Court on his counsel Julie C. Watts, 108 N. Washington St., Suite 302, Spokane, Washington 99201 on December 29, 2017.

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