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/Cross Petitioner.

REPLY RE: ANSWER TO CROSS PETITION FOR REVIEW

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I. INTRODUCTION

Martin's objection to Gonzaga's cross-petition for review cites *Bennett v. Hardy* – the framework the Washington State Supreme Court utilizes in determining whether an implied right of action exists – for the proposition that a private right of action exists under Martin's RCW 49.12.250 claim. Martin's reliance on *Bennett* invites the Washington State Supreme Court to address Martin's RCW 49.12.250 claim, pre-remand, given the Appellate Court's misapplication of the Supreme Court's statutory construction rules as well as the broad public policy implications that arise with the creation of a new claim.

II. ARGUMENT

A. The decision to reverse the trial court's summary judgement order based on Martin's RCW 49.12.250 claim is in conflict with Washington law relating to statutory construction.

Martin's failure to address the issue of statutory construction in his answer to Gonzaga's cross petition for review is fatal to his argument that Gonzaga's cross-petition should be denied. For the long line of Washington Supreme Court cases regarding the *plain meaning rule*, coupled with Gonzaga's argument that the Appellate Court did not follow the rule when creating a new cause of action invites this Court to address the issue relating

to the justiciability of Martin's alleged claim that Gonzaga violated RCW 49.12.250. Indeed, the "construction of a statute is a question of law reviewed de novo" and that principal certainly applies here and mandates such review. *State v. Wentz*, 149 Wn.2d 342, 346 (2003); *Roe v. TeleTech Customer Care Management (Colorado) LLC*, 171 Wash.2d 736, 746 (2011) (citing and quoting *Duke v. Boyd*, 133 Wash.2d 80, 87 (1997) ("When the words in a statute are clear and unequivocal, this court is required to assume the Legislature meant exactly what it said and apply the statute as written.").

B. Martin's reliance on *Bennett v. Hardy* is misplaced. Nevertheless, the Court should grant Gonzaga's cross petition for review to determine whether an implied cause of action exists under RCW 49.12.250.

Accordingly, the misapplication of *Bennett* in the context of RCW 49.12.250 is precisely a matter that this Court should review. *Bennett v. Hardy*, 113 Wash.2d 912, 920-921 (1990).

In conducting such a review this Court should apply the same test articulated in *Bennett* and adopted and used by the federal courts:

> [W]hether 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.

WPPSS Securities Litigation, 823 F.2d 349, 353 (9th Cir. 1987).

Bennett was significant in that it dealt with an issue of recognized public policy: preventing age discrimination in all aspects of employment from hiring, promotion, discharge and receipt of benefits. *Bennett*, at 920-921. The Court in *Bennett* correctly recognized that an implied cause of action exists "under a statute which provides protection to a class of persons but creates no remedy." *Id.* at 920; *In re WPPSS Sec. Litig.*, 823 F.2d 1349 (9th Cir. 1987).

In applying the first part of the *Bennett* test for an implied cause of action, Martin is not part of an identifiable class (those 40 and over), but a general class of persons (employees) who have limited rights under RCW 49.12.250.

In applying the second part of the test there is no express or implied language in RCW 49.12.250 or a related statute, or the pertinent administrative codes that the legislature intended to create remedy in a court of law that is at the same level as eradicating invidious discrimination in all aspects of employment regardless of the size of the employer. *See* Chapter 49.60 RCW and RCW 49.44.090; *see also Zhu v. North Central Educational Service District – ESD 171*, 189 Wash.2d 607 (2017).

In *Bennett,* RCW 49.44.090 created "a right on the part of employees within the protected class to be free from age discrimination by their employers." *Bennett*, at 921.

By contrast, RCW 49.12.250 is devoid of any legislative intent providing employees belonging to a protected or identifiable class with rights as fundamental as preventing an employer from engaging in the unfair practice of age discrimination in employment. *Bennett,* at 921; RCW 49.44.090. The statute provides a limited right relating to employer owned personnel files. Other than the pertinent WAC provisions and the right to file a charge with the Department of Labor & Industries ("DLI"), there is no right to recovery. *Bennett*, at 920.

With regard to the third part of the test in *Bennett,* implying a remedy is not consistent with the underlying purpose of RCW 49.12.250. In contrast to *Bennett*, this statute was enacted to provide a limited right to review a personnel file, owned by the employer, and upon request of the employee have the employer review the file for any "irrelevant or erroneous information in the file." The statute also provides a current or former employee "the right of rebuttal or correction for a period not to exceed two years." RCW 49.12.250(3).

That right, however, is not a fundamental or human right providing a right of recovery for invidious age discrimination. At best it is the right to access an employer's property (business records), the property in this instance being employer-maintained personnel files. And short of the mandates provided under state and federal law the employer is free to place in an employee's file, or not, whatever it chooses, and limit the right to inspect the file only annually. The statute does not provide the employee or a former employee with a right to have a copy of the file. RCW 49.12.250(2).

Further, if the underlying statute has not provided a right of recovery the court is not required to "devise a remedy." *Bennett*, at 920 (citing *State v. Manuel*, 94 Wash.2d 695, 699 (1980)).

As a result of Martin's failure to establish this 3-part test, the Court should reverse the Court of Appeals based upon its own precedent and federal case law.

C. The decision to reverse the trial court's summary judgment order based on Martin's RCW 49.12.250 claim is an issue of substantial public interest in light of the fact the Court of Appeals decision appears to be the first known appellate case interpreting the statute and therefore should be accepted by this Court for review.

For all the reasons set forth herein, the Court should grant Gonzaga's cross petition because it does involve an issue of substantial public interest: whether the legislature intended to imply a cause of action and remedy within RCW 49.12.250. *California v. Sierra Club*, 451 U.S. 287, 297 (1981).

III. CONCLUSION

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

RESPECTFULLY SUBMITTED this 27th day of January, 2018.

MICHAEL B. LOVE WSBA 20529
ATTORNEY FOR RESPONDENT/CROSS PETITIONER

SUPREME COURT 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 26, 2018, I sent by regular mail a true and correct copy of Reply Re: Answer to Gonzaga's Petition for Review to the individual listed below:

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RESPECTFULLY SUBMITTED THIS 26TH DAY OF JANUARY 2018.

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January 27, 2018 - 12:15 PM

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