

No. 35597-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY _____

TREV KISER,

Appellant,

v.

CLARK COLLEGE,

Respondent.

REPLY BRIEF OF APPELLANT

Honorable Chris Wickham
Thurston County Superior Court

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ORIGINAL

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I. INTRODUCTION TO REPLY

Clark College's arguments on appeal are striking in the degree to which they overlook the forest for the trees. Only by dissecting Kiser's case into elements and sub-elements, then analyzing each element with doctrine derived from cases derived on inapposite factual records, can Clark College effectively rebut the factual and legal strength of Kiser's lawsuit. Kiser respectfully requests that the standard of summary judgment be recalled when viewing his evidentiary record in this case: Taking the evidence and the reasonable inferences from the evidence in a light most favorable to Kiser, had Clark College demonstrated that no genuine issue of material fact existed and that it was entitled to judgment as a matter of law on each of Kiser's claims?

Viewing the facts of Kiser's employment and his termination as a whole; viewing Clark College's conduct toward Kiser as a whole; viewing the reasonable inferences as a whole and not in a partitioned way as Clark College urges, this matter was wholly inappropriate for summary judgment. Kiser carried his burden on each of the claims and was entitled to have them each tried to a jury. This Court should reverse the trial court and remand for a trial and other proceedings consistent with reversal of summary judgment.

II. REBUTTALS TO RESPONDENT'S STATEMENTS ABOUT THE FACTUAL RECORD ON APPEAL

A. KISER'S PROTECTED ACTIVITY WAS EXTENSIVE, AS APPEARS IN THE RECORD ON APPEAL

Clark College raises for the first time on appeal a claim that Kiser engaged in no protected activity. That claim is simply false. The following evidence of Kiser's protected activity appears in the appellate record and was presented to the trial court on summary judgment.

Kiser complained to the Athletic Director (Dave Waldow) about inability to spend budgeted funds for the Women's' team. Although both teams had equivalent monetary budgets, the Men's' team had been permitted to spend its budget and the Women's' team was denied that right. On December 28, 2001, he specifically complained that he was being denied the right to purchase budgeted items that the Men's' team had been permitted. CP 280-282.

Being denied any relief by AD Waldow, Kiser escalated these complaints about the budgetary issues to both Nisson (CP 78) and to Ardyth Allen, the Women's' Commissioner on Athletics. He went to Ms. Allen specifically because he had been told she was responsible for receiving Title IX complaints. (In March 2002, he was told by Ms. Allen, Mr. Nisson and Mr. Waldow to stop directing his concerns to Ms. Allen. CP 162, 164, 165).

Kiser complained about the unequal allocation of resources to the Women's' Team, in the form of assigned vans. He brought this issue to Women's' Commissioner of Athletics, Ardyth Allen. Kiser sought her assistance when inequitable assignment of vans between the Men's' and Women's' team created an impossible situation for the Women's' team in which they would not be able to travel with the entire team. CP 280.

Prior to the NWAACC tournament (which took place in late February 2002), Kiser complained to both Athletic Director Waldow and to VP Student Services Blaine Nisson about unequal allocation of resources in the form of hotel rooms for tournaments. The women were being housed 4 to a room while the men were housed 2 to a room. His email specifically referenced Title IX. CP 285-286.

Kiser met with AD Waldow, Nisson and Ardyth Allen on February 13, 2002 regarding a parent's Title IX complaint that the officiating of Women's' Basketball games was substandard. At that meeting, Kiser was criticized for discussing the issue with parents and was blamed by these administrators for inciting parents to complain. Nisson told him his "fingerprints" were all over the parent's letter. CP 293, 296.

On February 15, 2002, Kiser sent an email to Nisson referencing the previous meeting over Title IX issues with Nisson, Ardyth Allen and

Waldow, as well as Kiser's concerns about how Waldow was addressing Title IX issues overall. CP 203.

On March 1, 2002, Kiser met with AD Waldow to discuss the Women's' Basketball budget. Kiser showed Waldow that Waldow's accounting contained errors and the Women's' Budget had not been spent. Waldow displayed anger and stated he intended to spend the funds on other things besides the Women's' Basketball team. On March 3, 2002, Kiser reported to this communication to Nisson in an email in which he referenced Title IX and stated he was concerned about violation and needing to avoid improprieties of federal laws and regulations. CP 206.

On March 14, 2002, Waldow confirmed in writing his belief that Kiser was compounding the feeling of the women athletes that they were not receiving the same benefits as the male athletes. He also told Kiser to cease taking his concerns about these issues to Nisson or Ardyth Allen. CP 166.

In February 2002, Blaine Nisson elected to take certain steps in response to a parent's complaint about officiating at Women's' games. He directed the AD and Kiser to meet with the Executive Director of the NWAACC (also housed at Clark College). CP 203. He proposed the possibility of switching the officials, using the Men's' crew for Women's'

games and vice versa. (This proposal was quickly rejected by the coach of the Men's' Basketball team). CP 301.

No question can exist that Kiser was perceived by Clark College as participating in protected activity, both because of the evidence described in the foregoing paragraphs and because Waldow told Kiser on February 13, 2002 that if he didn't cease the Title IX complaints, he would be fired. CP 293, 296-297. This threat is a fact which is a verity on appeal, no controverting evidence having been submitted in the trial court.

III.REBUTTALS TO RESPONDENT'S ARGUMENT

A. THE ACCUSATIONS OF THEFT OR MISUSE OF FUNDS ARE NOT AS DAMNING A CAUSE AS CLARK COLLEGE ARGUES ON APPEAL

Underlying Clark College's argument is the assumption that its accusations of theft against Kiser are conclusive of the issue of his termination of employment. This is neither factually true, or legally appropriate.

Factually, Clark College ignores Kiser's explanation of how his gas card usage came about. It ignores the questions raised by that explanation regarding why the Women's' Basketball coach was required regularly to transport students long distances in his private vehicle. Clark ignores that another of its employees, the Athletic Director who supervised Kiser, was guilty of misusing meal money, a fact which he

disclosed only in the course of the investigation of Kiser and only to the extent of the then-current athletic season. Waldow admitted to the misuse of funds in an email dated March 13, 2002 in the amount of \$ 64.16. CP 211-215, 220-227, 397. It does not appear that any investigation ensued to determine how long Waldow had been overspending per diem money for players who had not actually traveled. For the two games he self-reported, the amount of the abuse was \$64.16. It may have been far greater considering prior seasons in which Waldow had coached Men's' Basketball. It is clear that no discipline ensued; Waldow was permitted to simply repay that money and revise the travel documents to reflect accurately who traveled and what was spent. CP 211-215, 220-227 and 143. Kiser, on the other hand, had made charges to the gas card totaling \$237. He repaid the money when asked, but was fired without being permitted to explain.

What was the difference between these two employees? Kiser was embroiled in trying to get fair allocation of resources for his team, citing specifically to the Title IX obligations of Clark College. Waldow, by contrast, was the Men's' Basketball coach and the Athletic Director. He was the person whose spending and resource allocation decisions were being called into question by Kiser's complaints, specifically referencing Title IX. Kiser received the ultimate discipline without being asked for

mitigating information; Waldow, whose position arguably required a better understanding of policy than Kiser's, escaped all discipline with absolutely no explanation as to why he spent money allocated to non-traveling players.

If this set of circumstances does not call for the decision of a trier of fact regarding whether unlawful retaliation motivated this firing, no set of circumstances does.

B. KISER'S BURDEN BELOW WAS THE BURDEN OF PRODUCTION, WHICH HE SQUARELY MET

1. Hill v. BCTI Did Not Alter the Plaintiff's Burden on Summary Judgment from Production to Persuasion

Clark College argues incorrectly that *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001) has changed an employment law plaintiff's obligation on summary judgment from a burden of production to a burden of persuasion. Clearly, the plaintiff's burden remains one of production.

The doctrine from *Hill* which is pertinent to this case is that in proving pretext, it "will ordinarily suffice" to establish a McDonnell Douglas *prima facie* case plus evidence sufficient to disbelieve the employer's explanation. 144 Wn.2d at 185. The Court goes on to describe the rule to be applied in exceptional cases. There is no reason to conclude that this case is such an exceptional case, given the strength of

the evidence of pretext, but even if it is, Kiser's evidence meets *Hill's* exceptional doctrine (derived from *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 Led.2d. 105 (2000)):

Whether judgment as a matter of law is appropriate in any particular case will depend on a number of facts. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that may properly be considered on a motion for judgment as a matter of law.

144 Wn.2d at 186.

This is not an exceptional case. The evidence of pretext, of unequal treatment, of suspicious timing and the direct evidence of retaliatory animus was so strong, that this case is not one in which the multi-factor test of *Hill* (later further refined in *Renz*) even need be reached by the Court.

C. KISER'S EVIDENCE MET THE LEGAL STANDARD FOR "PROTECTED ACTIVITY"

Kiser participated more than nine (9) times in meetings or email communications with the Athletic Director, the VP of Student Services and/or the Women's' Commissioner for Athletics on the subject of unequal and inequitable allocation of resources to the Women's' Basketball team. More than one type of resource was involved on these topics, including vans for transportation, hotel rooms for team travel,

uniforms, budget money to be used in recruiting, numbers of coaching staff and comparative quality of officiating.

Kiser sometimes referred specifically to Title IX in these complaints or concerns, sometimes misspoke and referred to the wrong Roman numeral (Title IV) and other times did not characterize the particular legal doctrine implicated by his concerns, but merely spoke of not being permitted the same resources for his Women's' team that the Men received and that he had traditionally received.

Nevertheless, all of these communications comprise relevant protected activity, first because the decision maker (Nisson) and Kiser's supervisor (Waldow) each understood that Kiser was complaining about Title IX; and second, because Kiser was not required to describe the concerns in legal terms in order to engage in protected activity.

Kiser need not have labeled any practice as "sex discrimination" or "Title IX discrimination" to have engaged in protected activity for purposes of his subsequent retaliation claim. *Gifford v. Atchison, Topeka and Santa Fe Railway Company*, 685 F.2d 1149 (9th Cir. 1982) (referring to Title VII). The Ninth Circuit, in *Gifford* reversed summary judgment, stating:

This circuit has held that an employee who opposes employment practices reasonably believed to be discriminatory is protected by the "opposition clause" whether or not the practice is actually discriminatory. *Sias*,

588 F.2d at 695. It does not follow that the employee must be aware that the practice is unlawful under Title VII at the time of the opposition in order for opposition to be protected. It requires a certain sophistication for an employee to recognize that an offensive employment practice may represent sex or race discrimination that is against the law.

Id. at 1156-67. Of course in this case, Kiser frequently used the term “Title IX” in his communications (or the misnomer “Title IV”), but even to the extent that the earliest communications failed to mention the specific statute that caused the concern, his conduct was still protected by the opposition clause in RCW 49.60.210 and by the doctrine of non-retaliation in Title IX matters derived from *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S.Ct. 1497, 161 Led.2d 361 (2005).

Even an employee’s use of the tools of enforcement for sex discrimination claims amounted to “protected activity” for the purpose of the non-retaliation provision. *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997); *Bell v. Gonzales*, No. 03-163, slip op. at 26 (D.C. May 6, 2005) (“Initiation of EEO counseling to explore whether an employee has a basis for alleging discrimination constitutes protected activity, even in the absence of an unequivocal allegation of discrimination.”). The purpose of the participation clause is to “protect an employee who utilized the tools provided by Congress to protect his rights.” *Hashimoto*, 118 F.3d at 680.

Washington's anti-retaliation statute, like Title VII's, protects an employee for both opposition and participation:

It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, *or because he or she has filed a charge, testified, or assisted in any proceeding* under this chapter.

RCW 49.60.210(1) (emphasis added).

Finally, the participation clause protects even one who is anticipated to serve as a witness, but does not do so. *Jute v. Hamilton Sundstrand Corporation*, 420 F.3rd 166 (7th Cir. 2005). (Person who volunteered to testify, but was not called to do so, is protected from retaliation).

Protected activity is not a difficult puzzle to be solved or a code to be cracked. It is merely conduct intended to oppose an unlawful practice or participate in another's opposition to same. The precise reason why the practice is unlawful need not be stated – or protected activity would only arise once lawyers became involved, and that is not the case.

Kiser engaged in a large volume of protected activity between December 2001 and March 2002 – at the cost of his job and career.

**D. THE EVIDENCE OF WALDOW'S THREAT HAS
SUBSTANTIAL CONTEXT, RELATING DIRECTLY TO
BOTH THE PROTECTED ACTIVITY AND THE
TERMINATION OF EMPLOYMENT**

Clark College claims that Waldow's threat to Kiser's employment is not direct evidence of retaliatory animus and further cannot establish pretext. Clark College cites to *Domingo v. BECU*, 124 Wn.App. 71, 98 P.2d 1222 (2004), for the proposition that pretext cannot be established by isolated discriminatory remarks out of context. The pertinent facts of *Domingo* involved an isolated "spring chicken" remark being used to establish pretext in an age discrimination case. The Court noted that without evidence indicating the context of the remark and somehow relating it to her termination, Domingo had not carried her burden of producing evidence of pretext.

The Waldow threat evidence in this case is 180 degrees different in both respects noted as important by the *Domingo* court. First, the context of the Waldow threat is known. Waldow made the statement directly after he and Kiser concluded a meeting on the subject of Title IX complaints; complaints for which Waldow and Nisson (the decision maker) blamed Kiser. Second, Waldow's statement specifically referenced the subject of the protected activity (telling Kiser that if he didn't stop with the Title IX complaints . . .). Third, Waldow's statement specifically referenced a

potential termination of employment and career if Kiser didn't cease protected activity. The language was objectively threatening in nature and Kiser testified that Waldow's statement was "blunt and mean" in nature (CP 297) (contrary to Clark College's attempts to paint the comment as helpful or friendly). Finally, the statement was close in time to the material adverse employment action (The threat came 20 days before the monitoring started, 27 days before the suspension and 45 days before the termination).

There is no basis to compare the Waldow threat with the *Domingo* isolated remark.

E. KISER'S COMPLAINTS WERE NEITHER MIS-DIRECTED OR TOO VAGUE, CONTRARY TO CLARK COLLEGE'S ARGUMENT

Clark College mixes a number of different case doctrines and holdings, all to make the point that Kiser's complaints did not give him protection from retaliation under Title IX or the Law Against Discrimination. Clark College argues variously that the matters complained of were not sufficiently serious under Title IX, that Kiser's complaints were not directed to the administrator authorized to receive them and that Kiser's complaints did not specify Title IX as the legal issue. Each of these arguments fails.

1. Clark College Made no Appellate Record Identifying its “Authorized Title IX Officer”

Clark College was no clearer in its published policy on the issue of Title IX complaints than on any of the other issues of policy implicated in this matter (e.g., per diem money, gas card usage). No written document has been submitted to the Court regarding how Clark College directed students or staff to make Title IX complaints. Clark College appears to accept Kiser’s testimony on this subject, that his players were orally instructed each Fall that they could take Title IX issues to the Women’s Athletic Commissioner, Ardyth Allen. Nisson admits that Allen assisted him in responding to a Title IX complaint (parent Gary Johnson’s letter). CP 386. And Ardyth Allen is where Kiser ultimately took a number of his Title IX concerns about budget issues and allocations of vans, a fact ignored by Clark College’s argument. Allen was also present in the meeting with Kiser over the parent’s Title IX complaint of poor officiating.

Clark College’s attack on Kiser on this point is doubly ironic. First, its administrators (Nisson, Waldow and Allen) actively discouraged Kiser from continuing to address his concerns and complaints to Ardyth Allen – and now Clark College condemns Kiser as not having engaged in protected activity to the extent he took his concerns elsewhere.

The second irony in Clark College's argument is that another of its administrators, Vice President of Student Services Blaine Nisson, was apparently authorized to act on Title IX complaints. When parent Gary Johnson complained in writing about Title IX issues on February 12, 2002, Johnson sent his letter to AD Dave Waldow, with copies to Nisson and Allen. CP 208-209. Nisson called and ran a meeting on this subject with Allen, Waldow and Kiser. CP 293. Nisson proposed solutions. And Waldow, not Ardyth Allen, responded to the parent's concerns. CP 158-161. It appears that Clark College had no hard and fast rules regarding how Title IX complaints were received or handled – until it became an issue in this lawsuit regarding Kiser's termination.

2. Clark College's Citations to Title IX Harassment Cases Are Inapposite

Clark College cites to *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S.Ct. 1989, 141 L:Ed.2d 277 (1998) for the proposition that only an actual violation of Title IX gives rise to an obligation by the school to remedy with corrective action. Because *Gebser's* facts involved discrimination in the form of sex harassment and a hostile environment claim, rather than unequal resource allocation between female and male students, the discussions in *Gebser* are largely inapposite. Here, an actual violation occurred when Clark College

decided to spend more on Men's' Basketball, to give it more vans, hotel room, uniforms and coaches per player than it did Women's' Basketball. Gebser involved student on student harassment, where the school was not responsible until it knew of and ignored the problem.

Similarly inapposite was *Barber v. CSX Distribution Services*, 68 F.3d 694 (3rd Cir. 1995), a case alleging retaliation for ADEA complaints, when the claimant only referenced "unfair treatment" in his underlying grievance. Far more salient is the 9th Circuit case of *Gifford v. Atchison, Topeka and Santa Fe Railway Company*, 685 F.2d 1149 (9th Cir. 1982) (referring to Title VII). The court reversed summary judgment and rejected the argument that a complaint must be specific about the law claimed to be violated. *Id.* at 1156-67.

3. Whether Kiser Was as Clear as an Attorney Would have Been over the Title IX Characterization of his Concerns, Clark College Understood that Title IX was the Issue

Clark College's arguments about Kiser's protected activity would indicate that certain "magic language" or specific administrative procedure need be utilized by the employee or student in order to obtain protection from retaliation for having made a complaint. While there may be cases in which such a doctrine is central to the issue, this case is not one of them. Clark College knew that Kiser was complaining about Title IX; so much

so, that Clark College was even blaming Kiser for participating in the Title IX complaints of parents, despite his denials!! The volume of evidence of Waldow and Nisson acknowledging that Title IX complaints were being made, that Kiser was behind the complaints and that they wanted to stop the complaints from going further, is all that is necessary to establish that Kiser engaged in protected activity and was entitled to be free from retaliation.

IV. CONCLUSION

Taking this record on appeal as a whole and drawing the reasonable inferences most favorably to Kiser, the trier of fact could easily determine that Clark College's decision to monitor and investigate Kiser was initiated wholly in retaliation for his persistent expressions of concern about Title IX issues; and further that the manner in which Clark College viewed the information about Kiser's use of the gas card, particularly in contrast to how it responded to Waldow's misuse of funds, was also motivated by retaliatory animus.

This Court should reverse the summary judgment dismissal of Kiser's claims and in issuing a mandate in this case, should further award Kiser his attorneys' fees and costs incurred on appeal.

DATED this 6th day of June, 2007.

McKAY HUFFINGTON, P.L.L.C.


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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed a copy of the foregoing BRIEF OF APPELLANT postage prepaid, via U.S. mail on the 6th day of June, 2007, to the following counsel of record at the following address:

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