

NO. 35597-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

TREV KISER,

Appellant,

v.

CLARK COLLEGE,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

EL SHON D. RICHMOND
Assistant Attorney General
WSBA No. 26813
7141 Cleanwater Drive, SW
PO Box 40126
Olympia, WA 98504-0126
(360) 586-6300

ORIGINAL

DEFINITION
STATE OF WASHINGTON
BY
CLARK COLLEGE
APPELLANT
CLARK COLLEGE
RESPONDENT

TABLE OF CONTENTS

I. NATURE OF THE CASE.....1

II. RESTATEMENT OF THE ISSUES2

 A. Retaliation–Protected Activity.....2

 B. Retaliation–Legitimate, Nonretaliatory Reasons2

 C. Wrongful Discharge.....3

III. RESTATEMENT OF THE CASE3

 A. Background Facts.....3

 B. Kiser’s And Waldow’s Relationship Becomes Strained
 After Waldow Becomes Athletic Director, Before Kiser
 Raised Any Title IX Concerns4

 C. Alleged "Title IX" Issues5

 1. A Player’s Parent Complains About Officiating5

 2. All Fall And Winter Sports Budgets Are Frozen Due
 To Shortfall Concerns.....6

 D. Kiser Provokes His Players To Complain About His Per
 Diem And Gas Card Practices7

 E. Kiser Is Dismissed Of His Duties After An Audit and
 Kiser’s Confession Establish His Fraud8

 F. Procedural History11

IV. SCOPE AND STANDARDS OF REVIEW12

IV. LAW AND ARGUMENT.....13

 A. The *McDonnell Douglas/Hill v. BCTI* Burden-shifting
 Analysis Applies To Plaintiff's Claims13

1.	The <i>McDonnell Douglas</i> Burden-shifting Analysis	13
2.	The Court Can Weigh Evidence On A Motion For Summary Judgment In A Retaliation Case	15
B.	Kiser's Retaliation Claim Was Correctly Dismissed Because He Did Not Meet His Burden Of Establishing A Prima Facie Case Or Pretext	17
1.	Kiser's Claims Fail For Want Of Any "Protected Activity"	17
a.	Kiser's Complaints To Other Than The Clark College Title IX Coordinator Did Not Provide Clark College With "Actual Notice" Of Title IX Violations As Required Under The Supreme Court's Implied Private Right Of Action For Claims Arising Under 20 USC § 1681(A)	21
b.	A Viable Title IX Complaint Sufficient To Constitute Protected Opposition Activity Requires Actual Violation Of The Statute With Misconduct Of Such Degree As To Deny Equal Access To An Institution's Resources And Opportunities	29
c.	Waldow's Alleged Remark Is Not Direct Evidence Of Retaliation And Does Not, On Its Own, Establish A Prima Facie Case	32
2.	Kiser Did Not Establish Pretext By Rebutting The College's Legitimate Justification For His Dismissal: His Fraud, Misappropriation, And Theft	35
a.	Confirmed Theft From Your Employer Is A Difficult Reason To Rebut	38
b.	Kiser's Alleged Concerns Did Not State Patent Violations Of Title IX	41

C.	Kiser Failed To Establish A Viable Claim Of Wrongful Termination, Which Is Essentially A More Difficult To Prove Common Law Retaliation Claim.....	43
1.	Kiser Did Not Establish The Jeopardy Element By Showing An Actual Violation Of Law Or Policy	44
2.	Kiser Did Not Establish Causation Or Pretext; His Misappropriation, Fraud, And Theft Caused His Dismissal	46
3.	Kiser's Wrongful Discharge Claim Was Correctly Dismissed Because Clark College's Decision Not To Renew Kiser's Coaching Contract Is Not Actionable Under A Wrongful Discharge Theory.....	48
V.	CONCLUSION	49

TABLE OF AUTHORITIES

Cases

<i>Baldwin v. Sisters of Providence in Wash., Inc.</i> , 112 Wn.2d 127, 769 P.2d 298 (1989).....	15
<i>Barber v. CSX Distribution Services</i> , 68 F.3d 694 (3rd Cir. 1995).....	30
<i>Bott v. Rockwell International</i> , 80 Wn. App. 326, 908 P.2d 909 (1996).....	44, 45
<i>Burch v. Regents of the University of California</i> , 433 F. Supp. 2d 1110 (E..D. Cal. 2006)	22
<i>Cannon v. University of Chicago</i> , 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed.2d 560 (1979).....	25
<i>Chen v. State</i> , 86 Wn. App. 183, 937 P.2d 612, <i>review denied</i> , 133 Wn.2d 1020, 948 P.2d 387 (1997).....	14
<i>Clark v. Shoreline School Dist. No. 412</i> , 106 Wn.2d 102, 720 P.2d 793 (1986).....	22
<i>Coville v. Cobarc Servs., Inc.</i> , 73 Wn. App. 433, 869 P.2d 1103 (1994).....	36
<i>Davis v. Monroe County Board of Education</i> , 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999).....	20
<i>Dicomes v. State</i> , 113 Wn.2d 612, 782 P.2d 1002 (1989).....	44
<i>Domingo v. Boeing Employees' Credit Union</i> , 124 Wn. App. 71, 98 P.3d 1222 (2004).....	15, 33, 36
<i>Ellis v. Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2000).....	44, 45

<i>Estevez v. Faculty Club</i> , 129 Wn. App. 774, 120 P.3d 579 (2005).....	39
<i>Franklin v. Gwinnett County Public Schools</i> , 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed.2d 208 (1992),.....	25
<i>Gardner v. Loomis Armored, Inc.</i> , 128 Wn.2d 931, 913 P.2d 377 (1996).....	43, 46, 47
<i>Gebser v. Lago Vista Independent School Dist.</i> , 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed.2d 277 (1998).....	passim
<i>Goodman v. Boeing Co.</i> , 75 Wn. App. 60, 877 P.2d 703 (1994), <i>affirmed</i> , 127 Wn. 2d 401, 899 P.2d 1265 (1995).....	22
<i>Gross v. City of Lynnwood</i> , 90 Wn.2d 395, 583 P.2d 1197 (1978).....	12
<i>Guild v. St. Martin's College</i> , 64 Wn. App. 491, 827 P.2d 286, <i>review denied</i> , 119 Wn.2d 1016, 833 P.2d 1390 (1992).....	48
<i>Havens v. C&D Plastics, Inc.</i> , 124 Wn.2d 158, 876 P.2d 435 (1994).....	46, 47
<i>Hibbert v. Centennial Villas, Inc.</i> , 56 Wn. App. 889, 786 P.2d 309 (1990).....	47
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 23 P.2d 440 (2001).....	13, 14, 15, 16
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002).....	43
<i>Jackson v. Birmingham Board of Education</i> , 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005).....	18, 23, 27
<i>Johnston v. Nordstrom, Inc.</i> , 260 F.3d 727 (7th Cir. 2001)	36

<i>Korslund v. DynCorp Tri-Cities Services, Inc.</i> , 121 Wn. App. 295, 88 P.3d 966 (2000).....	43
<i>Kuyper v. State</i> , 79 Wn. App. 732, 904 P.2d 793, 795 (1995).....	15
<i>LaMon v. Butler</i> , 112 Wn. 2d 193, 770 P.2d 1027, cert. denied, 493 US 814 (1989).....	12
<i>Manatt v. Bank of America, NA</i> , 339 F.3d 792 (9th Cir. 2003)	14
<i>McCormick v. School Dist. of Mamaroneck</i> , 370 F.3d 275 (2nd Cir. 2004)	41, 42
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).....	13, 15
<i>Meredith v. Beech Aircraft Corp.</i> , 18 F.3d 890 (10th Cir. 1994)	38
<i>Meritor Savings Bank, FSB v. Vinson</i> , 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed.2d 49 (1986).....	24, 25
<i>Milligan v. Thompson</i> , 110 Wn. App. 628, 42 P.3d 418 (2002).....	13, 14, 16
<i>Piper v. Department of Labor & Indus.</i> , 120 Wn. App. 886, 86 P.3d 1231 (2004).....	12
<i>Reeves v. Sanderson Plumbing Prods., Inc.</i> , 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).....	16
<i>Renz v. Spokane Eye Clinic, P.S.</i> , 114 Wn. App. 611, 60 P.3d 106 (2002).....	15
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	12
<i>Smith v. Employment Sec. Dep't</i> , 100 Wn. App. 561, 997 P.2d 1013 (2000).....	46

<i>Texas Dep't of Cmty. Affairs v. Burdine</i> , 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).....	15
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	44, 48
<i>Travis v. Tacoma Pub. Sch. Dist.</i> , 120 Wn. App. 542, 85 P.3d 959 (2004).....	14
<i>Tyrrell v. Farmers Ins. Co. of Washington</i> , 140 Wn.2d 129, 994 P.2d 833 (2000).....	12
<i>Vasquez v. County of Los Angeles</i> , 349 F.3d 634 (9th Cir. 2003)	32
<i>Villiarimo v. Aloha Island Air, Inc.</i> , 281 F.3d 1054 (9th Cir. 2002)	36
<i>Wilmot v. Kaiser Aluminum and Chemical Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	15, 48
<i>Wlasiuk v. Whirlpool Corp.</i> , 81 Wn. App. 163, 914 P.2d 102 (1996).....	44

Statutes

20 U.S.C. § 1682.....	25, 26
20 USC § 1681(A)	21
34 C.F.R. § 106.41(c).....	41
42 U.S.C. § 2000e-2(a)	25
RCW 8B.110.050.....	18
RCW 28B.....	45
RCW 28B.110.010.....	18, 22
RCW 28B.110.030(7)	30

RCW 42.52.160(1).....	44
RCW 49.60.210	18, 21, 22
WAC 250-71-010(3).....	30

Other Authorities

Workplace Torts: Rights and Liabilities

§ 3.21, at 96 (1991).....	44
---------------------------	----

Rules

Fed. R. App. P. 32.1	18
RAP 10.4(h)	18
RAP 2.5(a)	12

Regulations

44 Fed. Reg. at 71,415	42
44 Fed. Reg. at 71,422	42

I. NATURE OF THE CASE

Clark College Vice President Blaine Nisson dismissed Appellant/Plaintiff Trev Kiser from his duties with Respondent/Defendant Clark College because he concluded that Kiser was a thief. Specifically, Nisson believed that Kiser, the head coach of Clark College's women's basketball team, repeatedly stole travel reimbursement money from Clark College and likely misappropriated some of his players per diem money. Nisson's belief was confirmed by two sources: (1) an independent audit; and (2) Kiser himself.

Clark College learned of Kiser's fraud only after he provoked complaints from two women's basketball team players by withholding their travel money. An auditor's investigation concluded that Kiser had his players sign per diem acknowledgment forms but did not always provide the funds to the students. The audit also found that Kiser fraudulently obtained mileage reimbursements by using state gas cards assigned to school travel vans to buy gas for his own personal car, then requesting and receiving mileage reimbursements for the same travel.

There is no evidence that Nisson had any other understanding or motivation for his decision. Nevertheless, Kiser claims that he was not dismissed for theft but for making references to Title IX, the federal law

that prohibits gender discrimination by federally funded educational institutions.

As addressed herein, Kiser has not established that he engaged in statutorily protected opposition activity or rebutted Clark College's legitimate reasons for its actions – his fraud, misappropriation, and theft – in support of his retaliation or wrongful discharge claims. Moreover, Kiser's excuses for his wrongdoing are unreasonable, untimely (as Kiser never provided them to Nisson, despite chances to do so), and ineffective in negating the natural consequences of his wrongdoing – his dismissal. Consequently, the trial court's decision to grant summary judgment should be affirmed.

II. RESTATEMENT OF THE ISSUES

A. Retaliation–Protected Activity

Under State and Federal law, retaliation claims must be dismissed unless the claimant establishes that he engaged in protected activity. Did the trial court correctly dismiss Kiser's retaliation claim where he failed to establish that he engaged in protected opposition activity under Title IX?

B. Retaliation–Legitimate, Nonretaliatory Reasons

Retaliation claims must be dismissed unless the claimant establishes that the employer's legitimate reasons for its actions were not believed in good faith and were instead a pretext for retaliation. Did the

trial court correctly dismiss Kiser's retaliation claim because Kiser failed to rebut Clark College's legitimate, nonretaliatory reasons for dismissing him – Kiser's theft, misappropriation, and fraud – and failed to show that Nisson did not actually believe those reasons?

C. Wrongful Discharge

Under Washington law, wrongful discharge claims require essentially the same showing as a retaliation claim, except that employees must establish that they opposed an actual violation of law, regulation, or policy. Did the trial court correctly dismiss Kiser's wrongful termination claim because he failed to establish an actual violation of Title IX, causation, or pretext?

III. RESTATEMENT OF THE CASE

A. Background Facts

Clark College is a community college located in Vancouver, Washington. Trev Kiser was the College's part-time head coach of the women's basketball team, as well as a teacher and student advisor, from 1997 to 2002. CP at 62-63. Kiser's coaching and teaching appointments were governed by annual contracts with the College. CP at 93.

The women's basketball team included several student athletes who played on the team and took classes taught by Kiser. CP at 110-12. Prior to 2001 Kiser and Dave Waldow, the head coach of the men's

basketball team and a former women's assistant coach for two years, shared office space and were friends. CP at 66-67, 160, at ¶ 5.

B. Kiser's And Waldow's Relationship Becomes Strained After Waldow Becomes Athletic Director, Before Kiser Raised Any Title IX Concerns

In 2001 the College's Athletic Director (A.D.) position was vacated. The College initially chose to hire an interim A.D. and both Kiser and Waldow applied, but Waldow was selected. CP at 147. Later that year, after a more extensive search, the College made Waldow the permanent A.D. CP at 147. Kiser was a member of the hiring committee that made the decision. CP at 147, ¶ 2.

After Waldow became A.D., Kiser seemed to expect special treatment from him. CP at 148. Soon after Waldow became the permanent A.D., Kiser approached him about transferring funds from another sports team to Kiser's team. CP at 148. Waldow informed him that there would be no preferential treatment and that each of the College's coaches and sports programs would be treated equally. CP at 148.

Soon after that conversation, Kiser began to aggressively question Waldow's actions and decisions on issues unrelated to gender equity. CP at 148. For instance, Kiser criticized Waldow in writing about the organization and location of the academic advising and study tables for

student athletes. CP at 72-75, 153-55. By late 2001 Kiser and Waldow were not getting along. CP at 81-82.

Kiser also began a pattern of taking his non-Title IX related issues with Waldow directly to Waldow's supervisor, Blaine Nisson (the Vice President of Student Development), such as when Kiser and the track coach met with Nisson to complain about Waldow in December 2001. CP at 77-80, 148. Kiser did not hesitate to express his disagreements with Waldow's decisions. CP at 76. Kiser continued this practice throughout the remainder of his time at the College, despite instructions from Nisson, Waldow, and Women's Commissioner Ardyth Allen that he should first work with his immediate supervisor, Waldow, to address and resolve his athletic department issues. CP at 77-80, 162-67.

C. Alleged "Title IX" Issues

1. A Player's Parent Complains About Officiating

In February 2002 the women's basketball team played the Highline Community College team. Gary Johnson, the father of a Clark College women's basketball player, attended the Highline game and concluded that it was poorly officiated. Gary Johnson expressed his frustration with the refereeing to Waldow and stated that it might reflect a gender disparity in the competence of the referees assigned by the Northwest Athletic

Association of Community Colleges (NWAACC), possibly in violation of Title IX. CP at 156-57.

Waldow and Nisson took the issue to the NWAACC, whose officials explained that any deficiency in the refereeing was the result of a last-minute change of the officials assigned to the game, due to a referee's unexpected cancellation. NWAACC officials also explained that the assignment of officials to the men's and women's basketball games was uniform and did not implicate Title IX. CP at 130-34, 158-61. Waldow shared this information with Johnson in a February 13, 2002, letter. CP at 158-61.

2. All Fall And Winter Sports Budgets Are Frozen Due To Shortfall Concerns

By early 2002 Waldow and Kiser disagreed about the available budget for the women's basketball program after Waldow decided to freeze the budgets of all of the fall and winter sports teams, due to his concerns about a possible budget shortfall. CP at 124-25. In e-mails addressing this issue, Kiser expressed his concern that the budget for the men's basketball team might be larger than that of the women's team and that the budget freeze limit on his spending could lead to a Title IX violation. This concern was reviewed by Nisson and found to be untrue, as the budgets for the men's and women's basketball teams were equal and

any spending difference was attributable to the discretionary spending decisions of the team's head coaches. CP at 126-29.

Kiser's e-mails and deposition also show that his budget concerns were related to his discretionary decision not to buy sweats for the women's basketball team so that he could spend the money on his planned postseason recruiting trips. CP at 90 (Kiser Dep. at 119: ll. 2-4), 166, ¶ 5, 167 ¶ 4.

D. Kiser Provokes His Players To Complain About His Per Diem And Gas Card Practices

On March 7, 2002, the men's and women's basketball teams drove vans to the NWAACC conference basketball tournaments in Pasco, Washington. During the trip, three of the women's players rode in a men's team van. CP at 92. When the men's team stopped for lunch, Dan Selby, a men's basketball assistant coach, paid for the three women players' lunches out of his own pocket, with the expectation that Kiser would repay him with their per diem money, as the women players had not yet received their travel money from Kiser. CP at 168.

Later that day, when Selby and the players asked Kiser for their per diem money to reimburse Selby for their lunches, Kiser told them "*to tell Dave [Waldow] to come get the money; I'll give it to him.*" CP at 94 (Kiser Dep. at 132: ll. 3-10), 168.

The following week, Selby e-mailed Waldow about being reimbursed for the womens' players' lunches, because Kiser told him he didn't have it. CP at 150, ¶ 10, 168. Additionally, two of the three women's players Selby paid for complained to Waldow that they did not receive all of their travel per diem money for their NWAACC tournament trip and that on prior trips, Kiser had used the gas credit card assigned to the college travel van to fill his own car's tank with gas, sometimes having the women players fill the school van, then hold the gas pump while Kiser drove his own car up to the pump to fill its tank during the same transaction. CP at 150, ¶ 11, 168-69.

Kiser withheld per diem money from the three women players during and after the NWAACC tournament trip, as well as from seven other players who went home with their parents after the tournament. CP at 113-14. None of this money was returned until almost a month later, after Kiser was told to return the money. CP at 115-16.

E. Kiser Is Dismissed Of His Duties After An Audit and Kiser's Confession Establish His Fraud

When Nisson learned of the player's complaints, he requested an investigation. CP at 120. Tony Birch, the College's Vice President of Administrative Services at the time, assigned Clark College Internal Auditor Nicole Marcum to investigate. As reflected in her March 27,

2002, internal audit report, Marcum's investigation confirmed that Kiser had fraudulently double billed Clark College by routinely using the travel van gas cards to purchase gas for his personal car prior to road games, then requesting and receiving mileage reimbursements¹ for the same trips. CP at 138-43, 170-74.

The investigation also showed that Kiser commonly failed to fully distribute the travel money he obtained from the College to his players. CP at 138-43, 170. Several players stated that they usually were required to sign the per diem confirmation sheet at the beginning of team trips, but did not always receive all of their money. CP at 171-72. Rather than distribute the money to the players individually, before or during the trip, the coach would spend a portion of the money on the players by purchasing meals or snacks for the team as a group, but did not always distribute all of the travel money to the players. CP at 171-72. Also, when women's players rode home from away games with their parents rather than with the team, they typically did not receive their per diem. CP at 171-72.²

¹ Kiser signed each mileage reimbursement request before its submission. CP at 292 (Kiser Dep. at 100:11.10-18).

² The Athletic Director's secretary, Joy Varney, was asked to pull documents for the audit investigation. CP at 315-16. Varney testified that the dates in question were "a blur" but that she had no doubt that the request was made relative to Kiser's gas card/mileage/per diem issues. CP at 434. Earlier in her deposition, when asked about when she was asked to make notes, Varney stated "Not exactly. I would estimate in late February." CP at 321-22.

Nisson met with Kiser and notified him of the investigation into his use of the gas card on March 20, 2002. CP at 100, 117. In that meeting, Kiser admitted to Nisson that he used the college gas card to purchase gas for his private vehicle and received full mileage reimbursements for the same trips. CP at 100, 110, 117-18. Specifically, Kiser testified that during the meeting, Nisson told him about investigation, they "went on about a few things," and that he told Nisson "you don't need to investigate very far because I did use the gas card and I thought that that was okay." CP at 100 (Kiser Dep. at 170: ll. 15-20).³ On April 1, 2002, Kiser met with Nisson and others and again admitted his actions. CP at 83, 117.

On April 1, 2002, Nisson notified Kiser that he would not renew Kiser's basketball coaching contract (which was expiring that spring) and that his advising duties would not be needed, based on his misconduct that was substantiated by Marcum's investigation and confessed to by Kiser. CP at 83-84, 89, 93; 110-11, 121-23. Nisson was the final decision maker and determined that dismissal was appropriate. CP at 122. Nisson has

³ This testimony contradicts Kiser's claim that he had no opportunity to explain his actions.

stated that Kiser's theft of resources and apparent mishandling of per diem were the sole reasons for his decision. CP at 110-11, 121-23.⁴

Nisson also asked Kiser to repay the money he took. CP at 110-11, 113, 115. On April 10, 2002, *Kiser repaid \$237.00 in gas card charges and \$125.00 in meal money reimbursements to the college,* through his attorney. CP at 113-16.

Kiser filed an unsuccessful grievance contesting his dismissal, which was heard by Clark College representatives, and in which he was represented by a union representative and an attorney. CP at 107, 117-18. Soon after his dismissal, Kiser began managing a local courier business, earning approximately the same salary he had at Clark College. CP at 65.

F. Procedural History

On March 29, 2005, Kiser sued Respondent for reinstatement and money damages under the theories of wrongful termination in violation of public policy and retaliation in violation of RCW 28B.110 *et seq.* CP at 5, 7-8. Clark College moved for summary judgment, which the trial court granted by its order dated October 20, 2006, dismissing Kiser's lawsuit in

⁴ Nisson initially allowed Kiser to continue teaching billiards and bowling classes that did not involve women basketball players, as long as he had no contact with the players while the per diem portion of the investigation was completed. CP at 110-12. However, Kiser was later relieved of his remaining teaching duties when Nisson learned that Kiser communicated with women basketball players and/or their parents and tried to pressure players to sign a letter stating that they received all of their travel money for all of their trips, in violation of the no-contact instruction. CP at 101-02, 141.

its entirety. CP at 468-70. Kiser moved for reconsideration but the motion was denied on November 21, 2006. CP at 515. Kiser timely appealed.

IV. SCOPE AND STANDARDS OF REVIEW

This Court's review of an order granting summary judgment is de novo, and the Court engages in the same inquiry as the trial court. *Tyrrell v. Farmers Ins. Co. of Washington*, 140 Wn.2d 129, 132-33, 994 P.2d 833 (2000). An appellate court may affirm the trial court on any ground supported by the record, even if not considered or applied by the trial court. *E.g., LaMon v. Butler*, 112 Wn. 2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 US 814 (1989); *see also Piper v. Department of Labor & Indus.*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004).

Additionally, while issues not raised in the trial court may not generally be raised on appeal, RAP 2.5(a), under RAP 2.5(a)(2) “[a] party may raise failure to establish facts upon which relief may be granted for the first time in the appellate court.” *Gross v. City of Lynnwood*, 90 Wn.2d 395, 400, 583 P.2d 1197 (1978). This is essentially the same as “failure to state a claim.” *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005). This Court has “consistently stated that a new issue can be raised on appeal ‘when the question raised affects the right to maintain the action.’” *Id.* (citations omitted).

Here, Clark College raises for the first time on appeal Mr. Kiser's failure to state cognizable causes of action on his federal and state retaliation claims for failure to establish that he engaged in any "protected activity." These are issues of law reviewed *de novo*.

IV. LAW AND ARGUMENT

A. **The *McDonnell Douglas/Hill v. BCTI* Burden-shifting Analysis Applies To Plaintiff's Claims**

1. **The *McDonnell Douglas* Burden-shifting Analysis**

The burden shifting analytical framework first articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to state and federal retaliation claims. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81, 23 P.2d 440 (2001). In this and most employment cases, where there is no direct evidence of discrimination or retaliation, the employee must satisfy the first intermediate burden by producing the facts necessary to support a prima facie case. *Id.*; *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002) (burden-shifting scheme is the same for retaliation and discrimination claims).

To establish a prima facie case of retaliation under state or federal statute, Kiser must present evidence demonstrating that:

- He engaged in a statutorily protected activity;

- His employer took an adverse employment action against him; and
- A causal connection exists between the protected activity and adverse action

See Milligan, 110 Wn. App. at 638; *Manatt v. Bank of America, NA*, 339 F.3d 792, 800 (9th Cir. 2003). Unless a prima facie case is set forth, the employer is entitled to prompt judgment as a matter of law. *Hill*, 144 Wn.2d at 181. Opinions or conclusory facts are not enough. *Chen v. State*, 86 Wn. App. 183, 191, 937 P.2d 612, *review denied*, 133 Wn.2d 1020, 948 P.2d 387 (1997). Furthermore, to survive summary judgment, the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value." *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wn. App. 542, 549, 85 P.3d 959 (2004) (citations omitted).

Only if the employee can establish a prima facie case does the burden of production shift to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment decision. *Hill*, 144 Wn.2d at 181-82. Once such a reason is identified, the presumption of discrimination is rebutted. *Id.* The burden of production then shifts back to the employee to show that the proffered reason "was in fact pretext." *Id.*

To show pretext, the plaintiff must present evidence that the articulated reason for the action is unworthy of belief and was not believed

in good faith by the decision maker. *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 90, 98 P.3d 1222 (2004); *Kuyper v. State*, 79 Wn. App. 732, 738-39, 904 P.2d 793, 795 (1995). “If the plaintiff proves incapable of doing so, the defendant becomes entitled to judgment as a matter of law.” *Hill*, 144 Wn.2d at 182.

Notably, Kiser argues, based upon an apparent misreading of *Hill* and *McDonnell Douglas* by the court in *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 60 P.3d 106 (2002), that his burden under this protocol is merely one of production. His assertion is incorrect. Both the United States and Washington Supreme Courts have repeatedly stated that while the burden of production may shift during the application of the burden-shifting protocol, the *burden of persuasion remains with the employee/plaintiff at all times*. *Hill*, 144 Wn.2d at 181-82 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991); *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 134, 769 P.2d 298 (1989).

2. The Court Can Weigh Evidence On A Motion For Summary Judgment In A Retaliation Case

In *Hill*, the Washington Supreme Court followed the U.S. Supreme Court's guidance in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S.

133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) and held that even where an employee produces some evidence of pretext, other factors may still warrant judgment as a matter of law. *Hill*, 144 Wn.2d at 182-87. The Court of Appeals applied this standard in *Milligan*:

A court may grant summary judgment even though the plaintiff establishes a prima facie case and presents some evidence to challenge the defendant's reason for its action.

...
[W]hen the 'record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred,' summary judgment is proper.

Milligan, 110 Wn. App. at 637, quoting *Reeves*, 530 U.S. at 148 (internal quotations omitted); *Hill*, 144 Wn.2d at 184-85.

Consequently, mere competing inferences are not enough to defeat summary judgment. Only when the record contains a *reasonable* but competing inference of retaliation or discrimination will the employee be entitled to a jury decision. *Id.* Applying the foregoing standards to this case, as argued below, the trial court's dismissal was correct and should be affirmed because the record does not contain a reasonable inference of retaliation.

B. Kiser's Retaliation Claim Was Correctly Dismissed Because He Did Not Meet His Burden Of Establishing A Prima Facie Case Or Pretext

1. Kiser's Claims Fail For Want Of Any "Protected Activity"

Kiser's lawsuit is grounded on "two statutory retaliation claims: one under Title IX [20 USC § 1681(a)] and one under the Washington Law Against Discrimination [RCW 49.60.210]." Br. of Appellant, p. 20. The alleged retaliation also underlies Kiser's common law claim of wrongful discharge in violation of public policy. *See* Br. of Appellant, pp. 43-44. All of Kiser's claims fail, however, for want of any "protected activity" sufficient to sustain his retaliation claims.

The lynchpin of Kiser's claims is his alleged "protected activity" of making complaints of purported Title IX violations to Clark College officials. Br. of Appellant, pp. 21-22; 24; 29-30; 34-36; 37-38. Title IX prohibits sex discrimination by recipients of federal education funding.⁵ Retaliation for making complaints of Title IX violations is a form of discrimination based on sex that is actionable under the statute's implied private right of action. *Jackson v. Birmingham Board of Education*,

⁵ The statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a).

544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005).⁶ His state law retaliation claim under RCW 49.60.210 is based on RCW 28B.110.010 that “establishes the state law prohibition on gender discrimination in higher education, parallel to the federal law in Title IX.” Br. of Appellant, p. 22, n.1.⁷ His wrongful termination claim, in turn, is also based on the alleged retaliation under Title IX and RCW 28B.110.010. Br. of Appellant, pp. 44-45.⁸

The complaints Kiser argues were “protected activity” involved alleged “Inequitable Van Assignments,” “Refusal to Permit Purchase of Budgeted Items,” “Disparity in Coaching Resources,” disparity in “Hotel Room[.]” allocations, “Waldow’s Abusive Language Toward Female Players,” and poor “Officiating” of women’s basketball games. Br. of Appellant, pp. 4-8.

The incident involving Waldow’s alleged use of abusive language was not reported to Clark College officials by Kiser, but (according to

⁶ Kiser references this seminal case that established his Title IX retaliation claim only once in his brief, and then only in relation to the holding in an *unpublished* 2005 federal district court summary judgment decision that dealt with Title VI, not Title IX. Br. of Appellant, p. 21. In any event, citation to the unpublished order contravenes Fed. R. App. P. 32.1 (allowing only citation as authority to unpublished opinions or orders issued on or after January 1, 2007), and the spirit of RAP 10.4(h) (“A party may not cite as authority an unpublished opinion of the Court of Appeals.”).

⁷ As Kiser goes on to explain his state law retaliation theory, “RCW 8B.110.050 establishes that a violation of this chapter constitutes a violation of the Law Against Discrimination, affording all rights available under RCW Chapter 49.60, which includes the non-retaliation provisions in RCW 49.60.210.” Br. of Appellant, p. 22, n.1.

⁸ “Kiser complained of conduct violating Title IX and RCW 28B.110.010. He was entitled to be free from retaliation for that opposition conduct under Title IX and RCW 49.60.210, but was nevertheless fired.”.

Kiser) by the women's basketball team captain. Br. of Appellant, p.6. Kiser cites no authority for the proposition that he may take credit for someone else's complaint as his own "protected activity".

There is nothing in the record, either, to establish that Kiser initiated a complaint about the officiating of women's intercollegiate basketball games. Both "Kiser and Waldow conferred with the director of the NWAACC league about the poor officiating", Br. of Appellant, p. 7, but that meeting was initiated by Blaine Nisson, the Clark College Vice President of Student Development. CP at 301-02. There were some generalized concerns about officiating voiced by Assistant Coach Missy Hallead, Br. of Appellant, p. 7 (citing CP at 237), and a letter expressing displeasure with the officiating from a parent of one of Kiser's players. Br. of Appellant, p. 7 (citing CP at 202; 208-09). While Nisson had a 'foggy recollection' of Kiser initiating the officiating complaint, *see* CP at 385-90, Kiser testified that the parent's letter was the catalyst for the meeting with league officials. CP at 295-96.⁹ Again, as with the complaint about the athletic director's allegedly foul language, the complaint about poor officiating was not initiated by Kiser and is not his "protected activity." As the women's basketball coach, he was simply 'along for the ride.'

⁹ Kiser claims he was 'blamed' for instigating the parent's letter, which he denied. Br. of Appellant, p. 7.

Moreover, if there was a Title IX issue involving the quality of officiating women's basketball games in the NWAACC, it was a league issue, not a Clark College issue. "[A] recipient of federal funds may be liable in damages under Title IX only for its own misconduct." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 640, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999). "The recipient itself must 'exclud[e] [persons] from participation in, . . . den[y] [persons] the benefits of, or . . . subject[t] [persons] to discrimination under' its 'program[s] or activit[ies]' in order to be liable under Title IX." *Id.* at 640-41. As discussed below, any complaint of alleged misconduct by NWAACC could not give rise to any "protected activity" on Kiser's part for which Clark College would be liable under Title IX.

As for the remaining complaints Kiser identifies as "protected activity," none involved complaints he made or brought to the attention of "Ardyth Allen, the Clark College administrator who had been designated to respond to Title IX issues." Br. of Appellant, p. 6. All of Kiser's concerns were voiced to Athletic Director Waldow, and in one instance to Vice President Nisson. Br. of Appellant, pp. 5 (van assignment and budget issues addressed to Waldow); 6 (hotel assignment issue addressed to Waldow); *see also* CP at 281-82 (coaching issue addressed to Waldow);

391-92, 397 (budget issue shared with Nisson). As discussed below, this is not “protected activity” under Title IX.

a. Kiser’s Complaints To Other Than The Clark College Title IX Coordinator Did Not Provide Clark College With “Actual Notice” Of Title IX Violations As Required Under The Supreme Court’s Implied Private Right Of Action For Claims Arising Under 20 USC § 1681(A)

Kiser agrees that to establish a prima facie case of retaliation for both his state law retaliation claim and his Title IX retaliation claim, he must first show “protected activity under the relevant statute.” Br. of Appellant, p. 20 (addressing state law claim under RCW 49.60.210); 21 (elements of Title IX retaliation claim “virtually the same,” starting with “protected activity”). After recapping his complaints “about Title IX implications” of team budget issues for sweat uniforms, and what he claims were “other statutorily protected actions,” Br. of Appellant, pp. 21-22, Kiser simply states, without any analysis or citation to authority, that “these actions . . . more than satisfied the element of protected activity for purposes of either the Title IX claim or the Law Against Discrimination claim, RCW 49.60.210.” Br. of Appellant, p. 22 (footnoting RCW 28B.110.010 as the relevant state statute “parallel to the federal law in Title IX” prohibiting gender discrimination in higher education,

violations of which also violate chapter 49.60 RCW, “which includes the non-retaliation provisions in RCW 49.60.210.”)¹⁰

Whether Kiser believes that making informal complaints to his supervisors (Waldow and Nisson) is sufficient to show protected activity under Title IX and RCW 28B.110.010, is unclear from his briefing.¹¹ He focuses his argument instead on his assertion that he need “only prove that his ‘complaints went to conduct that was at least arguably a violation of the law, not that [his] opposition activity was to behavior that would actually violate the law against discrimination.’” Br. of Appellant, p. 22 (citation to quoted Title VII case omitted); *see also* 37-38, and n.3 (arguing “reasonable belief of violation, combined with opposition is sufficient” for retaliation claims (citations to Title VII cases omitted)).¹² However, under Supreme Court decisions interpreting the implied private right of action under Title IX, these propositions are incorrect, and

¹⁰ There are no reported decisions construing chapter 28B.110 RCW. Where state discrimination laws have the same purpose as their federal counterparts, Washington courts look to federal decisions to determine the appropriate construction. *Clark v. Shoreline School Dist. No. 412*, 106 Wn.2d 102, 118, 720 P.2d 793 (1986); *see also Goodman v. Boeing Co.*, 75 Wn. App. 60, 77, 877 P.2d 703 (1994), *affirmed*, 127 Wn. 2d 401, 899 P.2d 1265 (1995) (state courts look to federal courts for guidance where state discrimination laws “substantially parallels federal law”).

¹¹ There is authority to this effect in at least one reported Title IX retaliation case involving a terminated college wrestling coach that Kiser did not cite, *Burch v. Regents of the University of California*, 433 F. Supp. 2d 1110, 1126 (E.D. Cal. 2006). However, *Burch* relied on case law decided under Title VII as authority for this proposition, which, as discussed below, is inapposite under Title IX jurisprudence.

¹² Case law decided under Title VII as authority for this proposition, as discussed below, is inapposite under Title IX jurisprudence.

analysis under Title VII is misplaced because of fundamental distinctions between the two statutes.

In holding that the implied private right of action under Title IX extends to retaliation claims, the Court in *Jackson*, relied in part on its earlier decision in *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998), defining the contours of liability in private actions under Title IX. *Jackson*, 544 U.S. at 174-75. In *Gebser*, a case involving a teacher's sexual misconduct with a student, the Court held that damages may not be recovered in such actions "unless an official of the school who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Gebser*, 524 U.S. at 277.

The teacher in *Gebser* made inappropriately suggestive comments to students in his class generally and more so to Gebser, particularly when the two were alone in the classroom. *Id.* at 277-78. He eventually initiated sexual contact with Gebser, which led to sexual intercourse on a number of occasions. *Id.* Although the relationship continued for some time, and Gebser "realized [the teacher's] conduct was improper," she "did not report the relationship to school officials". *Id.* When parents of other students complained of the teacher's classroom comments, the

school principal arranged a meeting with the parents, where the teacher “indicated that he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again.” *Id.* The principal told the teacher “to be careful about his classroom comments” and advised the school guidance counselor of the meeting with the parents, “but he did not report the parents’ complaint to Lago Vista’s superintendent, who was the district’s *Title IX coordinator*.”¹³ *Id.* (emphasis added). Thereafter, the teacher was arrested by police when he was discovered having sex with Gebser, and the district terminated his employment. *Id.*

In *Gebser* the Court expressly rejected claims to recover money damages under Title IX on theories of constructive notice, and *respondeat superior* under agency principles, as is the case in Title VII actions under *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed.2d 49 (1986). *Gebser*, 524 U.S. at 282-83. The Court noted that

Meritor’s rationale for concluding that agency principles guide the liability inquiry under Title VII rests on an aspect of that statute not found in Title IX: Title VII, in which the prohibition against employment discrimination runs against

¹³ Under 34 CFR § 106.8 (Designation of responsible employee) “Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.”

“an employer,” 42 U.S.C. § 2000e-2(a), explicitly defines “employer” to include “any agent,” § 2000e(b). See *Meritor, supra*, at 72, 106 S. Ct., at 2408. Title IX contains no comparable reference to an educational institution’s “agents,” and so does not expressly call for application of agency principles.

Id. at 283.

The Court went on to also note that

[u]nlike Title IX, Title VII contains an express cause of action, § 2000e-5(f), and specifically provides for relief in the form of monetary damages, § 1981a. . . . With respect to Title IX, however, the private right of action is judicially implied, and there is no legislative expression of the scope of available remedies, including when it is appropriate to award monetary damages.¹⁴

Id. (citation omitted; footnote added).

Thus, because the private right of action under Title IX is judicially implied, it befell the Court “to shape a sensible remedial scheme that best comports with the . . . statutory structure and purpose.” *Id.* at 284 (citations omitted). The Court noted that Title IX was enacted “with two principle objectives in mind: ‘[T]o avoid the use of federal funds to support discriminatory practices’ and ‘to provide individual citizens effective protection against those practices.’” *Id.* at 286, citing *Cannon*,

¹⁴ The express statutory means of enforcement is administrative: federal agencies distributing education funding establish requirements to ensure non-discrimination, with the ultimate sanction of termination of federal funding. 20 U.S.C. § 1682; *Gebser*, 524 U.S. at 280-81. However, “[t]he Court held in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed.2d 560 (1979), that Title IX is also enforceable through an implied private right of action, . . . [and] subsequently established in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed.2d 208 (1992), that monetary damages are available in the implied private right of action.” *Gebser*, 524 U.S. at 282.

441 U.S. at 704. The statute operates by “conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.”¹⁵ *Id.* (citations omitted).

“Title IX’s contractual nature has implications for [the] construction of the scope of available remedies,” with the “central concern in that regard” being “that ‘the receiving entity of federal funds [has] notice that it will be liable for a monetary award.’” *Id.* at 287 (citation omitted). “Because the express [administrative] remedial scheme under Title IX is predicated upon notice to an ‘appropriate person’ and an opportunity to rectify any violation, 20 U.S.C. §1682, . . . the implied damages remedy should be fashioned along the same lines.” *Id.* at 290.

An “appropriate person” under § 1682 is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination. Consequently, in cases . . . that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond.

Id.

¹⁵ “That contractual framework [also] distinguishes Title IX from Title VII, which is framed in terms not of a condition but an outright prohibition. Title VII applies to all employers without regard to federal funding and aims broadly to ‘eradicat[e] discrimination throughout the economy[.]’” whereas “Title IX focuses more on ‘protecting’ individuals from discriminatory practices carried out by recipients of federal funds.” *Gebser*, 524 U.S. at 286-87 (citations omitted).

Moreover, the response of the “appropriate person” must amount to “deliberate indifference” to the discrimination.

The administrative enforcement scheme presupposes that that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. Under a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees’ independent actions.

Id. at 290-91.

This framework determines what constitutes “protected activity” for purposes of retaliation claims under Title IX. In recognizing an implied private right of action for such claims, the Court in *Jackson* observed that “[r]eporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX’s enforcement scheme would unravel.” *Jackson*, 544 U.S. at 180.

Applying these standards to this case, Kiser has failed to establish any protected activity under Title IX that would sustain a prima facie case of retaliation. His purported Title IX complaints were not made to “Ardyth Allen, the Clark College administrator who had been designated to respond to Title IX issues.” Br. of Appellant, p. 6. The only complaint the record reflects was ever brought to Allen’s attention was that of the

alleged NWAACC officiating problem, where Clark College was not the recipient of the league's federal funding (if any), and advocated for but was not in any position to remedy any possible Title IX violations by the league.¹⁶

Kiser's own complaints (van assignments, coaching assignments, hotel room allocations, and budget restraints) were made to Athletic Director Waldow, the Clark College employee who instituted the actions of which Kiser complained, and who stood by his decisions. Under Title IX, viable complaints must be made to one with authority to remedy violations, i.e. one such as Allen "designated to respond to Title IX issues", not employees whose independent actions give rise to the purported violation. *Gebser*, 524 U.S. at 290-91.

The record only reflects that in one case, that of the alleged discriminatory budget issues, did Kiser ever elevate his concerns to Blaine Nisson. *See* CP at 396. However, nothing in the record reflects that Nisson had authority to remedy Title IX violations on behalf of Clark College. Unless Nisson was shown to be in a position to make an "official decision" for Clark College on Title IX discrimination complaints, voicing

¹⁶ The records also show that Kiser asked Allen to allow him to take a recruiting trip using budget funds, while the budget freeze was in place. CP at 162-65. This request was perceived by Allen to involve her duty to assure compliance with accounting and budget processes, not her role as the Title IX coordinator. CP at 165. The record does not show that Kiser or Allen considered his request a Title IX complaint.

such concerns to him would not give rise to liability under the statute's implied private right of action, and should not be considered protected opposition activity under *Gebser*. 524 U.S. at 290-91.

Kiser has failed to ascend the first step of showing protected opposition activity with cognizable complaints under Title IX sufficient to sustain his retaliation claims, and in turn his claim of wrongful discharge. The trial court's summary judgment of dismissal should be affirmed.

b. A Viable Title IX Complaint Sufficient To Constitute Protected Opposition Activity Requires Actual Violation Of The Statute With Misconduct Of Such Degree As To Deny Equal Access To An Institution's Resources And Opportunities

Kiser's complaints to Waldow and Nisson also fail to rise to the level of protected opposition activity under Title IX because they fail to address actual violations of the statute. Under the judicially implied private right of action, a funding recipient is only liable for deliberate indifference to sex discrimination, in other words "an official decision by the recipient not to remedy the violation." *Gebser*, 524 U.S. at 290. In the context of the contractual nature of Title IX, *id.* at 286-87, a complaint of conduct that does not violate the statute does not give rise to a recipient's obligation to respond "with corrective action." *Id.* at 290. Complaints that fall short of addressing actual violations of the statute should therefore

not be considered “opposition activity.” *Cf. Barber v. CSX Distribution Services*, 68 F.3d 694, 701-02 (3rd Cir. 1995) (complaint of “unfair treatment” that did not violate Age Discrimination in Employment Act not “protected conduct” for purposes of prima facie case of retaliation).

Moreover, for a recipient to incur liability there must be misconduct of sufficient magnitude to violate the statute. In an implied private right of action case involving student-on-student sexual harassment the Supreme Court instructed that “a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim’s educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” *Davis v. Monroe County Bd. of Educ.*, 526 U.S. at 651. None of Kiser’s complaints involved circumstances “so severe, pervasive, and objectively offensive” as to “effectively den[y] equal access to [the] institution’s resources and opportunities.”¹⁷

When Kiser complained he had not been allocated sufficient college van capacity to transport his women’s basketball team to

¹⁷ *Cf.* RCW 28B.110.030(7) (institution’s participation in intercollegiate athletics shall be “with no disparities based on gender”) and WAC 250-71-010(3) (“Available without regard to gender” means “no institutional factors operating to prevent or discourage students of either gender from selecting, participating in . . . [an] activity”).

tournament play, he was told he could rent a another van (at college expense). CP at 274. Even though he ended up driving his own car instead, because it was “inconvenient” to rent a van, CP at 274-76, even if there was a “disproportionate allocation” of transportation resources between the men’s and women’s teams, it did not preclude the women from participating in the tournament. The same is true of the alleged disproportionate allocation of hotel rooms; even if the disparity occurred, the women’s team was not denied the equal opportunity for tournament play.¹⁸

The alleged disparity in assigned coaching staff was not shown to have adversely affected the women’s basketball team. Kiser simply points to the “ratio of coaches to players,” Br. of Appellant, p. 39, without any explanation of its effect. *See* Br. of Appellant, p. 5. Kiser similarly fails to address the effect of any alleged budget improprieties, as far as not being able to purchase sweat uniforms for the women’s team. Moreover, while Kiser admits the women’s budget included money for the sweats, he was apparently chagrined to learn that the men’s team ordered their sweats before budget expenditures were “frozen” and he had not ordered the

¹⁸ However, Kiser testified that the women's team received additional rooms after the same player's parent who complained about game officiating discussed the room issue with Nisson. CP at 285-86. Thus, the potential disparity was cured.

women's sweats to save money for his recruiting trips. Br. of Appellant, pp. 5; 40; CP at 90, 166 ¶ 5, 167 ¶ 4.

Taken individually or together, none of the circumstances of which Kiser voiced concerns were sufficient to rise to the level of Title IX violations, and the trial court properly considered the “seriousness of the Title IX concerns at issue here,” Br. of Appellant, p. 37, in evaluation Kiser’s retaliation claims. *Davis*, 526 U.S. at 651. None of the matters of concern “denied equal access to [the] institution’s resources and opportunities” nor did Kiser’s complaints about them constitute protected activity in opposition to Title IX violations. The trial court’s summary judgment dismissal should be affirmed.

c. Waldow's Alleged Remark Is Not Direct Evidence Of Retaliation And Does Not, On Its Own, Establish A Prima Facie Case

Kiser argues that Waldow’s alleged "threat" is direct evidence of retaliation, which would allow her to meet her prima facie case without additional evidence. Direct evidence is “evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption.” *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003). Initially, Respondent does not concede that Waldow made a

threat of any kind, and asserts that if the remark occurred, it is offered out of context and overstated my Kiser.¹⁹

In any event, discriminatory or retaliatory remarks allegedly made by nondecisionmakers are not material in showing that an employer's decision was based on discrimination or retaliation. *Id.*; *Domingo*, 124 Wn. App. at 90.²⁰ The proper analysis of alleged direct evidence is illustrated in *Vasquez*. In *Vasquez*, a youth probation officer asserted claims of discrimination and retaliation and argued that remarks about Hispanics made by a higher level employee with supervisory

¹⁹ Kiser's full testimony about the alleged remark shows that Waldow, in an attempt to help Kiser, offered Kiser advice that more likely involved the prudence of encouraging player parent complaints *before* attempting to first resolve issues in-house, given the context and focus of the meeting that occurred earlier than afternoon. CP at 203, 296-97. Indeed, Kiser specifically testified that Waldow said, "I'm trying to help you." CP at 297. Notably, the record reflects no evidence to support Kiser's "threat" assertion beyond his own statement. Where Kiser's only evidence is his own self-serving allegation, that evidence is not enough to invalidate the motivating power of Kiser's fraud and theft.

²⁰ The *Domingo* Court also considered a remark by an individual involved in the termination decision that Domingo was "no longer a spring chicken" in relation to Domingo's age discrimination claim. *Domingo*, 124 Wn. App. at 90. The Court affirmed the trial court's grant of summary judgment on the claim, finding that without evidence of the context of the remark, it was impossible to know whether it was related to Domingo's termination, and moreover, it created such a weak issue of fact that no rational trier of fact to conclude that Domingo was fired because of her age "in light of the uncontroverted, overwhelming evidence in the record that Domingo engaged in violent behavior and had difficulty working with coworkers throughout her six year employment her." *Id.*

In the current case as explained above, the context provided by Kiser's full testimony regarding Waldow's alleged statement indicates that it was something less than a threat. CP at 91, 296-97. In fact, in his February 15, 2002, e-mail regarding the meeting that preceded the alleged remark, Kiser writes in detail about the meeting, including concerns about Kiser working within the chain of command to resolve concerns, *but he conspicuously makes no mention of any threat or other remark supposedly made by Waldow after the meeting.* And of course, Kiser's essentially undisputed theft from his employer is exactly the type of misconduct that defeats this type evidence on summary judgment.

responsibilities were direct evidence of discriminatory intent that should allow him to make out a prima facie case of discrimination. *Vasquez*, 349 F.3d at 638, 640.

In affirming the summary judgment dismissal of Vasquez's claims, the court found that the employee's remarks were not direct evidence, as they were not remarks by the decision maker and Vasquez offered no evidence of similar remarks by the actual decision maker. *Id.* at 639-41. The court went on to explain that Vasquez therefore needed to show a connection between the employee's remarks and the decision maker's subsequent employment decisions. *Id.* at 640. The court further found that Vasquez did not establish the necessary nexus because the decision maker conducted her own investigation and Vasquez offered no evidence that discriminatory animus motivated her decision making. *Id.*

Kiser's case is comparable. Here, Waldow was not the decisionmaker, and Kiser has offered no evidence of discriminatory remarks made by Nisson, the actual decision maker. Because Nisson sought and relied upon an audit investigation and Kiser has presented no evidence of retaliatory remarks or animus on Nisson's part, Waldow's alleged remark is not direct evidence and is sufficient to establish a prima facie case.

Importantly, even Kiser perceived Nisson to be above his issues with Waldow. For example, in his February 15, 2002 e-mail to Nisson, which he sent two days after Waldow's alleged remark, and in which he discussed his issues with Waldow and the meeting that occurred the same day as the alleged remark, Kiser closes his e-mail by stating his appreciation for Nisson's concern for athletics and Kiser's feeling that Nisson was "very supportive of not only the coaches, but the student-athletes as well." CP at 203. Certainly, if Kiser perceived the alleged remark to be a threat, he did not perceive it to be Nisson's viewpoint.

2. Kiser Did Not Establish Pretext By Rebutting The College's Legitimate Justification For His Dismissal: His Fraud, Misappropriation, And Theft

Clark College submitted evidence showing that Kiser's admitted decision to take money from the College and his possible misappropriation of per diem were the legitimate, nonretaliatory reasons for his dismissal. Consequently, Kiser was required to present sufficient evidence to establish that he was not really dismissed for his fraud and theft, but that the College's reasons were really a pretext for unlawful retaliation.

Indeed, an attempt to show that the College's actions or beliefs were somehow unsound or incorrect is irrelevant and inadequate to show pretext, as a showing of an inaccurate perception or incorrect thinking on the part of the decision maker does not prove pretext. *Domingo*, 124 Wn.

App. at 88-89. Instead, Kiser must show that Nisson “did not, in good faith, believe that [Kiser] engaged in [theft]. *Id.* “In judging whether [the employer's] proffered justifications were ‘false,’ it is not important whether they were objectively false ... courts ‘only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless.’ “ *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (*quoting Johnston v. Nordstrom, Inc.*, 260 F.3d 727, 733 (7th Cir. 2001).

Yet Kiser did not and cannot meet this burden, as he has submitted no evidence suggesting that Nisson did not believe that he engaged in theft and possibly mishandled travel money. In fact, *even Kiser agrees that Nisson believed Marcum's audit report summary and conclusions.* CP at 85 .

Further, Opposition to an employer's possible discrimination does not enjoy absolute immunity; an employee may still be terminated for proper cause even when engaged in protected activity. *See Coville v. Cobarc Servs., Inc.*, 73 Wn. App. 433, 439, 869 P.2d 1103 (1994). Theft, fraud, and misappropriation of funds certainly fall within the purview of proper cause, as *even Kiser acknowledges that an employer may rightfully terminate an employee who steals from his employer.* CP at 86. Kiser admitted that he purchased gas using the College's gas card, then sought

and received mileage reimbursement for the same trips. CP at 83-84. Kiser's confirmed fraud, theft, and misappropriation was the legitimate reason for his dismissal and the dismissal of this case.

Notably, Kiser's misconduct came to light after his references to gender equity issues, but before Nisson's dismissal decision. Where egregious misconduct such as employee fraud and theft is revealed between the alleged protected activity and adverse action, it logically negates any timing based inference of retaliation that might otherwise have existed.

Furthermore, Clark College would have been justified in relieving Kiser of his coaching duties solely because of the bad example he was setting for the student athletes he was tasked with coaching, teaching, and advising. Kiser agrees that it is important for any coach to set a good example and be a good role model for his players. CP at 89. Kiser's dishonest acts directly involved and affected his players, from their loss of travel money, to watching Kiser commit fraud with the gas card. CP at 337.

As explained below, the trial court correctly considered the strength of Kiser's alleged Title IX complaints as a factor in its ruling; correctly found that the complaints were indirect, minor, and not extensively pursued; and properly concluded that they were not the types

of complaints that were reasonably likely to motivate unlawful retaliation. CP at 489-90. Moreover, as the court explained in its oral ruling, Clark College's action stood on its own and was not a pretext, but a valid employment action taken by an employer confronted with fraud. CP at 490.

Because the only evidence Kiser can submit to support his claim is evidence showing that he arguably referenced gender-equity concerns before his theft was revealed and before his dismissal, Kiser has not and cannot carry his burden of showing pretext. The summary judgment dismissing his retaliation claims should be affirmed.

**a. Confirmed Theft From Your Employer Is A
Difficult Reason To Rebut**

For obvious reasons, there are few published cases addressing the evidence necessary to rebut an employer's dismissal of an employee who is found to have engaged in admitted theft. However, one case highlights the extreme difficulty plaintiffs necessarily encounter in rebutting a dismissal based upon an employee's confirmed theft.

In *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890 (10th Cir. 1994), the plaintiff/appellant was fired after she filed a discrimination and retaliation lawsuit in federal court, because discovery in the lawsuit revealed that Meredith had taken her coworkers' confidential performance

evaluations from her employer's locked filing cabinet. *Id.* at 893-94. Although her termination followed her lawsuit filing, the court found that Meredith confirmed that she stole the documents and that her employer did not fire her until after it learned of the theft. *Id.* at 897. On those grounds and Meredith's failure to present evidence of a causal connection to the dismissal, the *Meredith* court affirmed the summary judgment dismissal of her retaliation claim. *Id.*

In the present case, Kiser also confirmed his theft and he was not dismissed until after the College learned of his fraud, misappropriation, and theft. Kiser then failed to provide any compelling evidence creating a reasonable inference that he wasn't fired for those reasons.

Interestingly, Kiser relies on *Estevez v. Faculty Club*, 129 Wn. App. 774, 120 P.3d 579 (2005), for the proposition that the absence of prior discipline and facially reasonable explanations for incidents of misconduct can support a reasonable inference of discrimination or retaliation. However, Kiser does not reference an important basis for the court's holding in *Estevez* – her employer initially provided one reason for its decision to terminate her, then asserted additional reasons in litigation

that were never explained to Estevez.²¹ That is not the present case, where Nisson's reasons have been consistent.

Further, Estevez's coworker who worked with her directly declared that he had never seen her act in the manner alleged by the Faculty Club. *Id.* at 801-02. *Estevez* is also distinguishable because Estevez was not found to have engaged in misconduct as serious as stealing from her employer and Kiser, in the present case, has not provided reasonable explanations for his fraud, misappropriation, or theft – either facially or otherwise.²² For these reasons, Kiser's retaliation claim was correctly dismissed.

²¹ Estevez was originally told that she was being terminated because of her "stressful vibe" and her supervisor's opinion that she was not a "good fit," but in litigation, the Faculty Club claimed then Estevez was fired for using vulgar language, her inability to work well with others, and her inability to handle anger directed toward coworkers and subordinates. *Id.* at 800.

²² For example, Kiser claims that a past athletic director, Joe Hash, purchased gas for Kiser's car in one emergent situation, although Hash did not specifically recall doing so. Br. of Appellant at 11-12; CP at 230. Hash declared that he "would not ordinarily have approved of using the school's gasoline card to fuel anything but the school van." CP at 230 ¶ 5.

More importantly, Kiser has conceded that neither Hash nor any other athletic director told him that he could or should buy gas for his car and then seek a mileage reimbursement for the same trip. CP 431-32. He also acknowledges that he never told any of his supervisors that he was doing it. CP at 432.

Furthermore, Kiser concedes that he is unaware of any other coach who handled the gas card and mileage reimbursements in the same manner that he did. Kiser Dep. at 104. Thus, he cannot present evidence that any other coach engaged in identical misconduct, but escaped similar punishment. In fact, Nisson testified that he does not recall anyone who falsified records or otherwise committed the type of misconduct that Kiser did. CP at 144. Although Kiser references Waldow's return of per diem money in a comparator-type assertion, this assertion was not reasonably developed in the record, if it is relevant at all. Notably, alleged comparators must be similarly situated, through similar jobs and similar conduct, and supervisors are not generally considered to be similarly situated to lower-level employees. *Vasquez*, 349 F.3d at 641 (9th Cir.2003).

b. Kiser's Alleged Concerns Did Not State Patent Violations Of Title IX

Contrary to Kiser's argument on appeal, the trial court's observation that the seriousness and strength of Kiser's Title IX allegations were factors for its consideration and that the allegations in this case were indirect, minor, and not extensively pursued are supported by the facts and relevant federal regulations and policy interpretations.

For example, each of the disparities identified by Kiser compares the men and women's basketball teams. Yet colleges have considerable flexibility in complying with Title IX. *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 293 (2nd Cir. 2004). Institutions comply with Title IX's equal treatment provisions if the program's components are equivalent, meaning equal *or* equal in effect. *Id.* (citing 44 Fed. Reg. 71, 415). In fact, *identical* benefits, opportunities, or treatment are not required if the overall effect of any difference is negligible. *Id.* There is also no requirement of team or per capita equity in expenditures. 34 C.F.R. § 106.41(c) ("unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams will not constitute non-compliance with [Title IX]"). Thus, Clark College's equal budgets for its men's and women's basketball teams *exceed* Title IX requirements.

Policy interpretations issued under Title IX are also clear that compliance is not generally measured by comparing a specific men's sport to a specific women's sport, but rather by examining the program-wide benefits and opportunities of the educational institution. *McCormick*, 370 F.3d at 293 (*citing* Title IX policy interpretations 44 Fed. Reg. at 71,422). A disparity that disadvantages one sex in one part of an educational institution's athletic program may be offset or balanced by a comparable advantage to that sex in another area of the institution's overall athletic program. *Id.* (*citing* 44 Fed. Reg. at 71, 415). Hence, a school that provides better equipment to the men's basketball team than the women's basketball team would nevertheless comply with Title IX if it provides better equipment to the women's soccer team than the men's soccer team. *Id.* at 293-94 (*citing* 44 Fed. Reg. at 71,422). Thus, an overall review of the institution's athletic programs and policies is necessary to determine if an institution has violated Title IX. Ad hoc suppositions fall short.

In summary, Kiser's claims that the alleged disparities between the men's and women's basketball teams "are serious violations of Title IX" are conclusory statements that are not supported by relevant case law, regulations, or the record in this case. Spending decisions made by individual coaches for their individual teams, anticipated program-wide overages that necessitate temporary, program-wide budget freezes, and

last-minute cancellations that require emergency referee assignments are all nondiscriminatory factors that would not preclude a finding of compliance. Consequently, as the trial court correctly discerned, the weakness of Kiser's concerns militate against Kiser's assertion of pretext and do not rebut Respondent's legitimate reason for dismissing Kiser – his fraud, misappropriation, and theft.

C. Kiser Failed To Establish A Viable Claim Of Wrongful Termination, Which Is Essentially A More Difficult To Prove Common Law Retaliation Claim

To establish a claim of wrongful discharge in violation of public policy, a employee must prove: (1) the existence of a clear public policy (the clarity element); (2) that discouraging the conduct he engaged in would jeopardize that public policy (the jeopardy element); (3) that the (employee's public policy related) conduct caused the discharge (the causation element); and (4) (if the employer presents evidence that its conduct was justified) that the justification was invalid or pretextual (absence of justification element). *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002). *See also Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996).²³

²³ Kiser's argument regarding the justification element is inapplicable to this case, as the justification element is only relevant when the employer asserts it as an affirmative defense and it is undisputed that the employer took its adverse action against the employee because of the employee's public-policy related conduct. *See Korshund v. DynCorp Tri-Cities Services, Inc.*, 121 Wn. App. 295, 322, 88 P.3d 966, 979 (2000);

Because Kiser admitted using the College's gas card to fill up his personal vehicle and kept his players' per diem money on at least one occasion, Kiser cannot rebut the legitimate reasons for his dismissal. Given Kiser's confirmed wrongdoing, his termination was reasonable.²⁴

1. Kiser Did Not Establish The Jeopardy Element By Showing An Actual Violation Of Law Or Policy

Wrongful discharge is a narrow exception to the doctrine of at-will employment. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). Accordingly, wrongful discharge is more difficult to prove than retaliation because plaintiffs must prove *actual* violations of law, policy, or regulation to sustain a claim of wrongful termination or discharge in violation of public policy. *Ellis v. Seattle*, 142 Wn.2d 450, 460-61, 13 P.3d 1065 (2000) (citing to *Bott v. Rockwell International*, 80 Wn. App. 326, 908 P.2d 909 (1996) and *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 914 P.2d 102 (1996)). A good faith belief is not enough. *Bott*, 80 Wn. App. at 336; *see also Dicommes v. State*, 113 Wn.2d 612, 624, 782 P.2d 1002 (1989).

Henry H. Perritt, Jr., *Workplace Torts: Rights and Liabilities* § 3.21, at 96 (1991). As explained above, that is not this case.

²⁴ Arguably, Kiser's dismissal *enhanced* public policy, because RCW 42.52.160(1) states "no state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee or another."

Kiser's assertion that his Title IX concerns were well founded does not meet his obligation to establish an actual violation of law, policy, or regulation to sustain his claim of wrongful termination or discharge in violation of public policy. *Ellis*, 142 Wn.2d at 460-61. A wrongful discharge claim fails if the defendant did not engage in clear wrongdoing, or commit an illegal act. *Bott*, 80 Wn. App. at 336 (a wrongful discharge in violation of public policy "cause of action fails if the employer acted within the law").

Kiser has not submitted evidence showing that the refereeing or budget freeze issues, the only issues he arguably labeled as possible gender equity issues prior to losing his duties, constituted actual violations of Title IX. In fact, as explained above, his issues do not establish any violation of Title IX.²⁵

For example, Nisson's inquiries confirmed that the referees for the women's basketball games were assigned by the athletic conference and that unanticipated emergency replacements led to any refereeing discrepancies during the game in question. CP 158-59, 130-34. Nisson also confirmed that the budgets for the College's men's and women's basketball teams were equal and that any differences in spending were

²⁵ Again, because there are no cases interpreting RCW 28B, Washington courts rely on federal cases interpreting its federal counterpart, Title IX.

attributable to the spending discretion of the team's head coaches. CP 126-29, 135-37.

Kiser's failure to submit sufficient evidence to rebut Clark College's evidence that the budget freeze and refereeing issues did not constitute violations of Title IX required the dismissal of Kiser's wrongful discharge claim.

2. Kiser Did Not Establish Causation Or Pretext; His Misappropriation, Fraud, And Theft Caused His Dismissal

Kiser's wrongful termination claim was properly dismissed for the same reasons that his retaliation claims were dismissed. He did not and cannot show that his allegedly public-policy-related conduct caused Clark College to relieve him of his duties. To succeed on a wrongful discharge claim, Kiser must meet the causation element by proving that his alleged public policy related conduct *actually and proximately caused his discharge*. *Gardner*, 128 Wn.2d at 941. It is not enough for an employee to merely allege causation; he must set forth specific facts that demonstrate causation. *See Smith v. Employment Sec. Dep't*, 100 Wn. App. 561, 569, 997 P.2d 1013 (2000).

Further, wrongful termination in violation of public policy is an intentional tort. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 177, 876 P.2d 435 (1994). A plaintiff must establish the wrongful intent to

discharge in contravention of public policy. *Id.*; *Hibbert v. Centennial Villas, Inc.*, 56 Wn. App. 889, 894-95, 786 P.2d 309 (1990). Therefore, to withstand a motion for summary judgment, Kiser must present sufficient evidence of a nexus between a clear mandate of public policy and the decision to discharge. *Havens*, 124 Wn.2d at 177-78. If this causation element is shown, plaintiff then must prove that the employer's articulated reasons for the discharge were a pretext. *Gardner*, 128 Wn.2d at 941; *Baldwin*, 112 Wn.2d at 136.

Kiser cannot establish this claim because the conduct he relies upon did not cause his termination and Clark College's decisions did not jeopardize any such clear public policy. Kiser did not supply adequate evidence to rebut the fact that Blaine Nisson's decision was motivated by Kiser's failure to fully follow the College's per diem procedures and his dishonesty in fraudulently double billing the College for using his private vehicle. In fact, Kiser confirmed in meetings with Nisson and others, as well as in his more recent deposition, that he put gas in his private vehicle using the college gas card, then claimed and received mileage reimbursements for the trips. CP at 83, 117. Kiser's conspicuous inability to establish causation justified the summary dismissal of his wrongful discharge claim.

Kiser also has not established pretext. Generally, if a plaintiff establishes a prima facie case for wrongful discharge (i.e., retaliatory discharge), Washington courts follow the basic evidentiary burden-shifting procedure used in retaliation claims; the employer must articulate a legitimate reason or reasons for the termination and the plaintiff must then show that the employer's articulated reason or reasons are pretextual. *See Wilmot*, 118 Wn.2d at 68, 70; *Thompson*, 102 Wn.2d at 232-33. For the same reasons that Kiser failed to establish pretext relative to his retaliation claim, he failed to establish pretext relative to his wrongful discharge claim.

3. Kiser's Wrongful Discharge Claim Was Correctly Dismissed Because Clark College's Decision Not To Renew Kiser's Coaching Contract Is Not Actionable Under A Wrongful Discharge Theory

The tort of wrongful discharge is not available to a college employee whose employer does not renew his or her periodically renewable contract. *Guild v. St. Martin's College*, 64 Wn. App. 491, 496, 827 P.2d 286, *review denied*, 119 Wn.2d 1016, 833 P.2d 1390 (1992). In this case, Kiser's employment was governed by annual contracts that Clark College could renew or discontinue each year. CP at 93.

Because Clark College retained the discretion to renew or discontinue plaintiff's contract, its decision not to renew Kiser's contract is

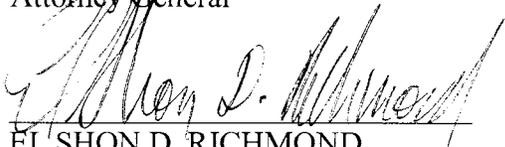
not actionable under the common law claim of wrongful discharge.
Consequently, this claim was also properly dismissed on this basis.

V. CONCLUSION

For the foregoing reasons, Clark College asks the Court to affirm
the trial court's order granting its Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 4th day of May, 2007.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "El Shon D. Richmond", is written over a horizontal line.

EL SHON D. RICHMOND
Assistant Attorney General
WSBA No. 26813

CERTIFICATE OF SERVICE

**I certify that I served a copy of this document on all parties or
their counsel of record on the date below by US Mail to:**

Ms. Jean Huffington
Attorney At Law
600 University Street, Suite 1904
Seattle, WA 98101-4115

**I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.**

DATED this 4th day of May, 2007, at Tumwater, WA.


Melissa D. Kornmann

07 MAY -7 AM 9:05
STATE OF WASHINGTON
BY  DEPUTY
COURT REPORTER
M. Kornmann