

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
Division III**

Court of Appeals No. 341038  
Spokane County Superior Court No. 15-2-00466-7

**FILED**

**DEC 27 2016**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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**In re:**

**DAVID MARTIN,**

**Plaintiff/Appellant,**

**vs.**

**GONZAGA UNIVERSITY,**

**Defendant/Respondent.**

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**APPELLANT'S OPENING BRIEF**

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**COURT OF APPEALS, DIVISION III  
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**TABLE OF CONTENTS**

<b>I.</b>	<b>SUMMARY OF ARGUMENT</b>	<b>1</b>
<b>II.</b>	<b>ASSIGNMENTS OF ERROR</b>	<b>1</b>
<b>III.</b>	<b>ISSUES PRESENTED</b>	<b>2</b>
<b>IV.</b>	<b>STATEMENT OF THE CASE</b>	<b>2</b>
<b>V.</b>	<b>ARGUMENT</b>	<b>29</b>
	<b>1.</b>	
	<b>The trial court erred when it dismissed Mr. Martin’s wrongful discharge claim.</b>	
	<b>a. Ensuring safety is a clearly established matter of public policy.</b>	
	<b>b. The University’s termination of Mr. Martin’s employment for going outside the “chain of command” to address safety concerns jeopardizes the public policy interest.</b>	
	<b>c. Mr. Martin’s conduct in drawing attention to the unsafe condition caused his dismissal.</b>	
	<b>d. The University cannot offer an overriding justification for Mr. Martin’s dismissal.</b>	
	<b>B.</b>	
	<b>The trial court erred when it dismissed Mr. Martin’s claim based on RCW 49.12.</b>	
<b>VI.</b>	<b>CONCLUSION</b>	<b>48</b>

**TABLE OF AUTHORITIES**

**STATE CASES**

*Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989) . . . . . 33, 34, 36, 40

*Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000) . . . . . 36, 37

*Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931,  
913 P.2d 377 (1996) . . . . . 32, 33, 34, 36, 41

*Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 52 Ill.Dec. 13,  
421 N.E.2d 876 (1981) . . . . . 34

*Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960) . . . . . 30

*Rickman v. Premera Blue Cross*, 184 Wn.2d 300,  
58 P.3d 1153 (2015) . . . . . 30-31, 33, 36-39, 41

*Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000) . . . . . 31

*Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268,  
358 P.3d 1139 (2015) . . . . . 32, 36, 40

*Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219,  
685 P.2d 1081 (1984) . . . . . 31-33

*Wagner v. Globe*, 150 Ariz. 82, 722 P.2d 250 (1986) . . . . . 36

*Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46,  
821 P.2d 18 (1991) . . . . . 38, 39, 41

*Wood v. Lowe*, 102 Wn.App. 872, 10 P.3d 494 (2000) . . . . . 49

**FEDERAL CASES**

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505,  
91 L.Ed.2d 202, 54 U.S.L.W. 4755 (1986) . . . . . 31

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133,  
120 S.Ct. 2097, 147 L.Ed.2d 105, 68 U.S.L.W. 4480 (2000) . . . 31, 33, 39-40

*St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742,  
125 L.Ed.2d 407, 61 U.S.L.W. 4782 (1993) . . . . . 39

*Whitaker v. Coleman*, 115 F.2d 305 (5th Cir. 1940) . . . . . 30

*Wilson v. United States*, 162 U.S. 613, 16 S.Ct. 895,  
40 L.Ed. 1090 (1896) . . . . . 40

*Wright v. West*, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225,  
60 U.S.L.W. 4639 (1992) . . . . . 40

**RULES**

RCW 28B.112.005 . . . . . 34 n.1

RCW 49.12 . . . . . 1, 2, 48

RCW 49.12.010 . . . . . 34 n.1

RCW 49.12.240 . . . . . 48

RCW 49.12.250 . . . . . 14, 48, 49

RCW 49.12.250 (2) . . . . . 49

RCW 49.12.250 (3) . . . . . 49

RCW 49.17.010 . . . . . 34 n.1

WAC 296-923-100 . . . . . 34 n.1

## I. SUMMARY OF ARGUMENT

The trial court erred when it granted summary judgment dismissal of Mr. Martin's claims based on wrongful discharge and RCW 49.12. Mr. Martin met his burden under the factors of the Perritt test when he (a) identified safety as a public policy interest, (b) demonstrated that an employer's termination of an employee for going outside the "chain of command" to address safety problems jeopardizes the public policy interest; (c) showed that Mr. Martin's conduct in drawing attention to the unsafe condition caused his dismissal; and (d) proved that the University cannot offer an overriding justification for Mr. Martin's dismissal. Mr. Martin's wrongful discharge claim should have survived the University's motion for summary judgment.

The trial court erred when it dismissed Mr. Martin's claim based on RCW 49.12. Employers should not be permitted to circumvent the requirements of Washington State statute by keeping employee information in an "employee relations" file rather than the employee's "personnel file." Mr. Martin's RCW 49.12 claim should have survived summary judgment for determination by a trier of fact.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred when it dismissed Mr. Martin's wrongful discharge claim.
2. The trial court erred when it dismissed Mr. Martin's claim based on RCW 49.12.

### III. ISSUES PRESENTED

1. Whether the trial court erred when it dismissed Mr. Martin's wrongful discharge claim after he (a) identified safety as a public policy interest, (b) demonstrated that an employer's termination of an employee for going outside the "chain of command" to address safety problems jeopardizes the public policy interest; (c) showed that Mr. Martin's conduct in drawing attention to the unsafe condition caused his dismissal; and (d) proved that the University cannot offer an overriding justification for Mr. Martin's dismissal.
2. Whether an employer can avoid complying with the requirements of RCW 49.12 based on keeping employee information in an "employee relations" file rather than the employee's "personnel file."

#### I. STATEMENT OF THE CASE

The plaintiff, David Martin, was a full-time employee at Gonzaga University (hereinafter, "the University") from January of 2008, until March of 2012. (CP 4, 13, 31, 41, 137, 150, 155, 181.) His title was Assistant Director of the Rudolf Fitness Center (hereinafter "RFC"). (CP 13, 31, 137, 150, 162, 169, 179, 199.) In addition to wages of approximately \$38,000 per year, Mr. Martin received other benefits, including health insurance and free tuition. (CP 4-6, 17, 33.) Mr. Martin made use of his tuition benefit and enrolled in the Masters program for Sports Administration at the University. (CP 5, 17, 33, 138, 152.)

The RFC opened in 2003; it provides services to students, faculty, staff, families of faculty and staff, and other members of the community; and

during the summer months, the University rents the RFC to other organizations such as youth camps and leagues. (CP 26, 50, 119, 149.)

In 2012, the RFC's employees were: the Director of the RFC, Dr. Jose Hernandez; the Associate Director, Ms. Shelly Radtke; and several Assistant Directors, including Ms. Kerri Conger, Mr. Andrew Main, and Mr. Martin. (CP 151, 162, 169.) Within the larger Athletics Department, Dr. Hernandez reported to Mr. Joel Morgan, who was the Assistant Director of Athletics; Mr. Morgan reported to Mr. Chris Standiford, who was the Senior Associate Athletic Director; and Mr. Standiford reported to Mr. Mike Roth, who was the Director of Athletics. (CP 151, 162-63, 180.)

*A. STUDENT INJURIES AT THE RUDOLF FITNESS CENTER*

Students were routinely injured at the RFC basketball court as a result of impact with the bare concrete walls and other unpadded surfaces behind and around the basketball court. (CP 4, 14, 20-21, 31-32, 38, 51, 137, 204.) Players sustained severe injuries, including concussions, head trauma, broken bones, dislocated shoulders, and lacerations, and, in one case, injuries had been so severe that an ambulance was required to provide emergency care. (CP 4, 14, 31-32, 204.) On one occasion, Mr. Martin was first on the scene to help a student before the ambulance arrived, and he had helped to support a student's broken leg; it was so misshapen, the student could see the bottom of his own shoe. (CP 204.) In addition to the risk of injury from physical impact with unpadded surfaces, students were routinely exposed to potential

hazards resulting from pathogens contained in blood and bodily fluids of injured students. (CP 4, 14, 26, 32, 38.) All of the courts used by the University in its *athletic* program were equipped with protective padding. (CP 4, 5, 14, 32.) Only the *recreational* court, which was primarily used by students who were not considered “student athletes,” had no padding. (CP 5, 137.)

In 2009, after Mr. Martin had been employed by the University for about a year, an incident arose where a student was seriously injured while playing basketball. (CP 15, 32.) Mr. Martin brought the incident to the attention of Dr. Hernandez, and they discussed the need for padding. (CP 15, 32; 71-74.) Mr. Martin believed that the University had a legal obligation to maintain a safe environment under the Washington Industrial Safety and Health Act (“WISHA”), but Dr. Hernandez took no action in response to Mr. Martin’s concerns. (CP 25, 32, 74.)

The unsafe condition in the basketball court had been brought to the University’s attention prior to Mr. Martin’s arrival. In 2004, a study had been conducted by an outside consultant to determine whether padding should be put in the basketball courts at the RFC. (CP 15, 20, 65, 67, 70.) The consultant had recommended that pads be installed for the safety of the students, but the University took no action. (CP 15, 66.) Dr. Hernandez, who had obtained the assessment, did not remember providing any

recommendation to his supervisor nor could he remember who had made the decision that no padding would be installed. (CP 15, 16, 68.)

In 2007, another study had been conducted that again concluded pads should be installed. (CP 15, 16, 68.) In his deposition, Dr. Hernandez testified that he had forwarded the 2007 assessment to his direct supervisor, Mr. Joel Morgan, with his recommendation that pads should be installed and that no action was taken (however, in his declaration filed with the trial court, Dr. Hernandez testified that he “*finally made a recommendation in 2012 to put in pads, even though it was not required as a code requirement or under NCAA regulations.*”). (CP 68-69, 138; emphasis added.) Mr. Morgan testified that he did not recall any such recommendation from Dr. Hernandez in 2007. (CP 79-80.) Mr. Standiford could not clearly recall having any meaningful conversation about installing pads prior to being made aware of Mr. Martin’s concern. (CP 53, 55-63.) Mr. Mike Roth, the Director of Athletics, testified that he could not think of any reason why the University would not have adopted a recommendation for the installation of safety padding in the RFC if it had received one in 2007. (CP 83.)

Over the next couple years, Mr. Martin repeatedly requested protective padding for the bare concrete walls beneath the basketball hoops and other areas where injuries frequently occurred. (CP 4-5, 14, 32, 60, 63, 74.) Mr. Standiford confirmed that Mr. Martin had requested “an assessment of what the condition is and what best practices are, what the code is, and to seek out

– seek an analysis of whether or not we had a condition that needed to be addressed.” (CP 60, 63.) Mr. Martin was told that requests for protective padding could only be made once a year and that protective padding was too expensive. (CP 4, 14, 32.) The cost of protective padding was less than \$30,000. (CP 4, 14, 32, 138.) Mr. Standiford testified that the installation of pads on the walls of the basketball courts were “budgetary decisions relating to capital investments which occur at my level,” and “the issue of whether to install padding on the walls was not a monetary issue,” but in his deposition, Mr. Standiford testified that the University had “difficulty” finding “justification for the investment.” (CP 62, 111.) Mr. Martin’s concerns and requests were ignored.

*C. THE GONZAGA BULLETIN INVESTIGATES*

The University’s student newspaper began investigating the injuries being suffered by students using the RFC basketball courts. (CP 34, 38-39; 102-107.) Mr. Martin believed that Mr. Morgan was angry about the investigation, and that he had engaged in inappropriate intimidation and threats in order to prevent the reporter and The Bulletin from investigating the story. (CP 103-104.) A rumor circulated that Mr. Martin had leaked information to the newspaper, but no one from the University ever spoke to Mr. Martin about it. (CP 104.)

*C. MR. MARTIN'S SAFETY PROPOSAL*

As part of his thesis project for his Master's program, Mr. Martin wrote a proposal that would create programs that could be offered to raise funds for the purchase padding for the basketball court. (CP 17, 33, 39, 41, 74-75, 102, 115, 152.) Mr. Martin spent three months preparing his proposal, after which he submitted it to Dr. Hernandez and engaged in a two-hour conversation about the ideas it contained. (CP 5, 17, 33, 102, 138.) Mr. Martin testified in his declaration that Dr. Hernandez told Mr. Martin that he liked the proposal and told him that he could submit the proposal to Mr. Standiford, who had oversight of the budget at the RFC. (CP 33.) Dr. Hernandez confirmed that Mr. Martin wanted to pursue an idea he had about how to generate funds to put in the padding in the basketball courts, and that he had given Mr. Martin permission to meet with Ms. Radtke, Ms. Conger, and Mr. Main about his idea. (CP 74-75.) Dr. Hernandez testified that he told Mr. Martin that going straight to Mr. Standiford was "not a good idea," but that, "I can't stop you if this is what you want to do." (CP 120.)

On February 29, 2012, Mr. Martin sent an email to Mr. Standiford and requested a meeting in order to present several proposals he had prepared. (CP 115.) Mr. Standiford responded and said, "[i]t is more organizationally appropriate for you to provide [Dr. Hernandez] with the proposal for consideration," and "[i]f you have already done this, and [Dr. Hernandez] supports the proposal, I would suggest he meet with [Mr. Morgan] for further

consideration and deliberation.” (CP 114.) Mr. Standiford then clarified that he was only interested in a proposal related to the aquatics project saying:

I have asked [Mr. Morgan], and by extension [Mr. Hernandez], that we do an analysis and programmatic review that demonstrates the relative vitality and necessity of the aquatic component as part of the Rudolf Fitness Center. Hopefully your work helps expedite that project as it is the most time sensitive. *The response to that question is the primary focus and the sole request at this time.*

(CP 114; Emphasis added.)

Mr. Martin responded, saying that “I have [Dr. Hernandez’s] consent in the matter,” and “I would ask that you please meet with me and hear my thoughts on this matter.” (CP 114.) Mr. Martin questioned the hierarchy referenced by Mr. Standiford, saying “according to our organizational layout in the Policies and Procedures Manual, pg. 6, there is no such line of communication or organization hierarchy established for the RFC to follow.” (CP 114.) The record does not contain a response from Mr. Standiford about the *Policies and Procedures Manual* or any acknowledgement of Mr. Martin’s response.

After his communication with Mr. Martin on February 29, 2012, Mr. Standiford contacted Dr. Hernandez and Mr. Morgan and asked them to contact Human Resources about having a meeting with Mr. Martin. (CP 110.) Dr. Hernandez testified that after meeting with Human Resources, he approached Mr. Martin and told him that he needed to attend a meetin; Dr.

Hernandez testified that he told Mr. Martin, “it will only get worse for you if you don’t go.” (CP 121.)

Mr. Martin met with Dr. Hernandez and Mr. Morgan on March 1, 2012. (CP 138, 188, 191.) Dr. Hernandez testified that during the meeting, Mr. Martin repeatedly asked why his email to Mr. Standiford was inappropriate; Dr. Hernandez responded that Mr. Standiford had “provided specific direction” that Mr. Martin should “present his aquatics proposal to me first” and that Mr. Martin had disregarded “a direct order.” (CP 121.)

Mr. Morgan read a prepared statement and then demanded that Mr. Martin release his proposal to Mr. Morgan. (CP 102.) Mr. Martin indicated he was uncomfortable since the proposal was his thesis project that he had worked on for three months; Mr. Martin took offense and put Mr. Martin on a seven-day probationary period and told him that the next day at work, his job expectations would be outlined. (CP 103.) Mr. Martin then requested to leave the meeting. (CP 121, 191, 214, 216.)

After the meeting, Mr. Martin was very shaken and felt sick to his stomach. (CP 103.) Mr. Martin was responsible for closing the RFC that evening; when he got back, Mr. Martin asked Ms. Radtke, his immediate supervisor, if he could go home because he did not feel he would be able to finish work. (CP 103, 110, 154, 166, 170 179, 192-193.) She gave him permission to leave, and Mr. Martin made arrangements with Mr. Main to cover his shift. (CP 103.) Mr. Martin then went back to Ms. Radtke and

confirmed that she would document his request. (CP 103; 192-193.) Mr. Martin called her again that evening to make sure that she had documented his request. (CP 103.) She confirmed that she had. (CP 103.)

The next morning, Dr. Hernandez informed Mr. Martin that he had been suspended, and that he was not to have contact with anyone at the University except for Human Resources and Dr. Hernandez. (CP 122.) Dr. Hernandez could not say why. (CP 103.)

Mr. Martin contacted Human Resources; that department was not aware that he had been suspended and could give him no information. (CP 103.) It took an additional five days before Human Resources contacted Dr. Hernandez to inform him of the reason for Mr. Martin's suspension, which had been for leaving work without permission. (CP 103.) Dr. Hernandez testified that Ms. Murray had advised him that Mr. Martin needed to be placed on administrative leave because he had been subordinate by not following "appropriate protocols." (CP 122.) Ms. Murray testified that: "it was my understanding that the situation with Mr. Martin being placed on administrative leave was his reaction during the meeting and also his insubordinate behavior by walking off his shift." (CP 166.) She noted that "Mr. Standiford had received push back from Mr. Martin," and "as a result, Mr. Standiford had reached out to Mr. Morgan and [Dr.] Hernandez to set up a meeting with [Ms. Murray]." (CP 166.) There is no information in the

record identifying who made the decision to place Mr. Martin on administrative leave.

Mr. Martin believed that Mr. Morgan and Mr. Standiford were trying to prevent him from raising his safety concerns to their supervisors higher up the “chain of command” in order to avoid embarrassment, and as a result, they did not want Mr. Martin’s proposal to ever be considered; Mr. Martin concluded that he would have to submit his proposal to the President of the University, Dr. McCulloh. (CP 34, 102-107.) On March 5, 2012, Mr. Martin contacted the Executive Assistant to the President of the University, Ms. Julia Bjordahl, and spoke with her about his situation. (CP 196-197.) She told him he should make the President aware of what was happening. (CP 197.) He then emailed his proposal to the President’s assistant. (CP 100.) In his accompanying email, he indicated that he knew he was putting his job in jeopardy by sending the email but that he had to do it anyway because of how much he cared about the students. (CP 100.) He indicated that he was concerned about making a “better, safer environment,” and indicated that he had been bringing his safety concerns to his direct supervisor for the last four years to no avail. (CP 100.) He explained that his professors in the University’s Masters program had worked with him to “consider [his] options,” and that “[w]e had a feeling it would not be easily accepted and that proposing any new changes would meet it’s [sic] obstacles.” (CP 100.)

Ms. Bjordahl responded on March 6, 2012, and said, “Thayne did tell me that policy requires that you vet this through your next in command, which appears to be Mike Roth?” (CP 100.)

On March 7, 2012, a student sustained a serious head injury from running into the bare concrete wall in the RFC basketball court; he had to be taken to the hospital by ambulance. (CP 38, 105.) The student had a concussion and had to receive stitches. (CP 38.) This student’s father was a personal injury attorney who later spoke to the student newspaper and relayed his concerns that no padding had been installed in the gym where his son was injured. (CP 38.) “I hope that the University will remedy the problem and put some padding up behind the hoops,” he said. (CP 39.) “I really hope they’ll just go ahead and pad that wall to protect the necks of kids, shoulders, and faces and whatever else.” (CP 39.)

The next day, the University fired Mr. Martin. (CP 105.) There was no Human Resources representative at the meeting where Mr. Martin was terminated. (CP 202.) During that meeting, Mr. Standiford told him that one of the reasons for his termination was that he was believed to be giving information about student injuries taking place at the RFC to the student newspaper. (CP 34.)

After he was fired, Mr. Martin wrote a letter to President McCulloh and Mr. Roth explaining what had happened, outlining his concerns, and requesting to be reinstated. (CP 102-107.) He indicated that he believed he

had been terminated “under the pretense of insubordination,” and that during his four years at the University, he had “seen a lack of responsiveness to safety issues” at the RFC. (CP 102.) He stated that “[r]ather than ‘throwing anybody under the bus’ or ‘naming names,’ [he] took initiative and put together a plan that was ‘win-win’ for everyone.” (CP 102.) He indicated a variety of safety concerns and noted that “repeated requests for safety improvement have gone unaddressed under the current organizational structure.” (CP 102.) He complained that “[e]ven now we don’t have the resources to replenish first aid kits before critical items are exhausted,” and that his proposal would provide for funds so that the RFC could pay “for our own protective equipment in the gym and not have to fight those in the chain of command to justify funding our safety provisions.” (CP 102.) He recommended a restructuring that would involve moving out of the Facilities department because “[t]he RFC is so low on the chain of command our staff is powerless to do our job safely and correctly, leading to increased university liability and continuing student injuries.” (CP 102.) Mr. Martin noted that, “It is important that I make you aware that our repeated safety concerns have fallen on deaf ears,” and he confirmed that, “[t]his is what prompted me to write the proposal in the first place.” (CP 102.) Mr. Martin confirmed that he had made repeated attempts to get protective padding for the students and indicated his belief that his termination sent a dangerous message to students and staff – first, that the University did not care about students’ safety, and

second, that if staff members brought forward an idea and drew attention to their cause, they would be punished. (CP 102.) The record does not indicate that Mr. Martin received a response.

Mr. Martin also contacted Human Resources and requested a copy of his personnel file, which he received. (CP 211.) He sent a letter of confirmation to the University confirming his receipt of the file and identifying the contents. (CP 211.) Mr. Martin requested any additional documents not identified in his list. (CP 211.)

Within nine months of Mr. Martin's termination, the University installed padding in the basketball courts at the RFC. (CP 111, 122.)

*E. PROCEDURAL HISTORY & INFORMATION IN THE RECORD*

COMPLAINT: Mr. Martin filed a *Summons* and *Complaint* against the University alleging that he had been wrongfully discharged in violation of public policy and that the University had violated RCW 49.12.250 when it failed to provide him with his personnel files per his request. (CP 6-7.)

ANSWER: In its *Answer*, the University admitted that the RFC did not have padding on the walls of during the period of Mr. Martin's employment and that there had been "incidents of students being injured while playing basketball while running into the wall." (CP 137.) The University also admitted that, in 2012, it had accepted the recommendation of a risk manager that padding should be put on the walls of the basketball court, and the padding had been installed. (CP 137.)

MOTION FOR SUMMARY JUDGMENT: The University moved for summary judgment, arguing that Mr. Martin had failed to allege any public policy violation by the University and that Mr. Martin had failed to produce sufficient circumstantial evidence that his actions in furtherance of public policy were the cause of his discharge. (CP 149.) The University provided numerous declarations in support of its motion.

DECLARATION OF DR. JOSE HERNANDEZ: In his declaration, Dr. Hernandez stated that Mr. Martin was “fired for cause due to repeated incidents of insubordination and poor performance, especially in the area of interpersonal relationships with staff in the Rudolph [sic] Fitness Center.” (CP 119-120.) He testified that Mr. Martin had “proceeded to walk off his shift without receiving permission from me,” but Dr. Hernandez does not comment on whether Mr. Martin sought or received permission from another superior or whether he made arrangements for someone to cover his shift. (CP 121.) Dr. Hernandez also did not provide information in his testimony about relevant RFC policy for covering shifts or how that issue had historically been handled, nor did he establish any basis for a conclusion that Mr. Martin knew the the alleged proper policy.

Dr. Hernandez attached three documents to his declaration, which included, (1) “a true and accurate performance review of David Martin dated April 2011,” (2) “notes of a meeting that I had with David Martin on August

16, 2011,” and (3) “an email communication that I sent to Heather Murray on March 2, 2012.” (CP 120.)

(1) *Performance Review* Dr. Hernandez stated that he provided a “true and accurate performance review” that was “dated” April 2011; however, he did not state that it was a true and accurate *copy* of a performance review that had *previously been written* in April of 2011. (CP 120.) Mr. Hernandez also did not indicate whether the performance review was ever provided to Mr. Martin. The document was not signed by Mr. Martin or by Dr. Hernandez. (CP 129.) The review provided Mr. Martin with above average ratings in eight of twelve areas and average ratings in four areas. (CP 126-127.) The review says many specific, complimentary things such as: “David planned and organized an excellent training program for our lifeguards and a development activity to improve the dynamic of our student employees,” and “David is an individual with a passion for the teaching and training of our student employees and patrons in general,” and “[h]e can be one of the most flexible and collaborative person in our staff,” and “he did an excellent job with the development and implementation of a new and improved training program for out [sic] student employees and professional staff.” (CP 126-129.) While the review contained some criticism, none of it was specific. (CP 126-129.) “[H]e displayed some key inconsistencies,” “David’s inconsistent performance kept him from meeting the basic job requirements,” “[t]hroughout the academic year, at time he would displayed [sic] great work

ethics and at other times he would not,” “David’s overall performance for this review was below the quality and standard that he is capable of” and “[a]fter beginning the year with a productive and positive fall semester, his spring semester was not up to the quality level that the job requires in several areas.” (CP 126-129.) Even the criticism confirms Mr. Martin’s previous performance were exemplary: “This up and down behavior and conduct was a surprise and is uncharacteristic of him.” (CP 128.) Even though Mr. Martin’s performance was characterized as being “below the quality and standard that he is capable of,” Dr. Hernandez still determined Mr. Martin’s performance was above the midpoint on the evaluation scale. (CP 126-127.)

2) “Notes” Dr. Hernandez does not comment as to why the “notes” he referenced are presented in the form of a communication addressed to Mr. Martin, and he does not testify as to whether the document was ever provided to Mr. Martin (in which case it may have more appropriately been characterized as a ‘letter’). (CP 134-135.) Although Dr. Hernandez *implies* that he wrote the notes, he does not actually identify the author. Even though the document is written in the form of a letter, the document is not signed, nor is a signature line provided. (CP 135.) The voice/style and use of language contained in that document are substantially different than the language contained in the email and the performance review written by Dr. Hernandez. Dr. Hernandez tends to repeat the same unusual word choices in his writing, e.g. like saying “in” when it is typical to say “on” or using mismatched

singular and plural sentence parts.<sup>1</sup> Without information as to the purpose of the document and the identify of the author, the document is of little use.

3) Email Sent to Heather Murray Despite his testimony, Dr. Hernandez provided no email communication between himself and Heather Murray. Instead, he provided email communication between himself and Mr. Martin, in which Dr. Hernandez asked Mr. Martin to answer two questions for him “as sincere as you can and with detail if necessary” about Dr. Hernandez’s job performance and how to improve the team. (CP 132.) Dr. Hernandez ended the email by saying, “Thank you David for your honesty and the opportunity to work with you.” (CP 132.)

DECLARATION OF MR. CHRISTOPHER STANDIFORD: Mr. Standiford states that Mr. Martin was “terminated for cause.” (CP 108.)

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<sup>1</sup> “*In the other hand...*” (CP 127); “He can be one of the most flexible and collaborative person *in our staff.*” (CP 127); “... at times *he would displayed great work ethics* and at other times he would not.” (CP 128); “Pursuit a more efficient substitute process...” (CP 128.); “I am grateful for your patient and willingness to improve and understand that this process to become good to deal with the challenge we have *in our hands* takes time.” (CP 132.); “Would you please answer *this two questions* as sincere as you can and with detail if it is necessary....” (CP 132.)

<sup>2</sup> **RCW 49.17.010**; “Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590); **WAC 296-823-100**; This chapter provides requirements to protect employees from exposure to blood or other potentially infections materials (OPIM) that may contain bloodborne pathogens. See also, e.g., **RCW 49.12.010**; “The welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health”; **RCW 28B.112.005**; “In order to

Mr. Standiford testified in his declaration that there was a “clear chain of command” that Mr. Martin violated when he emailed Mr. Standiford with his proposals. (CP 109.) Mr. Standiford also testified that he told Mr. Martin that he should provide his proposal to Dr. Hernandez, and that doing so was “part of our chain of command structure” and his “only option”; however, no emails that contain this language are contained in the record. (CP 109.) The email that *is* provided indicates that Mr. Standiford told Mr. Martin that it would be more “appropriate” to send the proposal to Dr. Hernandez and that, if that had already been done, Mr. Standiford “would suggest that he meet with Joel for further consideration and deliberation.” (CP 114.) Mr. Standiford provided no information about where the protocol and chain of command information had been published by the University. Interestingly, Mr. Standiford testified that he did, in fact, have an “in-person meeting with Mr. Martin on his aquatics proposal.” (CP 109.)

Mr. Standiford testified that sometime after February 29, 2012, he called Dr. Hernandez and Mr. Morgan and instructed them to contact Human Resources about Mr. Martin, but his declaration did not identify the purpose for this contact. (CP 110.) He then stated: “The first step in the process was Mr. Martin having a meeting with Jose Hernandez and Joel Morgan for the purpose of receiving a letter of expectation.” (CP 110.) Mr. Standiford also did not clarify the nature of the “process” to which he referred, nor did he indicate what the letter of expectation was intended to contain, whether it was

ever actually created, or whether it was ever delivered. He then testified that a meeting with Mr. Martin, Mr. Morgan, and Dr. Hernandez was held on March 1, 2012 at 4 PM, and that during the meeting, he received an email from Mr. Morgan saying that “Mr. Martin had exhibited unprofessional behavior and walked off the job even though he was responsible for closing the Rudolph [sic] Fitness Center that night.” (CP 110.) Mr. Standiford concluded that “as a result,” Mr. Martin was placed on administrative leave and instructed that he was not to have any contact with anyone associated with the University except for Human Resources and Dr. Hernandez.” (CP 110.) He does not testify as to who made the decision to suspend Mr. Martin.

Mr. Standiford testified: “Mr. Martin was insubordinate again by violating the terms of his administrative leave...” (CP 110.) He states that Mr. Martin was provided a termination letter signed by him on March 8, 2012 and that “Mr. Martin’s termination had nothing to do at all with any issue relating to the lack of padding on the walls of the basketball courts inside the Rudolph [sic] Fitness Center Fieldhouse,” and that “the reasons for Mr. Martin’s termination from Gonzaga University was his inability to meet performance standards, unprofessional conduct, and insubordinate behavior which had been brought to his attention as early as April 2011 during his performance review.” (CP 110.)

In the termination letter attached to Mr. Standiford’s declaration, Mr. Martin learned that “due to your failure to correct performance issues brought

to your attention in the April 2011 performance review, documented expectations provided in August 2011, combined with numerous on-going coaching sessions with your immediate supervisor, demonstrated insubordinate behavior by not following directions, inability to recognize your behavior, and your most recent actions that were in direct opposition to a stated directive from the Sr. Associate Athletic Director; Gonzaga University and the Athletic department believe it is the best interest to end your employment.” (CP 118.)

Mr. Standiford confirmed that there had been: “some students who had been injured over the years by running into the walls during pickup basketball games,” and that “as a result, and wanting to always ensure as best it can a safe environment for the students, Gonzaga University made the decision on the recommendation of a risk manager to invest around \$18,000 to put pads on the walls of the basketball courts.” (CP 111.)

DECLARATION OF SHELLY RADTKE: Ms. Radtke testified that she was the Associate Director of the RFC, and that she reported to Dr. Hernandez, who reported to Mr. Morgan, the Assistant Athletic Director, who, in turn, reported to Mr. Standiford the Associate Athletic Director, who then reported to Mr. Roth, the Director of Athletics. (CP 162-163.) Ms. Radtke did not testify as to whether she was Mr. Martin’s superior, nor did she testify as to whether she was authorized to grant him permission to leave or to allow another assistant to cover his shift. (CP 163.) Interestingly, Ms.

Radtke confirmed that her superiors followed a Assistant/Associate/Director hierarchy but made no comment about the RFC hierarchy with respect to Mr. Martin. (CP 162-163.) Were the same hierarchy applied to the RFC, Ms. Radtke would be Mr. Martin's direct supervisor.

She stated that on March 1, 2012, Mr. Martin came to her and said, "I need you to grant me permission to leave," and stated, "I can't be here," and "I have to get out of here and you need to document this." Ms. Radtke provided no testimony as to what she said in response to Mr. Martin, nor did she testify as to whether she engaged in any further communications with Mr. Martin after that. (CP 163.) She testified to her opinion that Mr. Martin was not "a good employee," and that he had "difficulty getting along with other employees and students," but she provides very little information. (CP 163.)

DECLARATION OF HEATHER MURRAY: Ms. Murray testified that she is the Associate Director of Human Resources and that she was in charge of employee relations at the time Mr. Martin was fired. (CP 165.) Ms. Murray testified that she met with Dr. Hernandez, Mr. Morgan and the Assistant Vice President, Mr. Dan Berryman, on March 1, 2012, to discuss a meeting later that day with Mr. Martin, during which he was "supposed" to be given a letter of expectation. (CP 166.) She stated: "At that point, Mr. Martin was not going to be placed on administrative leave, but simply have a letter of expectation presented to him." (CP 166.) Ms. Murray admits she was "in charge" of drafting that letter, but she does not testify as to whether

she ever actually wrote it. (CP 166.) No University employee testified that Mr. Martin was ever given a letter, and it is not included in the record.

Ms. Murray testified: “It is my understanding that the situation with Mr. Martin being placed on administrative leave was his reaction during the meeting and also his insubordinate behavior by walking off his shift while he was supposed to be on duty working that night and closing the Rudolph [sic] Fitness Center” and “[t]his is what led to him being placed on administrative leave with the expectation that he was not going to contact anyone associated with Gonzaga University with the exception of Human Resources or his supervisor.” (CP 166-167.) Ms. Murray does not testify that administrative leave was her decision or that it was an action based on her advice, nor does she testify that she was involved in or consulted about the decision prior to when it was made. The record does not disclose who made that decision.

Ms. Murray testified that she drafted the termination letter to be provided to Mr. Martin, and that she was not present at the termination meeting. (CP 167.) She stated that “the reasons for Mr. Martin’s termination was [sic] his on-going insubordination, the final incident being when he contacted Julia Bjordahl in violation of the terms and conditions of his administrative leave and going outside standard protocol, as well as ongoing performance issues that were being addressed with him and his supervisor Jose Hernandez starting in April of 2011.” (CP 167.)

Ms. Murray confirmed that HR keeps two separate files on employees: the “employee relations” file and a “personnel” file. (CP 167.)

DECLARATION OF ANDREW MAIN: Mr. Main testified that he was an Assistant Director at the RFC who worked with Mr. Martin. (CP 169.) He also testified to the “chain of command” but limited his statement as relevant only with respect to “any proposals,” which he indicated were to be taken to Dr. Hernandez, then to Mr. Morgan, then to Mr. Standiford. (CP 169-170.)

Mr. Main testified that he was “fed up with Mr. Martin’s performance,” and that “[y]ou could not rely upon Mr. Martin to be organized,” and that he “liked to do things his own way.” (CP 170.) He indicated that “Mr. Martin had issues with getting along with others in the workplace,” and indicated that he believed Mr. Martin had “issues” with Shelly Radtke and Kerri Conger. (CP 170.) Mr. Main provides no specific examples or other information.

According to Mr. Main’s testimony, Mr. Martin came up to him, clearly upset, and said that he was “not in a good state of mind,” and Mr. Main, who testified that he was very familiar with the chain of command and the policies regarding substituting shifts and who also described himself as “fed up” with Mr. Martin, volunteered without any prompting: “I can close for you.” (CP 170.) Neither Mr. Main nor Mr. Martin testified to engaging in a more substantive conversation about whether they were permitted to cover shifts for each other. Mr. Main also testified that after Mr. Martin’s termination, he received a text message from Mr. Martin that said, “You can back me up that

I got permission from Shelly to go home.” Mr. Main testified that “Shelly Radtke was not Mr. Martin’s supervisor and could not grant him permission to leave work,” but he provides no additional information to confirm his personal knowledge of that information, nor does he indicate what the proper procedure was, and/or whether he had reason to believe Mr. Martin was aware that Mr. Radtke was not his supervisor. (CP 170.)

DECLARATION OF JULIA BJORDAHL: Ms. Bjordahl testified that she is the Executive Assistant to the President of Gonzaga University, Dr. Thayne McCulloh. (CP 95.) Ms. Bjordahl testified that she had engaged in email communications with Mr. Martin that she attached as exhibits to her declaration. (CP 95.) Ms. Bjordahl also included another attachment, which was another email from Mr. Martin addressed to President McCulloh and Mr. Roth. (CP 95.) Although she testifies that it is a “true and correct copy” of the email, she has removed the header information indicating the date, subject line, the recipient addresses, and the sender’s address, so this statement appears to be untrue. (CP 95, 102.) The other emails submitted by Ms. Bjordahl provide this information. (CP 102.)

DECLARATION OF MICHAEL B. LOVE: Mr. Love, the attorney for the University, provided a declaration with attachments containing excerpts from Mr. Martin’s deposition. (CP 173.)

BRIEF IN OPPOSITION TO SUMMARY JUDGMENT: In his response brief opposing summary judgment, Mr. Martin argued that he had been fired

by Mr. Standiford and Mr. Morgan in an effort to cover up their negligence in refusing to fix the unsafe condition in the RFC basketball courts. (CP 20-22.) He argued that there is a clear public policy in favor of minimizing serious injuries to college students, and that he believed that WISHA required protective padding because the RFC basketball court was used by staff and faculty as well as students. (CP 25.) He noted that there was no policy at the University that prevented him from bypassing his supervisors in his “chain of command” in order to voice concerns about student safety. (CP 18.)

DECLARATION OF DAVID MARTIN: Mr. Martin testified that students were routinely injured on the basketball courts, and that for several years, Mr. Martin requested that the University provide protective padding on the walls in an effort to minimize injuries. (CP 31-32.)

Prior to raising the safety issues related to the protective padding in the basketball courts, Mr. Martin testified that he received good performance reviews and a raise for good work performance. (CP 32.) Mr. Martin testified that he had never been advised by the University that he had “performance” issues while he was employed there. (CP 35.) He noted that despite his many requests to examine his complete personnel file, the University had yet to provide him with any negative performance evaluations that it claims to have in its possession. (CP 35.)

DECLARATION OF AARON OWADA: Mr. Owada, Mr. Martin's attorney, provided a declaration with attached excerpts from the depositions of Mr. Standiford, Dr. Hernandez, Mr. Morgan, and Mr. Roth. (CP 47.)

Deposition of Chris Standiford Mr. Standiford acknowledged that the RFC served students, faculty, staff, and other members of the community as well, and that he was aware of quite a few injuries that had taken place in the basketball courts. (CP 50-57.) He testified that he viewed the issue of whether to put up pads as a subjective question saying:

There's nothing to say that putting a pad up is going to stop an injury. How thick should the pad be? How high should it be? Where should it go? It's a very complex question. It's not as simple as put a pad there and there's no injury, and if there is a pad there, there is.

(CP 57.)

Mr. Standiford confirmed that the other basketball courts at the University had pads and that pads were installed in the RFC *after* Mr. Martin was terminated in March of 2012. (CP 58.)

Deposition of Jose Hernandez Dr. Hernandez testified that an assessment related to the safety of the bare walls in the basketball courts was conducted in 2004 and in 2007. (CP 66-69.) Dr. Hernandez testified that he had recommended the installation of pads 2007. (CP 69.) He confirmed that he spoke with Mr. Martin about installing pads and that after he had that conversation, pads were not installed and no assessment or study was undertaken as a result. (CP 71.) He confirmed that even though he believed

that the pads should be installed and even though Mr. Martin kept bringing the pads up to him, nothing happened with respect to the pads for several years. (CP 74.) Dr. Hernandez testified as to Mr. Martin's personality and interest in safety as follows:

Q. You understood that Mr. Martin was passionate about putting pads in for the basketball courts? Would you describe his feelings for the pads as being passionate?

A. That's the way I would describe him: passionate.

(CP 75-76.)

Dr. Hernandez also made the following statements about Mr. Martin and the school newspaper:

Q. Did you ever share with Mr. Standiford that you believed that Mr. Martin was leaking information about the pads with a reporter with The Bulletin, the student publication?

A. I don't believe saying that.

Q. Did you ever believe that Mr. Martin was responsible for sharing information that led to the articles shown in Exhibit 1?

A. I don't... I'm not in a position to just say that he did.

Q. I'm not asking you whether you're in the position. Did you personally believe that Mr. Martin was sharing information with a reporter from The Bulletin?

A. Not necessarily.

Q. What do you mean "not necessarily"?

A. That I don't believe that.

Q. Did you have any thoughts that he might have shared this information with The Bulletin and the reporter?

A. Well, I can tell you this: One of the reporters told me that, in a group, he overheard Mr. Martin talking about it.

Q. So did that cause you to believe that maybe Mr. Martin was the person who was sharing information with the reporter?

A. Not necessarily.

Q. Did you ever share this information with Mr. Standiford or talk to him about Mr. Martin being the person giving information to the reporter?

A. Not exactly. I mean, why would I say something that I personally didn't know?

(CP 76-77.)

Deposition of Joel Morgan Mr. Morgan testified that he had no recollection of a safety assessment in 2007. (CP 79-80.)

Deposition of Michael Roth Mr. Roth testified that he could not think of any reason why the University would not have adopted the recommendation of an outside consultant had recommended that safety pads or the padding be placed in the RFC in 2007. (CP 83.)

REPLY MEMORANDUM: In its reply memorandum, the University argued that Mr. Martin failed to present admissible evidence that the University's reason for terminating his employment was false and a pretext for unlawful reasons and that the alleged unlawful reasons were a substantial factor in the University's decision to terminate Mr. Martin. (CP 223.) The

University also argued that Mr. Martin failed to establish a clear public policy and causation. (CP 223.)

ORDER GRANTING SUMMARY JUDGMENT: The trial court entered an order granting summary judgment dismissal of Mr. Martin's claims against the University. (CP 84.)

NOTICE OF APPEAL: Mr. Martin appealed. (CP 87.)

## II. ARGUMENT

“Summary judgment procedure is not a catchpenny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth,” and “[i]ts purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.” *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960), quoting *Whitaker v. Coleman*, 115 F.2d 305, 307 (1940).

Summary judgment is only affirmed when there are no genuine issues of material fact requiring trial and the moving party is entitled to judgment as a matter of law. *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 311, 358 P.3d 1153 (2015); CR 56(c). Evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences must be drawn in the nonmoving party's favor. *Id.* “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the

facts are jury functions, not those of a judge.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51, 120 S.Ct. 2097, 147 L.Ed.2d 105, 68 U.S.L.W. 4480 (2000), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed. 202, 54 U.S.L.W. 4755 (1986).

**1. The trial court erred when it dismissed Mr. Martin’s wrongful discharge claim.**

As a general rule, an employer may terminate an at-will employer “without fear of liability.” *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226, 685 P.2d 1081 (1984). But the Washington Supreme Court recognizes an exception to the common law doctrine of at-will employment via a cause of action in tort for wrongful discharge in violation of public policy; the purpose of this exception is to prevent the at-will doctrine from being “used to shield an employer’s action which otherwise frustrates a clear manifestation of public policy.” *Thompson*, 102 Wn.2d at 231-232. This exception is narrow, meaning that the employee has the burden of proving the dismissal violated a clear mandate of public policy, and it also means “a court may not *sua sponte* manufacture public policy but rather must rely on that public policy previously manifested in the constitution, a statute, or a prior court decision.” *Rickman*, 184 Wn.2d 300, 309-310, quoting *Roberts v. Dudley*, 140 Wn.2d 58, 65, 993 P.2d 901 (2000).

In evaluating a claim for wrongful discharge, the Washington Supreme Court adopted a burden-shifting analysis in which the analytical focus was

“whether the employee could establish that the discharge clearly contravened public policy,” which was designed to track the same burden-shifting analytical framework used for other employment discrimination claims:

The employee has the burden of proving his dismissal violates a clear mandate of public policy. Thus, to state a cause of action, the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened. ... [O]nce the employee has demonstrated that his discharge may have been motivated by reasons that contravene a clear mandate of public policy, the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee.

*Rose v. Anderson Hay & Grain, Co.*, 184 Wn.2d 268, 275, 358 P.3d 1139 (2015). “Particular to this tort, however, we insisted that the public policy at issue be judicially or legislatively recognized, emphasizing that the tort is a narrow exception to the at-will doctrine and must be limited only to instances involving very clear violations of public policy.” *Rose*, 184 Wn.2d at 276.

After *Thompson*, the tort remained narrow and was recognized under only four situations: “(1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers’ compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.” *Rose*, 184 Wn.2d at 276, citing *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996). In the years following the *Thompson* case, the Washington Supreme Court

looked to Professor Perritt's treatise, 'Workplace Torts: Rights and Liabilities,' for "a more refined" analysis, which it embraced in *Gardner*. *Rickman*, 184 Wn.2d at 310. The Perritt Test has four parts: "(1) 'the existence of a clear public policy (the *clarity* element),' (2) 'that discouraging the conduct in which the [plaintiff] engaged would jeopardize the public policy (the *jeopardy* element),' (3) 'that the public-policy-linked conduct caused the dismissal (the *causation* element),' and (4) that '[t]he defendant [has not] offer[ed] an overriding justification for the dismissal [of the plaintiff] (the *absence of justification* element).'" *Rickman*, 184 Wn.2d at 310, quoting *Gardner*, at 128 Wn.2d at 941.

Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors, including "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 properly may be considered on a motion for judgment as a matter of law." *Reeves*, 530 U.S. at 148-49.

***a. Ensuring safety is a clearly established matter of public policy.***

"The question of what constitutes a clear mandate of public policy is one of law." *Dicomes v. State*, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989), citing H. Perritt, *Employee Dismissal Law and Practice* § 7.11 (2d ed. 1987).

"In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively.... Although there is

no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.” *Dicomes*, 113 Wn.2d at 617, quoting *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 130, 52 Ill.Dec. 13, 421 N.E.2d 876 (1981).

Ensuring the health and safety of Washington citizens a public policy concern; this is confirmed in numerous Washington statutes<sup>2</sup> as well as in Washington case law. *Gardner* at 945.

At no point in the underlying case did the University seriously challenge Mr. Martin's claim that the safety of the students, faculty, staff, and other patrons of the RFC is a matter of public policy; in fact, the primary witnesses presented by the University all confirmed that safety was a high priority, if

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<sup>2</sup> **RCW 49.17.010**; “Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590); **WAC 296-823-100**; This chapter provides requirements to protect employees from exposure to blood or other potentially infectious materials (OPIM) that may contain bloodborne pathogens. See also, e.g., **RCW 49.12.010**; “The welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health”; **RCW 28B.112.005**; “In order to complement federal policy and *ensure the safety of all our students*, the legislature finds it necessary to establish minimum standards for all institutions pertaining to campus sexual violence policies and procedures and encourages institutions of higher education to share with all students and current employees, especially survivors of sexual violence, the protections, resources, and services available to them if they are a victim of sexual assault, domestic violence, dating violence, or stalking” (emphasis added).

not *the highest* priority, and that it should motivate the behavior of University employees: Dr. Hernandez testified that in 2012, he suggested to Mr. Morgan that pads should be installed on the walls because “we should be doing whatever was in the best interests of the students.” (CP 122.) Mr. Standiford testified that “[W]anting to always ensure as best it can a safe environment for the students, Gonzaga University made the decision on the recommendation of a risk manager to invest around \$18,000 to put pads on the walls of the basketball courts.” (CP 111.) Mr. Roth testified that he could not think of any reason why the University would not adopt a recommendation that safety pads be placed in the RFC if an outside consultant recommended it. (CP 83.)

In argument, the University avoided any discussion of safety as a public policy first by simply concluding that Mr. Martin’s actions were not actually taken in the interests of safety concerns (CP 156), and then, on reply, by arguing that Mr. Martin had an obligation to cite to a “federal, state, or local law or regulation that requires the installation of padding as a relates [sic] to a basketball court.” (CP 224.) This is an inaccurate statement of Mr. Martin’s obligations, but more importantly, it does not actually discuss or in any way refute Mr. Martin’s assertion that the health and safety of the RFC patrons is a matter of public policy.

Because the University appears to agree that the health and safety of its students, employees, and lessors is a public policy concern, it does not appear

that the clarity element is meaningfully disputed, and Mr. Martin has met his burden as to this factor as a matter of law.

**b. The University’s termination of Mr. Martin’s employment for going outside the “chain of command” to address safety concerns jeopardizes the public policy interest.**

“[A] plaintiff may prove ‘jeopardy’ either because his or her conduct *directly* related to the public policy *or* because it was necessary for the effective enforcement of that policy.” *Rickman*, 184 Wn.2d at 310, citing *Gardner*, 128 Wn.2d at 945. “[W]here there is a direct relationship between the employee’s conduct and the public policy, the employer’s discharge of the employee for engaging in that conduct inherently implicates the public policy.” *Rose*, 184 Wn.2d at 284. “In the context of concerns regarding public safety where imminent harm is present, we hold the jeopardy prong of the *Gardner* test may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action,” because “[t]his comports with our holding in *Gardner* emphasizing the need for swift action to protect human life.” *Ellis v. City of Seattle*, 142 Wn.2d 450, 461, 13 P.3d 1065 (2000)(expressly referencing “life and limb”). “The relevant inquiry is not limited to whether any particular law or regulation has been violated, although that may be important, but instead emphasizes whether some ‘important public policy interest embodied in the law’ has been furthered by the whistleblowing activity.” *Dicomes*, 113 Wn.2d at 621, quoting *Wagner v. Globe*, 150 Ariz. 82, 89, 722 P.2d 250 (1986).

In *Ellis*, the plaintiff refused to bypass the PA system in an arena without what he considered to be proper authorization for assurance, and he brought his concerns outside of the chain of command. *Ellis*, 142 Wn.2d at 461. “His motive was protection of the public.” *Id.* The plaintiff expressed his concerns about safety and legality to his supervisors, and he was fired for being insubordinate; firing him for raising questions about safety was determined to jeopardize the public policy. *Id.* The reasonableness of the plaintiff’s conduct relates to whether the plaintiff’s conduct furthers public policy goals. *Rickman*, 184 Wn.2d at 313.

Mr. Martin perceived his concerns were going unaddressed because they were not getting above his immediate supervisors. His decision to go outside the “chain of command” was a reasonable way to further the public policy interest in ensuring student safety.

In support of its motion for summary judgment, the University argued that the RFC was in compliance with all relevant regulations for the installation of padding, and that the University’s compliance prevented Mr. Martin from demonstrating that termination of his employment would jeopardize the public policy interest in the University’s compliance with such regulations; but the University misses the point of the public policy argument. The purpose of the test is not to ensure that employers do not violate the law as an end in itself; rather, the purpose of the test is to ensure that employers do not undermine the public policy purpose that any given set of rules is

intended to serve. Safety regulations are intended to prevent injury. Regardless of the University's technical compliance with rules, serious injuries were still occurring with alarming regularity as the result of the unsafe condition in the basketball courts; the University had repeatedly been warned that the basketball court was hazardous, but it had ignored warnings for eight years and injuries continued to occur. The University's action in firing Mr. Martin for pursuing his concerns above his immediate supervisors jeopardizes the public policy interest in ensuring safety.

Further, Mr. Martin testified that at the time, he believed the condition violated several statutory schemes. (CP 32.) The University argues that since it believes it was in compliance with these regulations, Mr. Martin's actions were unreasonable; but a plaintiff need not confirm the validity of his or her concerns before taking action. *Rickman*, 184 Wn.2d at 312.

Terminating or otherwise punishing employees who share concerns about unsafe conditions directly jeopardizes the public policy interest in ensuring safety. Mr. Martin met his burden with respect to the jeopardy element.

**c. Mr. Martin's conduct in drawing attention to the unsafe condition caused his dismissal.**

To establish a prima facie case, an employee need not attempt to prove the employer's sole motivation was retaliation; instead, the employee must produce evidence that the employee's public-policy-linked conduct was a cause of the firing and may do so by circumstantial evidence. *Wilmot*, 118

Wn.2d at 70 (“Ordinarily, the prima facie case must, in the nature of things, be shown by circumstantial evidence, since the employer is not apt to announce retaliation as his motive”), quoting 1 L. Larson, Unjust Dismissal § 6.05 at 6-51 (1988). “This test asks whether the employee’s conduct in furthering the public policy was a ‘substantial’ factor motivating the employer to discharge the employee.” *Id.* Under the substantial factor test, if the public-policy-linked conduct was a significant or substantial factor, the employer could be liable even if the employee’s conduct otherwise did not entirely meet the employer’s standards. *Wilmot*, 118 Wn.2d at 71.

Proximity in time between the public-public-policy-linked conduct and the firing coupled with evidence of satisfactory work performance and supervisory evaluations may be persuasive in establishing causation. *Wilmot*, 118 Wn.2d at 69. “It must also be kept in mind that the employee must prove the wrongful conduct, and must do so without the benefit of the employer’s own knowledge of the reason for the discharge, and generally without the access to proof which the employer has.” *Wilmot*, 118 Wn.2d at 72. “Proof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive.” *Reeves*, 530 U.S. at 147, citing *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 517, 113 S.Ct. 2742, 125 L.Ed. 407, 61 U.S.L.W. 4782 (1993)(“[P]roving the employer’s reason false becomes part of (and often considerably assists) the greater enterprise of proving that the

real reason was intentional discrimination”). There is a “general principle of evidence law that the factfinder is entitled to consider a party’s dishonesty about a material fact as ‘affirmative evidence of guilt.’” *Reeves*, 530 U.S. at 147, quoting *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225, 60 U.S.L.W. 4639 (1992), see also *Wilson v. United States*, 162 U.S. 613, 620-21, 16 S.Ct. 895, 40 L.Ed. 1090 (1896); 2 J. Wigmore, Evidence §278(2), p. 133 (J. Chadbourne rev. 1979).

In general, the issue of causation is a question of fact. *Dicomes*, 113 Wn.2d at 616, (“... the question of whether the discharge was premised on the management study or was in retaliation for exposing budget data would raise issues of fact precluding summary judgment”); *Rose*, 184 Wn.2d at 286 (“Viewing the facts in [the light most favorable to the nonmoving party], we accept [plaintiff’s] allegation that [defendant] terminated [him] for refusing to drive in excess of the federally mandated maximum.”)

The University does not argue that Mr. Martin was fired for a reason entirely independent from the conduct he claims is public-policy-linked; rather the University simply disputes whether his conduct actually was public-policy-linked. The University argues that Mr. Martin’s conduct was simply insubordinate, and to the extent it might be viewed as public-policy-linked, it does not form the basis of a claim because of an overriding justification proved by the University. (CP 225.)

Mr. Martin met his burden as to causation; a genuine issue of material fact requires trial.

**d. The University cannot offer an overriding justification for Mr. Martin's dismissal.**

“Once a plaintiff presents a prima facie case of wrongful discharge in violation of public policy, the burden of proof shifts to the employer to show the termination was justified by an overriding consideration.” *Rickman*, 184 Wn.2d at 314, quoting *Gardner*, 128 Wn.2d at 947-50. “To satisfy the burden of production, the employer must articulate a legitimate nonpretextual, nonretaliatory reason for the discharge.” *Wilmot*, 118 Wn.2d at 29, citing 1 L. Larson, *Unjust Dismissal* § 6.05 (1988). The employer must produce relevant admissible evidence of another motivation. *Id.*

This last element of the Perritt test “inquires whether the employer has an overriding reason for terminating the employee despite the employee’s public-policy-linked conduct”; this element “acknowledges that some public policies, even if clearly mandated, are not strong enough to warrant interfering with employer’s personnel management.” *Gardner*, 128 Wn.2d at 947. The court must balance the interests presented by the parties to determine whether the public policy raised by the plaintiff outweighs the interests of the defendant. *Id.*

The University claims that it fired Mr. Martin for insubordination, poor performance, and interpersonal problems. (CP 110, 118.)

*Insubordination*

The University cites to three actions by Mr. Martin to justify its conclusion of insubordination: (1) emailing Mr. Standiford, (2) leaving early from work, and (3) emailing the President. (CP 221-22.)

Emailing Mr. Standiford: The University argues that Mr. Martin was insubordinate when he submitted his proposal to Mr. Standiford after Mr. Standiford told him to first discuss it with Dr. Hernandez. (CP 221-22.) But Mr. Martin simply responded to an email to clarify that he had already acquired approval from Dr. Hernandez and that he did not understand the University's organizational policy to require him to take the proposal to Mr. Morgan, citing to the *Policies and Procedures* handbook. (CP 114.)

The University has never demonstrated any established policy that required Mr. Martin to follow a particular "chain of command."

Further, Dr. Hernandez's testimony that Mr. Martin had been suspended because Mr. Martin had been provided "specific direction from Chris Standiford to present his aquatics proposal to me first and that he had disregarded a direct order" does not reflect what actually took place. (CP 121.) True and correct copies of the emails were submitted into the record by the University. (CP 109.) Mr. Standiford simply said, "It is more organizationally appropriate for you to provide [Dr. Hernandez] with the proposal for consideration." (CP 114.) He then said, "If you have already done this, and [Dr. Hernandez] supports the proposal, *I would suggest* he

meet with [Mr. Morgan] for further consideration and deliberation.” (CP 114; emphasis added.) None of this language reflects a “direct order,” or even a clear directive. At best, this language amounts to an observation followed by a suggestion.

Further, while the parties differ as to the characterization of what was said between Mr. Martin and Dr. Hernandez, Dr. Hernandez admits that he previously discussed the proposal with Mr. Martin before Mr. Martin submitted it to Mr. Standiford, and that Dr. Hernandez was aware that Mr. Martin intended to submit it to Mr. Standiford. (CP 120.) Therefore, it is not unreasonable or insubordinate for Mr. Martin to respond to Mr. Standiford to inform him that he had already spoken to Dr. Hernandez, as Mr. Standiford anticipated he might have, and to ask a question about the University’s *Policies and Procedures* handbook. Mr. Standiford did not respond to Mr. Martin’s inquiry about the policy; rather, he simply took action to target him for adverse employment consequences.

Leaving Early From Work: Mr. Martin had a meeting with Mr. Morgan and Dr. Hernandez about his proposal, wherein Mr. Morgan demanded that Mr. Martin turn over his proposal to him. (CP 102.) Mr. Martin refused. (CP 102.) Mr. Martin was then suspended for insubordination. (CP 102, 110, 122, 154.) Pursuant to his suspension, he was told he was not permitted to speak to anyone at the University except for Dr. Hernandez and Human Resources. (CP 18, 110, 154, 166, 202.) When he first communicated with

Mr. Martin, Dr. Hernandez could not tell him why he was being suspended. (CP 103, 193-94.) Human Resources was unable to tell him why. (CP 103.)

Mr. Martin later discovered that he had been suspended for “walking off the job,” when he had been scheduled to close the RFC. (CP 103, 166.) But, Mr. Martin did not “walk off the job.” He asked Ms. Radtke for permission to leave and he found another Assistant Director to cover his shift. (CP 103, 179.) No one from the University ever cited to any policy that prevents employees from substituting one Assistant Director for another. Mr. Main’s declaration did not acknowledge anything unusual about switching shifts, and in fact, he testified to having spontaneously volunteered to cover Mr. Martin’s shift, which implies that doing so was permitted. (CP 170.)

Further, Mr. Martin testified that he received permission from Ms. Radtke, his direct supervisor. (CP 103, 179, 214.) Mr. Martin’s testimony reflects the hierarchical structure used elsewhere in the department (Assistant/Associate/Director). The University provides no information as to why the RFC structure would be different than the structure elsewhere in the Athletic Department. Ms. Radtke conspicuously does not testify to her conversation with Mr. Martin nor does she contradict his statement that she was his supervisor. (CP 162-63.) Mr. Martin’s testimony is undisputed.

The University presents no evidence beyond its own conclusory statements to support a contention that that Mr. Martin’s conduct in getting someone to cover his shift was insubordinate.

Emailing the President: When Mr. Martin was put on administrative leave, he was told he was forbidden to come on campus or to speak to anyone associated with the University except for Dr. Hernandez or Human Resources. (CP 18, 33, 154, 194, 222.) The University has never provided any information to demonstrate that it was entitled to impose this restriction on Mr. Martin, nor has it ever indicated who decided to issue such a directive. Mr. Martin, taken aback by the severity of the suspension terms, contacted the President's office about how he had been treated and about his proposal to address the safety concerns, and was told by the President's executive assistant to send an email to her for the President. (CP 196-97.) Mr. Martin sent the email and received a response that indicated that the office of the President did not even recognize the "chain of command," claimed by Mr. Standiford, Mr. Morgan, and Dr. Hernandez. (CP 100.)

Several days later, a student was seriously injured in the basketball courts at the RFC, and Mr. Martin was terminated the next day. (CP 38, 105.)

This timeline strongly suggests that Mr. Martin's conduct was not problematic because of "insubordination" but because it was drawing attention to the dangerous condition in the RFC basketball courts that had been allowed to continue for years through the negligence of Dr. Hernandez, Mr. Morgan, and Mr. Standiford, possibly with the outcome of incurring serious liability for the University.

*Poor Performance and Interpersonal Problems*

The University claims that Mr. Martin was also terminated because he had been performing poorly and because he had trouble getting along with people. (CP 221-22.) The evidence in the record, however, does not support this conclusion. The “performance review” provided by the University is not bad; in fact, it includes very specific complimentary comments and only a few general criticisms that do not actually identify specific behavior. (CP 126-29.) Interestingly, what criticism is included actually confirms Mr. Martin’s good performance when it says that poor performance was surprising and uncharacteristic. (CP 128.) Mr. Martin was given above average ratings. (CP 126-27.) More troublingly, however, no one signed this performance review. (CP 129.) In fact, Mr. Martin did not even remember it. (CP 211.)

Beyond that, the University provided some “notes” from an unknown author that purport to be written to Mr. Martin, but no one from the University testifies that they were ever provided to Mr. Martin. (CP 134-35.)

Finally, the University provides several declarations from coworkers that make general criticisms of Mr. Martin with respect to being a difficult person to get along with but they do not provide specific information. Despite negative comments, Mr. Main appears to be on a friendly basis with Mr. Martin, given his testimony that he offered to cover his shift and that they text each other outside of work. (CP 170.) With respect to Ms. Ratdke, Mr.

Martin testified that the two of them had had some trouble, and that he attributed it to their mismatch in personality; he was “amiable” and she was “a driver.” (CP 182.) Mr. Martin’s explanation corresponds with Dr. Hernandez’s comments that Mr. Martin was “one of the most flexible and collaborative [people] on our staff.” (CP 127.) Mr. Martin also testified that Dr. Hernandez “counseled” all the employees on their interpersonal skills and sent them all to professional seminars to learn personality traits and conflict resolution. (CP 189-190.)

If Mr. Martin’s behavior with respect to his tasks or his interaction with his colleagues were the cause of his termination, one would expect the record to reflect that Ms. Radtke, Dr. Hernandez, and Human Resources were involved in the decision to suspend and/or terminate Mr. Martin. It does not. One might also expect that he would have received a letter of expectation prior to termination, but he did not.

The record does not support the University’s argument that Mr. Martin’s employment was terminated based on insubordination and poor performance. Instead, the record shows that University employees had failed to address an unsafe condition that (1) they knew was unsafe, (2) they knew was causing significant injuries to students, (3) they knew how to fix, and (4) they had a duty to fix in order provide safe facilities for students. Mr. Martin was insistent about taking that information outside “the chain of command” and up the supervisory hierarchy in order to resolve the unsafe condition. In an

effort to cover up their failures, the University employees placed Mr. Martin on administrative leave and told him he was not permitted to speak to anyone at the University except Dr. Hernandez and Human Resources; when Mr. Martin contacted the President about his safety concerns, they fired him in violation of public policy.

The University cannot show that its interest in managing its employees is an overriding justification for silencing employees who raise safety concerns in furtherance of public policy.

Mr. Martin met his burden with respect to the justification factor, and his claim should survive summary judgment.

CONCLUSION: Mr. Martin met his burden under the Perritt Test for a claim of wrongful discharge based on the public policy exception to the at-will employment doctrine, and he should be permitted to bring his case to a jury for a determination of his claims on the merits.

**3. The trial court erred when it dismissed Mr. Martin's claim based on RCW 49.12.**

Pursuant to RCW 49.12.240, "every employer shall, at least annually, upon the request of an employee, permit that employee to inspect any or all of his or her own personnel file(s)." Pursuant to RCW 49.12.250, "[e]ach employer shall make such file(s) available locally within a reasonable period of time after the employee requests the file(s)." An employee is entitled to review all the information in the employee's personnel files that "are

regularly maintained by the employer as part of his business records or are subject to reference for information given to persons outside the company.” RCW 49.12.250(2). An employer is entitled to remove any irrelevant or erroneous information in the files, and if the employee disagrees with the employer’s decision, the employee may place a statement containing a rebuttal or correction in the file. RCW 49.12.250. A former employee shall retain the right of rebuttal or correction for a period not to exceed two years. RCW 49.12.250(3). Mr. Martin has an unconditional right to access his personnel files. *Wood v. Lowe*, 102 Wn.App. 872, 880, 10 P.3d 494 (2000).

Here, the University confirmed that “[t]here are two separate files which are kept on employees: the employee relations file and a personnel file.” (CP 167.) The University only provided Mr. Martin with a copy of his “personnel file.” (CP 211.) A policy of maintaining two separate files on employees but calling one of them an “employee relations” file in order to withhold it undermines the purpose of RCW 49.12.250.

Mr. Martin was entitled to exercise his right of rebuttal or correction for a period of two years. The University’s refusal to provide with all his personnel records prevented him from exercising his statutory rights.

### **III. CONCLUSION**

The trial court erred when it dismissed Mr. Martin’s claims. Mr. Martin respectfully requests that this Court reverse the ruling of the trial court and remand the matter to the Superior Court for trial on the merits.

RESPECTFULLY SUBMITTED this 26th day of DECEMBER, 2016,

  
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