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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
NO. 341038 – III

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

DAVID MARTIN,

Appellant,

v.

GONZAGA UNIVERSITY,

Respondent.

RESPONDENT'S BRIEF

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Table of Contents

I.	Introduction	pg. 1, 2, 3
II.	Statement of the Case	pg. 3,4,5,6,7,8,9,10
III.	Argument	pg. 10, 11
	1. Summary Judgment Standard	pg. 10, 11
	2. Martin's Arguments in his Opening Brief	pg. 11, 12
	3. Tort of Wrongful Discharge Claim	pg. 13, 14
	a. Clarity Element	pg. 15, 16
	b. Causation Element	pg. 16, 17, 18
	c. Overriding Justification Element	pg. 18, 19
	4. Claim under RCW 49.12.250	pg. 19, 20
IV.	Conclusion	pg. 20

Table of Authorities

Court Rules

CR 56(c)pg. 10

CR 56(e) pg. 10,
11

Statutes

RCW 49.12.240pg. 20

RCW 49.12.250pg. 1,
3, 19

RCW 49.12.260pg. 20

Federal Cases

Celotex Corporation v. Catrett, 106 S. Ct. 2548, 2555 (1986)pg. 10,
11

Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980)pg. 11

Washington Cases

Bennett v. Hardy, 113 Wash.2d 912, 924-925 (1990)pg. 16

Dicomes v. State, 113 Wash.2d 612, 618 (1989)pg.
14, 15

Farnam v. CRISTA Ministries, 116 Wash.2d 659, 672 (1991)pg. 16

Gardner v. Loomis Armored, Inc., 128 Wash.2d 931, 941 (1996) ...pg. 14,
15, 18, 19

Grimwood v. University of Puget Sound, Inc., 110 Wash.2d 355, 359-60
(1988)pg. 11

Rickman v. Premera Blue Cross, 184 Wash.2d 300, 313 (2015)pg. 15

Roberts v. ARCO, 88 Wash.2d 887, 894 (1977)pg. 13,
17

Thompson v. St. Regis Paper Co., 102 Wash.2d 209, 222, 232pg. 13,
15

I. INTRODUCTION

Appellant, David Martin ("Martin"), was hired by Respondent, Gonzaga University ("Gonzaga") on January 2, 2008, to work as an Assistant Director of the Rudolf Fitness Center ("Fitness Center"). Martin was an at-will employee.

Martin, along with others, during his employment with Gonzaga raised concerns about the lack of padding on the walls behind the basketball courts of Gonzaga's Fitness Center.

Martin was terminated on March 8, 2012, for legitimate reasons. Martin was terminated for his repeated insubordination and performance issues that had been addressed with him by his supervisor, Dr. Jose Hernandez, as early as April of 2011.

Martin filed a lawsuit against Gonzaga alleging he was wrongfully discharged by Gonzaga in violation of public policy for raising concerns about the lack of padding on the walls.

Martin also alleged that Gonzaga violated RCW 49.12.250 relating to employee personnel files by not providing him a copy of his complete personnel file upon his request after he was terminated.

Gonzaga denied all of Martin's material allegations relating to both claims.

Gonzaga brought a summary judgment motion seeking the dismissal of both claims. The hearing was held on January 22, 2016, before the trial court. The trial court by Order dated January 28, 2016, granted Gonzaga's motion on both claims. The trial court ruled summary judgment was appropriate because there was no genuine issue of material fact warranting a trial of this matter. As a result, Martin's case was dismissed with prejudice. CP 84-86

Martin filed an appeal with the Division III Court of Appeals on February 19, 2016. Martin contends genuine issues of material fact exist on both claims warranting a trial of this matter. CP 87

The trial court's decision to grant summary judgment should be affirmed. First, there is no genuine issue of material fact which would warrant a trial of this matter on the wrongful discharge claim. Martin was not engaged in any conduct for the purpose of furthering a recognized public policy prior to his termination. Martin was attempting to further his own personal interests. Secondly, Martin failed to produce sufficient circumstantial evidence that his actions in furtherance of any alleged public policy were a substantial factor for his termination. Thirdly, Gonzaga did provide an overriding justification for Martin's termination as evidenced by the record on appeal.

Gonzaga is also entitled to summary judgment relating to Martin's claim under RCW 49.12.250. Summary judgment was also appropriate on this claim because the statute was not violated. Martin received a copy of his personnel file.

II. Statement of the Case

Gonzaga is a Jesuit University that was founded in 1887. Over the years Gonzaga added several additions to its plant facilities. In 2003, Gonzaga opened the Fitness Center. The purpose of this new facility was to provide students with additional recreational activities. The Fitness Center is part of the Athletic Department at Gonzaga. CP 180

The Fitness Center has a fieldhouse where students play basketball. Until 2012 there was no padding on the walls directly behind the baskets of the fieldhouse. The lack of padding on the walls behind the baskets was not a compliance issue. CP 111 There was no legal code requirement or NCAA regulation that required padding on the walls. CP 111, 206

There had been a discussion for a long time among many employees (including assistant directors of the Fitness Center) and administrators as to whether padding should be installed on the walls. CP 111, 122, 170, 204-205

Christopher Standiford, Senior Associate Athletic Director at the time, had assigned to Dr. Jose Hernandez in 2004 to work with a risk manager in determining whether or not pads were necessary on the walls behind the basketball courts. A “couple of companies” were hired to “provide an estimate” as to the cost. CP 65

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

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

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

Martin was hired by Gonzaga on January 2, 2008, to work as an assistant director of the Fitness Center. CP 181, 209 Martin was an at-will

employee. Martin was not subject to a written contract for a definite term of employment with Gonzaga. CP 167, 176-177

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

In 2012, the chain of command or organizational structure of the Athletic Department in relation to the Fitness Center from the bottom to the top was as follows: all assistant directors of the Fitness Center reported to the director Dr. Jose Hernandez. CP 109, 119-120 Dr. Hernandez reported directly to the Assistant Athletic Director, Joel Morgan. Mr. Morgan reported to Mr. Standiford. Mr. Standiford reported to the Athletic Director of Gonzaga Mike Roth. CP 109, 162-163, 169-170, 179-180

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

Dr. Hernandez was also responsible for completing Martin's performance evaluation. CP 119-120, 126-129, CP 135, 166, 170, 182, 189, 200,

On February 29, 2012, Martin had an initial email exchange with Mr. Standiford relating to a proposal Martin had to keep a pool on campus for the students. Martin's proposal was part of an academic project he was working on as part of his Master's Program at Gonzaga. Nowhere in the initial email from Martin to Mr. Standiford does he address a lack of padding on the walls of the Fitness Center or raise any other safety issue or concern. CP 114-115

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

It is undisputed the reason for Martin's email was specifically related to the following: "I have a very specific plan, along with other ideas, on how to generate revenue to keep the pool operational and buy time for the future. . . . The ultimate goal being: keep a pool on campus for the students." CP 115, 178, 185

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

Martin objected and refused to follow Mr. Standiford's instructions. Martin's stated reason for his refusal was not based upon a *public policy* concern. Instead it was because Martin did not want someone else receiving credit for his "golden ticket idea. Something I don't want others corrupting or taking credit for." CP 114, 213

After his email communication and in person meeting with Martin on February 29, 2012, Mr. Standiford called Dr. Hernandez and Mr. Morgan. Mr. Standiford instructed both of them to contact Gonzaga's Human Resource Department for advice and consultation on how to proceed based upon Martin's refusal to follow the direction of Mr. Standiford. Mr. Standiford had also contacted Human Resources for advice and consultation. Mike Roth had also been made aware of the situation. CP 110, 166

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

protocols within the University.” CP 216 Ms. Murray drafted the letter of expectation for Martin. CP 165-166

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

At the meeting Martin was advised that he had been insubordinate in not following Mr. Standiford’s instructions relating to presenting his proposal to Dr. Hernandez first. CP 185-187, 189, 213-214, 216 Dr. Hernandez also advised Martin that he never gave Martin consent to take his proposal to Mr. Standiford. CP 75-76, 186, 188, 216 Martin exhibited unprofessional behavior during the meeting by arguing with Dr. Hernandez and Mr. Morgan. CP 121, 216

Martin was responsible for closing the Fitness Center at the end of his shift, but instead walked off the job without the permission of Dr. Hernandez. CP 121, 191-193 Martin’s behavior was reported to Mr. Standiford. CP 110, 163, 166, 170, 216

Ms. Murray was contacted after the meeting. As a result of Martin’s behavior during and after the March 1, 2012, meeting he was placed on

administrative leave by Human Resources and his IT access was removed.
CP 122, 166, 193-194, 216

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

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

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

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

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

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

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

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

III. Argument

1. *Summary Judgment Standard*

Summary judgment is not a “disfavored procedural shortcut” in disposing of claims lacking sufficient evidence to go forward to trial. *Celotex Corporation v. Catrett*, 106 S. Ct. 2548, 2555 (1986)

Pursuant to CR 56(c), “the Judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.”

CR 56(e) is also explicit in its requirements:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise

provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

CR 56(e).

“Ultimate facts or conclusions of fact are insufficient. (Citations Omitted) Likewise, conclusory statements of fact will not suffice. *Grimwood v. University of Puget Sound, Inc.*, 110 Wash.2d 355, 359-60 (1988).

Summary judgment is mandated if a party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 106 S. Ct. at 2552

2. Martin’s Arguments in his Opening Brief

Martin’s supposition that Gonzaga was retaliating against him over an alleged “rumor” he “had leaked information to the newspaper” or that Mr. Morgan and Mr. Standiford were “trying to prevent” Martin “from raising his safety concerns” to their superiors is not enough to survive summary judgment. *See* pg. 6 and 11 of Martin’s Opening Brief, CP 103-104; *see Grimwood*, at 361 (citing and quoting *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980), an age discrimination case in which the employee testified in conclusory form as to his competence. The court said: “[the

employee's] perception of himself . . . is not relevant. It is the perception of the decision maker which is relevant." There is no evidence in the record that Gonzaga ever terminated Martin for speaking with any reporter for the Gonzaga Bulletin.

Martin's allegation that a reporter for the Gonzaga Bulletin was allegedly intimidated by others within the Athletic Department is pure supposition on Martin's behalf and not supported by the record on appeal. Likewise, Martin's claim that his termination was causally related to speaking with the reporter about injuries sustained by students as a result of running into the walls directly behind the basketball court of the Fitness Center is also pure supposition on Martin's behalf and not supported by the record on appeal. Only after Martin was terminated did he raise these issues in an email to Dr. McCulloh and Mr. Roth. CP 102-106

Martin also concedes the record contains evidence of his performance being below the standard which was acceptable to Gonzaga. *See* pg. 17 of Martin's Opening Brief; CP 126-129 ("David's overall performance for this review was below the quality and standard that he is capable of . . . his spring semester was not up to the quality level that the job requires in several areas.")

Martin also criticizes Dr. Hernandez's "word choices" in his review of Martin's performance which is not material for purposes of summary judgment.¹ See CR 56(e)

3. Tort of Wrongful Discharge Claim

It is undisputed Martin was an at-will employee. *Thompson v. St. Regis Paper Company*, 102 Wash.2d 209, 222 (1984). ("Generally, an employment contract, indefinite as to duration, is terminable at will by either the employee or employer.") (Citing *Roberts v. Arco*, 88 Wash.2d 887, 894 (1977)). Martin does not dispute this in his brief to the Court of Appeals.

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

The Court has addressed four limited situations where the public policy tort claim can arise: (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public

¹ Dr. Hernandez's first language is not English. Dr. Hernandez is an immigrant from Venezuela where the official language is Spanish. See Wikipedia, the free encyclopedia, on Venezuela.

duty or obligation, such as serving on 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. *Dicomes v. State*, 113 Wash.2d 612, 618 (1989)

Later, the Court in *Gardner* adopted a 4-part test by a recognized legal scholar in the area of labor and employment law, Henry Perritt, Jr., relating to a public policy tort case. The plaintiff is obligated to prove the following elements: (1) the existence of a clear public policy (the clarity element); (2) that discouraging the conduct in which 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) the defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element). *Gardner v. Loomis Armored, Inc.*, 128 Wash.2d 931, 941 (1996).

Summary judgment for Gonzaga should be affirmed because Martin was not engaged in any situation giving rise to a public policy tort action. The closest situation is *whistleblowing*. However, there is no evidence in the record that Martin was fired for reporting misconduct on the part of

employees or supervisors employed by Gonzaga. CP 110, 118-120, 167, 198, 201-203

Additionally, Martin failed at the trial court level to present sufficient evidence on elements one and three of his claim for *wrongful discharge*. CP 110, 118-120, 167, 198, 201-203

a. Clarity Element

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

Martin alleges he was wrongfully terminated. The trial court’s decision dismissing this claim must be affirmed. There is no evidence in the record that Martin acted in furtherance of public policy. *Id.* at 222; *Rickman v. Premera Blue Cross*, 184 Wash.2d 300, 313 (2015)

Martin was obligated to present sufficient evidence to survive summary judgment that his “conduct furthers public policy goals.” See *Gardner v. Loomis Armored, Inc.*, 128 Wash.2d 931, 945 (1996) (finding employees must show “they engaged in particular conduct,” which “directly relates to the public policy”); *Thompson*, 102 Wash.2d at 232 (finding the employee must demonstrate the dismissal violates a clear mandate of public policy). Martin must show that he sought to further the public good, and

not merely private or proprietary interests.” *Dicomes v. State*, 113 Wash.2d at 620; compare *Bennett v. Hardy*, 113 Wash.2d 912, 924-25 (1990) (allowing a claim when the employee hired an attorney to protect himself from discrimination, an act for which she was later fired), with *Farnam v. CRISTA Ministries*, 116 Wash.2d 659, 672 (1991) (finding the employee did not seek to further the public good because she knew the employer’s conduct did not violate the law).

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

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

b. Causation Element

Martin was also obligated to produce sufficient evidence at time of summary judgment that the actions he took in furthering an alleged public policy was the cause of his firing. The legal test is whether Martin’s alleged

furtherance of a public policy was a “substantial factor” for his termination. *Rickman*, at 314

Martin alleges a substantial factor for his termination was his actions in raising safety issues pertaining to the lack of padding on the walls of the Fitness Center. This assertion is not supported by any evidence in the record. What the record does reflect is the lack of padding was an issue that was discussed dating back to 2004. CP 163 This was an issue being discussed within the Athletic Department on an on-going basis over several years by employees, including Martin. CP 163

The record substantiates Martin’s termination of his at-will employment for legitimate reasons. Martin had been counseled in the past by Dr. Hernandez relating to his inability to get along with others. CP 111, 119-120, 134-135, 190, 199, 206

Later, Martin engaged in insubordination on February 29, 2012, by refusing to follow the directive of Mr. Standiford to present his proposal to keep a pool on campus for the students to Dr. Hernandez first. CP 109, 114, 183-184, 213

Martin then engaged in additional acts of insubordination both during and after the March 1, 2012 meeting with Dr. Hernandez and Mr.

Morgan which caused Martin to be placed on administrative leave. CP 121, 191-193, 216

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

c. Overriding Justification Element

Martin claims in his opening brief Gonzaga failed to provide an *overriding justification* for his dismissal. Martin is conflating two different elements into one: the *causation* and *justification* element. *Gardner*, 128 Wash.2d at 941. As the Court in *Gardner* explained:

The last element inquires whether the employer has an overriding reason for terminating the employee despite the employee's public policy linked conduct.

Gardner, at 947

If Martin cannot provide sufficient evidence supporting the elements of *clarity* and *causation* then an analysis of the *justification* element is not necessary. *Id.* at 947

The Court in *Gardner* also noted the *justification* element “acknowledges that some public policies, even if clearly mandated, are not strong enough to warrant interfering with employers’ personnel management.” *Id.*

In this case, Martin’s conduct in presenting his pool proposal for the alleged purpose, in part, of wanting to generate revenue to pay for the installation of pads on the walls behind the baskets of the Fitness Center, was “not strong enough” to interfere with Gonzaga’s right to have employees follow the directions of their supervisors, especially when the employee had already been subjected to counseling from his supervisor for issues with his job performance. *Id.*; CP 111, 119-120, 134-135, 190, 199, 206

4. Claim under RCW 49.12.250

Summary judgment should also be affirmed on Martin’s alleged claim of a statutory violation under RCW 49.12.250.

Martin claims that Gonzaga failed to provide him with a complete copy of his personnel file upon request after he was terminated from employment and the failure to do so violates RCW 49.12.250.

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

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

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

IV. Conclusion

Martin failed at summary judgment to provide sufficient evidence on the elements of *clarity* and *causation* relating to his public policy tort claim.

Gonzaga, conversely, provided sufficient evidence on the *justification* element to support the decision to terminate for cause Martin's at-will employment.

Gonzaga did not violate RCW 49.12.250, but in fact complied as acknowledged by Martin.

Gonzaga respectfully requests the Court of Appeals affirm the trial court's decision to grant summary judgment because there is no genuine issue of material fact warranting a trial of this matter.


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