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NO. 37051-8

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

ZAIRE WEBB,

Appellant,

v.

WASHINGTON STATE UNIVERSITY, MICHAEL C. LEACH,
ANDREW LEHR, KAREN FISCHER, and KELLY MYOTT-BAKER,

Respondents/Cross-Appellants.

RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Respondents/Cross-Appellants appealed the trial court's ruling on due process and qualified immunity. The trial court's holding erred in two fundamental ways. First, the court used dicta in *Conard v. Univ. of Wash.*, 62 Wn. App. 664, 814 P.2d 1242 (1991) *aff'd in part, rev'd in part*, 119 Wn.2d 519, 834 P.2d 17 (1992), to apply a rigid elemental test for due process, where failing to satisfy one element means due process was not met. That is not how due process works, it is a flexible concept based on the particular situation and the interest at stake. In this case, the Respondents/Cross-Appellants provided Appellant Zaire Webb with due process based on the interest at stake – an athletic scholarship.

Second, the trial court's qualified immunity analysis disregarded clearly established law of which a reasonable official would have known. The uniform consensus of authority in the State of Washington and around the country is that college athletes generally do not have a due process property interest in their athletic scholarships. Clearly established law for purposes of qualified immunity is a highly particularized analysis and the court erred in denying qualified immunity for Respondents/Cross-Appellants Andrew Lehr, Karen Fischer, and Kelly Myott-Baker.

II. ARGUMENT

A. Respondents Provided Webb Due Process in Compliance with *Conard* and Based on the Facts and Interests of this Case.

The United States Supreme Court has repeatedly admonished, “due process is flexible . . . and it calls for such procedural protections as the particular situation demands.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 852, 200 L. Ed. 2d 122 (2018) (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 122 (1972)). The flexibility of due process “is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.” *Morrisey*, 408 U.S. at 481. The very nature of due process negates exactly what the trial court ordered in this case – inflexible procedures mechanically applied. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

With the due process standards in mind, it becomes apparent that Fischer, Myott-Baker, and Lehr provided due process in compliance with *Conard*, and based on the interest at issue in this case – the revocation of an athletic scholarship. The procedures outlined by the appellate court in *Conard* were based on the facts and circumstances of that case – two university football players were not provided any written information in advance of a hearing held by a non-neutral group of hearing examiners.

Conard, 62 Wn. App. at 673-74. The only written explanation from the athletic department in *Conard* came *after* the hearing. *Id.* That is why the appellate court explained the players were entitled to written information on which the nonrenewal was based in time to prepare a response, the opportunity to present and rebut evidence, and a hearing by an objective decision maker. *Id.* at 671-72.

Here, the University ensured Webb was given all of these opportunities. He was given the athletic department's reason for nonrenewal, and he was provided multiple opportunities to respond to the statement, present evidence in response, or rebut the statement. CP 493-95, 502-03, 505, 507, 509, 511. He chose not to file a written response, nor present any evidence other than his own testimony. CP 165 – 176, 315-16. He was also provided the right to have an attorney present during a hearing in front of neutral decision makers, *and* have the hearing recorded if he desired. CP 166, 495, 502. Webb's failure to take advantage of the rights provided should prevent him from now arguing he was deprived due process. *See Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000) ("A state cannot be held to have violated due process requirements when it has made a procedural protection available and the plaintiff has simply refused to avail himself of them...If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the courts

as a means to get back what he wants.”); *see also* *McDaniels v. Flick*, 59 F.3d 446, 460 (3d Cir. 1995); *Dwyer v. Regan*, 777 F.2d 825, 834-35 (2d Cir. 1985), *modified on other grounds*, 793 F.2d 457 (2d Cir. 1986); *Riggins v. Bd. of Regents*, 790 F.2d 707, 711-12 (8th Cir. 1986).

The next error made by the trial court and Webb in its due process analysis is failing to balance these procedures against the nature of the interest at stake pursuant to *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The first *Mathew's* factor is the significance of the interest at stake. *Mathews*, 424 U.S. at 335.

Case law around the country, including the Washington Supreme Court case of *Conard v. Univ. of Wash.*, 119 Wn.2d 519, 834 P.2d 17 (1992), *cert. denied*, 510 U.S. 827, 114 S. Ct. 91 (1993), leads to the conclusion that any protected interest in an athletic scholarship is minimal. Although *Conard* deals with the non-renewal of a year-to-year athletic scholarship, the reasoning of the court is informative here. *See also* *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1221-22 (D. Or. 2016) (finding no clearly established property right in existing or future athletic scholarship); *Holden v. Perkins*, 398 F. Supp. 3d 16, 23 (E.D. LA. 2019) (no due process property right in renewal of year-to-year athletic scholarship); *Colo. Seminary (Univ. of Denver) v. NCAA*, 417 F. Supp. 885, 896 (D. Colo. 1976) (no constitutional right to participate in intercollegiate

athletics). Factors including the well-established rule that athletes have no constitutional right to participation in athletics, as well as the contingent nature of scholarship agreements, show the interest is tenuous and speculative at best. *Conard*, 119 Wn.2d at 531-37; *Colo. Seminary*, 417 F. Supp. at 895-96. The Agreement in this case is equally speculative as the award amount could be reduced or cancelled for a number of reasons. CP 321. For example, the award is reduced or canceled if Webb voluntarily withdrew from the football program, if he became ineligible, engages in fraud, or if he violated team or University rules like he did in this case. *Id.* So even though Webb may have had an interest in the Agreement, the fact it is contingent and based solely on intercollegiate athletics does not justify a hearing with every protection possible.

Due process guarantees only provide an opportunity to be heard based on the interest at stake, they do not entitle Webb to a successful outcome or a hearing of his own design. *Austin v. Univ. of Or.*, 925 F.3d 1133, 1139 (9th Cir. 2019); *RBIII, L.P. v. City of San Antonio*, 713 F.3d 840, 845 (5th Cir. 2013). Webb asserts, without citation to authority or further explanation, that “[his] interest in his scholarship contract is significant.” Appellant’s Reply Br. p. 6. Although Respondents/Cross-Appellants concede Webb had a property interest in the

Agreement, they by no means concede the interest was significant enough to require procedure akin to school conduct expulsion cases.

Webb argues that counsel's discussion of *Conard* during oral argument is inconsistent with briefing on appeal, however, Respondents have always maintained they complied with *Conard*. RP at 86, ln. 6-7. It is the trial court's interpretation of *Conard*, 62 Wn. App. 664 that is problematic. The trial court explained "[s]o I'm going to rule that due process – the due process procedures as *required* in *Conard* were not complied with. Maybe they were – the NCAA rules were..." RP at 95, ln. 24-96, ln. 1. Emphasis added. In other words, the trial court took the procedures in *Conard* and applied them to this case in a rigid test-like fashion, which is improper. Due process is flexible, and Respondents have continued to maintain "[e]ven if there was a deviation from any kind of procedure and process, that doesn't mean there's an automatic due process violation." RP at 86, ln. 3-5.

Webb's persistent analogy to the procedure in school conduct cases exemplifies the critical flaw in skipping the first *Mathew's* factor. Appellant's Reply Br. pp. 8-10. If the different interests are not considered for a due process analysis, then the result would be a universal set of procedures required for every protected interest. In other words, every hearing would follow a mechanical set of standards without flexibility.

That is not due process. The United States Supreme Court summarized the issue as follows:

To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; *it is a recognition that not all situations calling for procedural safeguard call for the same kind of procedure.*

Morrisey, 408 U.S. at 481 (emphasis added). The means that different interests justify different procedure, so comparing school conduct cases to athletic scholarships is like comparing apples to oranges. In *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), a case cited by *Conard*, 62 Wn. App. at 671-72, the United States Supreme Court recognized that cases involving long term suspension or expulsion from public school require more stringent due process protections. *Goss*, 419 U.S. at 584. That is because a public education is seen as a fundamental constitutional right, *Goss*, 419 U.S. at 574, while participation in college athletics is not. *Colo. Seminary*, 417 F. Supp. at 895-96.

The cases cited and discussed by Webb – *Heredia v. WSU*, Whitman County Case No. 16-2-00085-0 and *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) – specifically deal with *school expulsion*, a recognized significant interest. Appellant’s Reply Br. pp. 8-10, 17-19. Here, Webb was not facing expulsion, or even suspension from pursuing his academic opportunities.

CP 517. He was told the University would assist him in achieving academic goals and help Webb work through his financial options in pursuing those goals. *Id.* Like nearly every other college student around the country, Webb was free to pursue academics with financial aid assistance. Webb presents no evidence showing otherwise. Considering Webb’s hearing did not involve school expulsion or suspension, but instead involved athletic financial aid, it is clear Fischer, Myott-Baker, and Lehr provided due process. The trial court erred reaching a different conclusion.

B. Qualified Immunity is Appropriate Because No Clearly Established Law Put the Process Due When Revoking an Athletic Financial Aid Agreement Beyond Debate.

Government officials enjoy qualified immunity to the extent their conduct does not violate clearly established statutory or constitutional rights that a reasonable official would have known. *Friends of Moon Creek v. Diamond Lake Improvement Ass’n*, 2 Wn. App. 2d 484, 493, 409 P.3d 1084 (2018). The United States Supreme Court has “repeatedly told courts . . . not to define clearly established law at a high level of generality” for qualified immunity purposes. *Kiesla v. Hughes*, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449(2018). Webb’s response does exactly that; he defines clearly established due process precedent in the most general terms possible: notice and an opportunity for a meaningful hearing. Appellant’s

Reply Br. 13-14. This high level of generality should be rejected by this Court because it is exactly what the Supreme Court cautioned against.

To overcome a claim of qualified immunity, the right alleged to have been violated by an official's conduct must have been clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

A right is clearly established only where existing precedent has placed the statutory or constitutional question raised by an alleged violation "beyond debate." *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). To determine that a clearly established right exists, the court "must be able to point to controlling authority – or a robust consensus of persuasive authority – that defines the contours of the right in question with a high degree of particularity." *Feis v. King Cty. Sherriff's Dept*, 165 Wn. App. 525, 543, 267 P.3d 1022 (2011) (quoting *Morgan v. Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011)). An official cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he or she was violating it. *Plumhoff v. Rickard*, 572 U.S. 765, 778-79, 134 S. Ct. 2012, 188 L. Ed.2d 1056 (2014). To be clearly established, a legal principle must have a sufficiently clear foundation in then existing precedent.

Dist. of Columbia v. Wesby, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018).

As the *Feis* court summarized,

Thus, to defeat a claim of immunity, the right at issue must be clearly established, not only among legal practitioners, but among all properly-trained and informed government officials as well: ‘The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant’s position should know about the constitutionality of the conduct.’

Feis, 165 Wn. App. at 544 (quoting *McCullough v. Wyandanch Union Free Sch. Dist.*, 185 F.3d 272, 278 (2d Cir.1999)). “In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.” *Kiesla*, 138 S. Ct. at 1152.

Therefore, for purposes of any qualified immunity analysis, it is important to define the right at issue with a high degree of particularity, but it is especially important when talking about due process because due process is fact specific. *See Jennings*, 138 S. Ct. at 852 (“Due Process is flexible, we have stressed repeatedly, and calls for such procedural protections as a particular situation demands.”); *Friends of Moon Creek*, 2 Wn. App. 2d at 493 (“Courts are required to determine the right at issue, and whether it is clearly established or not, on the basis of the specific context of the case.”) As the Supreme Court explained in *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987):

[T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause...violated a clearly established right....But if the test of “clearly established law” were to be applied at this level of generality, it would bear no relationship to the “objective legal reasonableness” that is the touchstone of [qualified immunity].

Because due process is fact specific, “the law regarding procedural due process claims can rarely be considered “clearly established” at least in the absence of closely corresponding factual and legal precedent.” *Segaline v. Dep’t of Labor & Indus.*, 199 Wn. App. 748, 767, 400 P.3d 1281 (2017) (quoting *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998)). Webb’s attempt to generalize the due process right runs contrary to existing precedent, and misconstrues fundamental concepts of qualified immunity and due process.

The right must be particularized, and in this case that means the right at issue involves procedural due process for the revocation of a college athletic scholarship. Other than *Conard*, addressed below, Webb does not cite any cases dealing with this particular right, but instead relies on cases with a high level of generality. Appellant’s Reply Br. pp. 13-14. For example, he cites *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) for the basic constitutional right to be heard under the due process clause. The case did not involve college sports or athletic scholarships. *Id.* He then cites

Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965) and *Vanelli v. Reynolds Sch. Dist.*, 667 F.2d 773, 779-80 (9th Cir. 1982) to argue a clearly established right under the due process clause for a “meaningful hearing.” Appellant’s Reply Br. pp. 13-14. Neither case has anything to do with college athletics or scholarship agreements. *Armstrong* deals with notice to a biological parent about an adoption, while *Vanelli* deals with a teacher’s mid-year dismissal “for cause” pursuant to a specific Oregon statutory provision. *Armstrong*, 380 U.S. at 546-48; *Vanelli*, 667 F.2d at 777-78. Because all the cited cases deal with unrelated, general due process principles, and not particularized rights, they are insufficient to find clearly established law for purposes of qualified immunity in this case. *See Segaline*, 199 Wn. App. at 767.

There is no clearly established law involving the particular right at issue in this case – due process and the revocation of athletic scholarships – that recognizes that college athletes have a due process interest in athletic scholarships or participation in college sports. *Austin*, 205 F. Supp. 3d at 1221-22 (No Supreme Court, Ninth Circuit, or Oregon District Court case establishes due process rights for the revocation existing or future athletic financial aid.); *Holden*, 398 F. Supp. 3d at 23 (plaintiff failed to show, and the court could not find, any binding precedent establishing a due process right to renewal of an athletic scholarship or participation on the women’s

volleyball team.); *Colo. Seminary (Univ. of Denver)*, 417 F. Supp. at 896 (no constitutionally protected property or liberty interest in participation in intercollegiate athletics.)

Washington law is in accord, although it gets there in a more circuitous route. Both parties continue to agree that Washington has one case that discusses due process and the revocation of athletic scholarships – *Conard v. Univ. of Wash.*, 119 Wn.2d 519 (1992), *certiorari denied*, 114 S. Ct. 91 (1993). The case worked its way through the appellate courts, before the Washington Supreme Court ultimately held that two University of Washington football players did not have a due process protected property interest in the renewal of their athletic scholarships. *Conard*, 119 Wn.2d at 537. In doing so, the “clearly established law” in Washington fell in line with the rest of the country, with the existing precedent recognizing no due process interest for athletic financial aid.

The confusion in Washington comes from what remains of the appellate court decision in *Conard* once the Supreme Court overruled. *See Conard*, 119 Wn.2d at 537-38. The appellate court outlined aspirational procedures for due process, but all of those procedures were dependent on the appellate court’s holding that a due process interest existed, which was a holding explicitly overturned by the Supreme Court. *Id.* The Supreme Court opinion explained, “The Court of Appeal’s decision holding plaintiffs

had a protected property interest in the renewal of their scholarships and remanding [one Plaintiff's] case for a rehearing is reversed. The Court of Appeal's decision is affirmed in all other respects." *Conard*, 119 Wn.2d at 538. What that means is undefined, unclear, and certainly up for debate. A strong argument could be made that what the Supreme Court did was reverse the due process issue, including any discussion about procedure, but affirmed the separate contract issues. *Id.* Whether it remains good law or not, the Supreme Court's opinion rendered any discussion about due process procedure as dictum because the student athletes did not in fact have due process rights. *Id.* If the issue is unclear for lawyers and judges alike, then it certainly does not constitute "clearly established law" that is "beyond debate" of which a reasonable official would have known. This is especially true when Washington precedent, and the *uniform* consensus of persuasive authority, stands for the position that due process is generally not required for the revocation of athletic scholarships – that is what Fischer, Myott-Baker, and Lehr would have known going into Webb's financial aid hearing.

1. Qualified Immunity does not depend on representation by the Attorney General's Office.

Webb next implies that somehow Washington State University and its employees are not entitled to qualified immunity because they "are

represented by the Washington State Attorney General’s Office, which is made up of 27 different legal divisions and more than 500 individuals [which means they] have immense legal resources at their disposal” so they should not be able to deprive individuals of their constitutional rights. Appellant’s Responsive Br., pp. 16-17.

There are several problems with this argument. First, Washington State University is not a “person” subject to 42 U.S.C. § 1983 liability, so a discussion about the University is immaterial to Webb’s due process claim. *Will v. Mich. Dep’ts of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989); *Wash. State Republican Party v. Pub. Disclosure Comm’n*, 141 Wn.2d 245, 285-86, 4 P.3d 808 (2000). Second, the standard for qualified immunity is “objective reasonableness” based on what a reasonable official would have known at the time of any alleged violation, and it has nothing to do with what a lawyer knew or might have known after an alleged violation occurred. *Gallegos v. Freeman*, 172 Wn. App. 616, 637, 291 P.3d 265 (2013) (citing *Hensley v. Gassman*, 693 F.3d 681, 687 (6th Cir. 2012)). *See also Feis*, 165 Wn. App. at 544 (the question is not what a lawyer would learn from researching case law, but what a reasonable person in defendant’s shoes would know about the issues constitutionality.) Finally, civil rights liability and qualified immunity attach to government employees. *See Will*, 491 U.S. 58. Government employees working in the

course and scope of their employment are uniformly represented by an Attorney General's Office or the United State Attorney's Office. *See* RCW 43.10.030(3). If qualified immunity depended on the number of attorneys in a given government practice, the qualified immunity defense would be non-existent. That is not the standard.

2. Student Conduct Proceedings are not “clearly established law” for purposes of athletic financial aid qualified immunity.

Finally, Webb once again circles back to student conduct proceedings and attempts to hold them up as “clearly established law” that should have alerted Fischer, Myott-Baker, and Lehr. Appellant's Reply Br. pp. 17-18. As discussed in Respondents' Opening Brief pp. 41-42, and above, student conduct proceedings are separate and distinct from athletic financial aid, and they are governed by different administrative code provisions. *See* WAC 504-04-010(1) (applying WAC 504-26 solely to student conduct proceedings). Qualified immunity for due process purposes cannot be overcome by comparing two separate and distinct processes (*Segaline*, 199 Wn. App. at 767), especially considering the student conduct proceedings cited by Webb are *not binding precedent*.

III. CONCLUSION

The trial court erred finding Lehr, Fischer, and Myott-Baker violated Webb's due process rights. Respondents/Cross-Appellants

respectfully request the Court overturn the trial court's conclusions on due process and qualified immunity. Webb received written notice, information regarding the reasons for dismissal, multiple chances to respond and submit evidence, and a hearing by objective decision makers. This was due process in accordance with his interest in the athletic scholarship.

Further, even if the Court finds the procedures insufficient, Fischer, Myott-Baker and Lehr are entitled to qualified immunity. Clearly established law in Washington and around the country does not recognize due process rights in scholarship agreements and the trial court erred by in finding Lehr, Fisher, and Myott-Baker were not entitled to qualified immunity. Respondents respectfully request the trial court is overturned with respect to due process and qualified immunity, and affirmed in all other respects.

RESPECTFULLY SUBMITTED this 28th day of April, 2020.

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PROOF OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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

DATED this 28th day of April, 2020, at Spokane, Washington.

s/Derek T. Taylor
DEREK T. TAYLOR

WASHINGTON ATTORNEY GENERAL SPOKANE TORTS

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