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## I. ASSIGNMENTS OF ERROR

- A. Summary judgment dismissal of Kiser's Title IX retaliation claim was error.
- B. Summary judgment dismissal of Kiser's state law retaliation claim (RCW 49.60.210) was error.
- C. Summary judgment dismissal of the wrongful termination (in violation of public policy) claim was error.

### A. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Was Waldow's threat to fire Kiser unless he stopped complaining of Title IX evidence of retaliatory animus, sufficient to establish the pretext element and defeat summary judgment? (Assignments A and B). The standard of review is de novo.
2. Was the trial court required to treat the Waldow threat as an established fact where Clark College failed to submit any controverting evidence? (Assignments A, B and C). The standard of review is de novo.
3. Was the suspicious timing and unprecedented nature of Clark College's monitoring of Kiser, preceding as it did any receipt of complaints about his handling of money, circumstantial evidence of

retaliatory animus toward Kiser? (Assignment A and B). The standard of review is de novo.

4. Were the shortcomings in Clark College's pre-firing investigation circumstantial evidence of retaliatory animus toward Kiser? (Assignments A and B). The standard of review is de novo.

5. Did Clark College's choice to terminate Kiser's coaching and athlete-related duties, while retaining him to teach other students, cast doubt on its claimed reason that employee theft motivated the firing? (Assignments A and B). The standard of review is de novo.

6. Did Clark College's choice to fire Kiser, while overlooking Waldow's simultaneous submission of false travel vouchers, cast doubt on its claimed reason for Kiser's firing? (Assignments A and B). The standard of review is de novo.

7. Was the evidence of the suspiciously-timed, unprecedented monitoring of Kiser, the short-comings in the investigation, the inconsistent choice to retain Kiser for non-athletic duties and the uneven standards of Clark College's discipline sufficient circumstantial evidence to meet Kiser's burden of production on pretext and to defeat summary judgment? (Assignments A, B and C). The standard of review is de novo.

## **II. STATEMENT OF THE CASE**

### **A. INTRODUCTION**

Trev Kiser coached successfully at Clark College for five years, compiling an impressive record of wins, tournament appearances and scholastic accomplishments of students on his teams. He complied with Clark's policies and the instructions of his supervisors as they were explained to him. In 2001-2002, however, he expressed concern repeatedly of inequities in the allocation of resources between his Women's Basketball team and the Men's team. The inequities mounting, Kiser's concerns escalated to explicit complaints to three superiors about Title IX violations. When Kiser did not keep quiet, even in the face of threats to his job, Clark College looked for and found a basis to fire him. This lawsuit followed.

### **B. TREV KISER'S ONLY CAREER GOAL WAS TO COACH**

Trev Kiser was raised by a father who coached basketball, and Kiser aspired early to a career in coaching. He fulfilled a lifelong dream in 1997 when he achieved a head coaching position in Womens' basketball at Clark College. CP 272.

Kiser succeeded as Head Coach. His teams advanced to post-season play 4 years out of 5. They made outstanding academic progress. He was named Coach of the Year for the league. CP 305. Kiser received

only positive feedback from Clark College for his work and had good relations with his supervisors in the first four years. CP 196.

Throughout much of Kiser's employment, he was supervised by Athletic Director Joe Hash. Following Hash's resignation in 2001, Clark College hired Dave Waldow, its Mens' Basketball Coach, to serve as Athletic Director in addition to his coaching duties. CP 196-197.

### **C. KISER OBSERVED GENDER INEQUITIES**

Commencing almost immediately after Waldow took over, Kiser and his assistant coach Missy Hallead observed inequities in Waldow's treatment of the Womens' basketball program, compared to the Mens' program. Kiser questioned Waldow about the issues and took his concerns to Vice President for Student Services Blaine Nisson and Ardyth Allen, Womens' Commissioner of Athletics. CP 384. Included in those complaints were:

1. Inequitable Van Assignments. In Fall 2001, Waldow scheduled the motor pool vans for the various sports teams for travel throughout the academic year. Waldow scheduled only one 11-passenger van for the Womens' basketball team, although the Mens' team had been assigned 2 vans. CP 273-274. The Womens' team was comprised of 13 members, 1 interpreter for a hearing-impaired student and 2 coaches, totaling 16. By comparison, the Mens' team that year traveled with 7 team members and 4

coaches – 11 persons. CP 287-288. When Kiser questioned the inadequate assignment, Waldow told him the Womens' team could either rent another van commercially or Kiser could use his own car to transport the players who could not fit in the single Clark College van. Because time constraints on travel days made renting a commercial van unfeasible, Kiser had no real choice but to turn his personal car into a Clark College vehicle. CP 273-277. He transported players to and from away games throughout the 2001-02 season. CP 199-200.

2. Refusal to Permit Purchase of Budgeted Items. The Womens' Basketball team budget included funds earmarked to purchase sweat outfits for the team. Kiser made the spending request to Waldow, as routinely required for any expenditure. In December 2001, Waldow refused the request, saying that Kiser's budget had been frozen. On December 28, 2001, Kiser observed the Mens' team taking delivery of its brand new sweat outfits, and he asked Waldow about the differing treatment. Waldow became angry. CP 280-282.

3. Disparity in Coaching Resources. At the same time, Kiser also inquired about why the Mens' team had 4 coaches and the Womens' team only 2. CP 281-282.

4. Hotel Rooms. In late February, 2002, the Womens' team qualified to play in the league (NWAACC) tournament on March 7-11.

Waldow told Kiser that the female players would sleep 4 to a hotel room during the tournament, to save the College money. Kiser asked Waldow why the separate budget for playoff expense would not afford equivalent accommodations to the Men's team (sleeping 2 players to a room), as it had in previous years. Kiser complained that no sports team at Clark College had been required to travel in such conditions. Kiser asked for permission to use other unspent money remaining in the Womens' team's budget to afford a larger number of hotel rooms. Waldow refused and gave the false explanation that the womens' team was over budget. Using a calculator, Kiser re-calculated the budget figures and showed Waldow where he had erred. Waldow's response was to become angry and throw the calculator. Kiser had no choice but to take this potential Title IX issue to Blaine Nisson, as did at least one concerned parent. CP 283-286.

5. Waldow's Abusive Language toward Female Players. In December 2001, the Womens' team captain reported to Kiser that Waldow had referred to the Womens' team, within earshot, as "fucking bitches." The team captain eventually took her complaint to Ardyth Allen, the Clark College administrator who had been designated to respond to Title IX issues. CP 277-279.

6. Officiating. On February 2, 2002 Clark College's Womens' team played Highline Community College at home. CP 202, 207. The

officiating was particularly poor, raising concerns about injuries to players. More than one parent of Women's team members voiced concerns about the quality of officials. Kiser and Waldow conferred with the director of the NWAACC league about the poor officiating. He confirmed to them the difference in the quality of the officials between Mens' and Womens' basketball, the officials assigned to the Mens' games being the better officials. CP 301-302. Assistant Coach Hallead made the same observation. CP 237. One concerned parent wrote a letter to Waldow on February 12 specifically asserting Title IX concerns about the poor officiating. CP 202, 208-209. Clark College administration quickly blamed Trev Kiser for the parent's letter. Kiser met with Nisson and Waldow to discuss these issues on February 13. Kiser denied instigating Johnson's letter, but Nisson responded saying Kiser's "fingerprints were all over the letter." CP 295-296. Nisson viewed the Title IX officiating concerns as being Kiser's concerns. CP 385-389.

Minutes after concluding the February 13 meeting about the officiating, Waldow took Kiser aside and threatened his job, saying that if Kiser did not shut up about Title IX complaints, he would be "out of a job" and "would never coach again." CP 293, 296-297.

Kiser continued to advocate for the Womens' program and seek the right to spend their budget, rather than see it frozen. He met with

Waldow on March 1 about these topics and on March 3, he reported his continued Title IX concerns to Nisson, in writing. CP 390-391, 396.

**D. CLARK COLLEGE'S RETALIATORY ACTIONS TOWARD KISER**

In approximately the first week of March 2002, Waldow or Nisson department secretary, Joy Varney, to monitor Kiser's behavior and make notes about her observations. After the last week in February, but no later than March 4, Varney was asked to make notes of interactions involving Kiser and to record her recollections involving him, print out every email regarding Kiser, and put such information in a special file. She has never been asked to do this regarding any other employee before or since. CP 317-318, 320-323.

Three female athletes came into conflict with Kiser the following weekend over their violation of team rules. The NWAACC tournament took place on March 7-11, 2002. As the teams departed, several women team members got out of the Womens' van in which they were seated and into one of the Mens' vans, also traveling to the same tournament. They defied Kiser's instructions to return and the Mens' van departed for Pasco, carrying the three female players along with the males. The three female players subsequently asked Kiser for their per diem (meal) money to reimburse a Mens' coach who had bought their food en route. Kiser

refused them. Although Kiser was willing to reimburse the coach, he wanted first to speak with Waldow, the Mens' coach, about his coaches' role in the girls' blatant violation of team rules requiring them to ride with their own team. CP 298-300.

After returning from that tournament, some time during the week of March 11, one or more of these three female student athletes complained to Waldow that they were denied their meal money by Kiser. Waldow initiated an "investigation" of Kiser, ostensibly on the strength of these player complaints. Players on the Womens' team were asked to come to the athletic department and report to Varney on their experiences with Kiser relating to per diem meal money. CP 331-334.

In the course of making these statements to Varney (all of which were dated March 19 or 20, 2002), one individual mentioned that Kiser filled his personal car using the school gas card. CP 319-320, 335-337.

On March 20, 2002, Kiser was issued instructions forbidding him to communicate with members of the Womens' team unless Waldow or Varney was present. CP 306-307, 312. (Varney has never before or since been asked to serve as a witness in this fashion. CP 328-329). Kiser was told nothing about the nature of the concerns, nor questioned in any way.

Joy Varney was asked to pull documents (relating only to the Womens' Basketball team), for an "audit." CP 315-316. Clark College's internal auditor compiled documentation indicating that on one occasion in 1999, two in 2001 and eight times in 2002, Kiser had apparently put gasoline into his personal car using the school gas card. For some, but not all those occasions, the report concluded, Kiser had also received a mileage reimbursement check. Kiser does not deny the use of the gas card. His explanation of these events is compelling, but was never sought or permitted.

On April 1, Nisson told Kiser for the first time that he was accused of mishandling per diem meal money and of misusing the school gasoline credit card. Nisson simultaneously gave Kiser a letter saying he would no longer be coaching. In this two-minute meeting, Kiser was permitted no opportunity to rebut the charges. CP 308-309. He was relieved of his duties advising athletes and of those portions of his teaching duties involving contact with the athletes on his team. He was retained at Clark to teach his other two classes for the remainder of the school year, although that continued job was conditioned on Kiser staying away from the athletes and their families. Id. Clark College administrators explained to students and staff that Kiser's firing resulted from employee theft. CP 238.

**E. A REASONABLE EMPLOYER WOULD HAVE SOUGHT KISER'S EXPLANATION BUT CLARK COLLEGE SIMPLY WANTED HIM OUT**

Prior to the date Kiser was informed of his termination, he was never questioned about the per diem money issues, or the unusual situation with the use of his personal car. Nor did the investigator inquire of his former supervisor Joe Hash about practices and policies developed during his tenure as AD. CP 231. The investigator never asked assistant coach Missy Hallead about the team's practices with per diem money. Had she been asked, Hallead would have confirmed that Kiser handled the meal money properly and often spent his own money to ensure that each girl received sufficient meals and snacks. CP 235, 238.

**1. Kiser Was Authorized by the Former Athletic Director to Fuel his Vehicle with the Clark College Gas Card**

Kiser was authorized to use the gas card to fill his car when he drove team members to away games in lieu of being issued a second van. This understanding arose in 1999, when former Athletic Director Joe Hash rode in Kiser's car to the NWAACC tournament in Eugene, Oregon. Most of the team rode in the motor pool van driven by the assistant coach. En route, that van ran out of gas and Kiser was forced to back track on I-5 several miles to find a gas station and purchase a gas can and gasoline. He

and Hash returned together to the van, put the small amount of gas into its tank and then caravanned to the next gas station in Albany to fill the tank completely. At the gas station in Albany, AD Hash used the college gas card and filled first the van's tank, then Kiser's car. He and Kiser had discussed during that car trip the fact that the basketball program actually incurred less expense when a private vehicle was used instead of a second motor pool van. Kiser understood from what Hash said and did that he was authorized to utilize the gas card in the same way his boss had done, when he was transporting students. He understood that this was preferable, in terms of budget dollars, to taking a second van. CP 198. For his part, Hash's memory of these events is less clear, but he admits he may have given Kiser this impression that day. CP 229-230.

Before that date in 1999, Kiser had never fueled his own car using the school gas card. CP 303. Following that date, he did so only on certain occasions when he was transporting students. CP 199-200. Until Waldow shorted the Womens' team one van in Fall 2001, Kiser only utilized the gas card on one or two occasions because he rarely had to drive students. In 2001-2002, however, he was regularly forced to do so and he used the gas card on the longer of those trips. Id.

**2. When Transporting Students, Kiser Treated His Vehicle Exactly Like Clark College Treated the Motor Pool Vans**

Kiser was aware of no wrong-doing connected to the seeming duplication resulting from his receipt of mileage reimbursements for these same trips on which his car was fueled. First, Kiser did not personally prepare requests for mileage reimbursement. The Travel Expense Vouchers were prepared by the department secretary, documenting the entire expense of the trip (including per diem money, hotel expense and mileage to be reimbursed for the van and any personal vehicles). Kiser signed them confirming the fact and details of the travel, without specifically noting they would result in reimbursement. CP 292.

But Kiser testified that it would not have occurred to him necessarily to be concerned about the mileage reimbursement because the Womens' basketball budget paid a duplicate expense of both mileage expense and actual gas costs every time it checked out a van. So to the extent it appeared to be duplicative, this was the same way Clark College charged the program for its use of vans, charging both the miles traveled and the gas purchased. CP 289-290.

Assistant coach Missy Hallead confirmed that Kiser's use of the motor pool gas card was never hidden from her or the students. It never occurred to her that Kiser's card use was a problem. Although Hallead

drove the Clark College van regularly for two years, she was provided no training on the use of the gas card, and knew of no written rules or policies governing the issue. CP 236.

Had Clark College asked Kiser any questions before it fired him, the authorization and understanding he received from the prior Athletic Director Hash would have come to light. Presumably this would have impacted Clark College's conclusions about Kiser's conduct and its pronouncement that Kiser was a thief – but Clark College wanted no explanation. Clark College's rush to judgment is further shown by the testimony of Missy Hallead. She received a phone call from a Clark College investigator during the period of Kiser's March 20 suspension. She was asked if she ever saw Kiser use the school gas card for his own vehicle. Hallead answered "yes" and started to offer additional information, by way of explanation and context. The caller cut her off and ended the call quickly, saying that was all she wanted to know. Hallead was never asked about per diem meal money practices but she observed that Kiser handled the per diem money properly and spent extra of his own money to ensure all players were well-fed. CP 237-238.

### **3. Kiser Complied with the Letter and the Spirit of Clark College's Ill-Defined Per Diem Policy**

Clark College's written policy provides no guidance on how per diem meal money is to be distributed to students and accounted for. CP 346, 349, 357-358. Absent written guidance, Kiser learned the procedures from his first supervisor at Clark College, former Athletic Director Daryl Broadsword. CP 304. Those procedures were as follows: Upon receipt of an advance check for per diem money (a daily amount, multiplied by the number of travel days, multiplied by the number of players and staff members traveling), Kiser cashed it and took the money with him on the away game or tournament. On most occasions, he purchased a team meal for the players as a group and paid the bill for all of them. When the team stopped for snacks, Kiser distributed the remaining money to each student equally, and if none remained, he paid for their snacks personally. When any team members declined to eat at the restaurant Kiser chose for the team, he gave those players cash and they went to their restaurants of choice and purchased their own meals. At various times during the travel, but always before the end of the trip, the girls each signed a form acknowledging their receipt of meal money --- whether they received cash or simply had cash spent on them. CP 197, 235. Joy Varney, Athletic Department secretary, confirmed that these were the proper per diem

procedures – either to distribute the money to students or to spend it on them, as each coach chose. CP 324.

Never in Kiser’s employment at Clark College did he personally keep any of the students’ meal money. CP 310. Nor did Clark College conclude that he did, according to its “audit report.” At most, Clark College concluded that a small number of students complained, but admitted they had always either received money from Kiser or had food purchased by him Kiser. CP 171-172.

**F. CLARK COLLEGE’S LACK OF WRITTEN POLICY AND UNEVEN DISCIPLINE ARE EVIDENCE OF ITS TRUE MOTIVATION**

Clark College published no policy governing use of a coach’s personal car to transport students. In discovery, Defendant produced all written policies governing use of the gas card and regarding mileage reimbursement. Those policies, attached at CP 348-381, are silent regarding the use of the gas card, silent regarding the use of a personal vehicle to transport students. They are silent on the subject of any mileage reimbursement for a coach, addressing only the topic of reimbursement to faculty who teach off-site.

Clark College’s written policy regarding meal reimbursement merely defines the eligible meals and is silent on how to handle the funds.

Hallead and Varney each confirm they had no training in handling per diem funds. CP 234-235, 330.

In fact, no less than Athletic Director Dave Waldow admitted to confusion regarding how to handle per diem money – and had to repay money wrongfully retained. This occurred during the identical time frame in which Kiser was terminated, allegedly for mishandling funds including per diem funds. On March 13, 2002, Waldow admitted to Nisson that at two games earlier that season, he had spent per diem meal money allocated to 12 players when only 7 had traveled. Unlike Kiser, Waldow's repayment of the money ended the issue without discipline. He implied in email to his boss that this practice of overspending had previously been commonplace:

I am going to have Joy revise the Mens' Basketball travel expense voucher for the Grays Harbor and the Pierce game. On both of these trips, the players were fed both lunch (Izzy's Pizza) and dinner (Wendy's). This made the total for each player more than the \$10 per diem budgeted, but less than the total advanced. In the past, we were allowed to spend all of the money advanced for travel even if we traveled with fewer athletes than budgeted. I now understand this can developed an appearance of inequity. \$64.16 will be deposited into the Men's Basketball account.

CP 392-397 (emphasis added).

Note, the travel expense vouchers (CP 221, 226) Waldow previously signed had falsely over-stated the number of players traveling. This is the

same form of document signed by Kiser giving rise to mileage reimbursement checks for which he was fired, despite his immediate repayment when requested to do so.

Varney gave a resounding “yes” when asked if she has had to chase down per diem forms from other coaches, or if other coaches have made mistakes on forms. She had to issue coaches constant reminders to submit signed forms for per diem money. CP 325-327. It would appear that only Kiser was singled out for particularly strict discipline in the loosely defined handling of per diem money.

#### **G. PROCEDURAL HISTORY**

Kiser filed his Complaint in this case on March 29, 2005 (CP 5-8) and caused it to be served on Clark College on April 5, 2005. CP 10. The Complaint included two claims for relief, unlawful retaliation under RCW 49.60.210 and common law wrongful termination in violation of public policy. Clark College filed its Answer to the Complaint on July 6, 2005 and simultaneously demanded a 12-person jury. CP 13-18, 11.

To obtain initial discovery in this case, Kiser was forced to file a Motion to Compel (CP 19-21), which the court granted on January 27, 2006, and awarded a monetary sanction to Kiser for Clark College’s failure to respond in any manner to discovery. CP 47-48.

Kiser and Clark College stipulated to the filing of an Amended Complaint, which was filed on August 24, 2006, adding an additional statutory retaliation claim pursuant to Title IX, 20 U.S.C. § 1681. CP 49-50, 53-57.

Clark College moved for summary judgment dismissal of all claims on August 25, 2006. CP 175-187. Kiser filed timely opposition including declarations and deposition testimony as well as a Motion to Strike and a Motion under CR 56(f). CP 190-423. The trial court heard argument on October 6, 2006 and October 20, 2006 and entered its Order Granting Summary Judgment dismissal of all claims on October 20, 2006. CP 468-470. Kiser filed a timely Motion for Reconsideration of October 30, 2006. CP 474-482. The court denied that Motion by letter opinion on November 21, 2006. CP 515. Kiser filed his Notice of Appeal on November 17, 2006. CP 505-512.

### **III. ARGUMENT**

The purpose of a motion for summary judgment is to examine the sufficiency of the evidence supporting the plaintiff's formal allegations so that unnecessary trials may be avoided where no genuine issue of material fact exists. CR 56; *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974); *Garbell v. Tall's Travel Shop, Inc.*, 17 Wn. App. 352, 353, 563 P.2d 211 (1977). A material fact is one upon which the outcome of litigation depends in whole or in part. *Morris v. McNicol*, supra; *Amant v. Pacific Power & Light Co.*, 10 Wn. App. 785, 520 P.2d 181 (1974), *aff'd per curiam*, 84 Wn.2d 872, 529 P.2d 829 (1975). The motion

will be granted only if after viewing the pleadings, depositions, admissions and affidavits, and all reasonable inferences that may be drawn therefrom in the light most favorable to the nonmoving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment.

*Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977).

Kiser presented an enormous amount of evidence of his own activities in support of gender equity at Clark College, of severe adverse impacts to his employment and of direct and circumstantial evidence suggesting that retaliation for his Title IX complaints was a significant motivation for the investigation that preceded his termination and the termination itself. The record in this case was inappropriate for summary judgment dismissal. The trial court's dismissal was erroneous.

**A. KISER ESTABLISHED ALL NECESSARY ELEMENTS OF EACH CLAIM AND SUMMARY JUDGMENT DISMISSAL WAS ERROR**

**1. Kiser Presented Admissible Evidence Of All Necessary Elements Of His Two Retaliation Claims.**

Kiser presented two statutory retaliation claims: one under Title IX and one under Washington's Law Against Discrimination. The elements required to carry Kiser's prima facie case under his state law claim were: (1) Protected activity under the relevant statute; (2) adverse employment action; and (3) a causal link between the two. *Estevez v. Faculty Club*,

129 Wn. App. 774, 797, 120 P.3d 579 (2005); *Delahunty v. Cahoon*, 66 Wn. App. 829, 839, 832 P.2d 1378 (1992); *Yartsoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987).

The elements of his Title IX retaliation claim were virtually the same, protected activity, an adverse employment action and a causal link between the two. *Gutierrez v. State Department of Social and Health Services*, No.CV-04-3004-RHW, slip op. at 9 (E.D.Wa. Sept. 26, 2005). *Gutierrez* was premised on retaliation for conduct under Title VI, but the Court expressly based its decision on *Jackson v. Birmingham Board of Education*, the Title IX case, stating that its holding applies to Title VI claims equally. Slip op. at 9.

Kiser's evidence established each of the three required elements of his statutory retaliation claims.

a) Kiser Complained About Potential Title IX Violations

Clark College does not dispute that Kiser complained about Title IX implications of Waldow's decision to freeze his team's budget. CP 178. At least one such complaint about the budget issue was written (CP 396). Kiser took other statutorily protected actions, including opposing the unfavorable and unequal hotel room allocation for the Womens' team at the league tournament (CP 284-286), questioning the denial of the

womens' budgeted sweat uniform purchases (when he noted the same purchase had been permitted for the Mens' team) and questioning the lesser number of coaches for the Womens' team. CP 280-282. Kiser was also perceived by Clark College administration to have been a motivator for a parent's written complaint about Title IX implications of the lower quality of officiating at the womens' games. CP 295-296.

Kiser established each of these actions by admissible evidence. They more than satisfied the element of protected activity for purposes of either the Title IX claim or the Law Against Discrimination claim, RCW 49.60.210.<sup>1</sup> Kiser needed only to prove that his "complaints went to conduct that was at least arguably a violation of the law, not that [his] opposition activity was to behavior that would actually violate the law against discrimination." *Estevez*, 129 Wn.App. at 798; *citing Kahn v. Salerno*, 90 Wn.App. 110, 130, 951 P.2d 321 (1998).

b) Adverse Employment Action is not Disputed

Kiser was suspended from coaching and advising athletes on March 20, 2002. He was removed permanently discharged from those

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<sup>1</sup> RCW 28B.110.010 establishes the state law prohibition on gender discrimination in higher education, parallel to the federal law in Title IX. RCW 28B.110.050 establishes that a violation of this chapter constitutes a violation of the Law Against Discrimination, affording all rights available under RCW Chapter 49.60, which includes the non-retaliation provisions in RCW 49.60.210.

duties effective April 1, 2002 and from all employment at the end of the academic year.

c) Causation Should be Presumed From the Timing, but is Also Established Directly by the Evidence

For summary judgment purposes, retaliatory motivation for the adverse employment actions should be presumed. Kiser needed only to show the sequence of events by admissible evidence in order to demonstrate this element. Circumstantial evidence will suffice:

Ordinarily, proof of the employer's motivation must be shown by circumstantial evidence because "the employer is not apt to announce retaliation as his motive." *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991) (citations omitted).

\* \* \*

[I]f the employee establishes that he or she participated in an opposition activity, the employer knew of the opposition activity, and he or she was discharged, then a rebuttable presumption is created in favor of the employee that precludes us from dismissing the employee's case. *Id.* at 69; *Graves v. Department of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994).

*Kahn v. Salerno*, 90 Wn. App. at 130-131.

The Court of Appeal's discussion in *Renz v. Spokane Eye Clinic*, 114 Wn.App. 611, 60 P.3d 106 (2002) sets forth the proper analysis the causation element of a retaliation claim. In reversing summary judgment

dismissal of an employee's retaliation claim, the court stated that retaliatory motive need not be the sole or principal reason for discharge; it need only "tip the scales" one way or the other to be substantial. *Renz*, 114 Wn.App. at 621. Circumstantial evidence suffices:

Employers, of course, rarely openly reveal that retaliation was a motive for adverse employment actions. Employees must then necessarily resort to circumstantial evidence to demonstrate the retaliatory purpose. [Citation omitted]. An employee can meet this prong by establishing that he or she participated in an opposition activity, the employer knew of the opposition activity, and the employer discharged him or her.

*Renz*, 114 Wn.App. at 621-22. Kiser presented the evidence necessary to establish causation circumstantially. He also presented direct evidence of causation when he testified that his supervisor, Waldow, had directly threatened his employment, only weeks before his suspension, saying that if Kiser did not shut up about Title IX complaints, he would be "out of a job" and "would never coach again." CP 293, 296-297.

Nowhere in the trial court summary judgment record did Waldow deny this statement.<sup>2</sup> The existence and timing of this threat being

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<sup>2</sup> Clark College made the unsupported claim in its response to Kiser's Motion for Reconsideration that Waldow "would deny" having made the threat. CP 503. This was in improper and unsupported claim, no affidavit, deposition testimony, declaration or any other such evidence containing such a denial having been submitted. Clark College had relied on Waldow's declaration testimony for its Motion for Summary Judgment and presumably could obtain additional declaration testimony from him. Yet the record is devoid of any evidence contradicting Kiser's sworn testimony that Waldow threatened him with firing if he did not stop complaining of Title IX violations.

uncontroverted, it was established, undisputed fact and the trial court was not free to ignore it. *Central Washington Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354-55, 779 P.2d 697 (1989); *Nauroth v. Spokane County*, 121 Wn. App. 389, 394, 88 P.3d 996 (2004).

Kiser having demonstrated his prima facie case, Clark was obligated to present evidence of a non-retaliatory reason for termination, which it admittedly did. At this point, Kiser was obligated, and did present overwhelming evidence that Clark College's stated reason was pretext, sufficient to send his case to a jury trial.

## **2. The Standard for Pretext Evidence Requires no "Pretext Plus"**

Once a defendant furnishes evidence of a non-retaliatory, legitimate reason for termination, the plaintiff has an opportunity to furnish evidence that the proffered reason is pretext – meaning that the reason is being offered to cover the retaliatory motivation. This element of pretext has undergone a significant amount of analysis in Washington case law, including recent clarifications.

The Washington Supreme Court clarified the breadth of pretext evidence required in *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001). The *Hill* court recited the varying approaches to pretext evidence, and followed Supreme Court precedent (*Reeves v. Sanderson*

*Plumbing Products, Inc.*, 530 U.S. 133, (2000)). *Hill* rejected the “pretext plus” approach (requiring proof that the proffered reason be false and that the actual reason be discriminatory). But *Hill* also rejected the “pretext only” approach (requiring no more than falsity of the proffered reason).

*Hill* adopted a hybrid approach:

[W]hile a *McDonnell Douglas* prima facie case, plus evidence sufficient to disbelieve the employer’s explanation, will *ordinarily* suffice to require determination of the true reason for the adverse employment action by a factfinder in the context of a full trial, that will not always be the case.

*Hill*, 144 Wn.2d at 186 (emphasis in original). *Hill* refers to *Reeves* in clarifying the new standard: Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors, including: (1) the strength of the plaintiff’s prima facie case, (2) the probative value of the proof that the employer’s explanation is false, and (3) 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. *Hill*, 144 Wn.2d at 186 (*quoting Reeves*, 530 U.S. at 148-49).

A 2005 decision of the Court of Appeals illustrates the application of this multi-factor test for pretext. *Estevez v. Faculty Club*, 129 Wn. App. 774 (2005). In *Estevez* a female employee was terminated after repeatedly complaining about another employee’s bizarre statements and disturbing behavior. She sued under state and federal law for hostile work

environment, sexual harassment and retaliatory discharge. The evidence showed that plaintiff had engaged in protected statutory activity under RCW 49.60, when she complained that a co-worker had exhibited a romantic or sexual interest in her, had told co-workers and police (falsely) that he and she were engaged, had insisted on giving her gifts at work, and had put her name on his credit cards, among other things. Plaintiff was discharged in close proximity to her protected statutory activity (9 days), giving rise to the rebuttable presumption in her favor of a prima facie case of discrimination. *Estevez*, 129 Wn.App. at 799-800.

The defendant asserted its legitimate, nondiscriminatory reasons for her termination: Estevez used vulgar language, was unable to handle anger toward co-workers and subordinates, and was unable to work well with her staff and other co-workers. In order to show that the defendant's stated reasons for termination were pretext, the *Estevez* court required "evidence that supports an inference that her complaints about Layne were a "substantial factor" motivating the employment decision. *Id.* (quoting *Allison v. Housing Auth.*, 118 Wn.2d 79, 84, 95097, 821 P.2d 34 (1991)). An employee may prove the employer's reasons were pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Because Estevez had

received only positive feedback, had not been reprimanded or disciplined, and provided facially reasonable explanations for the various incidents of improper conduct that the Faculty Club claimed motivated their decision to terminate, the court found that when viewed in the light most favorable to Estevez, the evidence supported a reasonable inference that the explanations given for her termination were pretextual and that her protected complaints about Layne were a substantial factor in her termination. *Estevez*, 129 Wn.App at 803.

From the *Estevez* application of the *Hill v. BCTI* test, arises the clear indication that certain of the *Hill* pretext factors may be sufficiently strong to outweigh others. Because Estevez' evidence regarding her good performance and explanations for the alleged performance problems strongly rebutted the employer's claim, the court did not discuss the relative strength of her prima facie case. Presumably, the relative weight of any factor may be equally compelling.

Distilling these cases to a rule, Kiser may establish that Clark College's claimed reason for the termination is pretextual by presenting admissible evidence showing a strong prima facie case and that Clark College's claimed reasons are not worthy of credence (including evidence of Kiser's reasonable explanations for the conduct alleged, of Clark College's disinterest even in knowing what those reasons were before it

fired Kiser) and accepting similar behavior from Waldow without even subjecting him to discipline.

Kiser's evidence need not prove pretext to survive summary judgment. In response to an employer's argument that pretext evidence was insufficient or weak, the court of appeals has stated:

[A]gain, the burdens here are burdens of production, not burdens of persuasion. . . . It is axiomatic that on a motion for summary judgment the trial court has no authority to weigh the evidence or testimonial credibility, nor may we do so on appeal. Our job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role, once a burden of production has been met.

*Renz*, 114 Wn.App. at 623.

### **3. Kiser's Evidence More Than Passes the Applicable Tests and Burdens**

Kiser presented substantial evidence that Clark College's claimed reason for terminating him was both incorrect and not its true motivation. Kiser's evidence of pretext included the following:

#### a) Direct Threat Invoking Retaliatory Motivation.

Waldow told Kiser on February 13, 2002 that if he did not drop his Title IX complaints, he would lose his job. Kiser ignored that threat in the ensuing weeks, his last written complaint of Title IX violations being

dated March 3, 2002. The monitoring of his activities commenced simultaneously.

b) Timing of Scrutiny Inconsistent With its Claimed Reasons

Clark College started monitoring Kiser before any complaint was voiced about meal money or gas card usage. The instructions to Varney to monitor Kiser, to observe him, take notes and pull all relevant emails, occurred within the days prior to March 4, 2002, after Kiser's series of Title IX complaints. This was before the three Womens' team members complained of being denied their meal money at the March 7-11 NWAACC tournament, before any evidence of inquiries into Kiser's handling of funds. The reasonable inference is that Clark College was already trying to document Kiser and find reasons to discharge him, for retaliatory reasons arising from his Title IX complaints.

c) Absence of Written Policy Governing Gas Card or Per Diem Issues

Given the paucity of guiding policy available to Kiser on the subject of his unique obligation to transport players in his own car, Clark College's reactionary response of firing Kiser before even discussing the matter or questioning him gives rise to the inference that defendant wanted

Kiser out for other reasons. The evidence of protected activity and Waldow's explicit threat to Kiser in February 2002 suggests that a substantial reason was retaliation.

d) Kiser's Choice to Fuel His Car Was Reasonable Under the Unique Circumstances.

*Estevez*' multi-factor test for pretext includes consideration of the employee's explanation for the conduct claimed by the employer to warrant firing. Kiser's explanation is reasonable (the standard described in *Estevez*), including that he had been authorized by his former direct supervisor to use the school gas card and had never done so prior to that authorization; that he had only done so when using his vehicle as a substitute for motor pool transportation; that policy guidance was nonexistent; that Kiser had not actively sought mileage reimbursement but had received it passively as part of the athletic department's usual process; and that the Womens' basketball budget always was charged for both gasoline and mileage for the motor pool vans, so Kiser treated his own vehicle identically.

Another argument for the reasonableness of his actions was never advanced by Kiser, but bears consideration: Every time Kiser put players in his car for a long round trip drive to a game, he incurred a significantly increased risk of liability. His own auto policy (rather than Clark's)

became “primary.” He ran the risk of excess liability in the event of a catastrophic event. He incurred a different and increased type of wear and tear on the vehicle. Reasonable compensation for the use by Clark College of Kiser’s vehicle as a “school bus” was warranted. Compensation to Kiser over and above purchasing the fuel to be used was warranted. Just as any rental of a vehicle by Clark College includes more compensation than merely purchasing the fuel to be used, Clark College should have compensated Kiser for forcing him to “rent” his car to the program throughout the 2002 season. Any apparent duplication of mileage reimbursement and gas card usage merely effected fair compensation, albeit without any particular intention by Kiser to claim such compensation.

e) Differing Standards of Discipline

On March 13, AD Waldow disclosed to his supervisor that he had misused per diem funds on two games (and implicitly in the past, as well). Waldow had done something Kiser was not even accused of doing: spending the total amount of per diem money issued for 12 players on a much smaller group. The evidence indicates no discipline or counseling of Waldow occurred, whatsoever.

Even more compelling, the timing of his disclosure is remarkable. His March 13 disclosure of his misuse of funds immediately followed the

post-tournament complaints from the disgruntled female players who had been denied meal money after refusing to ride with their team. The clear inference arising from this timing is that Waldow realized from those complaints that he would initiate an investigation of Kiser's handling of per diem, and knowing it might be a vehicle used to discharge Kiser, he wanted to correct abuses within his own handling of per diem money.

These actions are inconsistent with a good faith, non-retaliatory basis for terminating Kiser. They suggest manipulation entirely consistent with retaliatory animus.

f) Single-Minded and Inadequate Investigation

Had Clark College's sole purpose been to gain the truth about the conduct of its long-time employee, its investigation would have included interviewing Kiser personally, questioning the other staff member present for all of the alleged misconduct (Missy Hallead) and making at least an inquiry of the immediate past Athletic Director, who had supervised Kiser through most of his employment. Clark College would have permitted Missy Hallead to offer the explanation and clarification she tried to offer when asked about Kiser's gas card usage. Clark College would not have limited its inquiry to Kiser-related documentation; it would have explored the practices of others in the department, as well, (potentially revealing actual misuse of per diem funds by Waldow, and potentially by others).

The reasonable inference arising from all the facts Clark College didn't want to know is that Clark College performed the investigation as a means to an end it already planned – the discharge of Kiser from any role in the athletic department.

g) Kiser Was Retained for Limited Teaching Purposes, Provided He Stayed Away from Athletes

Had Clark College truly believed that Kiser had engaged in actionable employee theft, it would not have retained him teaching any classes to its students. Yet Clark College terminated only Kiser's coaching duties, his advising of athletes and his teaching in the two courses where he regularly encountered his team members. If he was truly viewed by Clark College as a thief, how could he be an appropriate instructor to any of its students?

Clark College also forbade Kiser, while on campus teaching his remaining two classes, from having any contact with his former team members or their parents. These facts suggest that rather than viewing Kiser as a dishonest thief, Clark College viewed him as a potential source of continued Title IX claims. It found a way to silence Kiser and separate him from any parents who might also be motivated to complain about Title IX. The reasonable inferences to which Kiser is entitled support his

claim that retaliatory animus motivated his termination in whole, or in significant part.

Kiser's evidence of pretext, summarized here, is compelling. The trial court's erroneous analysis, however, focused on weighing the seriousness of Kiser's accusations of Title IX violations, against the seriousness of the alleged non-retaliatory reasons for termination. This analysis was erroneous in three respects. First, it ignored the significant causation elements of Kiser's prima facie case. Second, it misjudged the seriousness of the Title IX violations. Third, it amounted to the trial court engaging in a weighing of the evidence, requiring Kiser to prove his pretext, rather than assessing whether Kiser had met his burden of production.

#### **4. Kiser's Prima Facie Case Was More than Just His Protected Activity**

The trial court's decision indicates that the judge weighed the seriousness of Kiser's complaints about Title IX against the seriousness of the allegations against him by Clark College as the deciding factor in the pretext analysis. CP 483-493. This analysis was unduly narrow. It overlooked both the other elements of Kiser's prima facie case. Not only did he prove his protected activity, he demonstrated direct evidence of retaliatory animus (and additional circumstantial evidence). The evidence

of Waldow's threat of firing, unrebutted in the record and expressly premised on Kiser's Title IX activities, was the type of prima facie evidence that should have concluded the pretext analysis in Kiser's favor and defeated summary judgment.

Direct evidence of retaliatory animus establishes pretext.

Stegall has two avenues available for showing that Marathon's legitimate explanation for firing her is actually a pretext for retaliation. The first is by "directly persuading the court that a discriminatory reason more likely motivated the employer[,] or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (citation omitted).

As in all civil cases, Stegall can prosecute her case using either direct or circumstantial evidence tending to prove that Marathon terminated her employment in retaliation for making complaints of gender discrimination. "Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d at 1221 (quoting *Davis v. Chevron, U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir. 1994)). "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." *Id.* In contrast, when direct evidence is unavailable, the *Godwin* court noted, and the plaintiff proffers only circumstantial evidence that the employer's motives were different from its stated motives, we require "specific" and "substantial" evidence of pretext to survive summary judgment. *Id.* at 1222.

*Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066 (9th Cir. 2004).

The trial court here virtually ignored the direct evidence of retaliatory animus, engaging instead in a multi-factor analysis as if only circumstantial evidence of pretext existed. The outcome of the trial court's analysis was a "but for" causation model. In short, the court concluded that the seriousness of the legitimate non-retaliatory reason "trumped" the seriousness of the Title IX complaints. In fact, the case law is clear that a plaintiff need only produce evidence that retaliatory animus was a substantial factor in the employer's decision to terminate. *Allison v. Housing Authority*, 118 Wn.2d 79, 96, 821 P.2d 34 (1991).

Such a conclusion was particularly inappropriate here, where the circumstantial evidence gave rise to the inference that Clark College only went looking for reasons to investigate Kiser after having developed retaliatory animus, and that Clark College singled Kiser out for particularly harsh discipline while ignoring financial misdeeds of at least one other.

#### **5. The Title IX Violations about Which Kiser Complained Were Significant**

The trial court's analysis also misjudged the seriousness of the Title IX concerns at issue here. Although Kiser was not obligated to prove that Clark College had actually violated Title IX in order to prove his

claim of retaliation<sup>3</sup>, the evidence gives rise to a well-founded reason to believe such violations occurred – and that they were serious violations. Kiser complained that the Womens’ team was being denied the right to spend its budget (resulting in the lack of sweats which the Mens’ team received); he complained about being required to sleep four to a room at an important tournament while the Mens’ team was able to sleep two to a room; he complained at the lack of sufficient van transportation, while the Mens’ team received excess van capacity; and he complained that the officiating for Womens’ games was subpar and the Mens’ officials were demonstrably better. He also received complaints from his players of open hostility toward women in AD Waldow’s comments that they were “fucking bitches.” Although Kiser did not present a complaint to Clark College about those comments, his having received those complaints is relevant to his own belief that the Title IX complaints were reasonable.

In the context of athletics, Title IX is violated when the programs being compared are not equal in effect. Benefits, opportunities for players and treatment of players must not be different in ways other than

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<sup>3</sup> Employee need not prove actual violation; reasonable belief of violation, combined with opposition is sufficient. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 619, 60 P.3d 106 (2002) (quoting *Graves v. Dep’t of Game*, 76 Wn.App. 705, 712, 887 P.2d 424, 428 (1994)).

negligible. *McCormick v. School District of Mamaroneck*, 370 F.3d 275, 292 (2<sup>nd</sup> Cir. 2004). Here, the differences were significant:

- Insufficient van transportation for the entire 2001-2002 season. Clark assigned one van carrying 9 passengers to a 13 member women's team, while assigning two such vans to the men's team, which traveled with only 7 members. CP 273-274, 287-288.

- Lesser Travel Accommodations. For the 2002 NWAACC tournament, Clark College assigned the women's team to hotel rooms cramming 4 women to a room, each sharing a bed and 4 sharing one bathroom. The men's team was assigned sufficient rooms to sleep 2 men to a room, and 2 sharing a bathroom. CP 283-286. Only after Kiser took this issue to Clark administrator Blaine Nisson did Clark relent and authorize more rooms for the Womens' team, although still not equivalent accommodations to the Mens' team. *Id.*

- Lesser Coaching Resources. For the entire 2001-2002 season, the mens' team had four paid coaches, while the womens' team had only two. CP 287-288. The actual ratio of coaches to players was even more disparate than that comparison suggests, because the women's team was larger, yet received half the coaching resources the men's team received.

- Lesser Uniforms. The 2001-2002 men's team was permitted to spend its budgeted funds on new sweat outfits for the team. CP 280-282. The womens' team had reserved its own budgeted funds to make the same purchase, but was not permitted to do so, specifically because the Athletic Director froze the budget and would not permit the women's budgeted funds to be spent. *Id.*

- Lower Quality Officials. Officiating for the womens' basketball program was acknowledged by the league to be of lesser quality than the officiating for the mens' program. CP 295-296, 237. One parent made a written complaint of this fact. CP 295-296, 202.

- Less Money per Player for Meals. For at least two games of the 2001-2002 season, the men's team received per diem meal money exceeding the amount received by the women's team players. At the February 23 game, AD Dave Waldow, took money intended for 16 and spent it on 11 (7 players and 4 coaches). Instead of receiving a meal worth 10 dollars per person, the men's team received half again as much (nearly 15 dollars per person). CP 211-215, 220-227.

The Washington Supreme Court described gender discrimination in athletics at Washington State University and included in its description "inferior treatment" for women's athletics in facilities, equipment,

coaching, uniforms and practice clothing, among other things. *Blair v. Washington State University*, 108 Wn.2d 558, 740 P.2d 1370 (1987).

The federal regulations promulgated under Title IX support Kiser's conclusion that these were serious violations. Unequal resources in the form of practice uniforms, transportation, housing, per diem meal money and numbers of coaches are all identified among factors to be considered in assessing whether equal opportunities have been provided:

In determining whether equal opportunities are available the Director will consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

34 C.F.R. § 106.41. The record on summary judgment in this case contained admissible evidence indicating that in factors numbered 2, 4, 6 and 9, Clark College provided more of these resources to its Mens' basketball team than to its Womens' team. These facts sufficed to demonstrate that Kiser's complaints and concerns regarding Title IX violations were serious and deserved Clark College's attention.

Nor may the college claim that the additional benefits to the Mens' team resulted from private fundraising. A public university may not skirt its legal obligations under Title IX by substituting funds from a private source. *Chalenor v. University of North Dakota*, 291 F.3d 1042, 1048 (8<sup>th</sup> Cir. 2002). "Once a university receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in their disbursement." *Id.*

#### **6. The Trial Court Should not have Weighed the Evidence**

Finally, the trial court's analysis amounted to a weighing of the evidence. Had the trial court accepted as a verity Kiser's evidence of Waldow's threat to his employment, as it was required to do, the court could not have dismissed Kiser's claims. By implication, the trial court must have rejected Kiser's claim despite the fact that Clark College submitted no evidence denying it. (Even had Clark College done so, Kiser

would have been entitled to all reasonable inferences from disputed evidence, as the non-moving party, but the fact that Waldow did not deny it is compelling).

**B. THE SAME EVIDENCE ALSO ESTABLISHED THE ELEMENTS OF KISER'S COMMON LAW CLAIM OF WRONGFUL DISCHARGE**

In order to carry his burden of proof on the claim of wrongful termination in violation of public policy, Kiser was required to submit admissible evidence demonstrating (1) the existence of a clearly stated public policy; (2) that Clark College's dismissal of Kiser would discourage the policy-linked conduct and jeopardize the public policy (the jeopardy element); (3) that the public-policy-linked conduct caused the firing (the causation element); (4) and that defendant's justification for the firing, if any, was not sufficient to override the public policy. *Gardner v. Loomis Armored*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). Kiser produced evidence satisfying each element.

**1. Title IX, its State Law Equivalent RCW 28B.110 and the Law Against Discrimination are Clearly Stated Public Policies Satisfying the Clarity Element**

Four different statutes were implicated in Kiser's complaints and conduct opposing Clark College's treatment of the Womens' basketball team and Kiser personally:

- Title IX (formally known as 20 U.S.C. §1681) prohibiting gender discrimination in higher education;
- RCW 28B.110.010, the parallel state law prohibition;
- RCW 28B.110.050, establishing that a violation of the aforementioned chapter constitutes a violation of the Law Against Discrimination, affording all rights available under chapter RCW 49.60; and
- RCW 49.60.210, prohibiting retaliation on the basis of opposition to any unfair practice under the Law Against Discrimination.

The public policies set forth within these statutes are precisely the type routinely relied upon to establish the clarity element. *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000) (RCW 40.60 sets forth a public policy against discrimination in employment sufficient to establish the “clarity” element); *Korslund v. Dyncorp Tri-Cities Services*, 121 Wn. App. 295, 319, 88 P.3d 966 (2004) (statute prohibiting retaliation against employees complaining of violations of the Federal Energy Reorganization Act or the Atomic Energy Act is a public policy for purposes of the tort of wrongful discharge).

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

nevertheless fired. Any of the statutory enactments referenced in this section established the clarity element for purposes of Kiser's common law claim.

## **2. Kiser's Termination Following Opposition of Title IX Violations Met the "Jeopardy" Element**

To establish the jeopardy element, Kiser had to show he "engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy." *Gardner v. Loomis Armored*, 128 Wn.2d at 945 (emphasis omitted). He must also show how the threat of dismissal will discourage others from engaging in the desirable conduct. *Hubbard v. Spokane County*, 146 Wn.2d 699, 713, 50 P.3d 602 (2002). Kiser openly voiced Title IX concerns and within a month was suspended and fired. Clark College broadly accused Kiser of theft despite never having previously asked him about the issues. It prohibited him from any contact with players and or their families. His credibility destroyed by the theft accusation and all contact with players terminating, Kiser's role in any ongoing Title IX complaints was effectively ended, as was his coaching career. Kiser's evidence meets the jeopardy element.

### **3. The Same Causation Evidence Discussed Above Meets This Element**

For purposes of summary judgment, the same rebuttable presumption as was discussed in the statutory claims exists: Where an employer knows of the employee's protected activity, and the employee is discharged, causation is established. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991) (applying rebuttable presumption analysis to claim of wrongful termination in violation of public policy). This is particularly true where the evidence showed that Kiser received only favorable job reviews prior to his initial complaints. Unquestionably Clark College knew of Kiser's formal Title IX complaints and subsequently discharged him. His evidence of causation suffices.

### **4. Absence of Over-riding Justification, the Least Understood Element of Wrongful Discharge, is Met Here**

The parties in this case hotly dispute the reason for Kiser's dismissal from Clark College. Where there is conflicting evidence regarding the reason for termination, the element of overriding justification is not established and becomes a question of fact for the jury. In *Hubbard*, the plaintiff presented evidence that he was terminated in retaliation for enforcing zoning requirements. The County asserted Hubbard's termination was due to a departmental reorganization. This

conflicting evidence created a question of fact precluding summary judgment. *Hubbard*, 146 Wn.2d at 718- 719.

The conflicting evidence and inferences about Kiser’s termination also create a genuine issue of material fact. The reasonable inferences drawn from the evidence indicate that his termination resulted from his public-policy linked conduct opposing Title IX violations, or at a minimum, the conduct was a substantial factor (all that is required to carry his burden).

Most important, the over-riding justification factor is not merely a recitation of a “just cause” standard or a “business justification” rule. Rather, to defeat the wrongful termination claim, defendant must show that its justification for firing Kiser was more important than the public policies set forth in Title IX, the Law Against Discrimination and RCW 28B.110.010, all of which were being advanced by Kiser’s conduct.

In *Gardner*, the Supreme Court of Washington made clear that the element of “absence of overriding justification” requires not simply a non-retaliatory reason to terminate; rather the inquiry is whether or not a justification exists which overrides the clearly articulated public policy declared to exist. *Gardner v. Loomis Armored*, 128 Wn.2d 931, 913 P.2d 377 (1996). Mr. Gardner had left his armored car to effect a rescue of another person in a life-threatening circumstance. Loomis Armored terminated Gardner, citing several work rules broken by the guard when

he exited his armored car. The Supreme Court confirmed that indeed a clear public policy existed in favor of the preservation of human life, which Mr. Gardner had advanced. In considering whether or not Loomis Armored's reasons for terminating constituted an overriding justification, the court considered the work rules and each of the reasons why each rule existed. Against these considerations, the court weighed the public policy of preservation of human life:

Loomis has defended its work rule as part of a fundamental policy designed to guarantee the safety of its employees. This court must balance the public policies raised by Plaintiff against Loomis' legitimate interest in maintaining a safe workplace and determine whether those public policies outweigh Loomis' concerns.

\* \* \*

The narrow public policy encouraging citizens to rescue persons from life threatening situations clearly evinces a fundamental societal interest of greater importance than the good samaritan doctrine. The value attached to such acts of heroism is plainly demonstrated by the fact that society has waived most criminal and tort penalties stemming from conduct necessarily committed in the course of saving a life. If our society has placed the rescue of a life above constitutional rights and above the criminal code, then such conduct clearly rises above a company's work rule. Loomis' work rule does not provide an overriding justification for firing Gardner when his conduct directly served the public policy encouraging citizens to save persons from serious bodily injury or death.

*Gardner*, 128 Wn.2d at 948-949.

In order for Kiser to fail to establish this element, the court would have to conclude that the evidence, including all reasonable inferences,

demonstrates that Clark College's stated reasons for terminating Kiser were non-pretextual and further that they are more important than the numerous public policies underlying Title IX, RCW 28B.110.010 and 49.60.210.

#### IV. CONCLUSION

This Court described eloquently the standard by which Kiser's summary judgment record should have been subjected below:

Once evidence supporting a prima facie case, a nondiscriminatory explanation, and pretext has been presented and "the record contains reasonable but competing inferences of both discrimination and nondiscrimination, `it is the jury's task to choose between such inferences.'"

*Carle v. Mechord Credit Union*, 65 Wn. App. 93, 102, 827 P.2d 1070 (1992).

There was no question but that Kiser complained of Title IX concerns. Nor was there any debate that he was suspended and fired thereafter. Kiser swore he was threatened for his Title IX complaints, and Clark College failed to submit any evidence denying that threat. Clark College's claimed reason for the firing was disputed by Kiser, who was relying on instructions and authorizations of a prior supervisor when he took the actions they claimed justified his firing.

This record was the classic example of one containing "reasonable

but competing inferences” and on which the factual disputes should have been resolved by a jury rather than by the judge. The summary judgment dismissal was error and should be reversed, all three claims being remanded for trial on the merits.

Kiser respectfully requests this matter be remanded for a trial of all issues before a jury of twelve. Kiser also requests that he be awarded his attorneys’ fees and costs reasonably incurred in prosecuting this appeal, pursuant to the authority of chapter RCW 49.60, chapter 49.48 and Title IX, 20 U.S.C. § 1681.

DATED this 5th day of March, 2007.

McKAY HUFFINGTON, P.L.L.C.



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JUNIOR V. JUDGE  
10/20/07

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CERTIFICATE OF SERVICE BY MAIL

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

I certify that I transmitted by fax machine and mailed a copy of the foregoing BRIEF OF APPELLANT postage prepaid, via U.S. mail on the 5<sup>th</sup> day of March, 2007, to the following counsel of record at the following address:

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