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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

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

In re:

DAVID MARTIN,

Plaintiff/Appellant,

vs.

GONZAGA UNIVERSITY,

Defendant/Respondent.

APPELLANT'S REPLY BRIEF

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**COURT OF APPEALS, DIVISION III
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I. OBJECTION TO RESPONDENT'S STATEMENT OF CASE

In *Respondent's Brief*, the University includes an "Introduction" section and a "Statement of the Case" section. In its "Introduction" section, the University provides twenty-four (24) statements, only two of which are supported by citation to the record. In its "Statement of the Case" section, the University provides sixty-five (65) statements, only forty-three (43) of which are supported by citation to the record. Taken together, nearly 50 per cent of the statements made in these sections are without citation to the record.

By asking this Court to accept assertions of fact that are made without citation to the record, the University fails to comply with RAP 10.3(a)(5), which requires that "[r]eference to the record must be included for each factual statement." RAP 10.3(a)(5). Therefore, Appellant requests that this Court disregard these portions of the University's brief. RAP 10.3 indicates that a responsive brief need not contain any statement of the case, and by failing to provide an alternative factual statement of the case with citation to the record, the University confirms it has no basis in the record to object to the statement provided by Appellant.

II. ARGUMENT

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

The University fails to follow the organization of the *Opening Brief* in this section, which is organized pursuant to all four factors of the *Perritt* test

as set forth in *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). Despite recognizing and reciting the four-part *Perritt* test on page 14 of *Respondent's Brief*, the University's brief addresses only three of the four factors: (a) the "Clarity Element" on page 15, (b) the "Causation Element," on page 16, and (c) the "Overriding Justification Element" on page 18. (*Respondent's Brief*, pgs. 15-18.) In this reply brief, Mr. Martin organizes the arguments made by the University under the factor to which the argument would have corresponded had the University included all four factors of the *Perritt* test.

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

The University does not dispute this assertion – nor can it, as there can be no dispute that ensuring the safety of students is a matter of public policy.

On appeal, the University avoids addressing whether actions taken in the interest of student safety are actions taken in the interest of public policy just as it did in the underlying case, and, instead, it argues that Mr. Martin's actions were not actually taken in the interests of student safety.

It is therefore undisputed on appeal that ensuring the safety of students is a matter of public policy, and Mr. Martin has met his burden on this factor. This Court need not address issues that a party neither raises appropriately nor discusses meaningfully with citation to authority. *Saviano v. Westport Amusements, Inc.*, 144 Wn.App. 72, 84, 180 P.3d 874 (2008); citing RAP 10.3(a)(6); *State v. Mills*, 80 Wn.App. 231, 234, 907 P.2d 316 (1995); see

also State v. Logan, 102 Wn.App. 907, 911, n.1, 10 P.3d 504, (2000)(“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”)(quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

The University’s arguments asserting that Mr. Martin’s actions were not actually taken in furtherance of a public policy interest is properly discussed in the context of the ‘jeopardy’ factor (section b, below), which considers the relationship between the employee’s conduct and the asserted public policy interest. Rickman v. Premera Blue Cross, 184 Wn.2d 300, 310, 358 P.3d 1153 (2015), citing Gardner, 128 Wn.2d at 945.

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

Despite refusing to identify the public policy interest at issue, the University argues that “[t]here is no evidence in the record that Martin acted in furtherance of public policy.” (*Respondent’s Brief*, pg. 15.) In support of this broad conclusion, the University makes two specific factual assertions on appeal to support its claim that “there is no evidence in the record that Martin acted in furtherance of public policy,” specifically:

“The email communications from Martin to Mr. Standiford fail to mention anything remotely related to Martin furthering the public good.”

(*Respondent’s Brief*, pg. 16.)

“Martin also acknowledged that there was no legal requirement to put padding on the walls of the Fitness Center.”

(Respondent’s Brief, pg. 16.)

EMAIL REQUEST FOR APPOINTMENT: The University does not explain the reasoning or authority on which it bases its conclusion that Mr. Martin is specifically required to identify language that explicitly indicates an intention to further the public good contained within his emailed request for an appointment to pitch his proposal. In attributing primary significance to the language contained in Mr. Martin’s request for an appointment, the University would have this Court believe that the contents and intentions of Mr. Martin’s proposal are otherwise unknown and can only be guessed at through the language of the appointment request; however, the record proves that this is untrue. Not only are Mr. Martin’s intentions confirmed by the communications he authored within the same time period that are contained in the record, but Dr. Hernandez’s testimony confirms that the intent of Mr. Martin’s proposal was to generate funds to put padding in the basketball court. (CP 74-75.) Mr. Martin also presented his proposal to Dr. Hernandez, Ms. Radtke, Ms. Conger, and Mr. Main. (CP 74-75.) The University is correct when it argues that Mr. Martin’s appointment request did not provide detail about the substance of his proposal, but this is to be expected given that the email is not *itself* the proposal; rather, it is merely a request to pitch the proposal at a later date.

The email's language simply indicates Mr. Martin's efforts to persuade Mr. Standiford that the proposal would be worth his time. The University's suggestion that Mr. Martin's reference to a "golden ticket idea" somehow proves that Mr. Martin's intentions were not to further the public interest are without merit; the record is replete with evidence to support Mr. Martin's assertion that any effort to acquire attention merely by citing safety concerns had previously been ignored for years and would likely continue to be ignored. This is confirmed by the University's own brief, which acknowledges that student injuries (including concussions/head trauma, broken bones, dislocated shoulders, and lacerations) were an ongoing phenomenon that had been observed and brought to the attention of management by employees of the Fitness Center for years with no response. (*Respondent's Brief*, pg. 4; CP 4-5, 14-16, 20-21, 25-26, 31-32, 38, 51-69, 70-74, 83, 100-102, 111, 137-138, 204.) No, Mr. Martin had already learned that any proposal requesting the installation of padding in the basketball courts that hoped to avoid falling on deaf ears would also have to propose a method for paying for them, which is what he intended to provide. That is the aspect of his plan that he emphasized to Mr. Standiford.

The University's argument about Mr. Martin's language in the email requesting an appointment to pitch his proposal has no merit.

LEGAL REQUIREMENTS TO INSTALL PADDING: The University argues that because "Martin also acknowledged that there was no legal

requirement to put padding on the walls of the Fitness Center,” Mr. Martin therefore could not have been acting in the public interest when he sought the installation of the pads. (*Respondent’s Brief*, pg. 16.) But once again, the University does not provide any reasoning or citation to authority to explain this assertion; therefore, this Court need not acknowledge it. *Saviano*, 144 Wn.App. at 84; *Mills*, 80 Wn.App. at 234; *Logan*, 102 Wn.App. at 911, n.1.

Not only does the University fail to provide any authority in support of its own argument, it fails to respond to the authority provided by Mr. Martin: “*The relevant inquiry is not limited to whether any particular law or regulation has been violated...*” *Dicomes v. State*, 113 Wn.2d 612, 621, 782 P.2d 1002 (1989).

Mr. Martin’s previous concerns about safety had gone unaddressed because they were not getting past his immediate supervisors; the University had ignored warnings about student safety for eight years, and serious student injuries continued. Mr. Martin’s decision to go outside the “chain of command” to speak to employees in authority over his supervisors was a reasonable way to further the public policy interest in ensuring student safety. The University’s action in firing Mr. Martin for pursuing his concerns above his immediate supervisors jeopardizes the public policy interest in ensuring student safety.

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

TIMING: The University does not dispute the timeline in this case.

February 29, 2012: Mr. Martin emailed Mr. Standiford to seek an appointment to pitch his proposal. (CP 114.)

March 1, 2012: Mr. Martin was required to meet with Mr. Morgan and Dr. Hernandez. (CP 138, 188, 191.) Mr. Morgan read a prepared statement and then demanded that Mr. Martin release his proposal to Mr. Morgan. (CP 102-103.) Mr. Martin refused, and Mr. Morgan put Mr. Martin on a seven-day probationary period. (CP 102-13.) Shortly thereafter, Mr. Martin went home early after finding another Assistant Director to cover his shift and after obtaining permission to leave from the Associate Director, Ms. Radtke. (CP 103-110, 121, 154, 166, 170-179, 191-193, 214-216.)

March 2, 2012: Mr. Martin was informed he had been put on administrative leave. (CP 122.) He was not told why. (CP 103.) He was specifically informed he could not speak to anyone associated with the University except for HR. (CP 216.)

March 5, 2012: Mr. Martin contacted the office of the President, Dr. McCulloh, and indicated that he was concerned about student safety and that he had been bringing his concerns to his direct supervisor for the last four years to no avail. (CP 100.)

March 7, 2012: A student sustained a serious head injury from running into the bare concrete wall in the Fitness Center basketball court and had to be taken to the hospital by ambulance. (CP 38-39; CP 102-107.)

March 9, 2012:

Mr. Martin was terminated; Mr. Standiford told Mr. Martin that one of the reasons for his termination was that he was rumored to have been giving information about student injuries to the student newspaper. (CP 34, 202.)

It is clear from the timeline in this case, that Mr. Martin's activity to procure safety padding in the Fitness Center was a 'substantial factor' motivating his termination. *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 70, 821 P.2d 18 (1991) ("Ordinarily, the prima facie case must, in the nature of things, be shown by circumstantial evidence, since the employer is not apt to announce retaliation as his motive"), quoting 1 L. Larson, *Unjust Dismissal* § 6.05 at 6-51 (1988). Contrary to the University's arguments that "[t]here is no evidence in the record that Gonzaga ever terminated Martin for speaking with any reporter for the Gonzaga Bulletin," and that there is "no evidence in the record that Martin was fired for reporting misconduct on the part of employees or supervisors employed by Gonzaga," Mr. Martin does not have to prove that the University's sole motivation was retaliation to establish a prima facie case. (*Respondent's Brief*, pgs. 12 & 14-15.) Rather, Mr. Martin must only produce circumstantial evidence that his public-policy-linked conduct was the cause of his firing, and he may do so by circumstantial evidence. *Wilmot*, 118 Wn.2d at 70. If Mr. Martin's public-policy-linked conduct was, in fact, a significant or substantial factor, the

University is liable even if Mr. Martin's conduct otherwise did not entirely meet the University's standards. *Wilmot*, 118 Wn.2d at 71.

The proximity in time between Mr. Martin's public-policy-linked conduct and the termination of his employment coupled with evidence of his previous satisfactory work performance and supervisory evaluations is persuasive in establishing causation. *Wilmot*, 118 Wn.2d at 69.

SPEAKING TO STUDENT NEWSPAPER: Mr. Martin provided information from the Gonzaga Bulletin showing an article on student injuries resulting from a lack of padding in the basketball court and testified that Mr. Standiford told him that he had been fired in part for speaking to a reporter. (CP 34; 103-104.) Mr. Standiford did not deny this accusation. Pursuant to a summary judgment motion, all facts must be considered in the light most favorable to the non-moving party, which is Mr. Martin. There is, therefore, a genuine issue of material fact as to whether Mr. Martin was fired because the University believed he had spoken to the student newspaper.

REPORTING MISCONDUCT: The University does not deny that its employees had repeatedly failed to address an unsafe condition (1) that they knew was unsafe, (2) that they knew was causing significant injuries to students, (3) that they knew how to fix, and (4) that they had a duty to fix in order to provide safe facilities for students. The University does not deny that Mr. Martin was insistent about taking that information outside "the chain of command" and up the supervisory hierarchy in order to resolve the unsafe

condition, and the University does not meaningfully refute Mr. Martin's allegation that he was fired in violation of public policy in an effort to cover up the failures of Dr. Hernandez, Mr. Morgan, and Mr. Standiford.

Mr. Martin met his burden as to causation; multiple genuine issues of material fact exist that require trial in this case.

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

"Once a plaintiff presents a prima facie case of wrongful discharge in violation of public policy, the burden of proof shifts to the employer to show the termination was justified by an overriding consideration." *Rickman*, 184 Wn.2d at 314, quoting *Gardner*, 128 Wn.2d at 947-50. To satisfy the burden of production, the employer must articulate a legitimate nonpretextual, nonretaliatory reason for the discharge and produce relevant admissible evidence of another motivation. *Wilmot*, 118 Wn.2d at 29.

The University provides little argument or reference to the record to support its claim that it acted pursuant to an overriding justification for its termination of Mr. Martin; it merely argues that Mr. Martin's interest in paying for the installation of the pads in the basketball courts was "not strong enough" to interfere with the University's "right to have employees follow the direction of the supervisors." *Respondent's Brief*, pg. 19. Despite casually concluding that the Mr. Martin was fired because he did not 'follow the direction' of his supervisors, the University has not actually addressed any

of the issues raised by Mr. Martin in his opening brief related to the University's claims about insubordination and poor performance:

INSUBORDINATION: The University does not address the fact that Dr. Hernandez did not actually direct Mr. Martin that he could not contact Mr. Standiford. It does not address the fact that Mr. Martin contacted Mr. Standiford in compliance with the Policies and Procedure Handbook. It does not address the fact that Mr. Standiford never provided Mr. Martin with a 'direct order' that he disobeyed; rather, he gave him a 'suggestion' that Mr. Martin politely asked him to reconsider. It does not address the fact that the University has entirely failed to demonstrate the existence of any policy that required adherence to a particular "chain of command," nor any policy that indicated that speaking to a person "outside" the "chain of command" within the liberal arts university is a terminable offense. At no point does the University reference any policy that says employees of the Fitness Center are not permitted to leave work after having another employee of equal rank cover their shift. At no point does the University explain how Mr. Martin failed to follow 'the direction of a supervisor' when he found someone to cover his shift and got permission from the Associate Director to leave early. At no point does the University reference any policy that says employees must get permission from the Director of the Fitness Center in order to adjust the schedule.

The University does not reference any policy that permits it to restrict the contact of Mr. Martin with anyone associated with Gonzaga University, particularly given his status as a student; nor does it identify the person who issued this restriction. The University does not explain how one of the most junior departments in the University has the authority to determine who may speak to the President nor does it indicate how Mr. Martin can be permitted to speak to the Human Resources Department but not the President, who oversees and is therefore the head of the Human Resources Department (as well as all other departments).

The University does not respond to the allegation that the timeline of this case strongly suggests that Mr. Martin's conduct was not problematic because of "insubordination" but because it was drawing attention to the dangerous condition in the Fitness Center basketball courts that had been allowed to continue for years through the negligence of Dr. Hernandez, Mr. Morgan, and Mr. Standiford, causing serious injuries to students and incurring liability for the University.

PERFORMANCE: The University claims that Mr. Martin was also terminated because he had been performing poorly and because he had trouble getting along with people, but there is very little information in the record to support this assertion, and the University does not make much effort in its brief to persuade the Court that Mr. Martin's termination was based on poor performance. It does not address the fact that the "performance review"

provided by the University is not signed by Mr. Martin and is not closely related in time to the events that gave rise to this lawsuit. It does not address the question of why Human Resources did not issue a letter of expectation prior to termination. It does not indicate that Mr. Martin was put on any kind of plan to resolve concerns about his performance or that he had ever previously been told that he was in danger of losing his job due to poor performance.

The University cannot show (and makes little effort to try) that its interest in having “employees follow the direction of their supervisors” is an overriding justification for silencing employees who try to raise safety concerns about the serious injuries of students.

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

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

2. The trial court erred when it dismissed Mr. Martin’s claim based on RCW 49.12.

The University argues that it was only obligated to make Mr. Martin’s file “available,” and that it was not required to make him a copy. (*Respondent’s Brief*, pg. 20.) Despite its claim that “Gonzaga satisfied Mr. Martin’s

request,” the University does not explain how it made Mr. Martin’s file available to him. Nor does the University even acknowledge Mr. Martin’s argument that the University kept two separate files and that he was not permitted to access both.

The University claims that Mr. Martin has no judicial remedy for the violation of this right, but it provides no authority for this position, so this Court may disregard it. Saviano, 144 Wn.App. at 84; Mills, 80 Wn.App. at 234; Logan, 102 Wn.App. at 911.

The University argues that Mr. Martin is entitled to complain to the Department of Labor and Industries, but it admits that the Department has no enforcement ability in a dispute. (*Respondent’s Brief*, pg. 20.) Mr. Martin was entitled to exercise his right of rebuttal or correction for a period of two years. The University’s refusal to provide him with all his personnel records prevented him from exercising his statutory rights.

III. CONCLUSION

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

RESPECTFULLY SUBMITTED this 22nd day of FEBRUARY, 2017,



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Defendant/Respondent.

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CERTIFICATE OF SERVICE

On February 22, 2017, I arranged for hand-delivery of a true and correct copy of the *Appellant's Reply Brief* to the individual listed below:

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RESPECTFULLY SUBMITTED THIS 22th DAY OF FEBRUARY, 2017.



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