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SUPREME COURT
STATE OF WASHINGTON
4/5/2018 4:44 PM
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THE SUPREME COURT OF WASHINGTON

Supreme Court No. 95269-8

Court of Appeals No. 341038

Spokane Superior Court No. 15-2-00466-7

In re:

DAVID MARTIN,

Plaintiff/Appellant,

vs.

GONZAGA UNIVERSITY,

Defendant/Respondent.

Appellant's Supplemental Brief

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THE SUPREME COURT OF WASHINGTON

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I. WRONGFUL DISCHARGE

A. Martin presented a prima facie case for wrongful discharge.

In a footnote contained in its supplemental brief, Gonzaga admits that the *Perritt* test does not apply to the case at hand; therefore, it is now undisputed that the framework set forth in *Thompson*[1] controls in this case. In evaluating a claim for wrongful discharge for whistle-blowing under the *Thompson* framework, the *Rose*[2] court adopted a burden-shifting analysis:

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

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

Gonzaga conceded that student safety constitutes a public policy.[3]

2. Martin's conduct was undertaken in furtherance of student safety.

Martin met his burden to demonstrate that his conduct was undertaken in furtherance of student safety. Over the course of several years, Martin repeatedly requested the installation of protective padding in the student gym. (CP 4-5, 14, 32, 60, 63, 74.) A witness for Gonzaga testified that Martin had requested "an assessment of what the condition is and what best practices are, what the code is,

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[1] Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984).
[2] Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 275, 358 P.3d 1139 (2015).
[3] *Opinion (Court of Appeals, Division III),* pg. 28.

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and to seek out – seek an analysis of whether or not we had a condition that needed to be addressed." (CP 60, 63.) Dr. Hernandez characterized Martin as passionate about the necessity of pads. (CP 76.) On his own time, Martin wrote a proposal as part of his thesis project for his Master's program that would raise funds for the purchase of padding for the basketball court. (CP 17, 33, 39, 41, 74-75, 102, 115, 152.) Not only are Martin's intentions confirmed by the contemporaneous communications he authored, but Dr. Hernandez's own testimony confirms that the intent of Martin's proposal was to generate funds to put padding in the basketball court. (CP 74-75.) Martin testified that his supervisors – who had consistently obstructed his previous requests for safety improvements – were trying to prevent him from raising his proposal higher up the "chain of command" to avoid embarrassment and other repercussions to themselves. (CP 34, 102-107.) Gonzaga does not deny that its employees engaged in misconduct when they repeatedly failed to address an unsafe condition (1) that they knew was unsafe, (2) that they knew continued to cause significant injuries to students, (3) that they knew how to fix, and (4) that they had a duty to fix to ensure student safety.

As the injuries continued, Martin eventually concluded that he would have to submit his proposal directly to the president. (CP 34, 102-107.) On March 5, 2012, Martin sent his proposal[4] to the president's assistant attached to an email in which he stated that he knew he was putting his job in jeopardy by sending the

[4] In Judge Pennell's concurring opinion, she states that "Mr. Martin never provided Mr. Standiford or Dr. McCulloh his proposal," but this is mistaken. As the record demonstrates, Martin did, in fact, provide his proposal to Dr. McCulloh.

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email, but that he believed he had to do it anyway because of how much he was concerned about making a "better, safer environment" for the students. (CP 100.)

Two days later, a student sustained a serious head injury from running into the bare concrete wall in the Rudolph Fitness Center ("RFC") basketball court. (CP 38, 105.) The student's father, a personal injury lawyer, expressed concern to the student newspaper that no padding had been installed in the gym. (CP 38.) The next day, Gonzaga fired Martin. (CP 105.) There was no Human Resources representative at the meeting where Martin was terminated, and during that meeting, one of Martin's supervisors told him that part of the reason he was being dismissed was because Gonzaga believed he had given information about student injuries to the student newspaper. (CP 34, 202.) After he was fired, Martin wrote a letter to the president and indicated that he had been dismissed "under the pretense of insubordination," and that his repeated requests for safety improvement had gone unaddressed. (CP 102.)

Nine months later, Gonzaga installed protective padding in the gym. (CP 111.)

While Gonzaga claims that there is no genuine issue of material fact, it does not meaningfully dispute any facts presented; therefore, Martin has met his burden to demonstrate that his conduct was in furtherance of promoting student safety.

3. Martin's conduct was reasonable.

Gonzaga argues that Martin's conduct must be reasonable, as determined by whether his conduct was in furtherance of public policy goals, as opposed to

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"merely private or proprietary interests."[5] Rickman v. Premera Blue Cross, 184 Wn.2d 300, 313, 358 P.3d 1153 (2015).

To support that contention, Gonzaga cites to an email that Martin wrote to his supervisor describing his plan to keep a pool on campus for the students. Gonzaga argues that the email "answers the question whether [Martin's] conduct was in furtherance of public policy goals." (*Gonzaga's Supplemental Briefing*, pg. 4.) This is puzzling, however, because not only does Gonzaga fail to explain why this seemingly random snippet of information should be viewed as determinative, but the language is taken out of context, which is particularly troubling because Martin clearly indicates that he has two proposals to discuss:

> "I have a proposal ready to go and available for implementation by Fall 2012. I am also finishing up my second (long term) proposal."

(CP 2.) It is apparent from Mr. Standiford's response that information demonstrating "the relative vitality and necessity of the aquatic component" is all that he is interested in: "The response to that question is the primary focus and sole request at this time." (CP 114.) It is not clear why Gonzaga believes that Martin's response to his supervisor's previous inquiry would prove whether his conduct was in furtherance of public policy.

Gonzaga also alleges that Martin revealed his "true motivation" as being personal and proprietary when he indicated that he did not want someone else

[5] Gonzaga appears to argue this for the first time in its supplemental brief; therefore, it should not be considered.

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receiving credit for his "golden ticket idea." (CP 102-103, 114, 213.) There are several problems with this argument.

First, Gonzaga misapprehends the nature of the test in question. It is not required that a person have completely altruistic *feelings* in order for his conduct to further public policy goals; rather, his *conduct* must actually be directed at or have the effect of furthering public policy goals. The fact that he might also hope to be congratulated for his efforts or that he might expect to receive credit for a successful contribution to solving a safety hazard does not change the nature and purpose of his *conduct*, which was to further the public policy goal of making a dangerous condition safe for students. Gonzaga does not indicate any basis on which Martin's *conduct* could be perceived as furthering his own private interests; Martin does not sell padding or have any ownership interest in the gym.

Second, the email's language simply reflects Martin's efforts to persuade Mr. Standiford that the proposal would be worth his time. The record is replete with evidence to support Martin's understanding that any effort to gain an audience merely by citing safety concerns had previously been ignored for years and would likely continue to be ignored. (CP 4-5, 14-16, 20-21, 25-26, 31-32, 38, 51-69, 70-74, 83, 100-102, 111, 137-138, 204.) This is also confirmed by Gonzaga's own briefing in this case, which acknowledges that student injuries were an ongoing phenomenon that had been observed and brought to the attention of management for years with no response. Martin had already learned that any proposal requesting the installation of padding would also have to propose a method of paying for them or be expected to fall on deaf ears. That, therefore, was the aspect

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of the plan Martin emphasized to Mr. Standiford, rather than safety concerns. That this was a strategic attempt to avoid obstruction is particularly apparent when Martin's communication with Mr. Standiford is viewed in contrast with his communication to Dr. McCullough, wherein he presented the same proposal through an email that vehemently argued for student safety. (CP 100.)

Finally, Washington law does not require that an employee's conduct be solely for the public good; rather, it requires that an employee's conduct cannot be solely or merely private or proprietary. *Rickman*, 184 Wn2d at 313.

Martin has met his burden to demonstrate that his conduct furthered the public policy goal of student safety.

B. Martin met his burden to demonstrate that his public-policy-linked conduct was a substantial factor in the termination of his employment.

To establish a prima facie case, an employee need not attempt to prove the employer's sole motivation was retaliation; instead, the employee must produce evidence that the employee's public-policy-linked conduct was a cause of the firing and he may do so by circumstantial evidence. *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). "This test asks whether the employee's conduct in furthering the public policy was a 'substantial' factor motivating the employer to discharge the employee." *Id.* Under the substantial factor test, if the public-policy-linked conduct was a significant or substantial factor, the employer

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could be liable even if the employee's conduct otherwise did not entirely meet the employer's standards. Wilmot, 118 Wn.2d at 71. "An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable" under the substantial facto causation standard. Scrivener v. Clark College, 181 Wn.2d 439, 447, 334 P.3d 541 (2015).

Proximity in time between the public-policy-linked conduct and the firing, coupled with evidence of satisfactory work performance, may be persuasive in establishing causation. Wilmot, 118 Wn.2d at 69. "It must also be kept in mind that the employee must prove the wrongful conduct, and must do so without the benefit of the employer's own knowledge of the reason for the discharge, and generally without the access to proof which the employer has." *Id.* at 72.

In general, the issue of causation is a question of fact. Dicomes v. State, 113 Wn.2d 612, 616, 782 P.2d 1002 (1989)("... the question of whether the discharge was premised on the management study or was in retaliation for exposing budget data would raise issues of fact precluding summary judgment"); Rose, 184 Wn.2d at 286 ("Viewing the facts in [the light most favorable to the nonmoving party], we accept [plaintiff's] allegation that [defendant] terminated [him] for refusing to drive in excess of the federally mandated maximum"). Summary judgment is "seldom appropriate" on the question of an employer's motivation. Scrivener, 181 Wn.2d at 445. This is illustrated by how this Court handled similar cases such as *Rose, Thompson*, and *Dicomes*. In *Rose*, this Court viewed the facts in the light most favorable to the nonmoving party to accept plaintiff's allegation that defendant terminated plaintiff for public-policy-linked conduct. Rose, 184 Wn.2d

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at 286. In *Thompson,* this Court recognized that whether plaintiff's discharge was premised upon his public-policy-linked conduct was a question of material fact requiring remand. Thompson, 102 Wn.2d at 234. In *Dicomes,* this Court assumed that the plaintiff was discharged for public-policy-linked conduct for the purposes of appeal because the question would raise issues of fact precluding summary judgment. Dicomes, 113 Wn.2d at 616.

Gonzaga does not address the evidence presented by Martin in any of his briefings; rather, it dismisses the entirety of the record with one sentence, saying "there does not exist even a *scintilla* of evidence that Martin's alleged public policy linked conduct was a substantial factor motivating Gonzaga to discharge Martin." (*Gonzaga's Supplemental Briefing to Washington Supreme Court*, pg. 5.). This is striking hyperbole. Interestingly, Gonzaga does not deny that Martin was fired for the conduct he claims is public-policy-linked; rather, Gonzaga relies solely on its previous argument that Martin's conduct was not actually public-policy-linked.

Gonzaga does not dispute the timeline in this case:

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

March 1, 2012: 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 Martin release his proposal to Mr. Morgan. (CP 102-103.) Martin refused to give Mr. Morgan his personal intellectual property, and Mr. Morgan put Martin on a seven-day probationary period. (CP 102-13.) Shortly thereafter, Martin went home early after finding another Assistant Director to cover his shift and after obtaining permission to leave from the Associate Director, Mr. Radtke. (CP 103-110, 121, 154, 166, 170-179, 191-193, 214-216.)

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March 2, 2012: 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 Gonzaga except for HR. (CP 216.)

March 5, 2012: 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 RFC basketball court and had to be taken to the hospital by ambulance. (CP 38-39; CP 102-107.)

March 9, 2012: Martin was terminated; No representative from Human Resources was present at the meeting, and Mr. Standiford told 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 Martin's advocacy to procure safety padding in the gym was a 'substantial factor' motivating his termination. *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 70, 821 P.2d 18 (1991). Because Martin's public-policy-linked conduct was, in fact, a significant or substantial factor, Gonzaga faces liability even if Martin's conduct otherwise did not entirely meet Gonzaga's standards. *Wilmot*, 118 Wn.2d at 71. Gonzaga also claims that Martin was terminated because of poor performance, but the record does not support this assertion.

Gonzaga submitted only one unsigned evaluation from April of 2011 into the record (despite presumably having had access to every evaluation), and even *that* document does not support the conclusion that Martin had performance problems. The performance scale in the evaluation submitted by Gonzaga gives employees a

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score from 0 to 3 in increments of .5; as a result, there were six potential boxes that could be checked, with the lowest score being 0 and the highest being 3. (CP 126-127.) Martin received a total score of 1.875 out of 3, which is above average. (CP 127.) Further, he received no score lower than 1.5 in any one evaluation area, which means that he received several scores that were average and that he did not receive *any* score that was *below* average. (CP 126.)

The performance review document describes Martin as "one of the most flexible and collaborative person [sic] in our staff," and acknowledges that he "did an excellent job with the development and implementation of a new and improved training program." (CP 126-129.) It is undisputed that Martin's performance was objectively above average; Gonzaga's own documents confirm that conclusion. Gonzaga's misrepresentation of the record undermines its position. "[P]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 517, 113 S.Ct. 2742, 125 L.Ed. 407, 61 U.S.L.W. 4782 (1993)("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination").

Further, Martin testified that before he raised safety concerns, he had received a raise for good performance, and after he raised safety concerns, he had received no further pay raises despite receiving complimentary performance evaluations.

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(CP 32-35.) That testimony is undisputed by Gonzaga. Gonzaga also fails to address the question of why Human Resources did not issue a letter of expectation prior to termination, nor does it indicate why Martin was not put on any kind of plan to resolve concerns about his performance or why he had never previously been told that he was in danger of losing his job due to poor performance.

The proximity in time between 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.

C. Gonzaga's argument regarding legitimate non-retaliatory reasons for dismissal is without merit.

Gonzaga argues that "the evidence in the record is overwhelming that Martin was fired for legitimate non-retaliatory reasons," which it identifies as "documented performance issues," and "insubordination." [6] (*Gonzaga's Supplemental Briefing,* pg. 5.) "Documented performance issues" were addressed above and demonstrated to be without merit, which leaves the question of insubordination.

Gonzaga claims that Martin was fired primarily for insubordination, but it never clearly defines insubordination nor does it identify which actions were

[6] In support of this assertion, Gonzaga argues that "[e]ven Martin acknowledged that he should have received 'a written warning for insubordination.'" *Gonzaga's Supplementary Brief,* pg. 6. This is a misleading statement. The cited information at CP 105 indicates that what Martin actually stated was that the consequences he suffered for what he was accused of doing were out of proportion to what occurred even if it were true, and that at worst he should have received a written warning, not termination.

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insubordinate. Gonzaga does not address the fact that Dr. Hernandez never actually *directed* Martin that he could not contact Mr. Standiford. It does not address the fact that Martin contacted Mr. Standiford in compliance with the Policies and Procedure Handbook. It does not address the fact that Mr. Standiford never provided Martin with a 'direct order' that he actually disobeyed; rather, he gave him a 'suggestion' that Martin politely asked him to reconsider. It does not address the fact that Gonzaga 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 a liberal arts university is a terminable offense. At no point does Gonzaga reference any policy that says employees of the RFC are not permitted to leave work after having another employee of equal rank cover their shift. At no point does the Gonzaga explain how 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. Gonzaga references no policy that permission from the Director of the RFC is required in order to simply cover a shift.

Gonzaga does not reference any policy that permits it to restrict the contact of Martin with anyone associated with Gonzaga, particularly given his status as a graduate student; nor does it even identify the person who issued this restriction. Gonzaga fails to explain how one of the most junior departments in the school has the authority to determine who is permitted to speak to the President nor does it indicate how Martin can be permitted to speak to Human Resources but not to the President, who is the head of all departments.

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Finally, as previously mentioned, Gonzaga does not deny that Martin was fired for the conduct he claims is public-policy-linked, because Gonzaga relies entirely on its previous argument that Martin's conduct was not actually public-policy-linked. Gonzaga admits that what it describes as insubordinate conduct is the same conduct that Martin alleges is public-policy-linked conduct, and this is no surprise because this is the expected nature of a whistle-blowing case. It would be very unusual that an employer would give an employee permission to report his misconduct, and it is conversely quite common that an employee will have been explicitly told not to engage in whistle-blowing activities prior to doing so anyway – in fact, it is just this scenario that creates the need for a whistle-blower. It is for this reason that "insubordination" is clearly an entirely insufficient basis for Gonzaga to claim it was entitled to terminate Martin's employment, because one would be hard-pressed to imagine any whistle-blowing case where the whistle-blowing employee's reporting activities were not inherently insubordinate in some fashion.

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

Martin met his burden to demonstrate a prima facie case and survive summary judgment, and Gonzaga's arguments are entirely without merit.

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II. RCW 4.12

A. The Bennett test controls the determination of an implied cause of action.

Gonzaga admits that the proper framework for evaluating an implied right of action is contained in *Bennett*,[7] as argued by Martin. (*Reply RE: Answer to Cross Petition for Review,* pgs. 4 and 6.) In particular, Gonzaga confirms that the *Bennett* court's conclusion that an implied cause of action exists "under a statute which provides protection to a class of persons but creates no remedy" was correct. (*Reply RE: Answer to Cross Petition,* pg. 6, citing Bennett, 113 Wn.2d at 920-21.)

The *Bennett* test has three considerations: "[F]irst, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Id.*

Benefited Class: With respect to the first part of the test, Gonzaga argues that Martin is not part of an "identifiable" class (e.g., "employees who are over forty years old"), but rather he is a member of a "general class of persons" (i.e., "employees of any age"). Gonzaga then immediately moves on to the second part of the test and provides no further argument or any citation to authority to assist the reader with grasping the import of this observation. This distinction has no meaning; it is a false dichotomy. Contrast between "unidentifiable" and "identifiable" or between "general" and "specific" could be meaningful, but the

[7] *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

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comparison between "identifiable" and "general" creates no useful distinction. Gonzaga appears to be trying to distinguish the *Bennett* case from the case at hand by observing that RCW 49.12 references a broad group of people (all employees) while the *Bennett* case referenced a subset of that group (employees over forty years old); even so, it nevertheless remains that both groups are clearly *identifiable*. This fact is implicitly confirmed by *Bennett* itself; if one could not identify the group referenced by the term "employees," then one would similarly be unable to identify the group referenced by the term "employees over forty years old," because the class of "employees over forty years old" is a subset of the class "employees." Gonzaga's argument implies the conclusion that there can be no rights accorded to the general class of people defined as "employees;" however, this is immediately disproved by the existence of a vast body of well-settled Washington law on the subject of employment rights, including the authority that governs the wrongful termination claim that is part of this very case.

Legislative Intent: In applying the second part of the *Bennett* test, Gonzaga argues that no statutory language indicates "that the legislature intended to create a remedy in a court of law that is at the same level as eradicating invidious discrimination in all aspects of employment regardless of the size of the employer," or any legislative intent to provide "rights as fundamental as preventing an employer from engaging in the unfair practice of age discrimination in employment." (*Reply RE: Answer to Cross Petition for Review,* pg. 7.) While this observation may be interesting to Gonzaga, it is not an accurate recitation of the second part of the *Bennett* test or particularly helpful to the Court. The second part

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of the *Bennett* test is simply "whether legislative intent, explicitly or implicitly, supports creating or denying a remedy." Bennett, 113 Wn.2d at 920. Gonzaga provides no argument or authority for the implication that legislative intent to create a remedy of a certain *type* or at a particular *level* or to provide "fundamental" human rights is required. Gonzaga concludes its cursory consideration of the second part of the *Bennett* test by admitting that employees have a limited right relating to personnel files, but declines to analyze this information further.

Gonzaga does not dispute or address the assertions made by Martin in his *Reply RE: Petition for Discretionary Review* regarding legislative intent or the explicit and implied remedies contained in RCW 49.12.130.

Purpose: In applying the third part of the *Bennett* test, Gonzaga states that implying a remedy would not be consistent with the underlying purpose of RCW 49.12 because the right conferred by the statute is not "a fundamental or human right providing a right of recovery for invidious age discrimination." (*Reply RE: Answer to Cross Petition for Review,* pg. 8.) This, however, is not the requirement of the third part of the *Bennett* test, nor does Gonzaga provide any authority for the suggestion that implied remedies are only available for fundamental human rights.

Gonzaga does not actually assert any underlying purpose, which makes consideration of its analysis under the *Bennett* test impossible. In his *Reply RE: Petition for Review,* Martin asserted that "[t]he underlying purpose of the legislation is to prevent employers from maintaining false or irrelevant employee records which would be damaging to employees" and which "would undermine public policy." (*Reply RE: Petition for Review, pg. 5.)* Gonzaga does not dispute

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this recitation. The best way to ensure that the legislative purpose is fulfilled is to permit employees to inspect their own records (as the legislature explicitly stated they have a right to do). Providing employees with a remedy for the enforcement of those explicit rights is consistent with that purpose.

B. Proper application of the 'plain meaning rule' supports an implied judicial remedy.

In requesting review by this Court, Gonzaga argued that the underlying decision is in conflict with prior decisions of this Court "relating to statutory construction and the *plain meaning rule.*" (*Answer to Petition for Review*, pg. 15.)

Despite its insistence that this case would be resolved if the plain meaning rule were accurately applied, Gonzaga curiously never references the specific, clear, and unequivocal language that would purportedly determine the issue. Reference to specific language is necessary to make use of Gonzaga's cited authority directing that "[w]here the plain language of a statute is unambiguous" a court is not to construe the statute otherwise. (*Answer to Petition for Review*, pg. 17, citing Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). Specific language is also required to apply Gonzaga's citation to Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997): "When the words in a statute are clear and unequivocal, this court is required to assume the Legislature meant exactly what it said and apply the statute as written." Puzzlingly, Gonzaga has not identified any such clear and unequivocal words. Gonzaga also does not explain how it expects this Court to evaluate language that it has not actually identified.

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While Gonzaga purports to argue for application of the 'plain meaning rule,' it is actually encouraging conclusions from the *absence* of clear and unequivocal language. This is a very different proposition from the application of the 'plain meaning rule,' and one for which Gonzaga provides no authority in support.

In *Rose,* this Court confirmed that "Congress and the legislature know how to create exclusive remedies, and as the popularly responsive branch of government, they are in the best position to determine when such remedies should be restricted in favor of employers." Rose, 184 Wn.2d at 287. The legislature created no such exclusive remedy here, and the reasoning of this Court in *Rose* confirms that contrary to Gonzaga's argument, a court is not to imply an exclusive statutory remedy in the absence of explicit language establishing one.

Ironically, Gonzaga argues the plain meaning rule where it does not control and entirely disregards the plain meaning of the statute where it is most relevant – in the identification of personnel files.

Gonzaga fails to meaningfully acknowledge that the statute governs personnel files, in the plural, despite its own repeated use of the plural term. This language, by its plain meaning, clearly contemplates that there may be more than one file included within the term "personnel files"; in fact, the plain meaning of this language includes *all* personnel files, regardless of their number or title. Second, the statute defines "personnel files" as those that "are regularly maintained by the employer as part of his business records" or that "are subject to reference for information given to persons outside of the company." RCW 49.12.250(2). The

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plain meaning of that statutory language clearly includes an "employee relations file," which was one of the files withheld by Gonzaga.

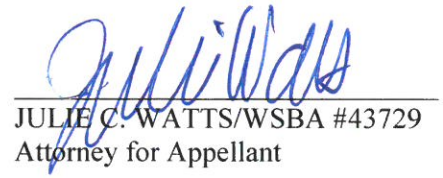
Gonzaga repeatedly indicates that the statute does not require an employer to provide a copy of the file to an employee, but this is a red herring intended to distract the Court. Martin's complaint was not that Gonzaga failed to provide him *a copy* of a file that was otherwise made available to him; rather, his complaint was that Gonzaga failed to provide him *access* to all of his personnel files. Instead, Gonzaga provided access to a file entitled "personnel file," while withholding other files it had maintained related to his employment as part of its business records under synonymic titles like "employee relations file."

As confirmed by *Bennett*, private enforcement of the explicit and implicit statutory remedies contained in RCW 49.12.250 is a justiciable claim pursuant to Washington law, and the Court of Appeals was correct to remand the claim for adjudication by the trial court.

III. CONCLUSION

Martin met his burden to provide a prima facie case for wrongful discharge and his claim should survive summary judgment. Martin's claim pursuant to RCW 49.23.250 is a justiciable claim pursuant to Washington law, and the matter should be remanded for adjudication by the trial court.

RESPECTFULLY SUBMITTED this 5th day of April, 2018,



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April 05, 2018 - 4:44 PM

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