

FILED
SUPREME COURT
STATE OF WASHINGTON
3/30/2018 9:46 AM
BY SUSAN L. CARLSON
CLERK

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/Petitioner

v.

GONZAGA UNIVERSITY,

Defendant/Respondent/Cross Petitioner.

SUPPLEMENTAL BRIEFING TO WASHINGTON SUPREME
COURT

MICHAEL B. LOVE WSBA #20529
Attorney for Respondent/Cross Petitioner
905 West Riverside Ave. Ste. 404
Spokane, WA 99201 (509) 212-1668

ORIGINAL

filed via
PORTAL

TABLE OF CONTENTS

I.	INTRODCUTION	1
II.	Argument.....	1-6
	A. Martin failed at time of summary judgment to present sufficient evidence that he acted in furtherance of public policy.	
	B. Martin failed at time of summary judgment to present sufficient evidence that his alleged public policy linked conduct was a substantial factor motivating Gonzaga to discharge his at-will employment.	
III.	Conclusion.....	7

TABLE OF AUTHORITIES

Becker v. Community Health Systems, 184 Wash.2d 252 (2015) 1

Bennett v. Hardy, 113 Wash.2d 912, 784 P.2d 1258 (1990) 2

Dicomes v. State, 113 Wash.2d 612, 620 (1989). 2

Farnam v. CRISTA Ministries, 116 Wash.2d 659, 672 (1991). 3

Gardner v. Loomis Armored Inc., 128 Wash.2d 931, 940 (1996). 1, 2

Kahn v. Salerno, 90 Wash. App. 110, 117 (1998) 4, 6

Rickman v. Premera Blue Cross, 184 Wash.2d 300, 313-314 (2015) . . 1, 2

Rose v. Anderson Hay and Grain Company, 184 Wash.2d 268, 274 (2015)
. 1

Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 232 (1984) 1, 2

Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wash.2d 46, 69 (1991)
. 1

I. INTRODUCTION

The *trilogy* of wrongful discharge decisions in *Rose*, *Becker*, and *Rickman* reembraced “the analytical framework established in *Thompson, Wilmot and Gardner*.” *Rose v. Anderson Hay and Grain Company*, 184 Wash.2d 268, 274 (2015).

This “analytical framework”¹ when applied to the record in this case once again supports affirming the Court of Appeals decision to uphold the trial court’s decision to grant summary judgment to Gonzaga University relating to David Martin’s wrongful discharge claim.

Martin’s wrongful discharge claim was appropriately dismissed on summary judgment because he failed to provide sufficient evidence that he (1) acted in furtherance of public policy and (2) that his conduct in furthering the public policy was a substantial factor motivating Gonzaga to discharge him from employment. *Rickman v. Premera Blue Cross*, 184 Wash.2d 300, 313-14 (2015).

¹ Gonzaga agrees with *amicus* Washington Employment Lawyers Association that the 4-factor Perritt formulation does not apply in this case.

II. ARGUMENT

A. Martin Failed at Time of Summary Judgment to Present Sufficient Evidence to Find that he Acted in Furtherance of a Recognized Public Policy

In *Thompson* and *Gardner* this Court stated the employee alleging that he or she was wrongfully discharged under one of the four scenarios (in Martin's case alleged *whistleblower* activity) must prove that his dismissal violated a clear mandate of public policy. *Thompson v. St. Regis Paper Company*, 102 Wash.2d 219, 232 (1984); *Gardner v. Loomis Armored Inc.*, 128 Wash.2d 931, 940 (1996).

Thompson also stands for the proposition that no liability attaches to the employer's decision to terminate an otherwise at-will employee "when the interest alleged by the plaintiff/employee has been found to be purely private in nature and not of general public concern." *Thompson v. St. Regis Paper Company*, 102 Wash.2d at 232 (1984).

Thus the analysis must focus on the *reasonableness* of Martin's conduct and whether his conduct was in furtherance of public policy goals, as opposed to "merely private or proprietary interests." *Rickman v. Premera Blue Cross*, 184 Wash.2d at 313 (citing and quoting *Dicomes v. State*, 113 Wash.2d 612, 620 (1989)).

This Court in *Rickman* compared the conduct of two employees under two different factual scenarios in prior cases decided by this Court. *Bennett v. Hardy*, 113 Wash.2d 912, 924-25 (1990) (allowing a claim when the employee hired an attorney to protect herself from discrimination, an act for which she was later fired), with *Farnam v. CRISTA Ministries*, 116 Wash.2d 659, 672 (1991) (finding the employee did not seek to further the public good because she knew the employer's conduct did not violate the law.)

In *Rickman* this Court in reversing the lower court's granting of summary judgment found that the plaintiff/employee had presented sufficient evidence that she acted in furtherance of public policy and not of her own "concerns to benefit her private or proprietary interests." *Rickman*, 184 Wash.2d at 313. The employee in *Rickman* believed and disclosed to her supervisor that the employer's "risk-bucketing plan would disclose the private information of policy holders, violating a clear mandate of public policy under HIPPA." *Id.* at 313

Contrary to the record in *Rickman*, there is no genuine issue of material fact that would preclude summary judgment in this case and

warrant a trial of this matter on Martin's wrongful discharge claim. Martin's own communication via email to his supervisor answers the question whether his conduct was in furtherance of public policy goals:

"I have a very specific plan, along with other ideas, on how to generate revenue to keep a pool operational and buy time for the future. I have a short term, five year plan for the pool, and another proposal to follow that. The ultimate goal being: keep a pool on campus for the students." CP 115

Martin's supervisor specifically instructed him to follow Gonzaga's chain of command within the athletics department. CP 109, 183-184. Martin refused and in doing so disclosed his true motivation which was clearly of a "purely private nature and not of general public concern" when he responded that he did not want someone else receiving credit for his "golden ticket idea. Something I don't want others corrupting or taking credit for." CP 102-103, 114, 213

Martin's own subjective assertion that he was a *whistleblower* and that he was allegedly furthering the public policy goal of ensuring the safety of the students at Gonzaga is belied by the record and is not supported by the case law. *Kahn v. Salerno*, 90 Wash. App. 110, 117 (1998) (Plaintiff must do more than express an opinion or make conclusory statements; to defeat summary judgment, plaintiff must establish specific and material

facts to support each element of his or her prima facie case.)

B. Martin Failed at time of Summary Judgment to Present Sufficient Evidence that his alleged public policy linked conduct was a substantial factor motivating Gonzaga to Discharge him.

In *Rickman*, this Court clearly set forth the test that must be met through circumstantial evidence by Martin: whether Martin's conduct in furthering the public policy was a substantial factor motivating the employer to discharge Martin. *Rickman*, 184 Wash.2d at 314.

In this case, 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. *Id.* at 314

Conversely, the evidence in the record is overwhelming that Martin was fired for legitimate non-retaliatory reasons. Martin had past documented performance issues. And most recently, engaged in insubordination which triggered him being placed on a leave of absence and later fired when he engaged in further insubordinate conduct. CP 75-76, 95-96, 100, 102-103, 109, 110, 114, 118-121, 165-167, 183-184, 185-189, 191-198, 201-203, 213-214, 216. Even Martin acknowledged that he should

have received “a written warning for insubordination.” CP 105

Contrary to *amicus* with the Washington Employment Lawyers Association and Justice Fearing, there is no evidence in the record of an improper motive on the part of Gonzaga to discharge Martin from his at-will employment. In order to prove an improper motive, Martin would have the burden of presenting circumstantial evidence of a close proximity in time between his discharge and his raising of concerns about student safety in the basketball gymnasium, “coupled with evidence of satisfactory work performance. *Kahn v. Salerno*, 90 Wash. App. at 130-131.

Even an employee engaged in public policy linked conduct “does not enjoy absolute immunity; an employee may still be terminated for proper cause.” *Kahn v. Salerno*, 90 Wash. App. at 129.

The proximity in time between Martin raising concerns about the lack of padding on the walls of the basketball court is too remote in time to create a material question of fact precluding summary judgment and warranting a trial of this matter. Other employees had engaged in such conduct over the years and did not face discipline or discharge. CP 111, 122, 170, 204-206

Additionally, Martin throughout his employment with Gonzaga had performance issues relating to his inability to get along with others at work which his immediate supervisor had been counseling him on as early as April of 2011. CP 119-120, 134-135, 190, 199

The substantial factor for Martin's discharge was his past documented performance problems and repeated acts of insubordination – nothing more.

II. CONCLUSION

The Court should affirm the decision of the Court of Appeals relating to Martin's wrongful discharge claim.

RESPECTFULLY SUBMITTED this 30th day of March, 2018.

/S/Michael B. Love

MICHAEL B. LOVE WSBA 20529

ATTORNEY FOR RESPONDENT/CROSS PETITIONER

SUPREME COURT OF THE STATE OF WASHINGTON

In re:	
DAVID MARTIN,	SUPREME COURT NO.
Petitioner/Appellant	95269-8
And	COURT OF APPEALS NO.
GONZAGA UNIVERSITY,	341038
Defendant/Respondent	CERTIFICATE OF SERVICE

On March 30, 2018, I sent by regular mail a true and correct copy of Gonzaga's Supplemental Briefing to the individuals listed below:

JULIE C. WATTS
LAW OFFICE OF JULIE C. WATTS, PLLC
108 N. WASHINGTON St. Ste. 302
SPOKANE, WA 99201

MICHAEL SUBIT
FRANK FREED SUBIT & THOMAS LLP
705 2nd Ave. Ste. 1200
Seattle, WA 98104-1798

JEFFREY L. NEEDLE
LAW OFFICE OF JEFFREY L. NEEDLE
119 First Ave. South, Suite 200
Seattle, WA 98104

RESPECTFULLY SUBMITTED THIS 30TH DAY OF MARCH
2018.

/S/Michael B. Love
MICHAEL B. LOVE WSBA 20529
ATTORNEY FOR RESPONDENT/CROSS PETITIONER
GONZAGA UNIVERSITY

MICHAEL LOVE LAW, PLLC

March 30, 2018 - 9:46 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 95269-8
Appellate Court Case Title: David Martin v. Gonzaga University
Superior Court Case Number: 15-2-00466-7

The following documents have been uploaded:

- 952698_Supplemental_Pleadings_20180330094406SC825072_7320.pdf
This File Contains:
Supplemental Pleadings
The Original File Name was Supplemental Briefing to Supreme Court.pdf

A copy of the uploaded files will be sent to:

- jneedlel@wolfenet.com
- julie@watts-at-law.com
- msubmit@frankfreed.com

Comments:

Sender Name: Michael Love - Email: mike@michaellovelaw.com
Address:
905 W RIVERSIDE AVE STE 404
SPOKANE, WA, 99201-1099
Phone: 509-212-1668

Note: The Filing Id is 20180330094406SC825072