THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0154

MELISSA DONOVAN,
Appellant

V.

SOUTHERN NEW HAMPSHIRE UNIVERSITY,
Appellee

APPEAL OF ORDER OF HILLSBOROUGH COUNTY SUPERIOR COURT
(RULE 7)

ANSWERING BRIEF OF SOUTHERN NEW HAMPSHIRE UNIVERSITY

Christopher Cole (NH Bar No 8725)
Megan C. Carrier (NH Bar No. 20352)
Sheehan Phinney Bass & Green, P.A.
75 Portsmouth Boulevard, Suite 110
Portsmouth, NH 03801
(603) 627-8223

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STATEMENT OF THE CASE

This case arises out of a broken math class, a private university's careful and responsive effort to address certain fairness concerns that arose out of that class by modifying two student grades, and an employee's disagreement with the university's approach to the problem. That employee – Appellant Melissa Donovan – resigned her employment with the university – Appellee Southern New Hampshire University ("SNHU") – approximately four months following the issue surrounding the grade changes and after an extended period of coaching related to ongoing performance concerns. She thereafter sued SNHU for wrongful termination based on a constructive discharge theory. The trial court properly granted SNHU's motion for summary judgment after determining that Dr. Donovan could not establish that her employment was terminated because she acted in accordance with a "public policy" where her grievance was aimed, not at vindicating a public policy, but at her disagreement with an internal management decision in a matter of private academic judgment. This appeal followed.

STATEMENT OF THE FACTS

A. Dr. Donovan's Employment and SNHU Reporting Structure

SNHU is a New Hampshire not-for-profit university that offers online and campus-based academic programs. Appendix to Brief of the Appellant/Plaintiff ("Apx."), at Vol. IV at 36 (¶ 1). Dr. Donovan began working for SNHU in September 2011 as a Teacher for SNHU's campus-based program. Apx. IV at 45 (¶ 3), 61-67. She became a Lecturer for the campus-based program in August of 2016, and was thereafter promoted to the position of Associate Dean of Faculty, Mathematics, for SNHU's online

program—a position she held until her resignation on November 30, 2018. Apx. IV at 45 (¶¶ 4-6).

As Associate Dean of Faculty, Mathematics, Dr. Donovan reported to Dr. Gwendolyn Britton, Executive Director of STEM, from December 2016 through approximately July of 2018, and to Dr. Susan McKenzie, Senior Associate Dean, from approximately July/August of 2018 through her resignation. Apx. IV at 36 (¶¶ 2-4), 46 (¶ 7). Prior to August of 2018, Dr. Donovan and Dr. McKenzie were peers and colleagues, both reporting to Dr. Britton. Apx. IV at 36 (¶¶ 2-4). Dr. Donovan's primary focus area was oversight of faculty assignments and support for mathematics courses, and Dr. McKenzie's primary focus area was oversight of course and program design, competencies and student learning experiences. Id. (¶ 5).

B. The MAT 136 Grade Changes

The grade changes which form the basis of Dr. Donovan's wrongful termination claim were for two students enrolled in SNHU's MAT 136 course, Introduction to Quantitative Analysis, which ran from May 7, 2018 through July 1, 2018. Apx. IV at 39-40 (¶ 20). For purposes of MAT 136, SNHU utilized a new adaptive courseware technology called ALEKS. Apx. IV at 124 (¶ 5). As originally structured, the grading scheme for MAT 136 consisted of a total of 1000 points, consisting of 200 points for participation, 500 points for so-called "Learning Path" assignments, and 300 points for the final exam. Apx. IV at 124 (¶ 6). But, the grading scheme was structured as an "all or nothing" system whereby:

- students who scored a 225 or higher on the final exam would receive 500 out of 500 points for the Learning Path; and

- students who scored a 224 or lower on the final exam would receive zero out of 500 points for the Learning Path

regardless of how many points the students had actually earned through completion of the Learning Path assignments. Id. Neither the course syllabus for MAT 136 nor the MAT 136 Course Introduction pages on Blackboard (SNHU's online learning platform in 2018) communicated this grading scheme to the students. Apx IV at 127 (¶ 16), 130, 135-38. Some instructors posted information about how the course would be graded on Blackboard, but those communications varied across MAT 136 sections. Apx. IV at 140-57.

Discussions regarding potential modifications to the MAT 136 grading scheme began as early as March 2018, but were not fully implemented until September 2018. Apx. IV at 40-41 (¶ 26). In March of 2018, Drs. Donovan and McKenzie asked Dr. David Sze – whose title was Technical Program Facilitator – Mathematics, and who was responsible for developing new courses and troubleshooting problem courses – to review MAT 136 because of concerns relating to the course design and grading structure. Apx. IV at 123 (¶ 4). Dr. Sze analyzed the grades of all of the students taking the MAT 136 course during that particular term under both the "all or nothing" method (described above) and the "you get what you get" method (whereby students would be awarded the points they actually earned via both the Learning Path and the final exam). Apx. IV at 124-27 (¶¶ 7-15), 200-08.

In late June of 2018, SNHU directed instructors for the MAT 136 course that they should not utilize the "all or nothing" grading method, but

some instructors did not follow this directive. Apx. at Vol. IV at 128 (¶ 21). On July 23, Dr. Sze sent an email to Drs. Donovan and McKenzie communicating his findings. Apx. IV at 128 (¶ 21), 210-12. His analysis revealed that there were two students (the "Students") who had failed the course under the "all or nothing" grading method, but would have received a passing grade under the "you get what you get" method. Apx. IV at 124-25 (¶ 9), 202, 206-07, 210-12. Dr. Sze's analysis also uncovered that the grading methods employed by the various MAT 136 section instructors were not consistent; specifically, some instructors awarded partial credit for the completion of Learning Path assignments, while others did not. Apx. IV at 125-26 (¶¶ 10-14). In fact, Dr. Sze found that across the eighteen sections of MAT 136, instructors applied one of four different grading methods. Id. The Students fell into a group of only five sections whose instructors graded using a firm "all or nothing" method. Apx. IV at 125 (¶ 11).

On July 30, 2018, Dr. Donovan received an email from Dr. McKenzie (who was then her boss), in which Dr. McKenzie explained that she had reviewed the information relevant to one of the Students with Dr. Britton, and asked that Dr. Donovan modify the Student's grade to reflect the grade the Student would have received if the "you get what you get" grading method – rather than the "all or nothing" grading method – had been applied. Apx. IV at 210. Dr. Donovan responded: "To clarify, am I being asked, or told?" Id. Dr. McKenzie responded and explained the reasoning behind the decision, but Dr. Donovan refused to make the grade change. Id. Ultimately, Dr. Britton authorized that grade change, in addition to a similar a change for the other Student. Apx. IV at 40 (¶ 21),

194-98. Dr. Britton had authority to approve the grade changes under the SNHU grade change policy, which allows an Executive Director to make late grade changes. Apx. IV at 40 (¶ 22), 214, 299-300.

The grade changes were consistent with SNHU's decision – which SNHU had already made by the time Dr. Britton approved them – to eliminate the "all or nothing" grading method from the MAT 136 course and to apply the "you get what you get" grading method going forward. Apx. IV at 40-41 (¶ 26). These final modifications to the MAT 136 grading scheme were fully implemented in September 2018. Apx. IV at 127-28 (¶¶ 19-20).

C. Dr. Donovan's Job Performance

On August 6, 2018, Dr. Donovan, Dr. McKenzie, and Dr. Britton met with SNHU's Human Resources department to discuss two concerns regarding Dr. Donovan's performance. Apx. IV at 39 (¶ 18). One concern related to Dr. Donovan's refusal to make the grade changes, while the other related to her refusal to follow up with a student who was upset about a course experience, despite Dr. McKenzie repeatedly requesting that she do so. Apx. IV at 39 (¶ 17), 221-28, 230-37, 239-47. While SNHU did not take any disciplinary action against Dr. Donovan as a result of these two incidents, she was coached and made aware that future such occurrences would result in some form of disciplinary action. Apx. IV at 39 (¶ 19), 249-50.

Importantly, Dr. Donovan had been exhibiting problematic behaviors for an extended period of time prior to the August 6 meeting. Specifically, as early as January of 2018, Dr. Britton began noting unprofessional and inappropriate communications, as well as lack of follow

through, on Dr. Donovan's part which Dr. Britton believed were not in alignment with SNHU's core competencies. Apx. IV at 37 (¶ 7), 162-66, 302-04, 306-07, 309-10, 312-13, 315-21, 323-25, 327-32. Dr. Britton discussed her concerns with Dr. Donovan at a meeting on January 22, 2018 – well before the MAT 136 grade change issue had arisen. Id. Among other concerns, Dr. Britton addressed the following with Dr. Donovan during the January 22 meeting:

- Dr. Donovan's failure to follow up with Dr. Britton regarding the status of a particular project, despite Dr. Britton's repeated requests. Id. at Vol. IV at 163-64.
- Certain unprofessional communications Dr. Donovan had made. Apx. IV at 164; see also id. at Vol. IV at 312-13.
- Dr. Donovan's sharing of disparaging remarks made about a colleague. Apx. IV at 165.
- Dr. Donovan's lack of follow-through on faculty training. Id.
- Expectations regarding work hours—specifically, Dr. Donovan having left early without telling Dr. Britton. Apx. IV at 166.

Despite the coaching that took place at the January 22 meeting, Dr. Donovan continued to exhibit performance deficiencies – and Dr. Britton continued to coach Dr. Donovan in relation to those performance deficiencies – relating to ineffective communication and follow-through and conflict with colleagues from March 2018 through May 2018. Apx. IV at 37 (¶ 8), 168-76; see also id. at Vol IV at 334-37, 339, 342-43, 345-46, 348-56, 358-60, 362-64, 366-69. On May 17, 2018, Dr. Britton met with Dr. Donovan to discuss Dr. Donovan's performance evaluation. Apx. Vol

IV at 38 (¶ 11), 180-88; see also id. at 79-89. Among other things, Dr. Donovan's performance review reflected the following concerns:

- Leading self:
  - Is surprised and defensive when receiving feedback
  - Has limited awareness of the impact they have on interpersonal relationships
  - Is uncomfortable building relationships especially with individuals of differing view points
  - May express[] opinions in an insensitive or negative manner
- Effective Communication
  - Does not always get the point across in writing or in person resulting in unclear expectations
- Team Player
  - May withhold resources or deal with lateral conflict noisily or uncooperatively
  - May not respect boundaries or exhibit trusting behaviors
  - May be very competitive, maneuver for advantages
- Instill Trust
  - May be guarded or appear to be holding back. Unclear about their own values.
- Growth Mindset
  - Does not enjoy putting a lot of time into work with unknown variables
  - Typically takes the path of least resistance or what appears to be the easiest option

Apx. IV at 37 (¶ 9), 79-89. Dr. Britton informed Dr. Donovan that if her behaviors did not improve, she would be put on a performance improvement plan, or "PIP." Apx. Vol IV at 38 (¶ 13), 190-92.

Dr. Donovan's problematic behaviors – in addition to beginning prior to the August 6, 2018 meeting at which Drs. Donovan, Britton, and McKenzie discussed the grade change issue – continued following the August 6 meeting. For instance, on one occasion, Dr. Donovan—employing an inappropriate and accusatory tone—demeaned Dr. Sze during a meeting at which others were present. Apx. IV at 106. She also sent a message stating, "HE HASN'T STARTED YET I AM GOING TO LOSE MY MIND" in a chat window that was visible to others in the meeting. Id. After months of unsuccessful coaching and recurring troublesome behaviors, Dr. Britton and Dr. McKenzie ultimately decided, in consultation with Human Resources, to place Dr. Donovan on a PIP. Apx. IV at 41 (¶ 29).

The PIP was presented to Dr. Donovan on October 16, 2018, and focused on behavioral issues that violated the same core competencies addressed in Dr. Donovan's 2017/2018 Performance Review, including:

> - Lack of a sense of urgency and appropriate work prioritization… not meeting the "Lead by Example" competency by "talking the talk" and "walking the walk" and diving into the details as needed and displaying composure in all situations…struggl[ing] with self management in terms of appropriately prioritizing [her] work and working with a sense of urgency in matters that are time sensitive."

- Inappropriate and unprofessional communication and behaviors/not meeting Agile Communication and Collaborative Partner competencies…struggl[ing] with being receptive to routine coaching and [is] often defensive, and at times, hostile with [her] managers and peers…struggl[ing] in building relationships with others and in providing appropriate feedback to others… struggl[ing] with communicating in a professional and constructive manner, and frequently [coming] across as hostile and accusatory."

Apx. IV at 105-06. Dr. Donovan's refusal to change the Student's grade was not included in, and was not a basis for, the PIP. Apx. IV at 41 (¶ 32), 105-07.

Unfortunately, even the PIP failed to effectively curb Dr. Donovan's problematic behaviors. In November of 2018, Dr. Britton again received reports of Dr. Donovan behaving inappropriately. Apx. IV at 42 (¶ 33). One report, received by Dr. Britton on Friday, November 16, 2018, related to Dr. Donovan having engaged in loud conversations that included, among other things, disparaging remarks about a colleague. Id.; see also id. at Vol IV at 257. Another report, which Dr. Britton received the same day, related to Dr. Donovan's combative and non-collaborative responses and reactions to aspects of a new faculty model pilot. Apx. IV at 42 (¶ 34), 257-58. Specifically, during a meeting to discuss the pilot, Dr. Donovan, after expressing disagreement with how the adjuncts would be paid, indicated she would be removing her best faculty from the pilot. Apx. Vol IV at 42 (¶ 34). This incident had been escalated to the President of SNHU's Global Campus, Gregory Fowler. Id. Dr. Britton and Dr. McKenzie consulted

with Human Resources about the PIP before it was shared with Plaintiff. Apx. Vol IV at 42 (¶ 35), 252-54.

D. Dr. Donovan's Resignation

At a meeting with Dr. McKenzie on November 27, 2018, Dr. Donovan informed Dr. McKenzie that she intended to resign her position on January 3, 2019. Apx. IV at 260. Thereafter, Dr. McKenzie called Plaintiff to follow-up on the November 27th meeting. Apx. IV at 264. Dr. McKenzie's notes from that call reflect the following:

> Sue: How are you feeling today?
>
> Melissa: Tender, How are you today?
>
> Sue: I am doing well. Glad it's Friday.
>
> Sue: When we spoke on Tuesday, you stated that you plan to resign on Jan 3rd. Is this still your plan?
>
> Melissa: Well I don't know. Maybe. I haven't submitted anything or written anything.
>
> Sue: **If this is so**, the process of HR is for you to submit a resignation letter stating that January 3rd will be your last day. I would like to have it by the end of the day.
>
> Melissa: I will let you [know] by the end of the day.
>
> Sue: **Meet on Monday** – Set expectations – this is a brief discussion between the 3 of us.
>
> Sue: **I would like to work with you on the PIP moving forward**.

> Melissa: I would like to have the notes to make a good decision.

Id. (emphasis added). Dr. McKenzie sent the notes Dr. Donovan had requested later that afternoon. Apx. IV at 266-77. Not having heard back from Dr. Donovan, Dr. McKenzie emailed Dr. Donovan on November 30, 2018, stating as follows: "Melissa, Just checking in to see if you have come to a decision about submitting your resignation. I am getting ready to leave for the day. Sue." Apx. IV at 279. In response to this email, Dr. Donovan sent an email resigning her position, effective immediately. Apx. IV at 109. Dr. Donovan's constructive discharge/wrongful termination claim followed.

SUMMARY OF THE ARGUMENT

The trial court properly granted SNHU's motion for summary judgment on Dr. Donovan's wrongful termination claim. Even assuming that Dr. Donovan could establish that she was constructively discharged (and under the applicable standard, she cannot), that claim – grounded upon the theory that SNHU terminated her employment because she raised ethical and academic policy violation concerns regarding the grade changes – fails as a matter of law. Specifically, as the trial court found, Dr. Donovan cannot demonstrate, as she is required to do in order to support a wrongful termination claim, that she was discharged for performing an act that public policy would encourage or refusing to perform an act that public policy would condemn. While often but not always left to the jury, the absence of an applicable public policy here is clear because it is well-established that (1) disagreement with an internal management decision is

not an act protected by public policy; (2) judicial intervention into a private educational institution's judgment of academic performance is inappropriate under the law; and (3) complaints about internal, rather than public, policy violations are not protected.

Even if the Court were to determine that the trial court was prohibited from determining that there was no valid "public policy" at issue, the court's decision should nonetheless be affirmed because, summary judgment in SNHU's favor can be affirmed on an alternative ground – that Dr. Donovan was never terminated and was not, as a matter of law, constructively discharged.

The trial court's decision should be affirmed.

STANDARD OF REVIEW

"In reviewing a grant of summary judgment, [the Supreme Court] look[s] at the affidavits and other evidence, and all inferences properly drawn therefrom, in the light most favorable to the non-moving party." Palmer v. Nan King Rest., 147 N.H. 681, 682-83 (2002). "If [the Court's] review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, [the Court] will affirm the grant of summary judgment." Id. at 683. "Review of the trial court's application of the law to the facts is de novo." Id.

ARGUMENT

A. The Trial Court's Decision to Grant Summary Judgment in SNHU's Favor Should be Affirmed Because the Absence of a Public Policy Encouraging Dr. Donovan's Conduct is Clear.

The Court should affirm the trial court's decision to grant SNHU's motion for summary judgment on Dr. Donovan's wrongful termination

claim. To prevail on a common law wrongful termination claim, Dr. Donovan was required to prove that (1) her termination was motivated by "bad faith, malice, or retaliation"; and (2) she was discharged for performing an act that public policy would encourage, or refusing to perform an act that public policy would condemn. See Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 921 (1981). Courts have held that the conduct protected by the wrongful termination standard—the performance of acts which public policy would encourage or the refusal to perform acts which public policy would condemn—must be construed narrowly in order to avoid "convert[ing] the general rule [permitting termination of at-will employees for any reason or no reason at all] . . . into a rule that requires just cause to terminate an at-will employee." See, e.g., Acher v. Fujitsu Network Comms., Inc., 354 F. Supp. 2d 26, 29 (D. Mass. 2005). Recognizing this concept, courts have held that the cause of action does not "extend so far as to cover all acts by an employee that are directed to [allegedly] illegal, unsafe, or unethical conduct." Id. (citing Wright v. Shriners Hospital, 589 N.E.2d 1241 (Mass. 1992) (no violation of public policy where nurse fired for criticizing quality of care rendered to patients at hospital, as required by nursing ethical code); Mistishen v. Falcone Piano Co., 630 N.E.2d 294 (Mass. App. 1994) (no violation of public policy where piano company employee was fired for threatening to reveal unfair and deceptive trade practices)).

Here, the trial court correctly found that summary judgment in favor of SNHU was appropriate because Dr. Donovan cannot satisfy the second prong of her wrongful termination claim. Dr. Donovan argues, on appeal,

that the trial court's decision was erroneous because public policy determinations are reserved for the jury. This argument is without merit.

As Dr. Donovan acknowledges, a court may rule on the existence of a public policy, where, as here, the presence or absence of a public policy is clear. Short v. Administrative Unit No. 16, 136 N.H. 76, 84 (1992) ("Although ordinarily the issue of whether public policy exists is a question for the jury, at times the presence or absence of such a public policy is so clear that a court may rule on its existence as a matter of law . . . and take the question away from the jury"); Cloutier, 121 N.H. at 921 (holding that in certain cases, "public policy could conceivably be so clear as to be established or not as a matter of law"); see also Brief of Appellant/Plaintiff ("Donovan Brief"), at 10 (citing Leeds v. BAE Sys., 165 N.H. 376, 379 (2013); Hidalgo-Semlek v. Hansa Med., Inc., 498 F. Supp. 3d 236, 249 (D.N.H. 2020)). Here, given that several well-established legal concepts prohibit a finding that public policy encourages Dr. Donovan's conduct relating to the grade changes in a manner that can support a wrongful termination claim, it was appropriate for the trial court to rule on the public policy issue.

More specifically, Dr. Donovan's argument that public policy supports her conduct in this matter is as follows:

> A jury could find that Dr. Donovan acted in accordance with public policy when she raised concern with what she reasonably perceived to be improper activity in the form of the proposed grade changes and would not participate in changing the grades pending resolution in accordance with the Whistleblower Policy. She believed, in good faith, that the proposed grade

> changes would be unethical and in violation of the SNHU Grade Change Policy. Dr. Britton, who ultimately carried out the grade changes, admitted that Dr. Donovan's concerns were reasonable.

Donovan Brief, at 14-15. The absence of a public policy supporting this described conduct is so clear as to be established as a matter of law for the following three reasons, all of which are well-established under the applicable case law: (1) disagreement with a management decision is not an act protected by public policy; (2) there is a policy against judicial intervention into to a private educational institution's judgment of a student's academic performance and the overall fairness of a grading rubric; and (3) complaints about an internal, rather than a public, policy cannot form the basis of a wrongful termination claim. In light of these concepts, it was appropriate for the trial court to rule on the existence of a public policy (or, more accurately, the lack thereof) in this matter.

The trial court's decision should be affirmed.

1. Disagreement with a Management Decision is Not an Act Protected by Public Policy.

It is long-settled in New Hampshire that:

> an employee's expression of disagreement with a management decision is not an act protected by public policy. See Newman v. Legal Services Corp., 628 F. Supp. 535, 539 (D.D.C. 1986) (no clear mandate of public policy prevents termination of employee who disagrees with organizational or managerial ideology of employer); cf. Bennett v. Thomson, 116 N.H. 453, 458, 363 A.2d 187, 190 (1976) (State may discharge employee whose policy disagreement

> with employer impairs his effectiveness and performance).

Short, 136 N.H. at 85 (1992); see also MacKenzie v. Linehan, 158 N.H. 476, 481 (2009) ("Public policy does not protect 'an employee's expression of disagreement with a management decision.'" (internal citations omitted)); Miesowicz v. Essex Group, Inc., No. Civ. 91-667-JD., 1994 WL 260641, at *4 (D.N.H. April 12, 1994) (finding, as a matter of law, that an employer's business decision to terminate an employee who disagreed with its point of view did not raise an issue of public policy which society encourages).

Here, Dr. Donovan asserts that she was constructively discharged because she disagreed with, and refused to carry out, a management decision to modify the MAT 136 course grade. Here, however, Dr. Donovan's disagreement was with respect to a course in which the grading rubric was flawed and varied from course section to section; where SNHU staff had analyzed the source and scope of the issues; and where senior administrators had determined that the grade change was fundamentally the fair thing to do. In light of the governing law, Dr. Donovan's wrongful termination claim unquestionably fails, and the trial court's decision to grant summary judgment in favor of SNHU should be affirmed.

2. There is a Countermanding Public Policy Against Courts Intervening in Private Academic Judgments.

The trial court's decision to grant summary judgment in favor of SNHU on the ground that Dr. Donovan could not satisfy the public policy prong of her wrongful termination claim was also appropriate because, in

asking the court to find that she refused to do something that "public policy" would condemn, Dr. Donovan was ineluctably asking the trial court to find that public policy would condemn SNHU's internal decision to make the grade changes at issue – a finding that the trial court could not make under the law. More particularly, as Dr. Donovan argues, "[i]t seems reasonable for the public to expect university grades to be calculated based upon merit, and Dr. Donovan took action to protect that public interest in good faith, regardless of whether her interpretation was ultimately correct." Donovan Brief, at 17. This argument is directly inconsistent with the law.

As an initial matter, Dr. Donovan's argument that public policy would condemn a university's decision to modify a student grade, following a careful review and in an effort to give the student credit for work actually completed, is questionable at best. Putting that aside, Dr. Donovan's argument fails because in finding that Dr. Donovan's opposition to the grade changes was an act "public" policy would encourage, the court would necessarily be intervening in an internal dispute concerning ethics and fairness in student grading and contradicting the managerial decisions of a private post-secondary educational institution. Such an action by the court would contravene the well-established public policy disfavoring judicial intervention in disputes involving academic standards.[1]

[1] Dr. Donovan argues that the recent prosecutions of "Operation Varsity Blues" support her position that "maintaining the integrity and fairness of merit-based course grading is an important public policy." Brief of Appellant/Plaintiff, at 19-20. She is wrong; these recent prosecutions are completely irrelevant to the questions at issue in this appeal. Operation Varsity Blues dealt with fraud in the public marketplace of admissions, in which certain wealthy families, with the complicity of rogue athletics coaches, effectively bought their children admission to certain colleges and universities. The public policy

This public policy against courts intervening in grade disputes and academic judgments is overwhelmingly evident from numerous cases. See, e.g., Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("Plainly, [judges] may not override [an academic decision] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment"); Doe v. Brown University, 209 F. Supp. 3d 460, 472 (D. R.I. 2016) ("Courts have long recognized that matters of academic judgment are better left to the educational institutions than to the judiciary and have accorded great deference where such matters are at issue."); Susan M. v. New York Law School, 76 N.Y.2d 241, 245-46 (1990) ("Strong policy considerations militate against the intervention of courts in controversies relating to an educational institution's judgment of a student's academic performance."); Russell v. Salve Regina College, 890 F.2d 484, 489 (1st Cir. 1989), rev'd 499 U.S. 225 (1991), reinstated in relevant part, 938 F.2d 315 (1991) (noting the "courts should be slow to intrude into the sensitive area of the student-college relationship, especially in matters of curriculum and discipline"); see also Apx. I at 6-7.

The basis for this policy is that "[d]eterminations concerning a student's qualifications rest in most cases upon the subjective professional judgment of trained educators, who are the best judges of their student's academic performance . . . As such, school authorities have absolute discretion in determining whether a student has been delinquent in his

(not to mention criminal law) implications at issue in connection with that scandal are dramatically different than those at issue here.

studies." Guidry v. Our Lady of the Lake Nurse Anesthesia Program, 170 So. 3d 209, 213-14 (La. Ct. App. 2015). The trial court cited several additional cases that further explain this policy, as follows:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978). "Because grading is pedagogic, the assignment of a grade is subsumed under the university's freedom to determine how a course is taught." Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001); see Lovelace v. Southeastern Mass. Univ., 793 F. 2d 419, 426 (1st Cir. 1986) ("Matters such as course content, homework load, and grading policy are core university concerns . . . ."). "Only the most compelling evidence of arbitrary or capricious conduct would warrant interference with the performance evaluation (grades) of a student made by his teachers." Jung v. George Washington Univ., 875 A.2d 95, 18 (D.C. Ct. App. 2005).

Apx. I at 6-7. Here, judicial review regarding Dr. Donovan's claim and asserted "public" policy – a refusal to accept an informed administrative decision to change a grade as "unethical" and a violation of SNHU's internal policy governing grade changes – would unquestionably run afoul of this policy against judicial intervention into grade disputes.

Dr. Donovan makes much of Dr. Britton's acknowledgment that Dr. Donovan's concerns regarding the grade changes were "reasonable." But

this acknowledgement that reasonable people could differ on this difficult subject only provides further support for this argument by highlighting that this grading issue posed a uniquely internal debate regarding the fairness of grades for two students who had taken a class that was new, concededly flawed, and graded differently – inconsistently – across the various class sections. Respectfully, this is not a matter into which courts can or should wade. By her arguments, Dr. Donovan asks the Court to dramatically expand the scope of "public" policy to allow a tort claim where any teacher or school administrator believes that a grade was wrong, too high, too low, or that the class was somehow unfair, or too rigorous, or not rigorous enough. These are the private internal policy decisions of academic institutions, and Dr. Donovan's disagreement with her supervisors' decision here is a private controversy. Because the Court cannot reverse the trial court's decision without intervening in SNHU's judgment regarding the propriety of the grade changes (or placing those judgments before a jury), the trial court's decision must be affirmed.

3. A Wrongful Termination Claim Cannot be based Upon an Internal Policy.

Dr. Donovan is, put very simply, wrong when she argues that the trial court's decision was somehow erroneous because she acted in accordance with SNHU's Whistleblower and Grade Change polices. New Hampshire courts have repeatedly rejected wrongful termination claims that are grounded on internal, as opposed to public, policies. For example, in Bourque v. Bow, 736 Supp. 398, 402 (D.N.H. 1990), the Federal District Court rejected a wrongful termination claim grounded upon an internal policy, reasoning as follows:

> Giving plaintiff every favorable inference from the facts he alleges, it appears that plaintiff was discharged because he legitimately spoke out against his supervisor. While it may appear to plaintiff that the wisest course of conduct would be to retain plaintiff and discharge the refractory employee, the matter is purely a managerial concern. Plaintiff complains about an internal, not public, policy, i.e., that the selectmen chose to fire him rather than defendant Cleverly, or rather than investigate plaintiff's allegations any further.

Id. (emphasis in original); see also Audsley v. RBS Citizens, N.A., Case No. 5:10-cv-208, 2012 U.S. Dist. LEXIS 132253, at *29 (D. Vt. 2012) (finding public policy did not protect employee from "a management decision with which she disagrees" because the issues she raised "implicate[d] a private business policy, not a 'public policy' which must be protected by the courts"). Like the argument advanced by the plaintiff in Bourque, Dr. Donovan's argument that she was constructively discharged because she spoke out against her supervisors – even assuming that her basis for speaking out was legitimate – is untenable.

Dr. Donovan inaccurately argues that a wrongful termination claim based upon the internal policies of an academic institution should be permissible because "[t]he judicial deference provided to academic institutions supports the internal reporting of ethical or policy violations by academic professionals." Brief of Appellant/Plaintiff, at 18. Put in its best light, Dr. Donovan's argument is that the law permits her to base a wrongful termination claim on the argument that she was terminated for acting in compliance with an internal policy (the Grade Change Policy)

because there is some supposed public interest in the enforcement of internal policies (and particularly academic standards and policies that courts have historically declined to weigh in on). The District Court for the District of New Hampshire has already rejected this argument.

Specifically, the plaintiff in Kertanis v. Georgia-Pacific Gypsum, LLC, Civil No. 14-cv-343-JL, 2016 U.S. Dist. LEXIS 52209 (D.N.H. 2016), argued that his workplace was "self-regulated" such that public policy encouraged him to speak out regarding perceived violations of internal policy. Id. at *14. The court rejected the argument, reasoning that:

> [Plaintiff] has cited no authority (nor provided any at oral argument) that recognizes such a public policy, or even, more generally, a public policy favoring any sort of management structure or an employee's involvement in it. See Short, 136 N.H. at 85 (holding that "an employee's expression of disagreement with a management decision is not an act protected by public policy"). That Kertanis may have been following a policy GP condoned has no bearing on the public policy analysis. Company policy and public policy are neither factually nor conceptually identical. "[T]he first prong [of the wrongful termination burden of proof] focuses on the nature of the employer's actions," Duhy v. Concord Gen. Mut. Ins. Co., 2009 DNH 074, 2009 U.S. Dist. LEXIS 48688, *29 (citations and punctuation omitted), while the second prong "focus[es] on the acts of the employee and their relationship to public policy, not on the mere articulation of a public policy by the employee." Frechette v. Wal-Mart Stores, Inc., 925 F. Supp. 95, 98 (D.N.H. 1995).

Id. at *14-15; see also Melvin v. NextEra Energy Seabrook, LLC, 2010 U.S. Dist. LEXIS 896, *8 (D.N.H. Jan. 6, 2010) ("[T]o the extent [the plaintiff] argues that his employment was terminated because he disagreed with NextEra's allegedly selective enforcement of its policies or its management of his supervisory role, those matters, as alleged . . . would not implicate a public policy.").

Like the plaintiff in Kertanis, Dr. Donovan cannot transform an internal policy into a public policy with a circular argument that public policy supports self-policing of private policies. Id. Were such an argument to prevail, the well-established restriction of wrongful termination claims to matters involving public policy, as opposed to private policy, would be rendered meaningless. As the trial court correctly noted, "[w]hile Plaintiff may have disagreed with the decision to apply different grading standards to some students and believed it to be unfair and/or unethical, it remained an internal policy determination of a private university." Apx. I at 8.

B. Summary Judgment in Favor of SNHU Was Appropriate because Dr. Donovan Cannot Satisfy the Constructive Discharge Standard.

Even if the Court were to determine, contrary to fact and law, that it was inappropriate for the trial court to grant summary judgment in SNHU's favor on the second prong of Dr. Donovan's wrongful termination claim, the trial court's decision should nonetheless be affirmed because – where Dr. Donovan was not terminated and cannot establish that she was

constructively discharged – she also cannot satisfy the first prong of her wrongful termination claim.[2] She was not discharged or terminated at all.

In order to establish that her voluntary resignation was in fact a "constructive discharge," Dr. Donovan must show "that her working conditions were so unpleasant that a reasonable person in her shoes would have felt compelled to resign." Lee Crespo v. Schering-Plough Del Caribe, Inc., 354 F.3d 34, 45 (1st Cir. 2003); Torrech-Hernandez v. GE, 519 F.3d 41, 50 (1st Cir. 2008) (requiring a showing "that conditions were so intolerable that they rendered a seemingly voluntary resignation a termination").[3] The constructive discharge standard is an objective one which "cannot be triggered solely by the employee's subjective beliefs, no matter how sincerely held." Torrech-Hernandez, 519 F.3d at 52. "[I]n order for a resignation to constitute a constructive discharge, it effectively must be void of choice or free will." Id. at 50. Accordingly, "the question is not whether working conditions at the facility were difficult or unpleasant, but rather, an employee must show that, at the time of [her] resignation, **[her] employer did not allow [her] the opportunity to make a free choice regarding [her] employment relationship**." Id. (emphasis added). "An injury to an employee's ego or prestige does not furnish a

[2] "When the trial court reaches the correct result, but on mistaken grounds, [the New Hampshire Supreme] court will sustain the decision if there are valid alternative grounds to support it." Sherryland v. Snuffer, 150 N.H. 262, 267 (2003).

[3] Because the standard for a claim of constructive discharge under New Hampshire law is equivalent to the standard for constructive discharge in the context of discrimination and retaliation under Federal Law, federal case law relating to constructive discharge is relevant and instructive. See Cass v. Airgas USA, LLC, Civil No. 17-cv-313-JD, 2018 U.S. Dist. LEXIS 129558, *13 (D.N.H. Aug. 2, 2018).

legally cognizable reason to treat a resignation as a constructive discharge." Caputo v. City of Haverhill, 67 Fed. Appx. 1, 8 (1st Cir. 2003).

Dr. Donovan's constructive discharge argument fails as a matter of law because no reasonable person in her position could or would believe, under the circumstances she has alleged, that her free will was void, and she had no free choice but to resign. In support of her claim that her working conditions were so unpleasant that she felt compelled to resign, Dr. Donovan relies on the following events:

- An email from Dr. McKenzie dated August 2, 2018, in which Dr. McKenzie, in her role as Dr. Donovan's supervisor, provides Dr. Donovan with respectful feedback regarding her job performance. Apx. III at 163.
- Several meetings at which Dr. McKenzie and/or Dr. Britton coached Dr. Donovan regarding her job performance, but did not subject her to any discipline. Apx. III, at 11-12, 15.
- Dr. McKenzie's assignment to another employee of certain projects that Dr. Donovan felt should have been assigned to her. Apx. III, at 15.
- Dr. McKenzie's statement that she was worried about what Dr. Donovan would say during a presentation. Apx. III, at 18.
- Dr. Donovan's placement on a performance improvement plan. Apx. III at 16-19.
- A phone call and a meeting regarding further issues with Dr. Donovan's job performance and, allegedly, a statement that Dr. Fowler wanted Dr. Donovan to be terminated (no disciplinary action taken). Apx. III, at 27.

- A discussion with Dr. McKenzie during which Dr. McKenzie allegedly invited (but did not compel) Dr. Donovan to submit her resignation. Apx. III, at 27-28.

While it is certainly a difficult experience to receive negative feedback from one's supervisors, no reasonable person in Dr. Donovan's position would feel compelled to resign based on these very normal and, as demonstrated by the evidence in the record, cordial, employment-related interactions. It is crucial to remember, in evaluating a constructive discharge claim, that "[a]n employee may not be unreasonably sensitive to his or her working environment." Id. at 50. As the First Circuit has explained:

> The workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins – thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world. Thus, the constructive discharge standard, properly applied, does not guarantee a workplace free from the usual ebb and flow of power relations and inter-office politics.

Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000).

The interactions at issue here cannot satisfy the constructive discharge standard as a matter of law. They constitute nothing more than the usual ebb and flow of "power relations and inter-office politics." Negative job-related feedback cannot constitute "constructive discharge." A determination that Dr. Donovan's allegations are sufficient to satisfy the standard would set a troublesome precedent, such that moving forward, every employee who resigns after receiving negative feedback from a

supervisor is able to maintain a constructive discharge claim. The case law makes clear that this is by no means the policy that the courts intended to advance.

This fact is particularly evident given that the courts have found much more compelling allegations to fall short of the constructive discharge standard. For example, in Slater v. Kane, the plaintiff – a police prosecutor – raised an issue with the Chief of her department regarding what she perceived to be an unfair requirement that she utilize a punch clock. 2009 U.S. Dist. LEXIS 22841, *6 (D.N.H. Mar. 20, 2009). The Chief "stormed into [her] office and slammed the door behind him" and then "accosted [her] in a loud voice and in an aggressive manner[,]" yelling, "You want to speak with me?" Id. at *6-7. The Chief then "adopted a mocking and sarcastic tone," threatened to take the plaintiff's phone and throw it out the window, jabbed a finger at the plaintiff and called her a "petty woman[,]" accused the plaintiff of lacking gratitude for all he had done for her, criticized what he perceived to be the plaintiff's excessive use of sick time, and "told [her] directly that [she] should be concerned about [her] job." Id. The Chief also mentioned his efforts to decertify a former police officer "with the obvious implication that he would engage in similar retribution toward [the plaintiff,]" and asked her "how she would like having her job performance 'nitpicked.'" Id. at 20. Noting that the constructive discharge theory "is a narrow one[,]" the Court rejected the plaintiff's constructive discharge claim, reasoning that "telling an employee, in essence, to 'shape up or ship out' does not amount to a constructive discharge, even if the criticism is unjustified." Id. at *19-20.

Dr. Donovan encountered nothing like the Chief in Slater. Here, at worst, Dr. Britton and Dr. McKenzie, in a significantly more diplomatic tone than the Chief, politely asked Dr. Donovan to shape up. Like the conduct at issue in Slater, the interactions between Dr. Britton, Dr. McKenzie, and Dr. Donovan do not rise to the level required to support a claim for constructive discharge. Id.; see also Essa v. Genzyme Corp., 2020 U.S. Dist. LEXIS 186737, at *42 (D.N.H. Oct. 8, 2020) (granting summary judgment to the employer, where the plaintiff failed to point to admissible evidence sufficient to warrant the conclusion that they were so intolerable, severe, and pervasive that a person of ordinary firmness would have felt compelled to quit); Caputo v. City of Haverhill, 67 Fed. Appx. 1, 11-12 (1st Cir. 2003) (holding that written reprimands, unsatisfactory performance evaluations, and being asked to sign a list of contingencies before being permitted to accept a new position were insufficient to satisfy the constructive discharge standard because "[b]eing disciplined is certainly unpleasant, but if [the plaintiff] wanted the reprimands to cease, she simply could have complied with her employers' professional standards"); King v. Town of Hanover, 116 F.3d 965, 970 (1st Cir. 1997) (finding suspension for one week without pay and placement on 90 days' probation insufficient to satisfy constructive discharge standard).

The cases in which courts have found the constructive discharge standard to have been satisfied have involve facts that much more powerfully demonstrate that the employee was stripped of free will and had no choice but to resign. For example, in Porter v. City of Manchester, 151 N.H. 30, 849 (2004), the plaintiff's supervisor (1) said that the plaintiff "had to go"; (2) stated to the plaintiff, "We'll see how long you last"; (3)

glared at the plaintiff, stuck her head into his office, and ignored his comments at staff meetings; (4) physically bumped into the plaintiff as they passed in the hallway; (5) referred to the plaintiff as a "disgruntled welfare department employee" in a public press release; (6) told her employees, while the plaintiff was on medical leave, that the plaintiff had been removed, that his leave was permanent, and that he was not to have contact with the staff; (7) told an employee that if her son could, "he'd come down and take out about four or five people"; (8) objected to the plaintiff's return from medical leave and demanded a certification from a psychologist that the plaintiff was emotionally stable enough to return to work; (9) told another employee that the plaintiff "was sick and that he needs help and that he's in counseling and that he's out to destroy [the supervisor]"; (10) called the plaintiff into her office and, in front of a client, chastised him for an action he had taken respecting that client; (11) physically prevented the plaintiff from going to HR during an argument between the two of them; and (12) ultimately suspended the plaintiff's employment. Id. at 33-36.

Put simply, the allegations supporting Dr. Donovan's argument that she had no choice but to resign pale in comparison to the allegations at issue in Porter, or in any other case where the court found the constructive discharge standard to have been met. Id.; see also Lacasse v. Spaulding Youth Center, 154 N.H. 246, 249 (2006) (finding that summary judgment in favor of employer was not appropriate because—despite the fact that "being ignored by one's supervisor and being yelled at three times in two weeks does not rise to the level of creating an intolerable working condition that would force a reasonable person in the same position to resign[,]"—the standard could potentially be satisfied in light of a supervisor's express

statement that she would "make it miserable enough for [an employee she did not like] to quit").

Finally, any argument that the evidence supports a finding of constructive discharge based on Dr. Donovan's subjective belief that "she would imminently be fired" is without merit. See Apx. III at 20. Even assuming that Dr. Donovan actually believed that her employment would imminently be terminated, she is still unable to satisfy the constructive discharge because, under the law, "apprehension of future termination is insufficient to establish constructive discharge—instead, an employee is obliged not to assume the worst, and not to jump to conclusions too fast." Torrech-Hernandez, 519 F.3d at 52. Particularly given that Dr. McKenzie's notes from the November 30, 2018 skype meeting between Dr. McKenzie and Dr. Donovan reflect Dr. McKenzie's suggestion that she, Dr. Britton, and Dr. Donovan meet the following Monday, as well as Dr. McKenzie's statement that she would like to work with Dr. Donovan on the PIP moving forward, any belief that Dr. McKenzie intended to terminate Dr. Donovan's employment was not reasonable. See Apx. IV at 264. Respectfully, Dr. Donovan cannot establish her termination or discharge as a matter of law.

CONCLUSION

For the foregoing reasons, SNHU respectfully requests that this Court affirm the findings of the trial court as to the issues addressed herein.

STATEMENT REGARDING ORAL ARGUMENT

Should the Court feel that it is desirable or necessary to conduct oral argument, SNHU requests that it be allowed fifteen minutes of argument. Christopher Cole will argue on SNHU's behalf.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

SNHU hereby certifies that this Brief is in compliance with the 9,500 word limit set forth in Supreme Court Rule 16(11).

Respectfully submitted,

SOUTHERN NEW HAMPSHIRE UNIVERSITY

By its Attorneys:

Sheehan Phinney Bass & Green ATA.

Date: June 30, 2022

/s/ Christopher Cole

Christopher Cole (NH Bar No. 8725)
Megan C. Carrier (NH Bar No. 20352)
75 Portsmouth Boulevard, Suite 110
Portsmouth, NH 03801
(603) 627-8223
ccole@sheehan.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this day on all parties of record via the Court's electronic filing system.

/s/ Christopher Cole

Christopher Cole