THE STATE OF NEW HAMPSHIRE
SUPREME COURT

MELISSA DONOVAN

v.

SOUTHERN NEW HAMPSHIRE UNIVERSITY

CASE NO. 2022-0154

MANDATORY APPEAL PURSUANT TO RULE 7
HILLSBOROUGH SUPERIOR COURT, NORTHERN DISTRICT

DOCKET NO. 216-2019-CV-00693

BRIEF OF APPELLANT/PLAINTIFF

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A. QUESTIONS PRESENTED

1. Whether the trial court erred in granting the Defendant's Motion for Summary Judgment. Apx.[1] I at 3, 9; Apx. III at 3, 6; Apx. VI at 3, 6.

2. Whether the trial court erred in finding that, in regard to the Plaintiff's wrongful termination by constructive discharge claim, the Plaintiff had not established a public policy as a matter of law. *Id.*

3. Whether the trial court erred by taking the public policy question away from the jury. *Id.*

4. Whether the trial court failed to consider the evidence in the light most favorable to the non-movant, Plaintiff Melissa Donovan, and make all reasonable inferences in her favor. *Id.*

[1] To fulfill the obligation of providing the Court with a sufficient record to review the Trial Court's Summary Judgment Order, the Appellant provides a six volume Appendix filed simultaneously with the instant brief, which includes all relevant orders and pleadings of the parties. "Apx." refers to the Appellant's Appendix, followed by a volume number. For example, Apx. II, refers to Appellant's Appendix, Volume II.

B. TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES & REGULATIONS CITED

491:8-a Motions for Summary Judgment. –

I. A party seeking to recover upon a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment, may, at any time after the defendant has appeared, move for summary judgment in his favor upon all or any part thereof. A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move for a summary judgment in his favor as to all or any part thereof.

II. Any party seeking summary judgment shall accompany his motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify. The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion, unless within 30 days contradictory affidavits based on personal knowledge are filed or the opposing party files an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits. Copies of all motions and affidavits shall, upon filing, be furnished to opposing counsel or to the opposing party, if the opposing party is not represented by counsel.

III. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

IV. If affidavits are not filed by the party opposing the summary judgment within 30 days, judgment shall be entered on the next judgment day in accordance with the facts. When a motion for summary judgment is made and supported as provided in this section, the adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial.

V. If it appears to the court at any time that any of the affidavits presented pursuant to this section are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the

affidavits caused him to incur, including reasonable attorney's fees. Any offending party or attorney may be found guilty of contempt.

C. STATEMENT OF THE CASE

The underlying case was initiated in the Hillsborough Superior Court, Northern District, by the filing of the Plaintiff's Complaint on August 8, 2019. Apx. II at 3.

The Summary Judgment deadline most recently established in the underlying case was November 30, 2021. Southern New Hampshire University ("SNHU") filed its Motion for Summary Judgment on August 23, 2021. Apx. IV at 3. After receiving an appropriate extension, Dr. Donovan filed her Objection to the Defendant's Motion for Summary Judgment on November 23, 2021. Apx. III at 3. SNHU filed its Reply on December 9, 2021. Apx. IV at 431.

On February 15, 2022, the Trial Court granted the Defendant's Motion for Summary Judgment without oral argument. Apx. I at 3. The Trial Court's Order granted summary judgment to SNHU on a singular basis, determining as a matter of law that Dr. Donovan did not act in accordance with public policy. *Id.* "While 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.

On February 22, 2022, Dr. Donovan filed a timely Motion for Reconsideration. Apx. VI at 3, 6. On February 28, 2022, SNHU filed an Objection. Apx. VI at 13. On March 9, 2022, the Trial Court denied the Motion for Reconsideration without issuing a written opinion. Apx. I at 9. This appeal followed.

D. STATEMENT OF THE FACTS

This case concerns the wrongful termination of Appellant Dr. Melissa Donovan, a former Associate Dean employed by SNHU. When Dr. Donovan was asked by her direct supervisor, Senior Associate Dean Dr. Susan McKenzie, to modify two failing grades to passing grades in a college math course, she raised good faith concerns that such modifications would be unethical and in violation of SNHU academic policy. Apx. III at 33-35, 136. More specifically, Dr. Donovan reasonably believed that the proposed grade changes did not comply with the SNHU Grade Change Policy and would unethically result in two students being graded differently than their peers. *Id.* Dr. Donovan acted in conformity with the SNHU Whistleblower Policy by raising the concerns and refusing to participate in the grade changes pending resolution of the concerns she raised. Apx. III at 34-35; 155-161.

Associate Vice President Dr. Gwendolyn Britton, who supervised both Dr. McKenzie and Dr. Britton, testified that Dr. Donovan was not unreasonable in her belief that the proposed grade change violated academic policy. Apx. III at 94-95. Dr. Britton also testified that she, even in her

Associate Vice President role, was bound to follow the SNHU Grade Change Policy. Apx. III at 87-88.

Ultimately, without resolution or involvement of the Chief Compliance Officer as required by the Whistleblower Policy (Apx. III at 158), Dr. Britton effectuated the grade changes by filling out Instructor Grade Change forms and submitting them on August 9, 2018, six days after she met with Dr. Donovan and listened to her admittedly *reasonable* concerns. Apx. III at 34-35, 90-95, 149-150, 227-231.

After Dr. Donovan raised her concerns with the proposed grade changes, she was placed under a microscope and targeted with discipline and criticism until she was finally compelled to quit. The Plaintiff's Memorandum Supporting her Objection to the Defendant's Motion for Summary Judgment describes the retaliation in detail, along with evidence demonstrating the correlation between the retaliation and the grade change issue[2]. Apx. III at 15-22. The constructive discharge of Dr. Donovan

[2] Because the Trial Court decided summary judgment on the singular issue of public policy, substantial facts concerning the retaliation suffered by Dr. Donovan have been omitted as irrelevant to this appeal. The Trial Court did note that Dr. Donovan was placed on a Performance Improvement Plan ("PIP") on October 16, 2018, that "makes no mention of the grade change incident." Apx. I at 4. The Court overlooked substantial evidence that the PIP was motivated by the grade change issue including, but not limited to, the first draft making reference to an email admonishing Dr. Donovan regarding the grade change issue, and HR Business Partner Michael O'Brien, who assisted in drafting the PIP, testifying that Dr. McKenzie expressed frustration to him regarding the grade change issue. Apx. III at 152-153, 180-184, 293-295.

culminated in Dr. McKenzie falsely telling Dr. Donovan that the Global Campus President wanted her fired and then, two days later, asking for her resignation twice in one day while Dr. Donovan was home sick from the stress. *Id.*

E. SUMMARY OF ARGUMENT

The Trial Court erred when it substituted itself for the trier of fact, finding that Dr. Donovan's actions were not supported by public policy as a matter of law. Apx. I at 3. New Hampshire law has long established that "[i]n most instances, it is a question for the jury whether the alleged public policy exists." *Cilley v. New Hampshire Ball Bearings, Inc.,* 128 N.H., 401, 406 (1986) (emphasis added)(citation omitted)(*citing Cloutier v. A.&P. Tea Co., Inc.*, 121 N.H. 915, 924 (1981)). The public policy determination can only be decided as a matter of law when "the presence or absence of such a public policy is so clear that a court may rule on its existence…" *Leeds v. BAE Sys.,* 165 N.H. 376, 379 (2013); *See also Hidalgo-Semlek v. Hansa Med., Inc.,* 498 F. Supp. 3d 236, 249 (D.N.H. 2020).

By taking the disputed public policy question away from the jury, the Trial Court failed to construe the facts in the light most favorable to the non-moving party, Dr. Donovan. *See Stewart v. Bader*, 154 N.H. 75, 85 (2006). This is not a case seeking to judicially overturn or undermine grading decisions of SNHU. Rather, it is a case where a jury should decide if public policy supported the Plaintiff raising issue with a grade change, *internally*,

that she believed, in good faith, to be unethical and a violation of SNHU academic policy. Apx. III at 32-36.

A reasonable jury could find that Dr. Donovan's actions were protected by public policy, particularly when the very actions she took were consistent with SNHU's Whistleblower and Grade Change Policies. Apx. III at 87-88, 155-161. She was not simply disagreeing with her managers; she was attempting to preserve the integrity of the merit-based academic system while conforming to institutional policy that her managers did not have authority to bend. *See* Apx. III at 87-88 (Dr. Britton acknowledges being bound by the SNHU Grade Change Policy.)

Given the judicial deference afforded to academic institutions concerning grade calculations[3], it is important and consistent with public policy for faculty members and administrators, working inside of academic institutions, to raise issue with potentially unethical grading conduct internally, especially when academic policy encourages doing the same. Because the buck stops inside the institution, Dr. Donovan, and those similarly situated to her, are well positioned to act in conformity with public

[3] "Courts have long recognized that matters of academic judgment are generally better left to the educational institutions than to the judiciary and have accorded great deference where such matters are at issue." *Doe v. Brown Univ.*, 209 F. Supp. 3d 460, 472 (D.R.I. 2016), aff'd, 943 F.3d 61 (1st Cir. 2019).

policy by safeguarding academic integrity and the system of merit-based student achievement expected by the public.

F. STANDARD OF REVIEW

In the context of an appeal seeking to overturn a summary judgment decision, the Court reviews the Trial Court's application of law to the facts *de novo*. *Lacasse v. Spaulding Youth Ctr.*, 154 N.H. 246, 248 (2006). "When reviewing a trial court's grant of summary judgment, [the Supreme Court] consider[s] the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the nonmoving party." *Id*; *White v. Asplundh Tree Expert Co.*, 151 N.H. 544, 547, (2004).

The Court affirms summary judgment if its "review of the evidence does not reveal a genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law." *Id.*; *See also* RSA 491:8-a.

G. ARGUMENT

The Trial Court Erred When It Decided the Public Policy Question as a Matter of Law and Granted Summary Judgment to SNHU

The Trial Court based its summary judgment decision exclusively upon the public policy prong of Dr. Donovan's wrongful termination claim. New Hampshire law has long established that "[i]n most instances, it *is a question for the jury* whether the alleged public policy exists." *Cilley,* 128 N.H. at 406 (emphasis added)(*citing Cloutier,* 121 N.H. at 924). The Trial Court's decision is inconsistent with the broad authority vested in juries to

determine whether a public policy exists in the majority of wrongful termination cases.

> "Public policy includes a wide range of societal goals including safety and public welfare, protection of an at-will employee's promised compensation, and *good faith reporting of reasonably perceived improper activity*."

Hidalgo-Semlek, 498 F. Supp. 3d at 249 (emphasis added) (*citing Sheeler v. Select Energy & NEChoice, LLC*, No. 03-59-JD, 2003 WL 21735496, at *8 (D.N.H. July 28, 2003)).

i. Public Policy Determinations Are Reserved for the Jury Unless the Public Policy Claimed Is So Clearly Unsustainable That It Can Be Decided as a Matter of Law

The public policy question can only be summarily decided by the Trial Court when "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." *Hidalgo-Semlek,* 498 F. Supp. 3d at 249; *Short v. School Admin. Unit 16*, 136 N.H. 76, 84, (1992) (citation omitted). It is exceedingly rare for a Trial Court to find that a particular action was not supported by public policy as a matter of law, while simultaneously construing the facts in the light most favorable to the Plaintiff as required by the summary judgment standard.

"The issue of whether a public policy is implicated in an employee discharge should be taken from the jury *only when* the public policy's existence can be 'established or not established as a matter of law....'" *Id.*

(emphasis added)*; See also Leeds,* 165 N.H. at 379 (Finding no public policy where Plaintiff had angrily approached another employee yelling obscenities and was fired for violating company policy prohibiting abusive or threatening language); *Hidalgo-Semlek,* 498 F. Supp. 3d at 249 (Finding that a jury could determine an employee's objection to specific uses of patient data, provided with informed consent, amounted to conduct supported by public policy).

Because a jury's finding of public policy "need not be supported by case or statutory law," a Plaintiff "need not even show a strong and clear public policy" in order for the question to be submitted to a jury. *Hidalgo-Semlek*, 498 F. Supp. 3d at 249 (*citing Cloutier*, 121 N.H. at 922; *MacDonald v. Tandy Corp.,* 796 F. Supp. 623, 626–27 (D.N.H. 1992)). "The public policy contravened by the wrongful discharge can be based on statutory or nonstatutory policy." *Cloutier*, 121 N.H. at 922. "[T]he 'multifaceted balancing process' articulated in *Cloutier* 'does not impose absolute requirements' or require a source that 'clearly expresses the policy in question.'" *Hidalgo-Semlek,* 498 F. Supp. 3d at 249 (*Citing Grivois v. Wentworth-Douglass Hosp.,* No. 12-cv-161-JL, 2014 WL 309354, at *7 (D.N.H. Jan. 28, 2014)).

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. Apx. III at 87-88, 155-161, 227-231. She believed, in good faith, that the proposed grade changes would be unethical and in violation of the SNHU Grade Change Policy. Apx. III at 32-35. Dr. Britton, who ultimately carried out the grade changes, admitted that Dr. Donovan's concerns were reasonable. Apx. III at 95.

Because the public policy alleged by Dr. Donovan presents a triable question for the jury, and is not "so clear that a court may rule on its existence as a matter of law", the Trial Court erred when it granted summary judgment to SNHU. *Leeds,* 165 N.H. at 379.

ii. Dr. Donovan's Actions Were Supported by SNHU Academic Policy, Further Evidencing that a Jury Could Find She Acted in Accordance with Public Policy

The academic policies maintained by SNHU during Dr. Donovan's tenure appear to acknowledge the presence of a strong public policy favoring academic integrity and the reporting of potentially unethical conduct. The SNHU Whistleblower Policy provided:

> "All Community Members are expected to seek guidance on, or to report, any issues involving unethical conduct or illegal behavior or violations of University policies of which they become aware. Regardless of your relationship to the University, if you become aware of conduct that is, or could be, illegal or unethical or involves a potential violation of a University policy, you have a duty to seek guidance and report it immediately. While the decision to report or raise a concern can sometimes be a challenging one, it is crucial for the shared success of the University. Ignoring an issue or assuming that someone else will raise it is unacceptable."

Apx. III at 157.

The Policy goes on to explain: "Managers and supervisors should never try to investigate, *validate* or remediate potential illegal or unethical conduct without first getting authorization from the Chief Compliance Officer or a designated member of the Leadership Team." Apx. III at 158. (emphasis added). SNHU Global Campus President Dr. Gregory Fowler testified that the purpose of the Whistleblower Policy was to provide people who "feel[ ] like there's something that is going on that is unethical or inappropriate" with "a vehicle by which to report that to the institution without repercussions." Apx. III at 262-263.

Dr. Donovan raised her concerns in reliance on the protection that was supposed to be afforded to her by the Whistleblower Policy, going so far as to bring a printed copy of the Policy with her when she had a meeting to discuss the proposed grade change issue with Dr. Britton, Dr. McKenzie and a representative from Human Resources, on August 6, 2019. Apx. III at 33-35, 152-153, 155-161; *see also* 136. Dr. Donovan shared her concerns that the proposed grade modifications did not fit within one of the narrow categories permitted by the Grade Change Policy, and that it would be unethical to calculate the scores of certain students in a different manner than their class section peers. *Id.*

Dr. Britton and Dr. McKenzie were both bound by the SNHU Grade Change Policy. Apx. III at 85-89, 136. Dr. McKenzie admitted that the proposed grade changes at issue did not comply with said Policy. Apx. III at 218-220. Further, Dr. Britton testified "I can understand why" Dr. Donovan did not want to change the grades. Apx. III at 94. Regardless, without resolving the matter with the involvement of the Chief Compliance Officer or designated member of the Leadership Team (pursuant to the Whistleblower Policy, Apx. III at 158), Dr. McKenzie and Dr. Britton unilaterally validated the conduct that Dr. Donovan believed was unethical, carried out the grade changes, and punished Dr. Donovan for raising the issue. Apx. III at 32-36, 227-230.

Given that SNHU's own policies emphasize the importance of its faculty raising issue with conduct perceived to be unethical or violative of academic policy, it is difficult to believe that a reasonable jury could not find that Dr. Donovan acted in accordance with public policy. It 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.

The instant case is not a case of an employee simply disagreeing with a management decision. Dr. Donovan does not seek for the Court to find that the grade changes were ultimately improper, nor does she seek that they be judicially overturned. Rather, she asks that the Court permit a jury to decide

whether she acted in accordance with public policy when she raised her academic integrity concerns internally.

iii. The Significant Judicial Deference Provided to Academic Institutions Regarding Grading Decisions Lends Further Support to Dr. Donovan's Alleged Public Policy

In its Order granting Summary Judgment to SNHU, the Trial Court cites extensive case law explaining the significant judicial deference provided to academic institutions in regard to course content and grading decisions. Apx. I at 6-7; *See e.g. Lovelace v. Southeastern Mass. Univ*., 793 F.2d 419, 426 (1st Cir. 1986) ("[M]atters such as course content, homework load, and grading policy are core university concerns . . . .").

The judicial deference provided to academic institutions supports the *internal* reporting of ethical or policy violations by academic professionals. An academic professional, such as Dr. Donovan, seeking to maintain academic integrity through the school's internal process is supported by public policy precisely because the ultimate decisions that are made internally are unlikely to be subject to scrutiny outside of the institution. Therefore, it is a matter of public concern as to whether the academics in charge of these decisions are acting according to some policy, standard or accepted method, as opposed to deploying improper motives such as favoritism or expediency.

Dr. Donovan was rightly concerned that reasons not connected to academic integrity, merit, or fairness could be driving the grade modification

proposals at issue. Raising her concerns forthrightly was clearly an act supported by public policy. The public interest in preserving and protecting the integrity of the merit-based postsecondary education system is well evidenced in the media and popular culture. The Court can take notice that career success and opportunity, particularly at the outset of individuals entering the competitive job market, can be greatly impacted by grades and the prestige of institutions an individual has attended.

In 2019, a college admissions scandal was revealed that led to widespread, international media coverage. The scandal, known as "Operation Varsity Blues[4]," speaks to the public policy and strong societal interest in preserving academic integrity. In the criminal prosecution related to the scandal, the Court explained:

> "Admission slots and prospective degrees are valuable to a certain extent because they are limited. Students seek admission to universities to be among other qualified and talented individuals and to learn from professors who are attracted to employment at a particular university, in part, for the opportunity to teach qualified students. Admission also entitles those students to a vast array of material university resources, from dormitories to laboratories. If a university admits students who are unqualified, it inevitably decreases the value of its degrees, hurts its reputation and its ability

[4] "Operation Varsity Blues" was a widely reported admissions scandal, made public in 2019, where a number of wealthy individuals, including actress Lori Loughlin, were accused of fraudulently influencing private college admissions decisions by falsifying admissions exam scores, fabricating academic/athletic credentials and bribing college officials. *See Joshua Lens, Operation Varsity Blues and the NCAA's Special Admission Exception*, Journal of Legal Aspects of Sport, Vol. 31, No. 1, p. 147 – 200, February 10, 2021. https://journals.iupui.edu/index.php/jlas/article/view/24923/23600

> to attract qualified tuition-paying students and recruit accomplished professors."

United States v. Sidoo, 468 F. Supp. 3d 428, 441–42 (D. Mass. 2020)

Just as maintaining the integrity and fairness of merit-based admissions is an important public policy, maintaining the integrity and fairness of merit-based course grading is an important public policy. Passing grades secure a student's ability to continue to utilize an institution's resources and ultimately obtain coveted degrees.

Dr. Donovan acted in accordance with public policy when she raised ethical concerns, in good faith, regarding proposed grade modifications that she believed would violate SNHU academic policy. She availed herself of SNHU's own internal procedures to address the issue. At a minimum, the questioned existence of a public policy should be determined by a jury. The alleged public policy is not so clearly unsustainable that it can be decided apart from the jury as a matter of law.

H. CONCLUSION

The Trial Court erred in granting summary judgment in favor of SNHU. Pursuant to a well-established body of New Hampshire precedent, a jury should decide whether Dr. Donovan acted in accordance with public policy when she raised ethical and academic policy concerns in good faith and did not participate in the proposed grade changes pending resolution in accordance with the SNHU Whistleblower Policy. In viewing the evidence

in the light most favorable to Dr. Donovan, the non-moving party, summary judgment should have been denied. The Appellant therefore asks this Honorable Court to Reverse.

I. REQUEST FOR ORAL ARGUMENT

The Appellant requests 15 minutes of oral argument to be given by her attorney, Sean R. List, Esq.

J. CERTIFICATIONS

I, Sean R. List, hereby certify that on June 8, 2022, copies of the foregoing and the Appendix were forwarded to opposing counsel, Christopher N. Cole, Esq. and Megan C. Carrier, Esq., by electronic service.

I, Sean R. List, hereby certify that the appealed decision is in writing and is included in the Appendix to this Brief, at Volume I.

I, Sean R. List, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains less than 9,500 words. Counsel relied upon the word count of the computer program used to prepare this brief.

Respectfully submitted,
Dr. Melissa Donovan,
By her attorneys,

Date: June 8, 2022 By: /s/ Sean R. List

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