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

REPLY BRIEF OF APPELLANT/PLAINTIFF

Sean R. List, Esq. NH Bar #266711
Lehmann Major List, PLLC
6 Garvins Falls Road
Concord, NH 03301
603-715-8882
sean@nhlawyer.com
Attorney for the Appellant/Plaintiff

A. REPLY ARGUMENT

I. The Appellant Has Established a Public Policy Question the Jury Must Decide

Despite the Appellee's attempt at conflating cases concerning grading and curriculum challenges by plaintiff college students with Appellant Dr. Donovan's employment case, Dr. Donovan does not seek to have the Court judicially overturn the modified grades she raised issue with, nor does she seek the Court's confirmation that her concerns were correct. *See Brief of the Appellant-Plaintiff ("Donovan's Brief"),* p.10-12*,* June 8, 2022. She does not even argue that the Court should find she acted in accordance with public policy as a matter of law. *Id.* Rather, Dr. Donovan argues that she has sufficiently alleged conduct a reasonable jury could find to be supported by public policy and therefore, the Trial Court granted summary judgment in error. *Id.* Pursuant to New Hampshire precedent reserving the public policy question to juries in most cases, a jury should decide if public policy supported Dr. Donovan raising issue with a proposed grade change, internally, that she believed in good faith to be unethical and a violation of Southern New Hampshire University ("SNHU") academic policy. *Cilley v. New Hampshire Ball Bearings, Inc.,* 128 N.H. 401 (1986).

The proposed grade modifications pertained to the course MAT 136. Appellant's Appendix, Volume II ("Apx. III"), p. 32. Notwithstanding the Appellee's attempt at painting the grade calculations for the course as "all or

nothing," whether a student passed the course was not exclusively dictated by final exam scores[1]. Students could either pass the course by completing all homework or scoring a 75% or higher on the final exam even if they did not complete the homework. Apx. III at 32-33. The students who failed the course scored less than a 75% on the final *and* failed to complete the homework. *Id.* Dr. Donovan's objection to the proposed grade changes specifically pertained to two students who had been given failing grades by their instructors because they both failed to complete the homework and failed the final exam. *Id.*

Regardless of whether the Court agrees with the concern raised by Dr. Donovan or the ultimate decision by Dr. Britton to change the grades, a jury good find that Dr. Donovan's good faith conduct, in raising an ethical and academic integrity issue, was supported by public policy. This is particularly true provided the low threshold a plaintiff must meet in order for a public

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[1] As per the Grading Instructor Resource for MAT136, full completion of the course homework (referred to as the "learning path") was worth 500 points and the final exam was to be graded out of 300 points. Apx. III at 32-33, 64-65, 129-130. The remaining 200 points were allocated to a quiz, pretest, and class participation. *Id.* In order to obtain all of the 500 learning path points, a student needed to either complete all of the homework **or** obtain a passing score of 75% or higher on the final exam. *Id.* No partial points for the learning path were to be awarded. *Id.* Although there were a few instructors that had deviated from the prescribed grading calculation for MAT 136 in the 18EW5 term, the majority used the proper formula detailed in the Grading Instructor Resource, including the instructors for the two sections relevant to the students in question. *Id. See also* Apx. III, p.123-125. Both of the students in question simply failed the course based upon the correct calculation formula. *Id.*

policy question to be submitted to a jury. *Hidalgo-Semlek v. Hansa Med., Inc.,* 498 F. Supp. 3d 236, 249 (D.N.H. 2020) (Finding that a public policy is not required to be "strong and clear" or based in statute.) (*citing Cloutier v. Great Atl. & Pac. Tea Co.,* 121 N.H. 915, 922 (1981); *MacDonald v. Tandy Corp.,* 796 F. Supp. 623, 626–27 (D.N.H. 1992)). Although there are circumstances where the public policy determination can be made as a matter of law, such circumstances are rare, and this is not one of them. *Id.; See also Short v. School Admin. Unit 16*, 136 N.H. 76, 84, (1992). The jury must be provided the opportunity to review Dr. Donovan's alleged public policy through the lens of the "multifaceted balancing process," which "does not impose absolute requirements." *Hidalgo-Semlek*, 498 F. Supp. 3d at 249 (Citation omitted).

The Appellee has attempted to paint Dr. Donovan's conduct as purely a disagreement with management, similar to an employee objecting to her employer's business model. Such is not the case. Dr. Donovan initially raised her concerns prior to a management decision even being made. Apx. III, p. 32-34, 123-125. Dr. Donovan raised an academic integrity concern that a jury could find to have independent societal importance, particularly to the students attending the University but also to their parents who often pay tuition and the public generally. *Id.* "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)).

An action independently supported by public policy does not lose its legal status simply because management ultimately disagrees with it. New Hampshire law stands for the proposition that a superficial management disagreement cannot be the basis of a public policy, not that a public policy is voided when management disagrees (such a finding would essentially nullify cases based upon retaliation for whistleblower and safety complaints). *See MacKenzie v. Linehan*, 158 N.H. 476, 481 (2009)(Employee was not protected when he disagreed with his manager concerning whether he had violated personal conduct rule.); *Cloutier*, 121 N.H. at 918 (Plaintiff store manager sufficiently articulated public policy where he disagreed with upper management concerning employees making potentially dangerous nighttime cash deposits and held cash in store safe in violation of employer's policy). Although public policy does not protect "an employee's expression of disagreement with a management decision" generally, it can certainly protect an employee raising an ethical issue or otherwise engaging in a protected report the employer disagrees with. *MacKenzie v. Linehan,* 158 N.H. at 481.

A reasonable jury could find that Dr. Donovan engaged in protected conduct despite the fact her immediate supervisors disagreed with her actions. It is hard to imagine a circumstance where a retaliation-based

employment claim could move forward if a prerequisite element to such a claim was the absence of disagreement with the employer. It is also important to note that Dr. Donovan's concerns were grounded not just in ethics, but also in her good faith belief that the proposed grade changes violated academic policy that was binding upon her immediate supervisors. Apx. III at 32-35, 85-89, 136. In essence, Dr. Donovan attempted to comply with the directives of the highest levels of management at the University by complying with policy that she, and her immediate supervisors, were concededly bound to follow.[2] *Id.*

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[2] The Appellee's attempts at supporting its arguments with dated, negatively treated and inapplicable Massachusetts case law are unavailing. Unlike New Hampshire, where the public policy determination is flexible and "can be based on statutory or nonstatutory policy" even without strong support, the Commonwealth maintains a rigid standard including that a public policy cannot lie where a remedial statute exists. See *Cloutier,* 121 N.H. at 922; *Hidalgo*, 498 F. Supp. 3d at 249; *Welch v. People's United Bank, Nat'l Ass'n*, No. 20-CV-11390-ADB, 2021 WL 1391467, at *5 (D. Mass. Apr. 13, 2021).

Even if the Massachusetts cases cited by the Appellee utilized the appropriate New Hampshire legal standard, each case cited is easily distinguishable from the matter at hand. *Acher v. Fujitsu Network Commc'ns, Inc.,* 354 F. Supp. 2d 26, 27 (D. Mass. 2005)(Sales manager terminated for opposing proposal by employer, an electronics manufacturer, to require client to remove or disable competitor's telecommunications equipment as condition of purchasing employer's new telecommunications hardware system); *Wright v. Shriners Hosp. for Crippled Child.,* 412 Mass. 469, 472, 589 N.E.2d 1241, 1243 (1992) (Employee nurse did not engage in protected conduct when she criticized quality of care to employer's national headquarters survey team.)

The significant deference provided by the Courts to academic institutions concerning grading and curriculum lends further support to Dr. Donovan raising her ethical concerns internally. Further, as cited by the Appellee in its own brief; "[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…" *Guidry v. Our Lady of the Lake Nurse Anesthesia Program*, 170 So. 3d 209, 213-14 (La. Ct. App. 2015)(Cited on p.24-25 of Appellee Brief). Dr. Donovan's objection to the proposed grade changes sought to preserve the grades provided to the students by their instructors (I.e., their "trained educators"). Apx. III at 32-34, 123-125.

A reasonable jury could find that Dr. Donovan acted in accordance with public policy. Therefore, the Court should reverse.

II. Appellee's Misplaced Constructive Discharge Arguments Are Not Properly at Issue With This Appeal

The Trial Court based its summary judgment decision exclusively upon the public policy prong of Dr. Donovan's wrongful termination claim. It did not address the constructive discharge arguments made by the Appellee, nor did it make the prerequisite findings of fact necessary for such arguments to be resolved with the instant appeal. Apx. I at 3-8. Although there are multiple examples of cases where the Supreme Court affirmed Trial Court decisions on alternative legal grounds, each such case contained a

well-developed factual record, established by the Trial Court, permitting the Supreme Court to undertake a review of alternative legal theories raised. *See Quinlan v. City of Dover*, 136 N.H. 226, 230 (1992). *See Conkey v. Town of Dorchester*, No. 2014-0343, 2015 WL 11077804, at *3 (N.H. Mar. 16, 2015). If the Trial Court has not yet made factual findings necessary for legal review of a particular issue, the case should be remanded. *See Cohoon v. IDM Software, Inc.,* 153 N.H. 1, 9 (2005)(Supreme Court partially reversed, vacated and remanded summary judgment decision where the Trial Court had not made factual findings that identified the undisputed facts necessary for the Supreme Court to apply the legal doctrine of equitable estoppel).

In the matter at hand, the Trial Court issued a six-page Summary Judgment Order in response to well over 500 pages of pleadings and exhibits filed by the parties. Apx. I at 3-8. None of those six pages contain the prerequisite factual findings for this Court to consider the constructive discharge prong of Dr. Donovan's wrongful termination claim. *Id.* Therefore, the Defendant's arguments regarding the same are improper at this juncture. Further, the record sufficiently supports that a jury could find that Dr. Donovan was constructively terminated, particularly where she resigned immediately following her direct supervisor asking her to resign twice in one day while she was at home sick from stress due to the ongoing abuse she was facing at work. Apx. III at 19-22, 27.

III. Appellee's Arguments Concerning Disputed and Irrelevant Facts Should be Disregarded

Lastly, the Appellant has included multiple factual arguments that are disputed, have not been resolved at the Trial Court level, and are otherwise irrelevant to this appeal. Such arguments include allegations concerning Dr. Donovan's job performance and the alleged level of due diligence completed by Dr. Britton and Dr. McKenzie prior to moving forward with the grade changes[3]. *See* Apx. III at 9-22. Because such arguments are based upon disputed factual matters irrelevant to the instant appeal issues, the Court should disregard them.

The Court should reverse the Trial Court's summary judgment decision.

B. CERTIFICATIONS

I, Sean R. List, hereby certify that on July 15, 2022, copies of the foregoing were forwarded to opposing counsel, Christopher N. Cole, Esq. and Megan C. Carrier, Esq., by electronic service.

I, Sean R. List, hereby certify that pursuant to Rule 16 of the New Hampshire Supreme Court Rules, this brief contains less than 3,000 words.

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[3] Neither Dr. Britton nor Dr. McKenzie engaged in due diligence or established even a basic understanding of how MAT136 grades were calculated prior to carrying out the grade changes. Apx. V at 64-65, ¶141-149.

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 15, 2022 By: /s/ Sean R. List

Sean R. List, Esq., NH Bar No. 266711
Lehmann Major List, PLLC
6 Garvins Falls Road
Concord, NH 03301
(603)715-8882
sean@nhlawyer.com